ISSN 0142-0843

ҚҰҚЫҚ
сериясы
№ 1(77)/2015
Серия
ПРАВО

Қаңтар–ақпан–наурыз
30 наурыз 2015 ж.
1996 жылдан бастап шығады
Жылына 4 рет шығады
Январь–февраль–март
30 марта 2015 г.
Издается с 1996 года
Выходит 4 раза в год

ҚАРАҒАНДЫ УНИВЕРСИТЕТІНІҢ ХАБАРШЫСЫ

ВЕСТНИК КАРАГАНДИНСКОГО УНИВЕРСИТЕТА

Собственник РГП **Карагандинский государственный университет имени академика Е.А.Букетова**

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

Редакторы *Ж.Т.Нұрмұханова*
Редактор *И.Д.Рожнова*
Техн. редактор *Д.Н.Муртазина*

Издательство Карагандинского государственного университета им. Е.А.Букетова
100012, г. Караганда, ул. Гоголя, 38,
тел.: (7212) 51-38-20
e-mail: izd_kargu@mail.ru

Басуға 28.03.2015 ж. қол қойылды.
Пішімі 60×84 1/8.
Қағазы офсеттік.
Көлемі 20,0 б.т.
Таралымы 300 дана.
Бағасы келісім бойынша.
Тапсырыс № 215.

Подписано в печать 28.03.2015 г.
Формат 60×84 1/8.
Бумага офсетная.
Объем 20,0 п.л. Тираж 300 экз.
Цена договорная. Заказ № 215.

Отпечатано в типографии издательства КарГУ им. Е.А.Букетова

Зарегистрирован Министерством культуры и информации Республики Казахстан.
Регистрационное свидетельство № 13108–Ж от 23.10.2012 г.

МАЗМҰНЫ

КОНСТИТУЦИЯЛЫҚ ЖӘНЕ ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ

МЕМЛЕКЕТ ЖӘНЕ ҚҰҚЫҚ ТЕОРИЯСЫ МЕН ТАРИХЫ

ҚЫЛМЫСТЫҚ ҚҰҚЫҚ ЖӘНЕ КРИМИНОЛОГИЯ

СОДЕРЖАНИЕ

КОНСТИТУЦИОННОЕ И МЕЖДУНАРОДНОЕ ПРАВО

ТЕОРИЯ И ИСТОРИЯ ГОСУДАРСТВА И ПРАВА

УГОЛОВНОЕ ПРАВО И КРИМИНОЛОГИЯ

ҚЫЛМЫСТЫҚ ПРОЦЕСС ЖӘНЕ КРИМИНАЛИСТИКА

АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ АЗАМАТТЫҚ ПРОЦЕСС

ЖАС ҒАЛЫМ МІНБЕСІ

МЕРЕЙТОЙ ИЕЛЕРІ

УГОЛОВНЫЙ ПРОЦЕСС И КРИМИНАЛИСТИКА

ГРАЖДАНСКОЕ ПРАВО И ГРАЖДАНСКИЙ ПРОЦЕСС

ТРИБУНА МОЛОДОГО УЧЕНОГО

НАШИ ЮБИЛЯРЫ

УДК 342 (574)

Е.К.Кубеев

Карагандинский государственный университет им. Е.А.Букетова
(E-mail: rektor@ksu.kz)

Проблемы становления социального государства и реализации конституционного права граждан на социальное обеспечение: тенденции и перспективы современного Казахстана

В статье выдвигается и обосновывается тезис о том, что реализация конституционного права на социальное обеспечение прямо зависит от функционирования механизма его реализации. На основе проведенного исследования сделан вывод о необходимости повышения паритетных начал государства и развития негосударственных общественных институтов в механизме реализации конституционного права граждан на социальное обеспечение, а также внедрения частно-государственных начал как необходимых условий построения социального государства Республики Казахстан.

Ключевые слова: Конституция, социальное государство, социальное обеспечение, концепция, социальные услуги, качество, социальные службы.

Изменения, происходящие в мировой экономике и политике, процессы глобализации, а также внутренняя динамика развития Республики Казахстан не позволяют останавливаться на достигнутом. В целях обеспечения соответствия национального права новым вызовам времени необходимо дальнейшее совершенствование нормотворческой и правоприменительной деятельности государства.

Общественно-политическое развитие Республики Казахстан характеризуется энергичными шагами государства по провозглашению и созданию всех необходимых условий для реализации прав граждан. Более того, на наш взгляд, сегодня нет более важной и значимой государственной задачи, так как именно от реализации прав человека в значительной степени будет зависеть качество решения политических, экономических, культурных и многих других проблем общества.

Провозглашая себя социальным государством, Казахстан тем самым подчеркнул приверженность международно-правовым актам в области прав человека. В первую очередь это Всеобщая декларация прав человека, согласно п.1 ст.25 которой каждый человек имеет право на такой жизненный уровень, включая пищу, одежду, жилище, медицинский уход и необходимое социальное обслуживание, который необходим для поддержания здоровья и благосостояния его самого и его семьи, и право на обеспечение на случай безработицы, болезни, инвалидности и т.д. [1]. Этот принцип развит в п.1 ст. 11 Международного пакта об экономических, социальных и культурных правах: «Участвующие в настоящем Пакте государства признают право каждого на достойный жизненный уровень для него и его семьи, включающий достаточное питание, одежду и жилище, и на непрерывное улучшение условий жизни**.** Государства-участники примут надлежащие меры к обеспечению осуществления этого права, признавая важное значение в этом отношении международного сотрудничества, основанного на свободном согласии».

В соответствии со ст. 1 Конституции 1995 г. Республика Казахстан утверждает себя социальным государством [2]. Несмотря на то, что нынешняя экономическая ситуация не позволяет говорить о том, что в Казахстане уже сформировано такое государство, тем не менее сам факт провозглашения

Республики социальным государством, а также разрабатываемые и принятые решения в этом направлении говорят о том, что интересы, потребности граждан, народа в целом являются главным звеном во всей цепи преобразований общественной жизни. Не случайно Конституция провозглашает высшими ценностями жизнь, права и свободы человека и гражданина, а также утверждает солидарность и консолидацию общества на основе согласования интересов. Здесь весьма актуально звучат слова Б.Кистяковского: «В чем же настоящие и истинные цели государства? Они заключаются в осуществлении солидарных интересов людей. При помощи государства осуществляется то, что нужно, дорого, ценно всем людям. Государство само по себе есть всеобъемлющая форма солидарности между людьми, и вместе с тем оно ведет к созданию и выработке наиболее полных и всесторонних форм человеческой солидарности. Общее благо — вот формула, в которой выражаются цели и задачи государства» [3; 259].

Развитие конституционного строительства было ознаменовано принятием 21 мая 2007 г. Закона «О внесении изменений и дополнений в Конституцию Республики Казахстан», которым провозглашены принципиально важные для страны новеллы. При этом в основном сохранились параметры казахстанской модели государственного устройства, выдержавшей проверку временем. Благодаря курсу на всестороннее развитие институтов гражданского общества, гармонизацию отношений государства и общества сняты конституционные запреты и ограничения на более активное взаимодействие государственных и общественных институтов, модернизирована система местного самоуправления, сегодня полностью отвечающая внутренним условиям и потребностям нашей страны. Главными итогами реализации новой Концепции стало дальнейшее воплощение и развитие Республики Казахстан как правового и социального государства.

В настоящее время Президентом и Правительством Республики Казахстан выдвинута оригинальная концепция социальной модернизации Казахстана, в которой труд должен быть выдвинут на первый план, как решающий национальный фактор социальной модернизации и глобальной конкурентоспособности. Сегодня государство должно создавать условия для развития граждан, быть партнером, а не донором. Важно понять, что успех Казахстана зависит от действий всех его граждан, всего общества. Каждый казахстанец должен осознавать, что его личный профессиональный опыт в любой отрасли, где бы он ни осуществлял свою трудовую деятельность, вносит неоспоримый вклад в развитие своей страны. От этого зависит успех модернизации Казахстана, которая должна базироваться на реальных экономических достижениях и реализовываться через Общенациональную концепцию.

Определен комплекс задач, реализация которых позволит продолжить социально-экономическую модернизацию нашей страны, дать достойный ответ на вызовы XXI в. На повестке дня — обновление социального законодательства, формирование эффективной модели социально-трудовых отношений, обеспечение высоких казахстанских стандартов качества жизни, развитие информационно-культурной составляющей модернизации, построение эффективной системы государственного управления социальными процессами.

В связи с этим, говоря о развитии социальной политики в Республике Казахстан, следует обратить внимание на один из наиболее используемых интегральных количественных показателей, принятых в системе ООН, — индекс развития человеческого потенциала. Он суммарно оценивает уровень здоровья и продолжительности жизни, уровень грамотности взрослого населения и охват населения учебными заведениями, ВВП на душу населения. Индекс развития человеческого потенциала служит показателем для международного сопоставления уровня и качества жизни населения.

Помимо интегральных показателей качества жизни, в практике социального управления также важное значение имеют конкретные индикаторы развития отдельных составляющих социальной сферы. К таким индикаторам, прежде всего, следует отнести: прожиточный минимум, среднедушевой доход, размеры социальных выплат, пенсий, стипендий, заработной платы, индекс потребительских цен, дефлятор, уровень безработицы, коэффициент Джини (соотношение децилей наиболее и наименее обеспеченного населения), минимальную заработную плату, первый разряд единой тарифной сетки (ЕТС), пенсионный возраст, ставку единого социального налога или суммарные платежи в государственные социальные фонды, долю коммунальных платежей по отношению к суммарным доходам.

Реализация государством своих функций может осуществляться только с использованием показателей, отражающих собственно социальный эффект конкретной деятельности. В этой связи можно привести определение «социального норматива», который представляет собой научно обоснованную количественную и качественную характеристику оптимального состояния социального процесса (или

одной из его сторон). Данная характеристика может быть получена на основе учета объективных закономерностей общественного развития и возможностей государства. И она должна быть направлена на максимальное удовлетворение материальных и духовных потребностей, всестороннее развитие личности. В этом случае социальный норматив становится эталоном оценки эффективности реализации социальных функций и целью социальной политики, необходимым элементом управления социальной сферой.

Социальные стандарты являются ориентирами при выработке социально-экономической политики, основой распределения ресурсов, формой социальных гарантий и обязательствами государства перед народом [4].

Нужно пересмотреть основные пункты законов, касающиеся социальной модернизации. Фундаментом всей модернизации послужит Общенациональная концепция социального развития Республики Казахстан, основанная на Стратегии «Казахстан-2050» и напрямую связанная с результатами индустриально-инновационного развития республики.

В новой программной статье «Социальная модернизация Казахстана: Двадцать шагов к Обществу Всеобщего Труда» Глава государства Н.Назарбаев делает краткий анализ пройденного нашей республикой за двадцать лет пути независимости, а также современной ситуации в мировой экономике, которую, по всем прогнозам экспертов, очевидно, ожидает вторая волна кризиса. Затянувшийся мировой финансовый кризис привел к негативным последствиям в экономике, вызвал напряжение в социальном самочувствии населения многих стран, в том числе высокоразвитых. Не случайно, что в период кризисных испытаний импульс получили интеграционные проекты [5]. Создание Таможенного союза России, Казахстана и Белоруссии открывает новые перспективы для интеграционных процессов в Азиатско-Тихоокеанском регионе. Как следствие этого — появление новых совместных проектов в области экономики, что позволит создать новые рабочие места. Следует отметить, что в России уже имеется определенный опыт решения вопросов социальной политики и социального развития, в частности, принятое в 1997 г. Постановление Правительства Российской Федерации «О государственных минимальных социальных стандартах» определяло, что социальная стандартизация является сферой регламентации важнейших параметров социального развития со стороны органов государственной власти в данном государстве. Такие социальные стандарты определены в следующих областях:

• оплата труда — минимальный размер оплаты труда; единая тарифная сетка по оплате труда работников бюджетной сферы;

• пенсионное обеспечение — минимальные размеры государственных пенсий;

• образование — набор общедоступных бесплатных услуг образовательных учреждений, финансируемых за счет средств госбюджета; нормы и нормативы предельной наполняемости классов и групп в государственных и муниципальных образовательных учреждениях; нормы и нормативы социальной поддержки обучающихся; норматив числа студентов, получающих бесплатное высшее профессиональное образование в государственных высших учебных заведениях;

• здравоохранение — перечень видов медицинской помощи, предоставляемой учреждениями здравоохранения бесплатно; набор общедоступных бесплатных услуг по оказанию амбулаторно-поликлинической, стационарной и скорой медицинской помощи, финансируемых за счет бюджетов различных уровней и фондов обязательного медицинского страхования; нормы и нормативы обеспеченности населения медицинской помощью;

• культура — набор общедоступных бесплатных услуг государственных и муниципальных учреждений культуры, финансируемых за счет бюджетов различных уровней; нормы и нормативы обеспеченности населения государственными и муниципальными учреждениями культуры, оказывающими общедоступные и бесплатные услуги;

• социальное обслуживание населения — набор бесплатных услуг государственных и муниципальных учреждений социального обслуживания населения, финансируемых за счет бюджетов различных уровней; нормы и нормативы обеспеченности населения услугами учреждений социального обслуживания населения;

• жилищно-коммунальное обслуживание населения — набор предоставляемых населению льготных жилищно-коммунальных услуг; нормы и нормативы минимального уровня жилищно-коммунального обслуживания населения, устанавливаемые органами исполнительной власти.

Говоря о социальном государстве, отметим, что в настоящее время в Казахстане также сформированы качественные показатели. Но это только начало большого пути, потому что проблем с реали-

зацией существующих задач очень много. В связи с этим в республике предлагается разработать и утвердить минимальный потребительский бюджет, который будет служить основой для гарантированной выплаты заработной платы, стипендий, пособий и других социальных выплат. В связи с реализацией Концепции правовой политики и обеспечения международных социальных стандартов в Республике Казахстан необходимо пересмотреть все показатели определения и использования прожиточного минимума в РК, в связи с чем необходимо уточнить систему расчета прожиточного минимума, базирующуюся на реальной величине расходов, и проведения налоговой политики в отношении доходов за счет изменения параметров шкалы налогообложения. Научно обоснованная разработка социальных мер демографической политики, социальная политика в области рождаемости и сокращения смертности, разработка программ по охране здоровья детей и женщин, по укреплению здоровья населения отражены в различных концепциях и программах, реализация которых осуществляется через принятие таких нормативно-правовых актов, как: Закон Республики Казахстан от 18 февраля 2011 г. № 407-IV «О браке (супружестве) и семье», Кодекс Республики Казахстан от 26 декабря 2011 г. № 518-IV «О здоровье народа и системе здравоохранения», Закон Республики Казахстан от 27 июня 2011 г. № 442-IV «О науке», Закон Республики Казахстан от 24 октября 2011 г. № 487-IV «О религиозной деятельности и религиозных объединениях», Закон Республики Казахстан от 11 октября 2011 г. № 483-IV «О миграции населения», Закон Республики Казахстан от 13.02.2009 № 134-IV «О Фонде национального благосостояния». Были внесены также изменения и дополнения в некоторые законодательные акты Республики Казахстан: Закон Республики Казахстан от 1 февраля 2012 г. № 550-IV «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам государственного-социального заказа», Закон Республики Казахстан от 22 декабря 2011 г. № 515-IV «О внесении изменений и дополнений в Закон Республики Казахстан «Об образовании», Закон Республики Казахстан от 22 июля 2011 г. № 477-IV «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам жилищных отношений», Закон Республики Казахстан от 22 июля 2011 г. № 479-IV «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам занятости и социальной защиты населения».

Нынешний период развития государственности характеризуется важнейшей особенностью, в отличие от тех времен, когда отдельные права и свободы лишь декларировались в Конституции, не имея под собой правового механизма реализации. Сегодня в Казахстане принят целый пакет законов, содержащих в себе гарантии осуществления прав и свобод граждан, в частности, в рассматриваемой области общественной жизни.

Помимо уже отмеченных направлений деятельности социально ориентированного государства, можно также выделить: борьбу со стихийностью рыночных отношений и экономическими кризисами путем государственного воздействия на экономику, борьбу с бедностью, безработицей, охрану труда, через государственное регулирование отношений, ослабление противоречий между трудом и капиталом; укрепление социальной функции частной собственности и увеличение числа граждан, причисляющих себя к среднему классу.

Предпринимаемые решительные шаги по развитию экономики обнадеживают и дают основание говорить о том, что Республика Казахстан в ближайшие годы будет социальным государством не только на словах, но и на деле. Ценность любой стратегии не в замысле, а в успешной его реализации.

Список литературы

1 Всеобщая декларация прав человека. Принята резолюцией 217 А (III) Генеральной Ассамблеи ООН от 10 декабря 1948 г. — [ЭР]. Режим доступа: http://www.un.org/ru/documents

2 Конституция Республики Казахстан, принята на республиканском референдуме 30 августа 1995 г. (с изм. и доп. по состоянию на 01.12.2014 г.). — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/K950001000_

3 *Кистяковский Б.А.* Социальные науки и право. Очерки по методологии социальных наук и общей теории права. — М.: М. и С.Сабашниковы, 1916. — 502 с.

4 «Социально-экономическая модернизация — главный вектор развития Казахстана» Послание Президента Республики Казахстан — Лидера нации Н.А.Назарбаева народу Казахстана, г. Астана, 27 января 2012 г. — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/K1200002012

5 *Назарбаев Н.А.* Социальная модернизация Казахстана: Двадцать шагов к Обществу Всеобщего Труда // Казахстанская правда. — 2012. — 10 июля.

Е.Қ.Көбеев

Әлеуметтік мемлекеттің қалыптасу және азаматтардың әлеуметтік қамтамасыздандыруға конституциялық құқығын жүзеге асыру мәселелері: қазіргі Қазақстанның заңдылықтары және келешегі

Мақалада әлеуметтік қамтамасыздандыруға азаматтардың конституциялық құқығын жүзеге асыру оның тетігінің қызметіне тікелей тәуелді болатындығы ұсынылып, негізделді. Жүргізілген зерттеулер негізінде Қазақстан Республикасы әлеуметтік мемлекетін құрудың қажетті шарты ретінде жеке-мемлекеттік бастамаларды енгізу, әлеуметтік қамтамасыздандыру азаматтардың конституциялық құқығын іске асыру тетігіндегі мемлекеттік емес қоғамдық институттарды дамыту және мемлекеттік тепе-теңдік бастауларды арттыру керектігі жайлы қорытынды жасалды.

Ye.K.Kubeyev

Problems of formation of the social state and realization of a constitutional right citizens on a social assistance: tendencies and prospects of Modern Kazakhstan

The thesis moves forward and locates in article that realization of a constitutional right on a social assistance directly depend on functioning of the mechanism of its realization. On the basis of the conducted research the conclusion is drawn on need of increase of the parity beginnings of the state and non-state public institutes for the mechanism of realization of a constitutional right of citizens on a social assistance, introduction of the public and private beginnings as necessary conditions of creation of the social state of the Republic of Kazakhstan.

References

1 Universal Declaration of Human Rights. It is accepted by the resolution 217 A (III) of the United Nations General Assembly of December 10, 1948, http://www.un.org/ru/documents

2 The constitution of the Republic of Kazakhstan, is adopted on a republican referendum on August 30, 1995 (with amendment and additional as of 01.12.2014), http://adilet.zan.kz/rus/docs/K950001000_

3 Kistyakovsky B.A. *Social sciences and right. Sketches on methodology of social sciences and the general theory of the right*, Moscow: M. and S.Sabashnikova, 1916, 502 p.

4 «Social and economic modernization — the main vector of development of Kazakhstan» the President's letter of the Republic of Kazakhstan — the Leader Nation of N.A.Nazarbayev to the people of Kazakhstan, Astana, on January 27, 2012, http://adilet.zan.kz/rus/docs/K1200002012

5 Nazarbayev N.A. *Kazakhstanskaya pravda*, 2012, July, 10.

УДК 351.752(574)

С.К.Амандыкова[1], И.Е.Искакова[2]

[1]Евразийский национальный университет им. Л.Н.Гумилева, Астана;
[2]Карагандинский государственный университет им. Е.А.Букетова
(E-mail: indianacan@mail.ru)

Правовое регулирование деятельности религиозных объединений в Республике Казахстан: современное состояние и накопленный опыт

В статье отмечено, что на современном этапе развития Республики Казахстан весьма актуальным становится вопрос о соотношении понятий «государство» и «религия», а также об особенностях правового регулирования деятельности религиозных объединений. Авторами показано, что за двадцать лет казахстанской независимости накоплен достаточно большой опыт в сфере регулирования религиозных отношений, благодаря чему в Казахстане обеспечивается межконфессиональное согласие между представителями различных религиозных течений. Проанализирована казахстанская модель правового регулирования отношений в сфере религии, рассмотрен накопленный при этом опыт.

Ключевые слова: религия, светское государство, религиозные отношения, право на свободу совести и религии.

Мирное сосуществование представителей различных национальных и религиозных групп во многом зависит от государственной политики, и в этой связи соответствующий опыт в Республике Казахстан заслуживает внимания. Межконфессиональное и межэтническое согласие в Республике Казахстан является одним из необходимых условий целостности государства и его продвижения по пути демократических преобразований. Президент Нурсултан Назарбаев отметил: «Наша модель межнационального и межрелигиозного согласия — это реальный вклад Казахстана в общемировой процесс взаимодействия различных конфессий» [1].

В пункте 1 статьи 1 Конституции РК провозглашено, что «Республика Казахстан утверждает себя демократическим, светским, правовым и социальным государством, высшими ценностями которого являются человек, его жизнь, права и свободы» [2]. Таким образом, конституционно закреплено, что в Республике Казахстан религиозные институты (во всех их проявлениях) отделены от государства, и это означает, что никакие конфессии не выполняют каких-либо государственных функций, что нет одной или нескольких религий, поддерживаемых государством, и что никакая религия не носит характера государствообразующего фактора.

Согласно пункту 1 статьи 22 Конституции РК: «Каждый имеет право на свободу совести» [2]. Из этого следует, что свобода совести является абсолютным правом человека и не подлежит ограничениям ни при каких обстоятельствах.

Современное понимание прав человека и свободы вероисповедания определяется общепризнанными международными соглашениями, принятыми ООН, ОБСЕ и другими организациями. Одним из важнейших документов стала «Всеобщая декларация прав человека», принятая Генеральной Ассамблеей ООН 10 декабря 1948 г. [3]. В статье 2 Декларации утверждается, что каждый человек должен обладать всеми правами и всеми свободами, провозглашенными настоящей Декларацией, без какого бы то ни было различия, как-то в отношении расы, цвета кожи, пола, языка, религии, политических или иных убеждений, национального или социального происхождения, имущественного, сословного или иного положения. Таким образом, принадлежность к какой-либо религии не является поводом для дискриминации или пренебрежительного отношения либо ограничения каких- либо прав человека и гражданина. Кроме того, ст. 18 Декларации дает более детальное определение права на свободу совести и религии. Из анализа данной статьи следует, что реализация права на свободу совести и религии включает право на свободу менять свою религию или убеждения и свободу исповедовать свою религию или убеждения как единолично, так и сообща с другими, публичным или частным порядком в учении, богослужении и выполнении религиозных и ритуальных обрядов.

Конституция РК не содержит отдельных положений, касающихся конституционных гарантий свободы мысли и религии. Очевидно, что эти гарантии охватываются конституционными нормами ст. 22 Конституции РК, касающимися свободы совести.

Е.К.Кубеев, рассматривая современный этап развития Казахстана в контексте данной проблемы, отметил, что он сопровождается сложными процессами в духовной жизни общества, ростом религиозных объединений как традиционно исповедуемых религий, так и нетрадиционных. В связи с этим государство должно, в первую очередь, обеспечивать исполнение религиозного законодательства. В то же время требуются изучение тенденции развития религиозных направлений и всесторонняя работа по нейтрализации негативных проявлений в религиозной среде [4; 464].

Можно сказать, что в Казахстане формируется собственная уникальная модель государственно-конфессиональных отношений, которая опирается на многовековой опыт мирного сосуществования полиэтнического и поликонфессионального состава населения Казахстана, базируется на исторически обусловленной открытой ментальности казахов, выражающейся в веротерпимости к инакомыслию и толерантности; она также основывается на экономической стабильности и все более проявляющейся тенденции к росту благосостояния граждан и общества в целом, продуманной политике государства, законодательно закрепившей светский характер государства и равенство всех религий перед государством, но учитывающей различный исторический вес и опыт деятельности конфессий на территории Казахстана [5; 113].

В научной литературе регулированию деятельности религиозных объединений посвящены исследования таких ученых, как А.П.Абуов и Е.М.Смагулов [6], Moazami Behrooz [7], Mark Elmore [8], John Foy [9], Jonathan Fox [10], Ervin Birnbaum [11], Nicole Elisabeth Brackman [12], Е.К. Кубеев [4], Р.А. Подопригора [5] и другие.

Анализируя сложившуюся ситуацию в Республике Казахстан в сфере правового регулирования религиозных отношений, а также научные труды указанных выше авторов, в настоящей статье нами предполагается научный анализ особенностей правового регулирования деятельности религиозных объединений в РК, а также подведение некоторых итогов в рассматриваемой сфере за 20 лет независимости Республики Казахстан.

Методологическую основу настоящего исследования составили: диалектический метод познания социально-правовых явлений, а также системно-структурный, сравнительно-правовой, логико-теоретический и частнонаучные методы изучения. Для достижения объективности результатов исследования данные методы применялись комплексно.

В первые годы приобретения независимости казахстанский законодатель, разрабатывая и принимая Закон Республики Казахстан от 15 января 1992 г. № 1128-XII «О свободе вероисповедания и религиозных объединениях» (утратил силу в соответствии с Законом РК от 11 октября 2011 г. № 483-IV), весьма либерально регулировал порядок формирования и деятельности религиозных объединений [13].

На этой весьма благодатной почве и в результате пассивного отношения правительства в первые годы образования независимой Республики Казахстан к данной проблеме и недостаточной религиозной грамотности населения многие граждане Казахстана, особенно представители молодого поколения, попали под влияние деструктивных религиозных сил. Страну наводнили различного рода миссии, ранее никому не известные в Казахстане. Наблюдается рост межконфессиональной напряженности, вызванный борьбой за вовлечение в свои ряды новых приверженцев. Способствует ее обострению активная деятельность в республике зарубежных проводников, которые, располагая значительными финансовыми средствами и большим опытом миссионерской деятельности, нередко теснят традиционные для Казахстана религии в борьбе за влияние на верующих. Хотя межконфессиональные противоречия пока, как правило, не приводят к каким-то антиобщественным действиям, проявляясь в основном в критике своих конкурентов как «лжепророков» на молитвенных собраниях, в публичных высказываниях духовенства, сама интенсивность ее является достаточно тревожным симптомом. Сама по себе неидеологизированная религия не представляет угрозу безопасности. Как заявил бывший председатель Комитета национальной безопасности РК Нуртай Абыкаев, в республике «увеличилось число иностранных религиозных миссий, посещающих республику с целью распространения религиозно-мистических учений и создания предпосылок для конфликтов на религиозной и этнической основе» [14].

Надо отметить, что в Казахстане за прошедшие десятилетия произошел значительный количественный и качественный рост религиозных институтов. В 2005 г. действовало 3259 религиозных объединений, что на 102 больше, чем было на 1 января 2004 г., а в 1990 г. — всего 670 [15; 234], в 2011 г. было 4551 религиозное объединение [16].

На сегодняшний день существует 3088 религиозных объединений 17-ти конфессий, получивших правовое оформление в соответствии с требованиями нового закона; их количество сократилось на 1463, или более чем на 32 % [16].

В общем числе религиозных объединений представлены: ислам — 2756, Русская православная церковь — 303, Римско-католическая церковь — 84, протестантские и новые религиозные движения — 1301. Религиозным объединениям принадлежат 3377 культовых сооружений, из которых 2416 — мусульманские мечети, 269 — православные церкви, 88 — католические костёлы, 5 — синагоги, а также многочисленные протестантские и другие церкви [6; 110].

Ислам в независимом Казахстане стал влиятельной общественной силой. Стремительно растет число мусульманских общин. Если в 1991 г. их было всего 68, то в начале 2000-х гг. их численность достигла 1652, а в 2011 г. насчитывалось уже 2756. По всей стране возводятся новые мечети, например, в 2011 г. действовало 2416 мусульманских культовых сооружений [6; 113]. В целом за период с 1991 по 2013 гг. отмечается значительный рост количества исламских объединений, зарегистрированных на территории Казахстана (диаграмма 1).

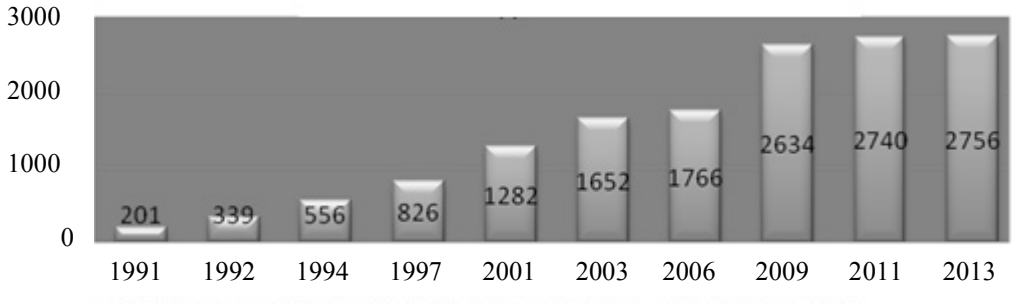

Диаграмма 1. Динамика изменений количества исламских объединений с 1991 по 2013 гг.

Подлинное возрождение Православной церкви в нашей стране началось после обретения Казахстаном независимости. О месте православия в жизни нашего общества Президент Нурсултан Назарбаев высказался предельно емко: «…православие и ислам — два столпа, на которых зиждется духовность Казахстана» [17].

Признание свободы совести позволило верующим вернуться к полнокровной духовной жизни. Если в 1956 г. в Казахстане функционировало всего 55 приходов Русской православной церкви (РПЦ), то на начало 1999 г. на территории республики действовали 212 приходов и 8 монастырей. За последнее десятилетие отмечен дальнейший рост. По официальным данным, в 2011 г. в Казахстане действовали 303 православные общины, зарегистрировано 269 церквей и других культовых сооружений, а также 9 монастырей. Практически при всех церквах и молитвенных домах открыты церковно-приходские школы по изучению основ православия, действуют воскресные школы, в которых обучаются как дети, так и взрослые [6; 113]. За период с 1991 по 2013 гг. на территории Казахстана отмечается значительная динамика роста количества зарегистрированных в стране объединений Русской православной церкви (диаграмма 2).

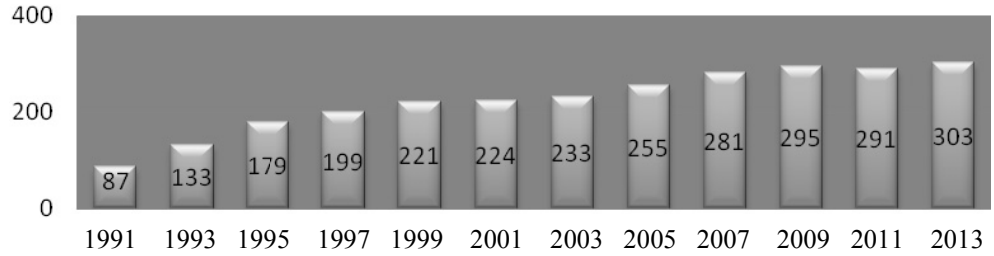

Диаграмма 2. Динамика изменений количества объединений
Русской православной церкви с 1991 по 2013 гг.

В Республике Казахстан в настоящее время проживают около 300 тысяч католиков. В католических церквах богослужения проводятся на русском, украинском, немецком, английском и польском

языках. Национальный состав верующих достаточно широк: на богослужениях наряду с немцами и поляками можно встретить украинцев, русских, литовцев, корейцев и представителей других национальностей. За последние 20 лет, в период с 1993 по 2013 гг., количество религиозных объединений Римской католической церкви в Республике Казахстан изменялось незначительно и возросло с 67 в 1993 г. до 84 в 2013 г. (диаграмма 3).

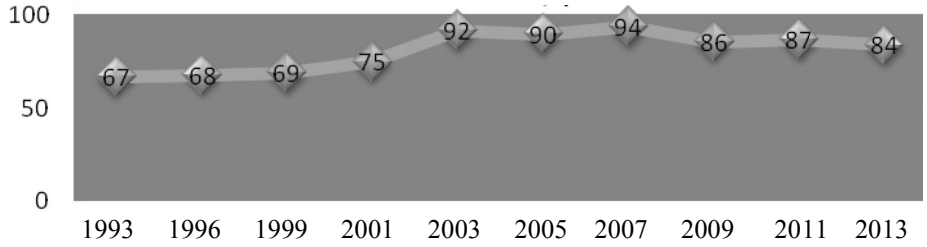

Диаграмма 3. Динамика изменений количества объединений
Римской католической церкви с 1993 по 2013 гг.

Следует отметить, что на фоне роста количества зарегистрированных мусульманских, православных и католических религиозных объединений за последние годы значительно сократилось количество лютеранских и баптистских религиозных объединений (диаграмма 4).

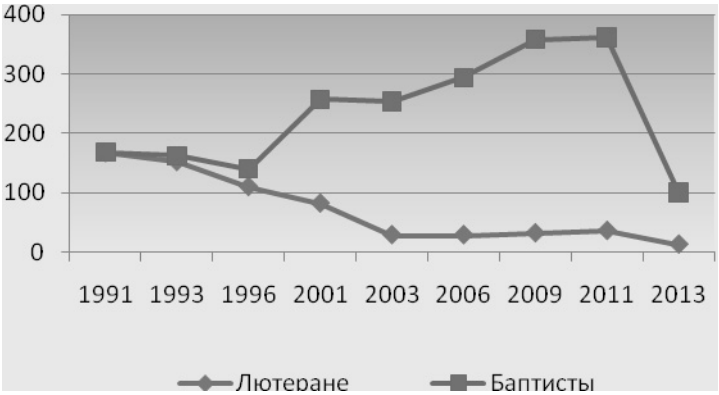

Диаграмма 4. Динамика изменений количества лютеранских и баптистских
религиозных объединений с 1991 по 2013 гг.

Количество пятидесятнических церквей к концу 2012 г. в Казахстане достигло 189, пресвитерианских — 239, харизматических — 306. Наиболее известными являются: «Грейс-Благодать», «Еммануил», «Новая жизнь», «Агапе», «Сун Бок Ым», «Церковь Полного Евангелия» [6]. Многие пятидесятнические и пресвитерианские церкви были созданы миссионерами из Южной Кореи и США. Среди их пасторов и последователей немало представителей корейской диаспоры. Особое место занимают такие общины, как Новоапостольская церковь, «Адвентисты Седьмого дня», «Свидетели Иеговы» и мормоны («Церковь Иисуса Христа святых последних дней»).

В настоящее время в Республике Казахстан действуют 8 высших, 6 средних специальных и 3 общеобразовательных духовных учебных заведений, также функционируют постоянно действующие курсы при крупных мечетях и воскресные школы при церквах. На конец 2011 г. в республике работали около 400 зарубежных миссионеров из 20 стран [6; 112].

В связи с изменением религиозной ситуации в стране возникла необходимость переосмысления достижений Казахстана на пути создания государства межконфессионального согласия и просчетов, допущенных при недооценке проблем в религиозной ситуации. В целях совершенствования государственно-конфессиональных отношений 11октября 2011 г. принят Закон РК «О религиозной деятельности и религиозных объединениях» [18]. Закон направлен на обновление законодательства о религиозных объединениях путем четкой регламентации их статуса и деятельности, установления необходимых правовых ограничений, а также определения основ системной работы государственных ор-

ганов в сфере регулирования конфессиональных отношений с учетом современных реалий и тенденций. Данный закон является гарантией свободы деятельности верующих всех конфессий и основывается на том, что Республика Казахстан утверждает себя демократическим, светским государством, подтверждает право каждого на свободу совести, гарантирует равноправие каждого, независимо от его религиозного убеждения. Признается историческая роль ислама ханафитского направления и православного христианства в развитии культуры и духовной жизни народа, уважаются другие религии, сочетающиеся с духовным наследием народа Казахстана, отмечается важность межконфессионального согласия, религиозной толерантности и уважения религиозных убеждений граждан. Тем не менее в своем правовом статусе данные вероисповедания никаких правовых привилегий не имеют.

Согласно казахстанскому законодательству государство отделено от религии и религиозных объединений. Данный принцип не указан в действующей Конституции РК, но в ст. 1 Конституции говорится о светском характере государства, что означает конституционное отделение от государства любых религиозных объединений всех направлений и течений.

Религиозные объединения и граждане Республики Казахстан, иностранцы и лица без гражданства, независимо от отношения к религии, равны перед законом. В Казахстане действуют самые различные религиозные объединения. Так как они находятся в одном правовом поле, государство не может отдавать предпочтение в правовом смысле какому-либо религиозному объединению. Исходя из этого в соответствии с законом никакая религия не может устанавливаться в качестве государственной или обязательной. Данное положение подтверждается особенностями порядка первичной регистрации и перерегистрации религиозного объединения на территории. Так, регистрация религиозного объединения производится в соответствии с Законом Республики Казахстан «О государственной регистрации юридических лиц и учетной регистрации филиалов и представительств» [19], с учетом особенностей, предусмотренных Законом Республики Казахстан «О религиозной деятельности и религиозных объединениях», а также иными нормативными правовыми актами.

Религиозные объединения могут создаваться со статусом: местных, региональных и республиканских. Местным религиозным объединением признается религиозное объединение, образованное по инициативе не менее пятидесяти граждан Республики Казахстан, действующее в пределах одной области, города республиканского значения и столицы.

Региональным религиозным объединением признается религиозное объединение, созданное по инициативе не менее пятисот граждан Республики Казахстан, являющихся участниками (членами) двух и более местных религиозных объединений, численностью не менее двухсот пятидесяти граждан Республики Казахстан от каждого из них, которые представляют не менее двух областей, городов республиканского значения и столицу. Региональные религиозные объединения создаются и осуществляют свою работу в пределах территории деятельности данных местных религиозных объединений.

Республиканским религиозным объединением признается религиозное объединение, образованное по инициативе не менее пяти тысяч граждан Республики Казахстан, представляющих все области, города республиканского значения и столицу, численностью не менее трехсот граждан РК в каждом из них, а также имеющее свои структурные подразделения (филиалы и представительства) на всей территории РК.

Особенностью регионального религиозного объединения является порядок его создания. Законодательством установлено, что создание регионального религиозного объединения возможно только после создания двух и более местных религиозных объединений, тогда как для создания республиканского религиозного объединения регистрация и создание ряда местных и/или региональных религиозных объединений не требуются.

Религиозное объединение с момента его государственной регистрации приобретает правоспособность юридического лица. В соответствии с п.1 ст. 33 Гражданского кодекса Республики Казахстан юридическим лицом признается организация, которая имеет на праве собственности, хозяйственного ведения или оперативного управления обособленное имущество и отвечает своим имуществом по своим обязательствам, может от своего имени приобретать и осуществлять имущественные и личные неимущественные права и обязанности, быть истцом и ответчиком в суде [20].

В статье 7 Закона РК «О религиозной деятельности и религиозных объединениях» религиозные обряды и церемонии беспрепятственно проводятся (совершаются) в культовых зданиях (сооружениях) и на отведенной им территории, в местах поклонения, в учреждениях и помещениях религиозных объединений, на кладбищах и в крематориях, жилищах, объектах общественного питания в случае

необходимости, при условии соблюдения прав и интересов близ проживающих лиц. В иных случаях религиозные мероприятия осуществляются в порядке, установленном законодательством Республики Казахстан [18].

Введен запрет на проведение (совершение) богослужений, религиозных обрядов, церемоний и (или) собраний, а также осуществление миссионерской деятельности на территории и в зданиях:

1) государственных органов, организаций;

2) Вооруженных сил, других войск и воинских формирований, судебных и правоохранительных органов, других служб, связанных с обеспечением общественной безопасности, защитой жизни и здоровья физических лиц;

3) организаций образования, за исключением духовных (религиозных) организаций образования.

Государственная регистрация духовной (религиозной) организации образования производится в соответствии с Законом РК «О государственной регистрации юридических лиц и учетной регистрации филиалов и представительств», с учетом особенностей, предусмотренных законодательством об образовании и о религиозной деятельности и религиозных объединениях [18].

В соответствии с п. 3 ст. 13 Закона РК «О религиозной деятельности и религиозных объединениях» республиканские религиозные объединения и региональные религиозные объединения в соответствии со своими уставами вправе создавать в форме учреждений духовные (религиозные) организации, образования, реализующие профессиональные учебные программы подготовки священнослужителей [18].

Инструкцией по государственной регистрации юридических лиц и учетной регистрации филиалов и представительств предусмотрено, что уставы (положения) духовных учебных заведений, мечетей, монастырей и иных религиозных объединений, основанных религиозными управлениями (центрами), утверждаются этими религиозными управлениями (центрами) [21]. Для регистрации представляется решение уполномоченного органа религиозного управления (центра) об их создании.

Система образования и воспитания в Республике Казахстан, за исключением духовных (религиозных) организаций образования, отделена от религии и религиозных объединений и носит светский характер. Светский характер образования указан как один из принципов государственной политики в области образования [22]. Согласно нормам казахстанского законодательства религиозное образование в организациях образования не допускается.

В соответствии с Законом РК «Об образовании» под духовной (религиозной) организацией образования понимается учебное заведение, реализующее профессиональные учебные программы подготовки священнослужителей [22].

Духовная образовательная деятельность подлежит лицензированию. Для получения лицензии на осуществление духовной образовательной деятельности необходимо:

1) наличие штатных преподавателей, имеющих высшее духовное образование по профилю подготовки и соответствующих требованиям, предъявляемым религиозными объединениями;

2) наличие фонда учебной литературы по отношению к контингенту обучающихся на полный цикл обучения в количестве не менее 50 единиц изданий на одного обучающегося;

3) наличие на праве собственности хозяйственного ведения или оперативного управления необходимой для организации образовательного процесса учебно-материальной базы, соответствующей требованиям санитарных правил и норм;

4) наличие медицинского обслуживания обучающихся;

5) наличие объекта питания для обучающихся;

6) наличие ходатайства соответствующего религиозного управления (центра), с обоснованием целесообразности функционирования данного учреждения религиозного образования, и копии свидетельства о регистрации религиозной конфессии на территории Республики Казахстан;

7) наличие образовательных программ (учебных планов) по профилю подготовки, утвержденных руководством религиозной конфессии;

8) наличие заключения Агентства Республики Казахстан по делам религий на заявленные религиозные образовательные программы.

Кроме того, в соответствии с Законом Республики Казахстан «О лицензировании» предусмотрена необходимость получения лицензии для осуществления деятельности, связанной с направлением за границу для обучения в духовных учебных заведениях [23].

В соответствии с принятым 11 октября 2011 г. Законом РК «О религиозной деятельности и религиозных объединениях» возникают следующие обязанности юридических лиц, деятельность которых так или иначе связана с религиозной деятельностью:

– религиозные объединения обязаны внести изменения и дополнения в учредительные документы, тем самым привести их в соответствие с требованиями Закона РК «О религиозной деятельности и религиозных объединениях», а также предоставить в регистрирующий орган документы, подтверждающие статус религиозного объединения в течение одного года со дня вступления в силу Закона РК «О религиозной деятельности и религиозных объединениях»;
– юридические лица, занимающиеся удовлетворением религиозных интересов и потребностей в иной организационно-правовой форме, кроме как религиозное объединение, обязаны внести соответствующие изменения в свои учредительные документы в течение одного года со дня вступления в силу Закона РК «О религиозной деятельности и религиозных объединениях» [18].

По истечении указанного срока юридические лица, не приведшие свои учредительные документы в соответствие с требованиями Закона «О религиозной деятельности и религиозных объединениях», ликвидируются в судебном порядке по обращению органа, осуществляющего государственную регистрацию религиозных объединений.

Таким образом, в соответствии с принятием нового закона, регулирующего деятельность религиозных объединений, для осуществления регистрации религиозного объединения необходимо наличие определенного количества граждан-инициаторов (в зависимости от статуса религиозного объединения), а также положительного заключения религиоведческой экспертизы.

В случае, если религиозное объединение зарегистрировано до принятия указанного выше закона, необходимо привести в соответствие учредительные документы на основе закона и в связи с этим пройти процедуру внесения изменений и дополнений, изложенных в Законе РК «О религиозной деятельности и религиозных объединениях».

Воспрепятствование законной религиозной деятельности, нарушение гражданских прав физических лиц по мотивам отношения к религии или оскорбление их религиозных чувств, осквернение почитаемых последователями той или иной религии предметов, строений и мест не допускаются.

Важно отметить регулирование миссионерской деятельности в данном законе. В соответствии со ст. 8 Закона миссионерская деятельность разрешается как гражданам Республики Казахстан, так и иностранцам, а также лицам без гражданства только после прохождения регистрации [18]. В отличие от ранее действовавшего законодательства миссионерами теперь являются не только иностранные граждане и лица без гражданства, но и граждане РК. Обязательным условием миссионерской деятельности является регистрация миссионеров.

Утвержден стандарт государственной услуги «Проведение регистрации и перерегистрации лиц, осуществляющих миссионерскую деятельность» [24]. Приказом председателя Агентства РК по делам религий от 18 июля 2012 г. утвержден Регламент государственной услуги «Проведение регистрации и перерегистрации лиц, осуществляющих миссионерскую деятельность» [25].

Регистрацию осуществляют территориальные подразделения уполномоченных органов в срок, не превышающий тридцати календарных дней со дня подачи документов. Срок регистрации приостанавливается при проведении религиоведческой экспертизы для получения заключения по материалам, предоставленным миссионером. Миссионеры на территории Республики Казахстан обязаны ежегодно проходить перерегистрацию в территориальных подразделениях уполномоченного органа. Перерегистрация миссионеров проводится так же, как и первоначальная регистрация.

Документы, выданные иностранными государствами, предоставляются с нотариально засвидетельствованной в Республике Казахстан верностью перевода на казахский и русский языки и нотариально засвидетельствованной в Республике Казахстан подлинностью подписи переводчика, осуществлявшего перевод.

Следует отметить, что возможен отказ в регистрации в качестве миссионера на основании отрицательного заключения религиоведческой экспертизы, а также если его миссионерская деятельность представляет угрозу конституционному строю, общественному порядку, правам и свободам человека, здоровью и нравственности населения. Еще одним основанием для отказа является предоставление недостоверных сведений в документах, предусмотренных п. 11 указанного стандарта [24].

Использование миссионерами материалов религиозного содержания и предметов религиозного назначения допускается после получения положительного заключения религиоведческой экспертизы. Осуществление миссионерской деятельности без регистрации запрещается и, более того, влечет ад-

министративную ответственность в соответствии с п.3 ст. 375 Кодекса Республики Казахстан «Об административных правонарушениях» [26].

Ответственность за нарушения законодательства РК о религиозной деятельности и религиозных объединениях установлена в различных нормативных правовых актах: Уголовном кодексе РК (ст. 141 «Нарушение равноправия граждан», ст. 164 «Возбуждение социальной, национальной, родовой, расовой или религиозной вражды», ст. 337 «Создание или участие в деятельности незаконных общественных и других объединений», ст. 337–1 «Организация деятельности общественного или религиозного объединения либо иной организации после решения суда о запрете их деятельности или ликвидации в связи с осуществлением ими экстремизма») [27], Кодексе РК «Об административных правонарушениях» (ст. 374–1 «Руководство, участие в деятельности не зарегистрированных в установленном законодательством РК порядке общественных, религиозных объединений, а также финансирование их деятельности», ст. 375 «Нарушение законодательства о религиозной деятельности и религиозных объединениях») [26] и др.

Самой строгой мерой ответственности для религиозного объединения являются его ликвидация или запрещение деятельности по судебному решению.

В настоящее время государственная политика в сфере религии продолжает формироваться в рамках определенной Главой государства Н.А.Назарбаевым стратегии по созданию единой системы государственно-конфессиональных отношений и предсказуемой управляемости религиозных процессов.

Текущая религиозная ситуация Казахстана характеризуется усилением роли государственных институтов и механизмов в регулировании данной сферы. Допущенная на начальном этапе определенная радикализация религиозных настроений в обществе в связи с ростом активности нетрадиционных религиозных течений значительно снизилась.

Агентству по делам религии совместно с другими государственными органами в течение 2012 г. удалось достигнуть существенных позитивных сдвигов по направлениям государственной политики в сфере религии [17].

1. Сформирована новая правовая база, регулирующая религиозные отношения в стране, в рамках которой в соответствии с интересами безопасности страны регламентированы и конкретизированы правовые аспекты религиозной деятельности и функционирования религиозных объединений.

2. Проведена перерегистрация религиозных объединений, которая структурировала и систематизировала конфессиональное пространство Казахстана. По итогам перерегистрации конфессиональное пространство Казахстана теперь представляют 3088 религиозных объединений 17-ти конфессий, получивших правовое оформление в соответствии с требованиями нового закона. Их количество сократилось на 1463 объединения, или более чем на 32 % [16]. Сокращение численности связано с тем, что около трети ранее зарегистрированных религиозных объединений, фактически не функционировали. Многие религиозные объединения, четыре с половиной тысячи, были зарегистрированы до нашей независимости, т.е. в период перестройки. А после получения независимости, а также в связи с тем, что многие граждане начали возвращаться на историческую родину, многие религиозные объединения остались только на бумаге, т.е. не было последователей. За счет недействующих религиозных объединений их количество сократилось на 32 процента. Также сократилось число духовных учебных заведений — из ранее имеющихся 28 учреждений прошли перерегистрацию тринадцать [16]. В соответствии с новым законом (ст. 13, п. 3) учебные заведения религиозного характера могут иметь только религиозные объединения, регионального или республиканского статуса. Таким образом, на территории Казахстана сейчас существует 9 медресе, институт повышения квалификации имамов, а также школа чтецов Корана. Имеющие статус местных религиозные объединения по закону не могут создавать на территории Казахстана религиозно-учебные заведения. На основе работы экспертов была предложена новая классификация религиозных объединений. Если ранее в стране официально насчитывалось 46 конфессий и деноминаций, то теперь их число составляет 17. Это результат уточнения классификаций религиозных объединений. В связи с этим Агентство по делам религий официально заявляет везде, что количество конфессий на территории Казахстана всего лишь 17, и все они действуют официально [17].

3. Усилена роль государства в регулировании миссионерской деятельности. Регламентирован порядок въезда и пребывания в Казахстане иностранных миссионеров. «В результате принятых мер количество иностранных миссионеров протестантского направления существенно уменьшилось. В 2009 г. их число в стране составляло 134, в 2011 г. — 76, а в настоящее время зарегистрировано 43

гражданина (миссионера) зарубежных государств», — сказал Лама Шариф на заседании коллегии Агентства по итогам деятельности за 2012 г. и задачах на 2013 г. [28].

Казахстан, провозглашая себя светским государством, не самоустраняется от создания гарантий осуществления свободы совести, а отстаивает и поэтапно проводит в жизнь принцип светскости государства, устраняет все, что может привести к расколу и конфликту в обществе на религиозной основе, обеспечивая равные условия для удовлетворения духовных потребностей как верующих, так и неверующих. Конституционное и законодательное регулирование реализации данного права гражданами Республики Казахстан соответствует общепринятым международно-правовым нормам в области свободы совести и вероисповедания.

Список литературы

1 Выступление Президента Республики Казахстан Н.А.Назарбаева, 2006. II Съезд лидеров мировых и традиционных религий. — [ЭР]. Режим доступа: Астана // http://www.zakon.kz/75693-vystuplenie-prezidenta-respubliki.html.

2 Конституция Республики Казахстан. Принята 30 августа 1995 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1005029.

3 Всеобщая декларация прав человека. Принята резолюцией 217 А (III) Генеральной Ассамблеи ООН от 10 декабря 1948 г. — [ЭР]. Режим доступа: http://www.un.org/ru/documents/decl_conv/declarations/declhr.shtml.

4 *Кубеев Е.К.* Теоретико-правовое аспекты развития конституционного строя Республики Казахстан. — Караганда: Изд-во КарГУ, 2012. — 485 р.

5 *Подопригора Р.А.* Комментарий к Закону Республики Казахстан «О религиозной деятельности и религиозных объединениях». — Алматы: Налоговый эксперт, 2013. — 212 с.

6 *Абуов А.П., Смагулов Е.М.* Религии в Казахстане. — Астана, 2011. — 225 р.

7 *Moazami B.* The making of the state, religion, and the Islmic Revolution in Iran (1796—1979). PhD. — New School University, 2004. — 422 p.

8 *Elmore M.* States of religion: Postcolonialism, power, and the formation of Himachal Pradesh. Ph.D.University of California. — Santa Barbara, 2005. — 583 p.

9 *Foy J.* The state, religion and Habermas's public sphere: Positing alternative forms of community. M.A. — University of Wyoming, 2008. — 93 p.

10 Fox J. Religion, ethnicity, and the state: A general theory of religion and conflict as applied to ethnic conflict with the state. PhD. — University of Maryland College Park. — 347 p.

11 *Birnbaum E.* The politics of compromise: state and religion in Israel. Ph.D.Columbia University, 1968. — 408 p.

12 *Brackman N.E.* Scaling the wall between religion and state: Religious party behavior in Israel. Ph.D. — Washington University, 1997. — 207 p.

13 Закон Республики Казахстан «О свободе вероисповедания и религиозных объединениях» от 15 января 1992 г. Утратил силу. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1000934.

14 *Мейрманов Ж.* Сохранить согласие и стабильность // Казахстанская правда. — 2004. — 18 февр.

15 *Иванов В.А., Трофимов Я.Ф.* Религии в Казахстане: Справочник. — Алматы: Аркаим, 2003. — С. 234–242.

16 *Лама Шариф К.* Выступление Председателя Агентства Республики Казахстан по делам религий на брифинге «Религиозная ситуация в Казахстане»: Фрагмент стенограммы. 2013 год. — [ЭР]. Режим доступа: http://religiopolis.org/documents/6274-religioznaja.

17 *Назарбаев Н.А.* Межконфессиональное согласие — основа мира и процветания // Казахстанская правда. — 2010. — 19 янв.

18 Закон Республики Казахстан «О религиозной деятельности и религиозных объединениях» от 11 октября 2011 г. № 483. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=31067690.

19 Закон Республики Казахстан «О государственной регистрации юридических лиц и учетной регистрации филиалов и представительств» Принят 17 апреля 1995 г. № 2198. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1003592.

20 Гражданский кодекс Республики Казахстан от 27 декабря 1994 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1006061.

21 Приказ Министра юстиции Республики Казахстан «Об утверждении Инструкции по государственной регистрации юридических лиц и учетной регистрации филиалов и представительств» от 12 апреля 2007 г. № 112. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=30101542.

22 Закон Республики Казахстан «Об образовании» от 27 июля 2007 г. № 319-III. — [ЭР]. Режим доступа: http://www.zakon.kz/141156-zakon-respubliki-kazakhstan-ot-27.html.

23 Закон Республики Казахстан «О лицензировании» от 11 января 2007 г. № 214. — [ЭР]. Режим доступа: http://www.zakon.kz/141150-zakon-respubliki-kazakhstan-ot-11.html.

24 Постановление Правительства Республики Казахстан «Об утверждении стандарта государственной услуги по проведению регистрации и перерегистрации лиц, осуществляющих миссионерскую деятельность». Принято 7 февраля 2012 г. — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/P1200000211.

25 Приказ Председателя Агентства Республики Казахстан по делам религий «Об утверждении Регламента государственной услуги по проведению регистрации и перерегистрации лиц, осуществляющих миссионерскую деятельность». — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/V1200007823.

26 Кодекс Республики Казахстан «Об административных правонарушениях» от 30 января 2001 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1021682.

27 Уголовный кодекс Республики Казахстан от 16 июля 1997 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1008032.

28 *Лама Шариф К.* Количество миссионеров протестантского направления значительно уменьшилось в Республике Казахстан. 2013 г. — [ЭР]. Режим доступа: http://www.newskaz.ru/society/20130201/4714933.html.

С.К.Амандықова, И.Е.Ысқақова

Қазақстан Республикасында діни бірлестіктердің қызметін құқықтық реттеу: қазіргі жағдайы және жинақталған тәжірибесі

Қазақстанда соңғы жиырма жылда қалыптасқан жаңа қоғамдық-саяси ахуалдың көріністеріне назар салсақ, қоғамдағы дін мен діни бірлестіктердің рөлі өзгерді. Яғни, дін мен діни бірлестіктердің қоғамдық беделі және қоғамдық өмірдің әр түрлі тұстарына ықпалы айтарлықтай өсіп, мәртебесі кеңейді. Қысқа мерзім ішінде дінге сенушілердің және діни бірлестіктердің саны бірнеше есеге артып, қоғамда олардың қызметінің белсенділігі жоғарылады, қазақстандық қоғамның әлеуметтік құрылымының маңызды бөлігіне айналды, мемлекеттік-конфессиялық қатынастардың сипаты өзгерді. Мақалада дін аясындағы қатынастарды құқықтық реттеудің қазақстандық үлгісі және жинақталған тәжірибесі қарастырылды.

S.K.Amandykova, I.Ye.Iskakova

Legal regulation of activity of religious organizations in the Republic of Kazakhstan: current status and lessons learned

At the present stage of development of the Republic of Kazakhstan it is becoming actually the issue of the relationship between concepts: state and religion, and the nature of the legal regulation of religious communities in the Republic of Kazakhstan. Over 20 years of Kazakhstan's independence, the regulation of religious relations Republic of Kazakhstan has accumulated extensive experience in the regulation of social relations in this sphere, so in Kazakhstan it is provided interfaith harmony between people of different faiths. In this paper, the authors analyzed the Kazakh model of legal regulation of relations in the sphere of religion, as well as accumulated experience.

References

1 Speech of President of the Republic of Kazakhstan Nursultan Nazarbayev. 2006. II Congress of leaders of world and traditional religions, Astana, http://www.zakon.kz/75693-vystuplenie-prezidenta-respubliki.html.

2 Constitution of the Republic of Kazakhstan. Accepted on August 30, 1995, http://online.zakon.kz/Document/? doc_id=1005029.

3 *The Universal Declaration of Human Rights. Adopted by resolution 217 A (III) of the UN General Assembly on December 10, 1948*, http://www.un.org/ru/documents/decl_conv/declarations/declhr.shtml.

4 Kubeyev Ye.K. *Theoretical and legal aspects of the constitutional order of the Republic of Kazakhstan*, Karaganda: KarSU, 2012, 485 p.

5 Podoprigora R.A. *Kommentary to the Republic Kazakhstan law «About religious activity and religious associations»*, Almaty: Nalogovy the expert, 2013, 212 p.

6 Abuov A.P., Smagulov Ye.M. *Religion in Kazakhstan*, Astana, 2011, 225 p.

7 Moazami Behrooz. *The making of the state, religion, and the Islmic Revolution in Iran (1796—1979)*, PhD, New School University, 2004, 422 p.

8 Elmore Mark. *States of religion: Postcolonialism, power, and the formation of Himachal Pradesh*, PhD, University of California, Santa Barbara, 2005, 583 p.

9 Foy J. *The state, religion and Habermas's public sphere: Positing alternative forms of community*, M.A., University of Wyoming, 2008, 93 p.

10 Fox J. *Religion, ethnicity, and the state: A general theory of religion and conflict as applied to ethnic conflict with the state*, PhD, University of Maryland College Park, 1997, 347 p.

11 Birnbaum E. *The politics of compromise: state and religion in Israel*, PhD, Columbia University, 1968, 408 p.

12 Brackman N.E. *Scaling the wall between religion and state: Religious party behavior in Israel*, PhD, Washington University, 1997, 207 p.

13 *The Law of Republic of Kazakhstan «On Freedom of Conscience and Religious Associations» Adopted on January, 15,1992. Repealed*, http://online.zakon.kz/Document/? doc_id=1000934.

14 Meiyrmanov Zh. *Kazakhstanskaya pravda*, 2004, February, 18.

15 Ivanov V.A., Trofimov Ya.F. *Religion in Kazakhstan:* handbook, Almaty: Arkaim, 2003, p. 234–242.

16 Lama Sharif K. Speech of Chairman of Agency for Religious Affairs of the Republic of Kazakhstan at the briefing, *«The religious situation in Kazakhstan»* Fragment transcript, 2013, http://religiopolis.org/documents/6274-religioznaja.

17 Nazarbayev N.A. *Kazakhstanskaya pravda*, 2010, January.

18 Law of the Republic of Kazakhstan «On religious activities and religious associations» adopted on October 11, 2011, 483 // http://online.zakon.kz/Document/? doc_id=31067690.

19 Law of the Republic of Kazakhstan «On State registration of legal entities and registration of branches and representative offices» Adopted on April 17, 1995, 2198 // http://online.zakon.kz/Document/? doc_id=1003592.

20 The Civil Code of the Republic of Kazakhstan, adopted on December 27, 1994, http://online.zakon.kz/Document/? doc_id=1006061.

21 Order of the Minister of Justice of the Republic of Kazakhstan «On approval of instruction on State registration of legal entities and registration of branches and representative offices», published on April 12, 2007, *112*, http://online.zakon.kz/Document/? doc_id=30101542.

22 Law of the Republic of Kazakhstan «On education», adopted on July 27, 2007. № 319-III, http://www.zakon.kz/141156-zakon-respubliki-kazakhstan-ot-27.html.

23 Law of The Republic of Kazakhstan «On licensing». Adopted on January 11, 2007. № 214, http://www.zakon.kz/141150-zakon-respubliki-kazakhstan-ot-11.html.

24 Decree of the Government of the Republic of Kazakhstan «On approval of the State service for the registration and re-registration of persons carrying out missionary activities». Adopted on February 7, 2012, http://adilet.zan.kz/rus/docs/P1200000211

25 Order of the Chairman of the Agency of the Republic of Kazakhstan on Affairs of religions «On approval of the rules of the State service for the registration and re-registration of persons carrying out missionary activities», http://adilet.zan.kz/rus/docs/V1200007823.

26 Code of the Republic of Kazakhstan «On administrative offences», adopted on January 30, 2001, http://online.zakon.kz/Document/? doc_id=1021682.

27 The Criminal Code of the Republic of Kazakhstan, adopted on July 16, 1997, http://online.zakon.kz/Document/? doc_id=1008032.

28 Lama Sharif K. *The number of Protestant missionaries are greatly decreased in the Republic of Kazakhstan*, 2013. http://www.newskaz.ru/society/20130201/4714933.html.

УДК 342.61

Э.Н.Ракимбаев, З.Ш.Бейшеналиев

Кыргызская государственная юридическая академия при Правительстве Кыргызской Республики, Бишкек (E-mail: 23ren09@mail.ru)

Правотворческая деятельность Президента Кыргызской Республики как форма обеспечения конституционных прав

В статье рассматриваются конституционно-правовые основы правотворческой деятельности Президента Кыргызской Республики (КР). Отмечается, что в соответствии с Конституцией КР Президент является гарантом Конституции и обеспечивает согласованное функционирование и взаимодействие органов государственной власти. Выделяются его участие в законодательном процессе, полномочия по изданию правовых актов. Отмечено, что Президент обладает широким диапазоном средств и форм участия в правотворческом процессе. В совместной деятельности с Жогорку Кенешем (ЖК) он становится непосредственным участником законотворческого процесса, правотворческой деятельности.

Ключевые слова: Президент, правотворческая деятельность, законодательный процесс, правотворчество Президента, указ, распоряжение.

Правотворчество в Кыргызской Республике является одной из важнейших сторон деятельности государства, формой активности, имеющей своей непосредственной целью формирование правовых норм, их изменения, отмену или дополнение. В каждом государстве правотворчество обладает свои-

ми особенностями, но везде оно направлено на создание и совершенствование единой, внутренне согласованной и непротиворечивой системы норм, регулирующих сложившиеся в обществе разнообразные отношения.

Правотворчество Президента Кыргызской Республики — сравнительно новое явление в правовом пространстве КР. Оно выражается в издании актов Президента и в сотрудничестве с Жогорку Кенешем КР.

Осуществление единой государственной власти невозможно без тесного сотрудничества, взаимодействия главы государства с парламентом. В демократическом государстве законодательная и исполнительная ветви власти имеют рычаги взаимного влияния, которые получили название «сдержки и противовесы» [1; 16]. Существование такой системы позволяет предупредить бесконтрольность власти, злоупотребление ею. В рамках этой системы во многом и строятся отношения между Президентом и ЖК Кыргызской Республики.

Многогранная деятельность Президента КР осуществляется через правовые акты, каковыми согласно Конституции КР являются указы и распоряжения. Полномочия Президента Кыргызской Республики реализуются через принятие им нормативных правовых актов. Согласно ст. 65 Конституции Президент Кыргызской Республики издает указы и распоряжения [2], которые можно разделить на нормативные и индивидуальные.

Нормативные указы и распоряжения содержат общие правила поведения, рассчитанные на постоянное или многократное применение, и относятся к неопределенному кругу физических и юридических лиц, органов государственной власти и управления. Это, следовательно, нормативный акт.

Указ может носить и правоприменительный характер, а следовательно, не иметь нормативного значения. Указы ненормативного значения издаются, например, о назначении того или иного лица на определенную должность. Индивидуальные указы и распоряжения касаются только конкретных отношений либо определенных лиц: решения о назначении и освобождении от должности руководителей центральных структур системы исполнительной власти, награждении государственными наградами, присвоении специальных званий и классных чинов, рангов, почетных званий Кыргызской Республики, о помиловании, о гражданстве.

Анализ указов и распоряжений Президента показывает, что в форме указов оформляются решения Президента по значительно большему кругу проблем политического и общественного (социально-экономического) характера, исходя из их значимости. В форме распоряжений, как правило, принимаются решения Президента по оперативным, организационным и кадровым вопросам, а также по вопросам работы аппарата Президента.

В соответствии с Конституцией Кыргызской Республики указы и распоряжения Президента обязательны для исполнения на всей территории Кыргызской Республики. Все государственные органы, должностные лица и граждане обязаны следовать предписанным в актах Президента правилам поведения. Указы и распоряжения Президента КР не называются в Конституции подзаконными актами, но они таковыми являются, ибо не должны противоречить как Конституции КР, так и государственным законам [2]. Указы и распоряжения Президента КР подлежат обязательному официальному опубликованию, кроме актов или отдельных их положений, содержащих сведения, составляющие государственную тайну, или сведения конфиденциального характера.

Среди многочисленных указов Президента КР немало и таких, которые посвящены вопросам правового регулирования труда, например: указы Президента КР от 1 августа 2000 г. УП № 196 «Об условиях оплаты труда государственных служащих» 155, от 24 апреля 2001 г. УП № 136 «О мерах по профессиональной переподготовке высвобождаемых государственных служащих в Кыргызской Республике», от 13 декабря 2007 г. УП № 548 «Об условиях оплаты труда государственных и муниципальных служащих Кыргызской Республики» 157 и др.

Акты Правительства КР. В соответствии со ст. 18 Закона КР «О нормативных правовых актах» Правительство КР на основе и во исполнение Конституции и законов КР, указов Президента КР принимает в пределах своих полномочий постановления и распоряжения. Если эти акты носят нормативный характер, то они вступают в силу одновременно на всей территории КР по истечении семи дней после дня их первого официального опубликования.

Иные акты вступают в силу со дня их подписания. Такой строгий порядок, установленный Указом Президента КР, имеет значение для единообразного применения актов главы государства по всей территории страны. Порядок подготовки указов и распоряжений Президента КР, предусматривающий согласование в Правительстве КР и Администрации Президента, с помощниками Президента и

юридическую экспертизу, установлен распоряжением Президента КР. Решение о готовности проекта акта к представлению Президенту принимает руководитель Администрации Президента КР. Указы, распоряжения и законы подписываются собственноручно Президентом КР.

Полномочия президентов стран СНГ подробно регулируются соответствующими конституциями. Президенты стран СНГ являются главами государств, гарантами Конституции, прав и свобод человека и гражданина. В установленном Конституцией порядке они принимают меры по охране суверенитета страны, ее независимости и государственной целостности. Детальный анализ соответствующих положений конституций стран СНГ позволяет, в зависимости от правовой специфики полномочий президента, разделить их условно на шесть идентичных, как нам представляется, для большинства президентов стран СНГ групп, которые рассмотрим на примере полномочий Президента Кыргызской Республики (ст. 46 Конституции Кыргызской Республики) [1;14].

Полномочия Президента Кыргызской Республики

Первая группа полномочий Президента Кыргызской Республики — это его права и обязанности, связанные с деятельностью Собрания народных представителей и Законодательного собрания Жогорку Кенеша Кыргызской Республики. Он назначает выборы в Законодательное собрание и Собрания народных представителей; осуществляет досрочный роспуск Законодательного собрания и Собрания народных представителей в случаях, предусмотренных Конституцией Кыргызской Республики; вносит законопроекты в Жогорку Кенеш; подписывает законы либо возвращает их со своими возражениями в соответствующую палату Жогорку Кенеша для повторного рассмотрения; обнародует законы; вправе опротестовать в Конституционном суде Кыргызской Республики законы или ратифицированные Кыргызской Республикой международные договоры; вправе обращаться к народу с ежегодными посланиями о положении дел в стране, оглашаемыми на совместном заседании обеих палат Жогорку Кенеша; вправе досрочно создать заседание Законодательного собрания, сессию СНП и определить вопросы, подлежащие рассмотрению; в случаях и порядке, предусмотренных ст. 68 Конституции Кыргызской Республики, осуществляет законодательные полномочия; назначает по собственной инициативе референдум; принимает решение о назначении референдума по инициативе не менее трехсот избирателей, большинства от общего числа депутатов обеих палат Жогорку Кенеша; назначает с согласия Собрания народных представителей Генерального прокурора Кыргызской Республики; назначает с согласия Собрания народных представителей Председателя Правления Национального банка Кыргызской Республики; представляет Законодательному собранию и Собранию народных представителей кандидатуры для избрания на должности Председателя Конституционного суда Кыргызской Республики; представляет СНП кандидатуры для избрания на должности председателей Верховного суда Кыргызской Республики, Высшего Арбитражного суда Кыргызской Республики, их заместителей и судей Верховного суда и Высшего Арбитражного суда Кыргызской Республики; освобождает их от должности.

Вторая группа полномочий Президента Кыргызской Республики — его права и обязанности, связанные с деятельностью правительства. Президент Кыргызской Республики определяет структуру Правительства Кыргызской Республики; назначает, с согласия Собрания народных представителей, Премьер-министра Кыргызской Республики; назначает по консультации с Премьер-министром Кыргызской Республики членов Правительства Кыргызской Республики, а также руководителей административных ведомств; освобождает их от должности; принимает прошения Премьер-министра, Правительства или отдельных его членов об отставке; по своей инициативе принимает решение об отставке Премьер-министра или Правительства; по консультации с Премьер-министром утверждает единую систему подготовки и подбора кадров для органов, содержащихся за счет государственного бюджета, финансирования государственных органов и оплаты труда государственных служащих; вправе приостановить или отменить действие актов Правительства Кыргызской Республики, актов других органов исполнительной власти; вправе передавать полномочия, предусмотренные подпунктом 2 п. 3 ст. 46 Конституции Кыргызской Республики, Премьер-министру, членам Правительства и другим должностным лицам, а также ратифицировать подписанные ими международные финансовые договоры и кредитные соглашения.

Третья группа полномочий Президента Кыргызской Республики — его права и обязанности в области обороны. Президент Кыргызской Республики образует и возглавляет Совет безопасности Кыргызской Республики и иные координационные органы; формирует подчиненные ему службы государственной охраны и Национальную гвардию; присваивает высшие воинские звания, классные чины и иные специальные звания; при наличии оснований, предусмотренных законом, предупрежда-

ет о возможности введения чрезвычайного положения, а при необходимости вводит его в отдельных местностях, без предварительного объявления, о чем незамедлительно сообщает в Законодательное собрание; объявляет общую или частичную мобилизацию; объявляет состояние войны в случае агрессии или непосредственной угрозы агрессии на Кыргызскую Республику и незамедлительно вносит этот вопрос на рассмотрение Законодательного собрания; объявляет в интересах защиты страны и безопасности ее граждан военное положение и незамедлительно вносит этот вопрос на рассмотрение Законодательного собрания; является Главнокомандующим Вооруженными силами, назначает и смещает высшее командование Вооруженных сил Кыргызской Республики.

Четвертая группа полномочий Президента Кыргызской Республики — его права и обязанности в области внешних сношений.

Президент Кыргызской Республики осуществляет руководство внешней политикой Кыргызской Республики; ведет переговоры и подписывает международные договоры Кыргызской Республики; подписывает ратификационные грамоты; назначает и отзывает дипломатических представителей КР в иностранных государствах и международных организациях; принимает верительные и отзывные грамоты аккредитуемых при Президенте КР глав дипломатических представительств иностранных государств и представителей международных организаций; решает вопросы предоставления гражданства и выхода из гражданства Кыргызской Республики, предоставления политического убежища; присваивает дипломатические ранги.

Пятая группа полномочий Президента Кыргызской Республики — его компетенция, связанная с координацией деятельности соответствующих властных структур государства.

Президент Кыргызской Республики назначает Государственного секретаря Кыргызской Республики, определяет его статус и полномочия; формирует Администрацию Президента Кыргызской Республики; назначает с согласия соответствующих местных кенешей глав государственных администраций областей, районов, городов; освобождает их от должности; образует и упраздняет исполнительные органы, не входящие в состав Правительства; назначает председателей, их заместителей и судей судов областей, города Бишкека, районов, городов, арбитражных судов областей и города Бишкека, а также военных судов Кыргызской Республики и в случаях, предусмотренных Конституцией и законами, освобождает их от должности; назначает выборы в местные кенеши и в предусмотренных законом случаях осуществляет их роспуск; назначает председателя Центральной комиссии по выборам и проведению референдумов и одну треть ее членов; назначает председателя Счетной палаты и одну треть ее аудиторов; издает указы и распоряжения, которые обязательны для исполнения на всей территории Кыргызской Республики.

Шестая группа полномочий Президента Кыргызской Республики — его права и обязанности по специфическим вопросам.

Президент Кыргызской Республики награждает государственными наградами Кыргызской Республики; присваивает почетные звания Кыргызской Республики; осуществляет помилования; вправе решать вопрос финансирования мероприятий, имеющих неотложный характер, за счет государственных средств; учреждает фонды.

Итак, осуществляя свои полномочия, Президент КР издает два вида актов: указы и распоряжения. Различие между ними установить довольно сложно. Казалось бы, надо исходить из того, что указ — акт более широкого действия, имеющий нормативный характер, а распоряжение — документ более частного, конкретного назначения. Но это не так. Нередко нормативными являются и указы, и распоряжения. Причем иногда для регулирования сходных вопросов используются то указы, то распоряжения (например, создание подразделений Администрации Президента и утверждение положений о них).

Правда, в последнее время наблюдается все-таки тенденция к использованию для нормативного регулирования общественных отношений формы указов. Кроме того, для определенных вопросов ненормативного характера устойчивой формой является не распоряжение, а указ (например, в отношении предоставления гражданства КР, выхода из гражданства и др.). Поэтому граница между актами Президента КР порой условна.

Но, пожалуй, в одной ситуации форма указа употребляется весьма часто. Связано это с регулированием наиболее важных общественных отношений, особенно если они не урегулированы законом; указ Президента в данном случае как бы заменяет законодательное регулирование.

Проблема соотношения указа и закона заслуживает того, чтобы на ней остановиться подробнее. Введя пост Президента КР, Конституция КР предусмотрела, что Президент издает свои акты на осно-

ве и во исполнение не только Конституции и законов КР, но и решений Съезда и Верховного Совета. Однако при конституционных реформах, которые проводились неоднократно в нашей республике, осталось лишь положение о том, что указы (но не распоряжения) не могут противоречить Конституции и законам КР. То же записано и в действующей Конституции, но относится к обоим видам актов: указы и распоряжения Президента не должны противоречить Конституции КР и законам КР. Здесь отражена иная концепция назначения актов Президента КР, а именно: в том случае, если какой-то вопрос уже урегулирован законом, Президент КР обязан с ним считаться. Однако если вопрос в законе не урегулирован, Президент КР вправе его урегулировать своим актом. Причем на практике могут возникать такие ситуации:

а) вопрос юридически не урегулирован, и не ясно, каким актом это должно быть сделано, — законом, указом Президента КР, постановлением Правительства КР и т.д.;

б) вопрос еще не урегулирован, но понятно, что он является предметом закона. По мнению Президента КР, он вправе издавать свой нормативный акт не только в первой ситуации, но и во второй — для заполнения правового пробела на тот период, пока закон еще не принят, а общественные отношения настоятельно требуют регулирования.

Указы Президента — это акты не главы исполнительной власти, а главы государства. Другими словами, их абсолютно подзаконный характер не очевиден. Разумеется, эти указы не должны противоречить Конституции и действующим законам. Но при наличии правовых пробелов их восполнение с помощью нормативных актов главы государства до принятия соответствующих законов вполне естественно и правомерно [3; 107].

Во-вторых, одной из конституционно установленных прерогатив Президента КР является определение основных направлений внутренней и внешней политики страны. Ясно, что отнюдь не только ежегодные послания Президента КР могут считаться формой реализации этого полномочия.

В-третьих, необходимость выполнения функций гаранта Конституции также обусловливает возможность издания Президентом КР нормативных указов для обеспечения действия Конституции КР.

Таким образом, пока нет соответствующих законов, указы Президента КР остаются полноценной правовой базой для возникновения и изменения тех или иных общественных отношений.

В соответствии с Конституцией Президент КР является гарантом Конституции КР и обеспечивает согласованное функционирование и взаимодействие органов государственной власти. В силу этого не противоречит Конституции КР издание им указов, восполняющих пробелы в правовом регулировании по вопросам, требующим законодательного решения, при условии, что такие указы не противоречат Конституции и законам КР, а их действие во времени ограничивается периодом до принятия соответствующих законодательных актов. Таким образом, участвуя в законодательном процессе, при наличии полномочий по изданию правовых актов, Президент КР обладает широким диапазоном средств и форм участия в правотворческом процессе, в сотрудничестве с ЖК КР Президент Кыргызской Республики становится непосредственным участником законотворческого процесса, что выражается:

1) в наличии у него права законодательной инициативы и права на внесение предложений о поправках к Конституции КР;

2) в работе полномочных представителей и представителей Президента ЖК КР;

3) в возможности давать на законопроекты заключения, содержащие замечания и конкретные предложения;

4) в работе согласительных комиссий с участием представителей главы государства;

5) в его праве налагать вето на принятые законы КР и возвращать их без рассмотрения, если нарушен конституционный порядок их принятия;

6) в промульгации законов.

Список литературы

1 *Окуньков Л.А.* Правовые акты Президента: их статус, направленность, содержание // Журнал российского права. — 1997. — № 2. — С. 14–23.

2 Конституция Кыргызской Республики от 27 июня 2010 года. — [ЭР]. Режим доступа: http://rus.gateway.kg/content/gov/Constitution/41

3 *Сахаров Н.А.* Институт президентства в современном мире. — М.: Юрид. лит., 1994. — 176 с.

Э.Н.Ракимбаев, З.Ш.Бейшеналиев

Қырғыз Республикасы Президентінің құқық шығармашылық қызметі конституциялық құқықтарды қамтамасыз ету нысаны ретінде

Мақалада конституциялық құқықтарды қамтамасыз ету нысаны ретіндегі Қырғыз Республикасы Президентінің құқық шығармашылық қызметі қарастырылған. Президент Қырғыз Республикасының Конституциясына сәйкес Конституцияның кепілі және мемлекеттік билік органдарының әрекеттестігі және келісіп жұмыс істеуін қамтамасыз ететіні анықталды. Заңдық үрдісіне оның қатысуы, заң актілерін шығарудағы өкілеттілігі белгіленді. Президент құқық шығармашылық қызметке қатысуда кең ауқымды қамтиды. Жогорку Кенешпен қызметтестікте Президент құқық шығармашылық қызметтің және заң шығармашылық үрдістің тікелей қатысушы болып табылады.

E.N.Rakimbayev, Z.Sh.Beishenaliyev

Law-making activity of the President of the Kyrgyz Republic as a form of ensuring the constitutional rights

There are considered the constitutional and legal bases of the law-making activity of the President of the Kyrgyz Republic in this article. It is noted, that in accordance with the Constitution of the Kyrgyz Republic the President is the guarantor of the Constitution and ensures coordinated functioning and interaction of public authority. He participates in the legislative process, has authority to issue legal acts. The President has a wide range of means and forms of participation in the legislative process. In cooperation with the Jogorku Kenesh President becomes a direct participant in the legislative process, legislative activity.

References

1 Okunkov L.A. *Journal of Russian law*, 1997, 2, p. 14–23.

2 The Constitution of the Kyrgyz Republic on June 27, 2010 // http://rus.gateway.kg/content/gov/Constitution/41

3 Sakharov N.A. *Institution of the presidency in the modern world*, Moscow: Jurid. literature, 1994, 176 p.

УДК 323:332.1(574)

Г.М.Бейсембаева, А.Ж.Мусина, Р.Б.Сартова

Павлодарский государственный университет им. С.Торайгырова
(E-mail: Galiya_akhmetova@mail.ru)

Развитие местного самоуправления в Республике Казахстан на современном этапе

В современных условиях все большую актуальность приобретают вопросы, связанные с развитием местного самоуправления как одного из институтов демократизации общества. Местное самоуправление во всем мире является фундаментом регионального развития. Суть местного самоуправления заключается в том, что в стране, наряду с интересами личности и государства, признаются и гарантируются еще и местные интересы — связанные с решением вопросов непосредственного обеспечения жизнедеятельности населения каждого отдельно взятого населенного пункта.

Ключевые слова: государственные органы, местное самоуправление, административно-территориальная единица, правовое регулирование, конституция, гражданское общество, выборные органы, маслихат, демократизация общества, конституционно-правовое регулирование.

В юридической литературе под местным самоуправлением подразумевается самостоятельная и гарантируемая государством деятельность населения соответствующей административно-территориальной единицы и его выборных органов по управлению местными делами, форма осуществления народовластия на местах или власть местного территориального коллектива.

В Модельном законе СНГ указанный термин трактуется как «форма реализации власти народа, осуществляемая посредством самостоятельной и под свою ответственность деятельности населения муниципальных образований по решению вопросов местного значения в соответствии с конституцией и законами государства».

Одним из базовых институтов демократического гражданского общества является система местного самоуправления. Ее учреждение было декларировано еще в 1995 г., когда на республиканском референдуме была принята Конституция Республики Казахстан [1].

Теоретической базой для конституционно-правового регулирования местного самоуправления являются общепризнанные ценности муниципальной демократии и муниципального управления, закрепленные Европейской Хартией местного самоуправления [2].

Конституция не определила уровни местного самоуправления. Если предположить, что оно создается во всех звеньях территориального управления, возникает вопрос о том, какие еще представительные структуры государства могут создаваться на местном уровне, если маслихаты — это органы местного самоуправления? Статья 85 Конституции устанавливает осуществление местного государственного управления местным представительным и исполнительным органами. Логически предположить, что местные сообщества могут быть созданы в нижестоящих звеньях управления, кроме областного. В силу разных факторов (огромные размеры территорий, низкая плотность населения, наличие огромных пустынных и иных неблагоприятных для жизнедеятельности зон, неравномерность в экономическом развитии и прочее) самоуправление на этом уровне проблематично. Областные и приравненные к ним маслихаты должны сохранить свой прежний статус в качестве региональных представительных органов государства. Если же их признать органами местного самоуправления, то значит, что в областях надо создавать параллельные представительные структуры, которые юридически будут относиться к государству. В противном случае ст. 85 Конституции будет оставаться не до конца реализованной.

Разработанный Правительством в 2006 г. и вынесенный на всенародное обсуждение проект Закона РК «О местном самоуправлении в Республике Казахстан» ориентирован на введение местного самоуправления в районах городов, городах районного значения, поселках, аульных (сельских) округа, аулах (селах). Организационными структурами данного института предполагались кенесы (представительные органы) и Тор-Ага (исполнительные органы), но в процессе своего прохождения в Парламенте законопроект вызвал много нареканий и был отозван Правительством [3].

Следующий шаг по созданию системы местного самоуправления был сделан 21 мая 2007 г., когда в действующую Конституцию были внесены изменения и дополнения.

Конституция Казахстана не содержит четкой формулировки рассматриваемого понятия, однако устанавливает, что в «Республике Казахстан признается местное самоуправление, обеспечивающее самостоятельное решение населением вопросов местного значения» (п. 1 ст. 89) [1].

Основной Закон регулирует также вопросы организации и деятельности органов местного государственного управления, что наталкивает на тесную связь этих понятий. Поэтому создание структур местного самоуправления невозможно без реформирования органов государства на местах.

В Конституции претерпели изменения основные формы реализации гражданами своего права на самоуправление. Ранее в качестве них признавались выборы органов местного самоуправления, деятельность выборных и других органов самоуправления, а также право обращаться лично, направлять индивидуальные и коллективные обращения в органы местного самоуправления (п. 1 ст. 33) [1]. По сути, это ограничивало иные формы непосредственного решения населением вопросов местного значения, ибо конституционная норма предусматривала закрытый перечень форм местного самоуправления. Любые другие способы волеизъявления граждан (например, те же собрания, сходы), пусть даже и закрепленные в законе, фактически ставили их вне конституционного поля.

Закон РК от 21 мая 2007 г. кардинально поменял конституционную норму, поскольку не раскрывает непосредственные формы реализации гражданами права на местное самоуправление. Это могут быть и выборы органов местного самоуправления, и местные реформы, и правотворческая инициатива, собрания и сходы граждан и т.д. Эти пути волеизъявления населения, проживающего на территории местных сообществ, будут определяться законом, что создает возможность их потенциального разнообразия [2].

Кроме того, на конституционном уровне маслихаты признаны в качестве органов местного самоуправления, допускается создание и других органов самоуправления, закреплена возможность делегирования органам местных сообществ государственных функций.

В базовый Закон Республики Казахстан «О местном государственном управлении и самоуправлении в Республике Казахстан» введена дополнительная глава 3–1 «Участие граждан в местном самоуправлении». В статье 39–1 закреплен принцип территориальности для физических лиц как условие признания членом местного сообщества, участия их в осуществлении местного самоуправления. Для граждан РК таким условием является факт регистрации по месту жительства. При этом они обладают всей полнотой прав членов местного самоуправления. Следовательно, наличие недвижимости или постоянного места работы на соответствующей территории не является основанием признания членами местного сообщества. Главное — надо здесь постоянно проживать [2].

Внесение поправок в действующее законодательство не завершило процесса формирования системы местного самоуправления. Наоборот, данный процесс только начался. Требуется создать полноценную правовую базу местного самоуправления, экономическую и финансовую основу, продолжить дальнейшее совершенствование законодательства в этом направлении. В этой связи утвержденная Указом Президента РК от 28 ноября 2012 г. № 438 Концепция развития местного самоуправления в Республике Казахстан содержит анализ проблемных вопросов данной сферы в нашей стране и определяет основные направления и параметры формирования системы местного самоуправления на ближайшую перспективу.

Концепция предусматривает два этапа по формированию и развитию действенной системы местного самоуправления:

- первый этап (2013–2014 гг.) — расширение потенциала действующей системы на нижних уровнях управления;

- второй этап (2015–2020 гг.) — дальнейшее развитие местного самоуправления.

На первом этапе предполагается решить следующие задачи.

1. Повышение роли населения в решении вопросов местного значения через собрания и сходы местного сообщества на уровне аулов (сел), поселков, городов районного значения.

Для обсуждения вопросов местного значения путем прямого волеизъявления могут проводиться собрания (сходы) местного сообщества. Это одна из форм непосредственной реализации населением права на участие в осуществлении местного самоуправления.

Поскольку законодательство не запрещает участия иностранцев и лиц без гражданства в собраниях (сходах), это как раз та форма местного самоуправления, которая учитывает в полной мере интересы всего населения, проживающего на соответствующей территории, а не только его части (граждан РК). На собрании (сходе) местного сообщества могут обсуждаться только вопросы местного значения, т.е. те, регулирование которых связано с обеспечением прав и законных интересов боль-

шинства жителей соответствующей административно-территориальной единицы. Закон возлагает регламентацию вопросов, касающихся порядка проведения собрания (сходов) и принятия решений, на областные (города республиканского значения и столицы) маслихаты. Это значит, что сам порядок созыва данных собраний, определение кворума их правомочности, периодичность и процедура проведения и прочие вопросы будут в разных регионах различаться.

Предлагается законодательно закрепить нормы, предусматривающие:

- определение полномочий органов местного самоуправления и их ответственности;
- регламентацию порядка формирования, проведения и полномочий собраний и сходов и оформления их решений;
- обязательность обсуждения собранием или сходом вопросов финансирования мероприятий местного значения (акимы нижнего уровня управления не имеют самостоятельного бюджета, но являются администраторами пятнадцати бюджетных программ в составе бюджета района);
- включение в действующие программы развития района (города областного значения) подраздела, в котором найдут свое отражение первоочередные потребности населения, принятые на собраниях и сходах местного сообщества на уровне аула (села), аульного (сельского) округа, поселка, города районного значения.

Сходы местного сообщества будут проводиться по наиболее важным вопросам, требующим всеобщего обсуждения (отчет акима, определение состава участников собраний и т.д.).

Собрание местного сообщества будет проводиться для обсуждения текущих вопросов: бюджетных программ, формирования и использования собственных доходных источников и других.

Участники собрания местного сообщества будут формироваться из представителей, делегированных сходом, представляющих интересы отдельных групп населения: ветеранов, по делам семьи и женщин, по делам молодежи, старейшин, домовых, уличных и квартальных комитетов и других. Представители собраний местного сообщества делегируются на период, определяемый законодательством, и осуществляют свою деятельность на постоянной основе.

Решения акимов нижних уровней по вопросам местного значения согласовываются и одобряются представителями собраний. В случае отсутствия компромисса в решении соответствующих вопросов они будут переходить в компетенцию вышестоящего органа. Во избежание исполнения акимом противоправных решений и в целях исключения лоббирования интересов отдельных групп и слоев населения будет закреплено положение об обязательности рассмотрения акимом решений собраний и сходов и информирования населения о принятии (либо отклонении) им решения с учетом соблюдения законности.

Учитывая особенности управления общегородским хозяйством в крупных городах, указанные выше меры предлагается не распространять на районы в городах Астане, Алматы, Караганде, Шымкенте, которые также относятся к нижнему уровню управления [4; 41].

Кроме того, следует отметить что несмотря на предлагаемые меры по усилению роли сходов и собраний населения, они только обсуждают, но никак не решают вопросы местного значения.

Действующий Закон о местном государственном управлении и самоуправлении не производит разграничении функции государства и местного самоуправления. Косвенное указание на такое разграничение можно усмотреть лишь в подпункте 7 ст. 1. Он определяет понятие «вопросы местного значения» как «вопросы деятельности области, района, города, района в городе, сельского округа, поселка и села, не входящего в состав сельского округа, регулирование которых в соответствии с настоящим Законом и иными законодательными актами Республики Казахстан связано с обеспечением прав и законных интересов большинства жителей соответствующей административно-территориальной единицы».

Поскольку на органы местного самоуправления возложены функции по решению вопросов местного значения (подпункт 10) ст. 1), логично поставить знак равенства между понятиями «вопросы местного значения» и «вопросы (функции) местного самоуправления» [1].

Если прежде Конституция закрепляла, что порядок работы органов самоуправления мог устанавливаться самими гражданами в пределах закона, то новая редакция ст. 89 степень самостоятельности населения несколько ограничивает. Организация и деятельность местного самоуправления должны определяться законом [1]. Следовательно, государство на законодательном уровне определяет формирование и деятельность системы местного самоуправления, включая его формы, порядок создания и деятельности его органов, источники его экономической основы и т.д. Такой подход основан на унитарном устройстве Казахстана и противостоит возможности создания на местах органов, раз-

личающихся не только по названиям, но и по направлениям, формам, порядку деятельности, дополнительным источникам доходов, способам взаимодействия с органами местного государственного управления и т.д. [5].

Самостоятельность органов местного самоуправления должна быть гарантирована законом, т.е. необходимо установить специальные экономические, правовые и организационные меры, которые бы обеспечивали и защищали их права. Кроме того, следует обеспечить самостоятельность местного самоуправления в формировании своих исполнительных структур.

Органы государства должны содействовать органам местного самоуправления в осуществлении их функций. Содействие и партнерство могут иметь разные формы: финансовая поддержка тех или иных проектов, предоставление льготных кредитов из местных бюджетов, организационная (предоставление административных помещений), информационная и консультативная помощь и т.д.

Указанные меры позволят повысить роль населения в решении вопросов местного значения, стимулировать участие, заинтересованность и ответственность граждан при принятии решений, укрепить доверие к государственным органам.

2. Важной задачей является создание и развитие механизма активного вовлечения городского населения в процесс принятия управленческих решений.

За маслихатами городов будет закреплено право создания общественных структур для взаимодействия акима города с населением, финансирование деятельности которых предлагается осуществлять за счет средств местного бюджета по государственному заказу.

Созданные общественные структуры будут содействовать акимам городов в обеспечении охраны общественного порядка и безопасности граждан в порядке, определенном законом, а также способствовать надлежащему функционированию жилищно-коммунальных служб, улучшению санитарного состояния в населенных пунктах. Будут повышены общественная и гражданская активность и заинтересованность местного населения в улучшении условий жизнедеятельности на территории проживания и в целом социально-экономического развития населенного пункта [6; 38]. Другими словами, на территории городов не предполагается создание каких-либо других органов местного самоуправления, кроме существующих представительных и исполнительных органов, осуществляющих, наряду с государственным управлением, функции местного самоуправления. Предполагаемое создание общественных структур не позволит передавать им самостоятельное решение каких-либо вопросов местного значения. Они могут только содействовать акимам в их деятельности.

3. Одной из задач, решаемых на первом этапе, является введение выборности акимов в городах районного значения, поселках аульных округов, аулах (селах), не входящих в состав аульного округа маслихатами районов (городов).

Внесение на рассмотрение соответствующего маслихата кандидата в акимы аула (села), поселка, аульного округа, города районного значения будет осуществляться акимом района (города) на альтернативной основе. Освобождение от должности акимов нижних уровней должно осуществляться только по решению акима района (города).

При введении выборности акимы будут сочетать в себе функции как исполнительного, так и представительного органа, без образования отдельного представительного органа местного самоуправления в ауле и городе районного значения. При этом целесообразно сохранить действующий порядок назначения акимов областей, городов Астаны и Алматы, районов, осуществляющийся в настоящее время в демократичном режиме, т.е. с предварительного согласия депутатов соответствующего маслихата [7].

4. Еще одной задачей является расширение финансовой самостоятельности нижних уровней управления.

Концепция предусматривает, что акимам нижних уровней:

– будет предоставлено право формирования собственных доходных источников (доходы от оказания платных услуг, добровольные и целевые сборы, взносы благотворительных фондов и спонсоров, сборы за торговлю в специально установленных местах, штрафы за нарушение правил благоустройства, повреждение объектов инфраструктуры и зеленых насаждений, торговлю в неустановленных местах и прочие источники, не противоречащие законодательству);

– будет предоставлено право на открытие специальных счетов в органах казначейства, где будут отражаться доходы и расходы, направленные на реализацию функций местного самоуправления;

– будет передана часть районной коммунальной собственности (клубы, библиотеки, детские сады и др.) с целью ее эффективного использования, удовлетворения запросов и нужд местного населения и получения дополнительных доходов.

За процессами формирования и использования собственных доходных источников, а также коммунальной собственности предлагается осуществлять государственный финансовый и общественный контроль.

Предполагается, что основными источниками поступающих средств будут доходы от платных услуг, сборов, штрафных санкций и добровольных взносов физических и юридических лиц. Все это понятно, но достаточны ли будут эти источники для решения местных проблем, не станут ли так называемые «добровольные» взносы добровольно-принудительными?..

В целях предоставления полноценных возможностей в решении вопросов местного значения поэтапно будут расширены полномочия акимов нижнего уровня управления за счет оптимизации реализационных и разрешительных функций исполнительных органов областного и районного уровней [8].

В настоящее время государством проводится работа по разграничению полномочий между уровнями государственного управления в части оптимизации системы государственного управления путем перераспределения властных полномочий по вертикали: «республика (центр) — область — район — городские и сельские населенные пункты».

В результате должна быть выработана эффективная схема взаимодействия центральных государственных и местных исполнительных органов в рамках исполнения стратегических, контрольных, надзорных и реализационных функций. Ее приоритетным направлением станет организация эффективного государственного управления и самоуправления на уровне города, города районного значения, поселка, аула (села), аульного (сельского) округа, прежде всего его институциональное и функциональное укрепление.

5. Следующее направление представляет собой организацию и проведение мероприятий по повышению правовой грамотности населения по вопросам реализации прав и возможностей на осуществление самоуправления.

Среди предлагаемых мер:

– подготовка, переподготовка и повышение квалификации кадров для органов местного самоуправления;

– организационно-методическая поддержка деятельности местного самоуправления, включающая консультирование должностных лиц и работников органов самоуправления, организацию и проведение конференций, семинаров по актуальным вопросам местного самоуправления, практическому обмену опытом и др. [9];

– информационная поддержка местного самоуправления — популяризация идей, принципов и задач местного самоуправления среди населения, информирование о ходе и проблемах реформы, о роли населения в создании системы общественного контроля за деятельностью органов местного самоуправления, проведение социологических исследований, в том числе опросов.

Второй этап (2015–2020 гг.) будет нацелен на дальнейшее развитие местного самоуправления, опираясь на создание механизмов управления и финансирования.

В частности, после 2014 г. будут рассмотрены вопросы дальнейшего разграничения функций местного государственного управления и самоуправления (с передачей функций), формирования бюджета и собственности органов самоуправления, а также оптимизации административно-территориальных единиц на уровне сельских округов (с целью увеличения потенциала для формирования полноценного местного самоуправления). В этом плане Программой «Развитие регионов», утвержденной постановлением Правительства Республики Казахстан 26 июля 2011 г., также предусматривается привлечение населения к выработке предложений по определению проектов (мероприятий), направленных на развитие сельских населенных пунктов и улучшение жизнеобеспечения сельского населения. При этом необходимо отметить, что финансовая поддержка будет оказываться только тем аулам (селам), которые имеют экономический потенциал развития и положительные демографические тенденции (согласно критериям для определения сельских населенных пунктов с низким и высоким экономическим потенциалом, утвержденным совместным приказом министерств сельского хозяйства и экономического развития и торговли).

Согласно четвертому приоритету Программы «Развитие регионов» будет оказываться финансовая поддержка местному самоуправлению. В рамках данного приоритета реализация проектов (мероприятий) будет осуществляться только в аулах (селах) и поселках с высоким и средним экономиче-

ским потенциалом путем привлечения населения к выработке предложений по определению проектов (мероприятий), которые будут реализовываться в рамках финансовой поддержки местного самоуправления [10; 14].

Акимы аула (села), поселка обеспечивают организацию собраний (сходов) местного сообщества, на которых будут обсуждаться предложения и приниматься решения по отбору проектов (мероприятий), исходя из первоочередности и актуальности (принцип отбора мероприятий (проектов) «снизу вверх»).

Финансовая поддержка местного самоуправления будет осуществляться по следующим направлениям:

- в 2012 г. по коммунальному хозяйству: освещение и озеленение улиц, сохранение фонда жилых домов и вывоз мусора, ликвидация несанкционированных свалок, снос бесхозных объектов, обустройство полигонов твердых бытовых отходов и скотомогильников, ремонт отопительной системы, установка дворовых детских игровых площадок;

- в 2013–2014 гг.:

1) капитальный и текущий ремонт объектов образования, здравоохранения, культуры, спорта, водоснабжения, газоснабжения;

2) коммунальное хозяйство: освещение и озеленение улиц, сохранение фонда жилых домов и вывоз мусора, ликвидация несанкционированных свалок, снос бесхозных объектов, обустройство полигонов твердых бытовых отходов и скотомогильников, ремонт отопительной системы, установка дворовых детских игровых площадок;

3) транспортные коммуникации: капитальный, средний и текущий ремонт внутрипоселковых дорог и мостов, установка светофоров;

4) сельское хозяйство: очистка водоемов, восстановление бесхозных гидротехнических сооружений;

5) прочие: телефонизация, Интернет.

В Послании Президента РК народу «Стратегия «Казахстан — 2050» особое внимание уделено развитию местного самоуправления. Глава государства отметил необходимость непосредственного вовлечения общества и граждан в процесс принятия государственных решений и их реализации, предоставления населению через органы местного самоуправления реальной возможности самостоятельно и ответственно решать вопросы местного значения, усиления общественного контроля за работой местных органов власти, влияния граждан на ситуацию на местах [11].

Развитие гражданского общества является важным условием для создания демократического, светского, правового и социального государства. Общественный процесс, демократическое развитие, экономический подъем возможны при активном участии граждан во всех важных сферах жизнедеятельности общества.

Одна из важнейших проблем современного местного самоуправления в Республике Казахстан — формирование его финансовой базы, законодательное закрепление и обеспечение финансовых гарантий самостоятельности органов местного самоуправления.

Без стабильных и достаточных финансовых источников местное самоуправление неэффективно, нежизнеспособно. Можно наделить местное самоуправление разнообразными и широкими полномочиями, однако без подведения под них соответствующей материально-финансовой базы они так и останутся нереализованными.

Пока не будет четкого разграничения источников доходной части бюджетов всех уровней, разделения бюджетных полномочий, пока законодательство не определит принципы формирования и использования финансовых ресурсов, взаимоотношений местного самоуправления с хозяйствующими субъектами и финансово-кредитными институтами, пока местная власть будет зависеть от распределения кусков общего «бюджетного пирога», местное самоуправление не сможет реализовать свой огромный потенциал. Однако в целом перспективы развития местного самоуправления в Республике Казахстан оценить позитивно можно.

Список литературы

1 Конституция Республики Казахстан, принятая 30 августа 1995 г. на Республиканском референдуме. — [ЭР]. Режим доступа: http://adilet.zan.kz/kaz/docs/K950001000_

2 Содружество Независимых Государств. Декларация от 29 октября 1994 г. «О принципах местного самоуправления в государствах-участниках Содружества». — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/H940000090_

3 Закон Республики Казахстан от 23 января 2001 г. № 148 «О местном государственном управлении и самоуправлении в Республике Казахстан». — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/Z010000148_

4 *Жанузакова Л.* Регламент и иные нормативные правовые акты маслихата производного вида // Информационный бюллетень «МАСЛИХАТ». — 2006. — № 3. — С. 14–30

5 *Кожуганова Д., Мензюк Г.* Реформирование системы государственного управления. — [ЭР]. Режим доступа: www.vestnik-kafu.info

6 *Берентаев К.* Особенности становления местного самоуправления в Республике Казахстан // Информационный бюллетень «МАСЛИХАТ». — 2004. — № 3. — С. 38–47

7 Указ Президента Республики Казахстан от 28 ноября 2012 г. № 438 «Об утверждении Концепции развития местного самоуправления в Республики Казахстан». — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/U1200000438

8 Об утверждении Программы «Развитие регионов». Постановление Правительства РК от 26 июля 2011 г. № 862. — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/P1100000862

9 *Назарбаев Н.А.* Стратегия «Казахстан – 2050»: новый политический курс состоявшегося государства». Послание Президента Республики Казахстан — Лидера нации Н.А.Назарбаева народу Казахстана, г. Астана, 14 декабря 2012 года. — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/K1200002050

10 *Жанузакова Л.* Проблемы совершенствования местного управления и формирования системы местного самоуправления в Республике Казахстан // Информационный бюллетень «МАСЛИХАТ». — 2009. — № 1. — С. 14–30.

11 *Жанузакова Л.Т.* Конституционно-правовые проблемы организации и деятельности местных представительных органов в Республике Казахстан. — Алматы: Сага, 2003. — 340 с.

Г.М.Бейсембаева, А.Ж.Мусина, Р.Б.Сартова

Қазіргі кезеңде Қазақстан Республикасының жергілікті өзін-өзі басқарудың дамуы

Қазіргі жағдайда қоғамды демократияландыру институттарының бірі ретінде жергілікті өзін-өзі басқаруды дамытумен байланысты мәселелердің өзектілігі артуда. Жергілікті өзін-өзі басқару барлық әлемде аймақтық дамудың негізі болып табылады. Жергілікті өзін-өзі басқарудың мәнісі туралы қысқаша тоқталып өтетін болсақ, оның болуы жеке тұлға мен мемлекеттің мүдделерін білдіреді, жергілікті мүдделер әрбір жеке елді мекеннің тұрғындарының өмірлік қажеттіліктерін қамтамасыз ету мәселелерін шешумен байланысты мүдделер болып танылады және оларға кепілдік беріледі.

G.M.Beisembayeva, A.Zh.Mussina, R.B.Sartova

Development of local government in the Republic of Kazakhstan at the current stage

In modern conditions become increasingly important issues related to the development of local self-government as one of the institutions of the democratization of society. Local government in the world is the foundation of regional development. Very briefly about the nature of local government can be said that his presence is implied in the country along with the interests of the individual and the state, recognized and guaranteed even local interests — the interests of addressing issues of direct life support of the population of each individual areas.

References

1 The Constitution of the Republic of Kazakhstan adopted on 30 August 1995 the republican referendum, http://adilet.zan.kz/kaz/docs/K950001000_

2 Commonwealth of Independent States Declaration of October 29, 1994 «On the principles of local self-government in the member states of the Commonwealth», http://adilet.zan.kz/rus/docs/H940000090_

3 Law of the Republic of Kazakhstan dated January 23, 2001 № 148 «On local government and self-government in the Republic of Kazakhstan», http://adilet.zan.kz/rus/docs/Z010000148_

4 Zhanuzakova L. *Newsletter «Maslikhats»*, 2006, 3, p. 14–30.

5 Kozhuganova D., Menzyuk G. *Public administration reform*, www.vestnik-kafu.info

6 Berentaev K. *Newsletter «Maslikhats»*, 2004, 3, p. 38–47.

7 Decree of the President of the Republic of Kazakhstan dated November 28, 2012 № 438 «On approval of the Concept of development of local government in the Republic of Kazakhstan», http://adilet.zan.kz/rus/docs/U1200000438

8 On approval of the Program «Regional Development», Government Resolution dated July 26, 2011 № 862, http://adilet.zan.kz/rus/docs/P1100000862

9 Nazarbayev N.A. Strategy «Kazakhstan – 2050»: a new policy established state». Message from the President of the Republic of Kazakhstan — Leader of the Nation N.A.Nazarbayev to the people of Kazakhstan, Astana, December 14, 2012, http://adilet.zan.kz/rus/docs/K1200002050

10 Zhanuzakova L. *Newsletter «Maslikhats»*, 2009, 1, p. 14–30.

11 Zhanuzakova L.T. *Constitutional and legal problems of organization and activities of local representative bodies in the Republic of Kazakhstan*, Almaty: Saga, 2003, 340 p.

UDC 342.314(574)

A.Bozhkarauly

Ye.A.Buketov Karaganda State University
(E-mail: altai6969@mail.ru)

The struggle with illegal migration as mean of ensuring of national security

The problem of migration is characterizing with special complexity, as it covers not only legal aspects, but also the problems of sociology, demography, political economy, ethno geography, and the problems of labor resources in the economics. The legal aspect have the special important place, because the migration is closely connected with the legal security, regulation and organization of migration processes, from which depends other problems of essential value for living conditions of the society.

Key words: migration, types of migration, commuting, migration, labor migration, migration factors, ethnic migration, migration policy concept of migration.

In the modern world, the impressive size reaches legal and illegal migration, which are the main causes of political and economic instability in some countries, the demographic crisis — in other accelerated by factors such as the globalization of labor markets, the exchange of information, expertise and technology. Migration process is a permanent feature in all stages of human history. Migration is one of the ways for the mass of the population to respond to changes in life situation, accurately and clearly reflect to the changes taking place in society. It is difficult to find another social process that could be compared with migrations in this regard. Illegal migration is today one of the main threats to the national security of each state, is no exception, and the Republic of Kazakhstan. Situation of migration on post-Soviet territory has dramatically changed after the collapse of the Soviet Union. Because of the specificity of its geographical position Kazakhstan serves as a geopolitical center connecting European countries with Central Asian states, whereby the influx of foreigners in the country — an inevitable phenomenon that also contribute to the observed growth in the country and maintain a stable internal political situation [1; 32]. As a result, in the aspect of regional migration such countries as Kazakhstan and Russia are now «host» states, and Kyrgyzstan, Tajikistan and Uzbekistan are «sending states». Thus, in 2013 in the Republic of Kazakhstan arrived more than 987,000 foreigners (including 820 000 — from the CIS countries). From this number for violations of immigration laws to administrative responsibility were attracted 99.3 thousands of foreigners, and more than 3.4 thousand — expelled. The most typical violations of immigration laws are inappropriate purpose of stay, failure to depart at the end of the registration period, the occupation illegal employment [2]. Also for violations of immigration laws instituted 262 criminal cases (in 2012 — 197), including 111 cases — on the facts of non-enforcement of the expulsion order, 29 — on the facts of illegal immigration, as revealed in 2283 the illegal foreign labor [2].

In these conditions, extremely increases the relevance of research administrative and legal means of influence offenses in the sphere of the stay of foreign citizens and stateless persons in the territory of the Republic of Kazakhstan, which are based on administrative responsibility. Illegal (external) migration — is the entry in a particular country, stay in and departure from its territory of foreign citizens and stateless persons in violation of the legislation governing the stay of foreign citizens, arbitrary change of their legal status during the period of its territory, as well as leaving its citizens from the territory in violation of the legislation governing the procedure for their departure. In accordance with the Law «On Migration» on July 22, 2011 illegal immigration — is entry into the Republic of Kazakhstan and the stay of foreigners or stateless persons

in the Republic of Kazakhstan in violation of the laws of the Republic of Kazakhstan regulating the entry and stay as well as for transit through the territory of the Republic of Kazakhstan [3].

Thus, illegal immigration is a negative factor, getting a criminal nature and the worsening crime situation in the state.

According to the law «On Migration» on July 22, 2011 one of the main principles of the state policy in the field of migration is the protection of national interests and national security. To achieve the national security in the area of migration state aims to provide international cooperation in the regulation of migration processes, the prevention and suppression of illegal immigration [3].

Migration Policy of the Republic of Kazakhstan is constructed based on the realities of economic development, political and social stability. In the field of migration in Kazakhstan created a whole meets the international standards of the legal framework that allows to develop tourism, attract foreign labor to return to their historical homeland repatriates. The main regulations governing relations in this sphere is the Law «On Migration» of July 22, 2011, «On Legal Status of Foreigners» June 19, 1995 and the rules of entry and residence of foreign nationals, approved by Government Decision of 28 January 2000. They defined the rights and duties of foreign citizens and functions of public bodies for control over migration processes in the country [4].

In addition, in order to strengthen the control of migratory flows and combating with illegal migration, measures were taken to improve national legislation. Thus, one of the innovations of laws governing migration is the Law «On the identity documents», which was signed by the President January 22, 2013. In December 2013, the Law «On amendments and additions to some legislative acts on issues of labor migration», which provides a simplified procedure for issuing permits to migrant workers from the CIS to work for individuals.

According to the Comprehensive plan to address the problems of migration, strengthening control of migration flows from neighboring countries, the creation of favorable conditions for domestic skilled labor in order to prevent their excessive outflow to foreign labor markets to 2014–2016 years, a major focus of migration policy is strengthening measures to curb illegal migration. So, in order to accomplish the task will be carried out joint interstate operations and preventive measures aimed at detection and suppression of violations of immigration laws. In addition, will be done work on the implementation together with the competent authorities of foreign countries of measures to counter illegal migration, there will be seminars, roundtables to explore the experience of foreign countries for the prevention of the facts of illegal migration, as well as protecting the rights of migrant workers, planned for 2015 [5]. The legislation establishes the conditions and procedures for exit of citizens of the Republic of Kazakhstan abroad for permanent residence, as well as establishing the grounds for denial of permission citizen of the Republic of Kazakhstan on leaving the country for permanent residence. In addition to this study carried out new editions of the Criminal Code, the executive and the Administrative Code, which would increase penalties for violations of immigration laws, including on the part of citizens of the Republic of Kazakhstan [2].

The Republic of Kazakhstan is an active supporter of stability and security, has become a full participant in the process of interaction and cooperation among the partners, other interested countries and international organizations, and NGOs on the implementation of migration policy. So, in 2013, during the visit of the President of the Republic of Belarus LukashenkoA.G. to Kazakhstan in October 4, 2013 were signed two international treaties in the field of migration:

- Agreement between the Republic of Kazakhstan and the Republic of Belarus on the order of stay of citizens of the Republic of Kazakhstan in the Republic of Belarus and the citizens of the Republic of Belarus in the Republic of Kazakhstan;
- Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Belarus on readmission and Executive Protocol on the procedure of its implementation [2].

In accordance with the Request of the Prime Minister of the Republic of Kazakhstan from July 4, 2013 on results of the state visit of the President of Turkmenistan G.Berdimuhamedov to the Republic of Kazakhstan on 10–11 May 2013, the Ministry of Internal Affairs in conjunction with theCommittee on National Security prepared information on establishing a working relationship with Turkmenistan on cooperation, exchange of information and experience in the field of combating illegal migration, international terrorism and drug trafficking.

Also signed readmission agreements with nine countries (Germany, Switzerland, Norway, the Czech Republic, Latvia, Lithuania, Russia, Uzbekistan, Belarus), considering the issue of bilateral intergovernmen-

tal agreements on readmission with another 12 states. Focuses on the control of entry and stay in the country of foreign nationals, illegal migration prevention facts [2].

In January 2014 was signed an agreement on visa-free travel for holders of diplomatic passports from 48 countries, holders of service passports — with 33 countries, for national passports — with 14 countries [2].

On an ongoing basis the work on the implementation of the Unified Information System (UIS) «Berkut-MIA» carried out. In software UIS control over the entry, stay and departure of foreigners includes additional features electronic approval visa support and visa consular offices of cleared materials abandon foreigners for permanent residence and citizenship in reception, as well as jobs for closing entry to foreigners who have violated migration legislation of the Republic of Kazakhstan [2].

In matters of immigration control and the fight against illegal migration Republic of Kazakhstan is working closely with international organizations such as the Organization of the Collective Security Treaty, the Eurasian Economic Community, Customs Union and the Common Economic Space.

Continuing development of common approaches in countries — participants of the Customs Union to regulate migration processes and harmonization of legislation in this area, the establishment of joint control of the automated systems of entry and residence of foreigners in the territory of the Republic of Kazakhstan, the Russian Federation and the Republic of Belarus.

In the framework of the CIS major priority to improve the efficiency of combating illegal migration are:

– further cooperation with the International Centre for Migration Policy Development (ICMPD), International Organization for Migration (IOM) and other international and regional organizations specialized on combating illegal migration;

– development of model laws aimed at unification and harmonization of the national legislation of the Commonwealth countries in the fight against illegal migration;

– harmonization and improvement of existing national immigration legislation and regulatory framework on immigration control;

– development of inspection techniques on the state border states — participants of CIS cargo and vehicles in order to effectively curb illegal migrants;

– stirring up the cooperation of the states — participants of CIS on readmission [6].

The International Organization for Migration (IOM) launched a regional approach, led by the Coordinating Office in Astana. Thus, the IOM Strategy in Central Asia for 2011–2015 identified the following objectives:

– Promote better understanding of many aspects of migration among government employees, communities, employers.

– Assist in the creation of an effective system of migration management.

– Promote and protect the rights of migrants.

– Contribute to poverty reduction in the countries of Central Asia, among migrants and among the receive and send their communities.

– Promote the creation of necessary conditions for decent work and equal opportunities.

– To maintain stability in the communities and the integration of migrants in conflict-prone areas.

– Encourage people to travel.

– Provide assistance in combating human trafficking, including prevention of trafficking protection of trafficking victims [7].

Thus, illegal migration from the secondary moved into the category of global problems has become a challenge to the world community, the scope and possible consequences of exacerbations that may pose a serious threat to international stability and sustainable development of nations. The Republic of Kazakhstan is one of the most successful countries in the post-Soviet space, attracts a large number of illegal migrants — mostly from Central Asia. Increasing migration creates many new challenges not only for the migrants, but also the state as a whole. These challenges include the following issues: increasing irregular migration, smuggling and trafficking; population displacement as a result of conflict, natural disasters and economic crisis, as well as illegal migration, which poses a threat to national security. However, Kazakhstan is actively working on the regulation of migration processes, including illegal migration, is working to improve national legislation, has successfully implemented programs such as the IOM Strategy in Central Asia for 2011–2015 year, Comprehensive plan to address the problems of migration, strengthening control migration flows from neighboring countries, the creation of favorable conditions for domestic skilled labor in order to prevent their excessive outflow to foreign labor markets to 2014–2016.

References

1 *Суворов А.* Действия полиции и внешняя миграция в Казахстане // Саясат. — 2003. — № 11. — С. 29–33.

2 Миграционная ситуация в Республике Казахстан на 2013 год // Интернет-портал СНГ. — [ЭР]. Режим доступа: http://www.e-cis.info/page.php? id=24091

3 Закон Республики Казахстан от 22 июля 2011 г. № 477-IV «О миграции населения» (с изм. и доп. по состоянию на 12.06.2014 г.). — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/Z1100000477

4 Закон Республики Казахстан от 19 июня 1995 г. № 2337 «О правовом положении иностранцев» (с изм. и доп. по состоянию на 10.12.2013 г.). — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/U950002337_

5 Постановление Правительства Республики Казахстан от 31 декабря 2013 г. № 1593 «О Комплексном плане по решению проблем миграции, усилению контроля за миграционными потоками из сопредельных государств, созданию благоприятных условий для отечественных квалифицированных кадров с тем, чтобы не допустить их чрезмерного оттока на зарубежные рынки труда на 2014 — 2016 годы». — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/P1300001593

6 [ЭР]. Режим доступа: http://www.cis.minsk.by/

7 МОМ-стратегии в Центральной Азии на 2011–2015 годы // www.iom.kz

А.Божқараұлы

Заңсыз көші-қонмен күресу ұлттық қауіпсіздікті қамтамасыз ету құралы ретінде

Көші-қон мәселесі өзінің күрделілігімен ерекшеленеді. Себебі, оған тек қана құқықтық сұрақтардан басқа, саяси-экономикалық, демографиялық, әлеуметтік сұрақтармен қатар, этногеографиялық және экономикадағы еңбек ресурстары мәселелері де өзектілігімен көрінуде. Солардың ішінде заңдық қыры ерекше орынды иеленеді. Заң саласы көші-қон үрдісін ұйымдастыру мен оны реттеуде, құқықтық қамтамасыз етуде маңызды рөл атқарады.

А.Божкараулы

Борьба с незаконной миграцией как средство обеспечения национальной безопасности

В статье отмечено, что проблема миграции характеризуется особой сложностью, так как в ней переплетены вопросы не только правовые, но и социологии, демографии, политической экономии, этногеографии, проблемы трудовых ресурсов в экономике. Автор подчеркивает, что среди них юридический аспект занимает особое место, поскольку от надлежащего правового обеспечения, регулирования и организации процессов миграции зависит решение других вопросов, имеющих существенное значение для жизнедеятельности общества.

References

1 Suvorov A. *Sayasat*, 2003, 11, p. 29–33.

2 The migration situation in the Republic of Kazakhstan for 2013, the Internet portal of the CIS, http://www.e-cis.info/page.php? id=24091

3 The Law of the Republic of Kazakhstan 22 July 2011 № 477-IV «On Migration» (with alterations and amendments as of 12.06.2014, the), http://adilet.zan.kz/rus/docs/Z1100000477

4 The Law of the Republic of Kazakhstan dated June 19, 1995. № 2337 «On legal status of foreigners» (with alterations and amendments as of 10.12.2013), http://adilet.zan.kz/rus/docs/U950002337_

5 Resolution of the Government of the Republic of Kazakhstan dated December 31, 2013 № 1593 «On a Comprehensive plan to address the problems of migration, strengthening control of migration flows from neighboring countries, the creation of favorable conditions for domestic skilled labor in order to prevent their excessive outflow of foreign markets work on 2014–2016 years», http://adilet.zan.kz/rus/docs/P1300001593

6 http://www.cis.minsk.by/

7 IOM Strategy in Central Asia 2011–2015 years, www.iom.kz

UDC 348.97 (497.2)

I.Iliyeva

Institute for the State and the Law, Bulgarian Academy of Sciences, Bulgaria
(E-mail: nik_marin@yahoo.com)

Current status of the state-religion relationships in Bulgaria. Focus on muslim community

The article is devoted to the current situation of the relationships between the state and the religious denominations on the basis of the legislation's analysis with focus on the Muslim community. The study is restricted temporally and encompasses the period after 1989: the transition after the totalitarian regime in Bulgaria. On the ground of the last census data since 2011 the composition of the population on «religious belonging» will be analyzed with special attention to the Muslim community. An important characteristic of the Bulgarian regulation of the matter of equality, non-discrimination and minorities' relations are the primacy of the obligations under the International Public Law.

Key words: Bulgaria, status, muslim community, state-religion relationships, International Public Law.

Introduction

The current status of the relationship between the Bulgarian state and the religious denominations is the result of a long, complex and sometimes dramatic historical process.

The Bulgarian State is one of the oldest in Europe and the only one that has kept its original name «Bulgaria» since its establishment to the present day. Along with the creation of the Bulgarian nation historically, groups of people from different ethnicities, religions and nationalities have been shaped and they have eventually settled down. The ethnic composition of the country is not uniform, and in this regard, our country is no exception.

The subject of the present article is the current situation of the relationships between the state and the religious denominations on the basis of the legislation's analysis with focus on the Muslim community. The study is restricted temporally and encompasses the period after 1989: the transition after the totalitarian regime in Bulgaria. On the ground of the last census data since 2011 the composition of the population on «religious belonging» will be analyzed with special attention to the Muslim community.

I. STATISTICAL DATA

There are three undeniable traits that define persons belonging to minorities and differentiate them from the majority of countries: «ethnicity», «mother tongue» and «religion.» They are the basis of the methodology used in collecting statistics in recent years in the Republic of Bulgaria.

In the period from 1900 till now there have been 13 official censuses of the population in Bulgaria.

The main principle of the last census laid down in the Law on the Census of the Population and the Housing Fund [1] is the self-identification of the individuals involved. Pursuant to Art. 6, Para. 3 the data about the belonging to an ethnic group, a religious denomination and command of mother tongue were to be collected voluntarily from the individuals interviewed in the census. The Law on Statistics does not put under obligation the natural persons to give to the statistics bodies data about their race, nationality, ethnic origin, religion (religious denomination), health condition, private life, political affiliation, committed legal offences, philosophical and political opinions (Art. 21, Para. 2) [2].

The data of the last census includes also information on:

- citizens of the European Union and foreigners with permission for permanent stay according the Law on Foreigners in the Republic of Bulgaria before 1st February 2010 (Art. 4, Para. 1, 4); 4. (amend. SG. 100/2010, amended. SG. No. 9 as of 2011);
- persons that have been granted protection by virtue of the Law on Asylum and Refugees before 1 February 2010 (Art. 4, Para. 1, 5); 5. (amend. SG. No. 100 as of 2010);
- citizens of the EU and foreigners with permission for short term, continued, long term and permanent stay according the Law for the foreigners in Republic of Bulgaria after 31 January 2010, except for the persons under item 4. (Art.4, Para.1, 7) 7. (amend. SG. No. 100 as of 2010, amended. SG. No. 9 as of 2011);
- persons undergoing a procedure for granting protection or with granted protection according to the Law on Asylum and Refugees after 31 January 2010. (Art. 4, Para.1, 8), 8. (amend. SG, No. 100 as of 2010)

The last population census conducted in 2011 shows the following data.

The last 2011 census combined the features «ethnic groups» and «mother tongue», because of the historically grounded realities [3].

Statistical data of the population by «mother tongue»

According to the data, by 1st February 2011 the citizens of Bulgarian nationality by mother tongue are in absolute numbers 5,631,759 of the total 6,611,513 nationals. The second ethnic (national) group by mother tongue Turkish are the Turks with 604,246 people, followed by the Roma (Gypsies) with 280,979 people [4].

Other smaller ethnic groups by mother tongue are: Armenians (5,567), Jews (141), Wallachians or Vlachs (1,815), Russians (15,211), Tartars (1,367), Arabians (1,321), Greeks (3,182), Macedonians (1,376), Romanians (5,454), Ukrainians (1,691), other (9,946) and ones that are not self-identified (47,458).

Statistical data of the population by «ethnic groups»

The last data of the population census by ethnic groups is the following: Bulgarians 5,604,300; Turks 585,024; Roma (Gypsies) 320,761; Armenians 6,360; Jews 1,130; Vlachs 3,598; Karakachans 2,511; Russians 986; Greeks 1,356; Macedonians 1,609; Romanians 866; Ukrainians 1,763; other 19,260; and ones that are not self-identified 53,107.

The complexity of the picture arises, because the features «mother tongue» and «ethnicity» do not always coincide. For example, the group of Pomaks who are Muslims, speak Bulgarian language. They are the descendants of the Slavic Bulgarians who converted to Islam centuries ago during the Turkish domination. The Gagauz are Turkish speaking, but they are Orthodox Christians. A problem rises also with the definition of the Macedonian language and whether the Macedonians are a linguistic minority. The official Bulgarian position is well-known: the Macedonian language does not exist; it is a dialect of the Bulgarian language. This official position does not impede the relations between the two states. It should be underlined that Bulgaria was the first state officially recognising Macedonia under the name «The Republic of Macedonia» on 15th January 1992.

The picture of the religious minorities presents the same complexity. The ethnicity differs from the religious confessions and beliefs. The pure cases as: Bulgarian nationally and Orthodoxy, or Turkish nationality with Muslim confession are diversified. The Muslim religion is the second largest religion in Bulgaria. There are Bulgarian Roman-Catholics, Bulgarian Muslims, Bulgarian Jews, as well Orthodox Roma, Protestant Roma, Muslim Roma. The only absolutely homogenous religious group is the Armenian minority, where all Armenians are Armeno-Gregorians.

Historical background

The existing ethnic groups can be classified in two categories on the grounds of their historical arrival on the territory of the state. The first category includes the so called 'historical minorities'. They are an integral part of the Bulgarian population on the basis of the historical destiny of the country. The following are listed here: Turks, Roma, Armenians, Jews, Wallachians or Vlachs, Karakachans, Russians, Tartars, Circassians or Cherkess, Gagauz, Albanians, Serbs, Bosnians, Greeks, Romanians, Slovaks, Slovenes, Ukrainians and the Macedonians who require additional clarification [5]. The second category presents the so called 'new minorities', such as Africans, Arabians, Vietnamese, Kurds, Germans, Poles, Hungarians, French, Syrians, etc. Their presence in Bulgaria is the result of migration, mixed marriages or other reasons.

Population by confession by 01.02.2011

Total for the country	**5,758,301**
Eastern Orthodox	4,374,135
Catholics	48,945
Protestants	64,476
Muslims	
Sunni Muslims	546,004
Shiite Muslims	27,407
Muslims	3,728
Armeno-Gregorians	1,715
Judaism	706
other	9,023
I profess no religion	272,264
not self-identified	409,898

The brief statistical review demonstrates the differentiation on the grounds of national and ethnic origin, language and religion. In addition, we can also add cultural differences, historical traditions, etc. This complex picture needs to be legally regulated in order to meet the needs of the democratic society, the rule of law, human rights, international obligations and domestic social relations.

II. THE LEGAL FRAMEWORK

An important characteristic of the Bulgarian regulation of the matter of equality, non-discrimination and minorities' relations are the primacy of the obligations under the International Public Law. According to Art. 5, Para. 4 of the Bulgarian Constitution, the international treaties ratified in accordance with the Constitution, promulgated and entered into force for Bulgaria, become an inherent part of the Bulgarian domestic legislation. They prevail over the contradicting dispositions of the internal (domestic) legislation. In addition, Bulgaria as a member state of the European Union is subject to the European Union Law which is characterized by its direct effect and primacy.

Thus, the relevant law provisions can be classified in the following three big categories:

A. Obligations under the International Public Law.

B. Obligations under European Union Law.

C.Obligations under the domestic legislation.

GENERAL INTERNATIONAL OBLIGATIONS

- The Charter of the United Nations — Art. 1, Para. 3, Art. 55, Art. 56.
- The Universal Declaration of Human Rights — 1948.

SPECIFIC INTERNATIONAL OBLIGATIONS ON THE MINORITIES, INCLUDING RELIGIOUS MINORITIES

- Article 27 of the International Covenant on Civil and Political Rights (ICCPR) — 1966: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.' [6; 41].
- UN Declaration on the Rights of Individuals, belonging to national, ethnic, religious and linguistic minorities — 1992.
- Framework Convention for the Protection of the National Minorities — 1995, into force 1998.

OTHER RELEVANT INTERNATIONAL OBLIGATIONS

- Convention on the Prevention and Punishment of the Crime of Genocide — 1948.
- International Covenant on Economic, Social and Cultural Rights — 1966.
- International Convention on the Elimination of All Forms of Racial Discrimination — 1966.
- Convention on the Elimination of All Forms of Discrimination against Women — 1979.
- International Convention on the Suppression and Punishment of the Crime of Apartheid — 1973.
- Convention of the Rights of the Child — 1985.

OBLIGATIONS UNDER THE EUROPEAN STANDARD ON HUMAN RIGHTS/COUNCIL OF EUROPE AND EUROPEAN UNION LAW

- European Convention for the Protection of Human Rights and Fundamental Freedoms — 1950.
- Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms — 2000.
- Framework convention for the Protection of National Minorities — 1995, into force 1998.

- Directive 2000/43/CE implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Directive 2000/78/CE establishing a general framework for equal treatment in employment and occupation.

RELEVANT DOMESTIC LEGISLATION

The following list of the relevant domestic acts is based on the supremacy of the Bulgarian Constitution. The list of the acts is made on my personal doctrinal appreciation on the importance of the laws for the minorities in the country [7].

- The Constitution of 1991.
- Political Parties Act — 2005.
- Law on Bulgarian Citizenship — 1998.
- Law on Foreigners in Bulgaria — 1998.
- Protection against Discrimination Act — 2003 (the name was amended in 2006).
- Law on Religions — 2002.
- Public Education Act — 1991.
- Higher Education Act — 1995.
- Law on Radio and Television — 1998.
- Law on the Educational Degree, the Educational Minimum and the Learning Plan — 1999.
- Protection and Development of Culture Act — 1999.
- Civil Registration Act — 1999.
- Law on the Bulgarians Living Outside the Boundaries of the Republic of Bulgaria — 2000.
- Penal Code — 1968.
- Law on Normative Acts — 1973.
- Judiciary Act — 2007.
- Civil Procedure Code — 2007, in force since 1 March 2008.
- Criminal Procedure Code — 2005.
- Administrative Procedure Code — 2006.
- Civil Servants Act — 1999.
- Defence and the Armed Forces Act — 2009.
- Law on Non-profit Legal Entities — 2000.
- Child Protection Act — 2000.
- Social Assistance Act — 1998.
- Labour Code — 1986.
- Commercial Law — 1991.
- Regulations on the Organisation of the Activities of the Constitutional Court, 1991.
- Rules of the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry, 1993.
- Rules and regulations for the implementation of the Public Education Act, 1999.
- Decree for the general educational minimum and the distribution of school hours, 1999.

The Bulgarian system for protection of the rights of the minorities is based on two fundamental levels. The first is the general principle of equality before the law and non-discrimination for all Bulgarian citizens. This principle is established on a large scale in the Bulgarian legislation.

The second level of protection of individuals, belonging to minority groups [8; 81, 82] consists of legal guarantees, establishing specific rights in all spheres of human rights.

Thus, the individuals, belonging to the minorities fully enjoy all rights and freedoms as Bulgarian citizens, and in addition they have a wide list of specific rights in order to preserve and develop their identity. On this criterion, the domestic legislation can be divided into two groups: provisions on the equality and non-discrimination, and special rights, protective measures and norms of the type of 'positive' discrimination.

In the first big group of legal provisions concerning minorities the following ones need to be cited: Art. 6, Para. 2 of the Constitution; Art. 8, Para. 3 of the Labour Code [9]; Art. 4 of the Protection against Discrimination Act [10]; Art. 10, Para. 2 of the Law on the Protection of the Child [11]; Art. 11, Para. 1 of the Code on Criminal Procedures [12]; Art. 7 of the Civil Servants Act [13]; Art. 3 of the Social Assistance Act [14]; Art. 2 of the Law on Encouraging the Employment [15] and others [16; 138].

III. THE MAIN PRINCIPLES GOVERNING THE RELATIONSHIP BETWEEN THE BULGARIAN STATE AND THE RELIGIOUS DENOMINATIONS

The religious rights and freedoms are proclaimed in the basic law: the Constitution of the Republic of Bulgaria, adopted in 1991. The main principles in the regulation of this matter are the following:

- Practicing any religion is free (Art. 13, Para.1 of the Constitution);
- The religious institutions shall be separate from the state (Art. 13, Para. 2). Prof. Giovanni Cimbalo pointed out that the secularization is a very important feature of the constitutions of the East European states, nevertheless the relationship between the state and the confessions is realised by different instruments [17; 16].
- The Eastern Orthodox Christianity is considered the traditional religion in Bulgaria (Art. 13, Para. 3);
- Religious institutions and communities as well as religious faith shall not be used to political ends (Art. 13, Para. 4 of the Constitution) [18].

IV. LEGAL REGULATION OF THE FREEDOM OF CONSCIENCE, THE FREEDOM OF THOUGHT AND FREEDOM OF RELIGION

The main disposition is Art. 37, Para. 1 of the Constitution: «The freedom of conscience, the freedom of thought and the choice of religion and religious or atheistic views are inviolable. The state shall assist the maintenance of tolerance and respect among the believers of different denominations, and among believers and non-believers».

The freedom of conscience, the freedom of thought and the choice of religion or religious or atheistic views are proclaimed and guaranteed as fundamental individual rights of the Bulgarian citizens.

I believe that the inclusion of freedom of atheist views is an original solution to the Bulgarian Constitution. Of course, it is considered by some authors as a remnant of the totalitarian past. If the qualification about an imposed «forced model of atheism» [19; 201] of Alejandro Torres Gutierrez is valid for the period 1944 — 1989, then how can one explain the majority that claimed to have atheistic views 25 years after the democratic changes? As it is evident from the statistics in 2011, 272,264 people say they do not profess religion and other 409,898 are not self-identified.

Terminology

Before analyzing the Bulgarian legal regulation of the freedom of conscience, the freedom of thought and freedom of religion, it is useful to precise the terminology of the Constitution and the Law on Religions.

The freedom of conscience

The freedom of conscience means the freedom of every person to build his/her own religious belief (or not to build such a belief) for the situation of the human being in the world and his/her relation to the supernatural (Supreme powers) and accordingly, their behavior should be in conformity with these beliefs. The freedom of conscience encompasses the internal freedom to believe or not to believe, as well the external freedom: the belief to manifest and disseminate. Accordingly, the expression of the thesis of freedom is not only a positive one — sharing views and belonging to a religious community, but a negative one as well — omission of religious views or not forming such views.

The freedom of thought

The freedom of thought means that the human being is free to create his/her own way of looking at things and to act according to it and the faith professed. The freedom of thought is without doubt part of the freedom of opinion (Art. 39 of the Constitution) as a fundamental right of every person.

The constitutionally proclaimed freedoms may be subject to restrictions. The grounds for that are national security, public order, public health and ethics and the rights of the others. The listed grounds are compatible with the internationally accepted restrictions, especially with the provision of Art. 9, Para. 2 of the European Convention of Fundamental Rights and Freedoms.

The freedom of conscience and religion shall not be practiced to the detriment of national security, public order, public health and ethics, or the rights and freedoms of others (Art. 37, Para. 2 of the Constitution).

The Law on Religions was adopted by the National Assembly of the Republic of Bulgaria on 20 December 2002 [20; 86].

Religion/ religious denomination

The terminology on religious rights and freedoms is specified only for the purposes of the Law on Religion. There are substantial differences in Bulgarian and English terminology used. According § 1, Para. 1 of the Complementary disposition «**Religion** (вероисповедание) means the totality of the faith convictions and principles, the religious community and its religious institution». Paragraph 2 of the same text defines «**Religious community**» as a voluntary union of physical persons for confessing religion, performing worship, religious rites and ceremonies.

According Para. 3 «**religious institution**» is a religious community registered in accordance with the Law on Religions which has the capacity of a legal entity, with its management and statute.

In this study I use the term «religion» as defined by the Law on Religion and as a synonym of «religious denomination» in English. In Decision No. 12 of 15 July 2003 the Constitutional Court found that the definition «religious institution» is not relevant for the term used in the Constitution [21].

The provisions of the Law specify the constitutional rights on religion and faith and provide the legal status of the religious communities and institutions and their relations with the state (Art. 1). The main principles proclaimed in the Constitution are specified in detail by the Law:

- The right of religion and faith has an absolute character, including the right of free choice of religion and free practicing of religion. It is fundamental, absolute, subjective, personal and inviolable.
- The obligations, established by the Constitution and the Law shall not be defaulted upon on grounds of religion or other convictions.
- The principle of secularization means that the religious institutions shall be separated from the state. «No state interference in the internal organization of the self-administered religious institutions shall be allowed» (Art. 4, Para. 2).
- Discrimination on the ground of religion and faith is prohibited. «Nobody shall be persecuted or restricted in their rights because of their religious faith. No restrictions or privileges based on affiliation or rejection of affiliation to a religion are allowed» (Art. 3, Para. 1).
- The religions are free and equal in rights (Art. 4). The Law on Religions reaffirms the historically established position of the Eastern Orthodox Christianity as the traditional religion in Bulgaria.
- The registration of the religious communities is not compulsory. The right of religion and faith can be practised through associations without registration [22].

The special historical role and position of the Eastern Orthodox Church is a specific feature of the Bulgarian legislation on religious rights and freedoms: «The traditional religion in the Republic of Bulgaria is the Eastern Orthodox. It plays a historic role in the Bulgarian statehood and has a genuine meaning in the state's life. Its voice and representative is the autocephalous Bulgarian Orthodox Church, which under the name Patriarchy, is the successor of the Bulgarian Exarchate and is a member of the United, Holy, Congregational and Apostolic Church. It is presided by the Holy Synod and is represented by the Bulgarian Patriarch who is also the metropolitan of Sofia» (Art. 10, Para. 1). The Bulgarian Orthodox Church is *ipso iure* (by the Law on Religions) a legal entity. Its structure and management are established in its statute (Art. 10, Para. 2).

In 2003 some of the provisions of the Law on Religions were contested by a group of 50 deputies before the Constitutional Court of Bulgaria. They claimed contradictions of the legal rules with the European convention on human rights and fundamental freedoms (ECHR) and the International Covenant on Civil and Political Rights. The second contested disposition was Art. 10, Para. 1 and Para. 2, as well as § 2, Para. 3 of the Transitional and Final Provisions.

According to § 2, Para. 3 of the Transitional and Final Provisions: «The court officially incorporates in a closed-door session the registered religions under paragraph 1 except for the religion under Article 10. In this case the court could not refuse the registration».

Thus the acquisition of this status by law is allowed only to the Bulgarian Orthodox Church.

The claim asserted that through these dispositions one religion was placed in a position of inequality and was privileged in comparison with the other religions. The members of Parliament consider it as direct interference in the internal organization of the Bulgarian Eastern Orthodox Church on behalf of the state. This, in their opinion, does not support the mutual understanding, tolerance and respect on matters related to the freedom of conscience and religions. They claim this is in contradiction to Art. 6, Para. 2, Art. 13, Para. 2, Art. 37, Para. 1 of the Constitution and Art. 9 of ECHR.

For this item of the claim the Constitutional Court did not reach a majority vote and it was rejected. The lack of majority vote impeded the formulation of common motives for the decision. There were two different statements supported by the judges. According to the first group, this regulation was in compliance with Art, 13, Para. 3 of the Constitution underlying the traditional role of the Bulgarian Eastern Orthodox Church. The recognition of the role of the prevailing religion in the respective country is not an exception in Europe (Art. 4 of the Constitution of Denmark; § 2 of the Constitution of Norway; § 4 of the Act on the Succession to the throne in Sweden; Art. 3 of the Constitution of Greece; Art 1 of the Constitution of Cyprus; Art. 8 of the Constitution of Italy; the situation of the Anglican Church in the United Kingdom) [23; 117, 118]. Thus, the

ascertaining of the prevailing religion is in the spirit of the actual European constitutional tradition. The equality of all religions is expressly proclaimed and guaranteed by the Law on Religions in the Preamble and Art. 4, Para. 1. The reference to «Orthodox», «United», «Holy», «Congregational and Apostolic Church» are terms with theological content and have no juridical relevance to the constitutionality of the provision. The Church has two denominations: one for theological, internal use, the second for the secular, legal regulation. The dogmas about the apostology, the cathedral, synodal form of governance, or the rule that the patriarch shall be the metropolitan of the capital city do not affect the constitutionality of the text.

The disposition that the Bulgarian Orthodox Church is a legal entity does not contravene to Art. 6 of the Constitution. This constitutional provision rules the equality of the citizens and does not exclude the right of the legislator to create different regime for the various categories of legal entities. The Law on Religions embraces the more liberal democratic standards in practicing a religion. Every individual can practice his/her own religion trough an association. There is no obligation for registration of the religious community. Art. 14 stipulates: «Religious communities shall acquire the status of a legal entity on the conditions and according to the procedures of this law.» The revised formulation of the text shows clearly that the registration is a possibility, but not an obligation for the religious communities. Thus, the right of religion and faith can be exercised through association in non-registered communities. When there is a wish of the citizens in the association created by them to become an independent legal entity, participating on their behalf and on their own account in various legal relations, they must register it as such.

There is no constitutional prohibition for the state to recognize by law the status of a legal entity a certain community, in this case the Bulgarian Orthodox Church. This recognition does not in any way impede the right of association. According to this argumentation the claim is not grounded.

The second opinion of the constitutional judges states that the claim is well founded and must be accepted. The provision of Art. 10, Para. 1 embraces the denomination, the governing body and the person who represents it as well as the functions of the Patriarch as a governor of the Sofia diocese. This violates the principles of freedom of religions and separation of the religious institution from the state (Art. 13, Para. 1 and 2 of the Constitution). They are autonomous and independent from the state deciding the matters of their self-government such as the questions of denomination, of their seat, of the religious faith, the religious practice, structure, governing bodies, their constitution and representation. The decision of the Constitutional Court is to this effect, as formulated in Decision Nr. 5 of 11 June 1992 (Constitutional case No. 11/1992): «The state through its bodies and institutions cannot intervene and menage the internal organizational life of the religious communities and institutions. This is a matter of regulation by their statutes and other internal rules of the organization». The case-law of the European Court on Human Rights is also to this effect. In some of the cases it has stated that in a dispute among the religious communities and the state institutions the state cannot intervene between the disputing parties and make decisions, but it must ensure tolerance between the disputing parties, as the role of the state is not to eliminate the ground for the tension suppressing pluralism, but to guarantee the alternativeness between the disputing groups. (The Decision of 20 October 2000 in the Case Hassan and Chaush v. Bulgaria, the decision in the case Serif v. Greece, the decision of 12 December 2001 in the case of the Bassarabian Metropolite Church v. Moldova.)

Article 10, Para. 1 reiterates the dispositions of the Statute of the Bulgarian Orthodox Church. The Statute is an act of the religion. It can be modified when necessary, adopting another decision on the matter regulated by the statute. The Law regulation on these questions excludes such modifications, that will contravene the law. Thus, due to the state intervention there is no possibility for the modification in the statute on any matter, that must be regulated exactly by the statute, which is a restriction on the freedom of religious faiths and the autonomy of the religious institutions, in accordance with Art. 13 Para. 1 and 2 of the Constitution.

Pursuant to Art. 10, Para. 2 the Bulgarian Orthodox Church is a legal entity. Its structure and management are established by its statute. The part of the text proclaiming the Bulgarian Orthodox Church for legal entity contravenes Art. 6 of the Constitution. The acquisition of this status by law is allowed only to the Bulgarian Orthodox Church. The other religious denominations can acquire the same status under the conditions and according to the procedures in Art. 14 — 20 of the Law on Religions, through registration by the Sofia Municipal Court pursuant to Chapter 46 of the Code of Civil Procedures. The different acquisition of the status of legal entity (by law and by registration) demonstrates the inequality of the legal regime of the religious denominations. As it acquires the status of legal entity by law, the Bulgarian Orthodox Church is exempt of the obligations which exist for the other denominations, as well as of the sanctions that may be imposed on them. This places it in a privileged position in comparison to the other denominations, although Art. 13, Para. 3 of the Constitution does not create a special privileged status for the Eastern Orthodoxy. This inequality

in the legal regime of the denominations violates Art. 6 of the Constitution. The same principle is evoked demonstrating the contradiction between § 2, Para. 3 of the Transitional and Final Provisions to Art. 6 of the Constitution.

An interesting case is the one connected with the registration of the Bulgarian Orthodox Church under Interpretative Decision № 1/23, November 2010 of the Supreme Court of the Republic of Bulgaria, the General Assembly of Commercial Colleges [24].

The Supreme Court of Cassation — Commercial Colleges was referred to by the Minister of Justice of the Republic of Bulgaria with a request for a ruling on the question:

«Is there a need to register the Bulgarian Orthodox Church in the Public Register of Religions, which is at the Sofia City Court under Art. 18 of the Law on Religions (LR) as well as the entry of its local branches, according to Art. 20 of LR and their re-registration under § 2 Para. 4 of LR in order to prove their legal capacity and governmental power?»

The reflections on the case of the Commercial Colleges follow this legal logic: «Art. 15 of the Law on Religions (LR) since 2002 envisages a judicial order for the registration of religious communities as legal entities. The entry into the public register under Art. 18 of LR is provided for emerging religious communities with a view to acquire their status as legal entities (Art. 14 of LR) and the religious denominations recorded under Art. 6 of the repealed Religious Denominations Act (RDA), retaining their status of legal persons.

With Art. 10 Para. 2 of LR and § 2 Para. 3 of the Rules of LR, the Bulgarian Orthodox Church (BOC) is explicitly excluded from the procedure for registration provided for in Chapter III of the Act.

Regarding the entry into the Public Register under Art. 18 of LR of the traditional Eastern Orthodox Christianity in the Republic of Bulgaria, whose expression is the Bulgarian Orthodox Church, there is a lack of any case law. Nowhere in the practice of the courts has the question of the necessity of the BOC entry in the register under Art. 18 of LR been raised, neither as a new one (Art. 15 with reference to Art. 14 of LR), nor as an established one within the meaning of § 2 Para. 1 of TFP (Transitional and Final Provisions) of LR whether a religion should obtain or maintain its status as a legal entity. In the Public Register of Religions that is kept by Sofia City Court, the Bulgarian Orthodox Church has not been recorded and there is not a batch open for entering the circumstances under Art. 18 of LR.

Therefore, the **General Assembly of the Commercial Colleges deviates** the proposal of the Minister of Justice for an interpretative decision on the question «Should the BOC be entered in the public register of religions, which is kept in the SCC, pursuant to Art. 18 of LR as well as the registration of its local branches, according to Art. 20 of LR.

In terms of local branches of BOC the Commercial Colleges rules the following legal arguments in such a way:

«The Religious Denominations Act adopted in 1949 (repealed) does not provide legal registration for religions or their local units. According to Art. 6 of RDA (repealed) the religious denominations acquire the quality of a legal entity from the moment of validating their statutes from the Council of Ministers or its authorized deputy chairperson of the Council of Ministers. From this moment on the quality of the legal entity is obtained by the local branches of religion as well.

Following the adoption of LR in 2002 the established local branches that are legal entities are subject to registration in the register of the respective district court, preserving this status according to that established order under § 2, Para. 4 TFP of LR.

The controversial case law is the result of different interpretations by the courts regarding the applicability of this order of existing local branches of the Bulgarian Orthodox Church. Legal acts containing conflicting interpretations of the law are laid down on the occasion of registered proceedings under Art. 500 of CPC (repealed) and upon inspection under Art. 25 of CPC (repealed) of the legal capacity of a party in contentious proceedings.

The problem arises because of the different legislation in repealing the Law on Religions and registry system introduced by the Religious Denominations Act since 2002.

The legal definition of the concept of «local units» in LR is missing. It also lacks in the repealed RDA which under Art. 6, Para. 1, proposal 2 with reference to 1 defines only the procedure for acquiring the quality of legal entities of local branches of religious denominations. The statute of the BOC approved in 1949 is consistent with the RDA. This Statute does not contain the term «local units».

With the adoption of the new Statute of the Bulgarian Orthodox Church — Bulgarian Patriarchate (BOC-BP), in 2009 the definition of «local units» was introduced. Under Art. 13, Para. 1 of the new Statute,

as local units — legal entities — are listed the following: bishoprics, churches and monasteries. The contradictory case law on the application of § 2, Para. 4 of LR preceded the adoption of the Statute of the Orthodox Church in 2009, but as far as the courts ruling is under cases related to the necessity of registration and proof of legal capacity of churches and monasteries, there is no obstacle to the interpretation of Art. 124, Para. 1 of JA under the present case for the court to use the definition of local branches established by this Statute, excluding the other legal entities under Art. 13 of the repealed statute from the scope of ruling.

One of the views covered is that the existing local branches of the BOC that are LE should be entered in the registers of the respective district courts under § 2, Para. 4 of TFP of LR since the law has not excluded the applicability of protective proceedings in respect of them, as it did with the religions under Art. 10 of LR — § 2, Para. 3 of TFP of LR.

The other thesis in the case law is that the existing local branches of LR of BOC that are LE should not be entered in the registers of the respective district courts, as although the law does not explicitly exclude them, regarding them there extends the exception under Para. 3 of § 2 of TFP of LR, insofar as divisions of religions for which this mode does not apply.

On the applicability of the procedural rules under § 2, Para. 4 of TFP of LR, there is a controversial case law calling for the application of Art. 124, Para. 1 of JA regarding it, due to which SCC-Commercial Colleges owes a ruling under this matter.

The legal reasoning of the Higher Court of Cassation is the following.

Regulating the special status of the BOC-BP under Art. 10 of Chapter II, the law excludes the traditional religion of the Republic of Bulgaria on the mode of the registration of the religions established by Chapter III (Articles 14–20 of LR).

The legal logic suggests that since the Registry mode is excluded for religion, this scheme does not apply to its local branches.

The local units — components of the BOC-BP and their legal status as a legal entity are defined by Art. 13 of the Statute (the Statute established by LR since 1949) and the current Statute of 2009. The procedural order under § 2, Para. 4, proposal 3 of the TFP of LR includes the mandatory presentation of a document determined by the entry of religion into the register under Art. 18 of LR that BOC-BP can not present as it is not to be included in this register.

Due to the foregoing considerations, the General Assembly of the Commercial Colleges of the Supreme Court of Cassation holds that the procedure under § 2, Para. 4 of TFP of LR does not apply to existing local divisions of the Bulgarian Orthodox Church — Bulgarian Patriarchate.

The legal capacity of the BOC-BP is subject to direct settlement by the law: Art. 10, Para. 2, proposal 1 of LR, so it is not susceptible to proof under Art. 27 of CPC. The power of representation of the BOC-BP is also governed by the law: Art. 10, Para. 1, proposal 4 of LR with reference to Art. 30, Para. 1 of CPC; the act of choosing the Bulgarian Patriarch (Art. 47, Para. 4 of the Statute of the BOC-BP) is considered to be a legitimizing document.

Local units of the Bulgarian Orthodox Church — Bulgarian Patriarchate, those having the status of legal persons are bishoprics, churches and monasteries: Art. 13 of the Statute of the BOC-BP with reference to Art. 10, Para. 2, proposal 2 of LR. Their legal representatives within the meaning of Art. 30, Para. 1 of CPC identify themselves as such by the acts of election or appointment, issued by bodies that elected or appointed them: Art. 96, Para. 3 of the Statute — about bishoprics: Art. 140, Para. 4 of the Statute — about the churches and Art. 161, Para. 3 and Para. 4 of the Statute — about the monasteries.

Therefore, the General Assembly of the Commercial Colleges decided that the local branches of the Bulgarian Orthodox Church — Bulgarian Patriarchate is not subject to re-registration under § 2, Para. 4 of TFP of LR. The legal capacity of the Bulgarian Orthodox Church — Bulgarian Patriarchate and its local branches, having the status of legal persons, derives from the law: Art. 10, Para. 2 of LR. The representative power of those who represent them is evidenced by acts of election or appointment issued by bodies that elected or appointed them [24].

V. THE MUSLIM COMMUNITY

The data of the last census shows that the Muslim community in Bulgaria consists of different «subgroups». The traditionally living in Bulgaria ethnic Turks are in majority Muslims Sunits (546,004 persons or 94,6 %), Shiite Muslims (27,407 persons or 4,75). Other people are self-identified only as «Muslims» (3,728 persons or 0,65 %). The ethnic Turks, Bulgarian Mohammedans (Pomaks), Roma Muslims are citizens of the Republic of Bulgaria, while most representatives of the Arab countries have a status of permanent or temporary residents or refugees [26]. The comparison of the data of the censuses in 2001 and 2011 shows

a trend of decreasing of the Turkish population in Bulgaria. The number of Turks according to the census in 2001 is 746,664, while in the 2011 census this number is 585,024, which means 161,640 persons less.

Turks as to 01.02.2011

Ethnic groups	Total	Bulgarian	Turkish	Roma	Russian	Tar-tarian	Arabian	Roma-nian	Other
Turks	585,024	18,975	564,858	549	15	8	4	4	52

The sociological survey of Emilia Chengelova, Roska Petkova and Vesselin Minchev, conducted in 2010 distinguishes three distinctive stages of the image of the Muslim community in Bulgaria since 1944.

«The first stage spans the period until the beginning of 1980s, when in the conditions of a state-organized social and economic regime the Muslims were treated as one of the minorities in the country, with equal rights and opportunities for free will, equal access to medical services, social insurance, education and labour. The main focus, however, was placed on the ethnic Turks. Purposeful care was taken for their integration in the Bulgarian society, and special attention was paid to the so-called regions with mixed population. This stage was characterized with the implementation of a state policy for encouraging the ethnic Turks to acquire higher education and directing them towards professional realization in the construction-engineering and some humanitarian areas.

This stage was considerably calm and the ethnic Turks were considered one of the minorities, which were the part of the Bulgarian state without any problems. The predominating public attitudes among the Bulgarians towards the ethnic Turks are that they are peaceful, hard-working, diligent people, cooperative and neighbourly. Difference is made concerning the Bulgarian Mohammedans, who are referred to as a more closed community (compared with the ethnic Turks), following more strictly the norms of the Muslim religion and leading a considerably more capsulated social life» [25; 18].

The second period in the positioning of the Muslim community in the Bulgarian context encompasses the end of 1970s and the beginning of 1980s with the carrying out of the so-called «regeneration process». The tragic events during the coercive change of the names of the Turks and their replacement with Bulgarian names in 1984 — 1985 gave birth to illegal formations, which gradually crystallized in the form of a movement of the Turks and Muslims for restoration of their rights. «The respondents talk carefully about this period, not hiding their deep disappointment from the violence exercised upon them. They talk about the inevitable changes in the way of thinking of the ethnic Turks, who, in response to their rights being taken away, choose the moving to Turkey» [25; 18].

It is less known that the so called «Revival Process» has its preceding stages in respect to the Bulgarian population with Muslim faith.

The current state of the Bulgarian Muslim community (the so called Pomaks) is the subject of a new field study carried out in 2014 under the guidance of Hristo Matanov [26]. He rightly noted that «the problems of the Bulgarian Mohammedan community in our country during the last century and a half have been the subject of interest that sometimes subsides, then grows depending on the situation in the Bulgarian society. It is usually treated without regard to its historical roots.» [27; 5].

In order to integrate this population, the first steps were undertaken through changing the traditional clothing. «Then, in the period 1964 — 1974 there was an action on the change of the Arab-Turkish names to Bulgarian ones. It did not run smoothly, as it was recognized by many of the participants.» [28; 7]. In most of the interviews taken by Ilian Iliev, the answer to the question of «How should I call the citizens of the Republic of Bulgaria, who profess Islam?» is Bulgarians who profess Islam, pure Bulgarians, Mohammedan Bulgarians or Bulgarians professing the Muslim religion.»[28; 107, 112, 116, 122, 127].

The years of the so called regeneration process were a serious ordeal for the Bulgarian society: the existing peaceful inter-ethnic attitudes were destroyed, many challenges to the social peace appeared, and in the regions with mixed population conflicts occurred. In this situation emerged the Movement for Rights and Freedoms (MRF), which set its primary goal to fight for restoring and protecting the rights of the ethnic Turks and Muslims in Bulgaria.

The third stage of the development of the ethnic Turks started after 10th November 1989. The radical changes in the political and socio-economic conditions in the country cleared the way for political pluralism. This new opportunity was perfectly captured by the MRF leaders who participated actively in the pluralistic political life. In its rhetoric MRF actively defended the protection of the rights of the Turks and Muslims in Bulgaria. With time MRF identified itself as a spokesman for the interests and guarantor of the rights of all

Muslims living in Bulgaria. The authors of the sociological study pointed out: «Our intention has been to avoid the political discourse, but during the interviews it became clear that it was impossible. For the other communities predominant are organizations and unions of cultural, religious and social character, but for the ethnic Turks there is a serious political mobilization. They think that maintaining their identity is possible almost only through an active political activity, which would guarantee real mechanisms for protecting the universal rights. That is why the respondents point MRF as the only organization, which expresses their interests. So, de facto, despite their numerousness, the ethnic Turks have no other legitimate for them organizations. The study also shows that the main focus of their activity is protecting their civil and human rights, which concerns implementing certain policies and active involvement in the political life of the country.

The interviews show that this thesis is most closely followed by the representatives of the ethnic Turks. They point MRF as the main institutional form of organizing the activities of the Muslim community in Bulgaria» [28; 19].

VI. LEGAL REGULATION OF THE MUSLIM COMMUNITY/HEAD MUFTI'S OFFICE/The religious institutions of the Muslim community

Another important organization, which supports the Muslim community's identity, is the Head Mufti's Office [29; 85]. According to the respondents, the most correct definition of the Head Mufti's Office is a religious institute of the Muslims in Bulgaria, which organizes their religious life. The Mufti's Office organizes the religious education. These are mainly Qur'an courses, as well as education helping people of all generations to understand the Muslim religion. Special attention is drawn to the involvement of young people in the Qur'an courses and their introduction to the main ethic and moral norms concerning the practice of religion [30; 95, 96].

The current Statute of the Muslim faiths was adopted by the Extraordinary National Muslim Conference on 12.02.2011.

According to Art. 1: «The Muslim religion is an autonomous community of citizens, followers of the Islamic religion based on uniformity of religious affiliation and religious rituals.» [31].

Article 3 governs the composition of the Muslim religion: «The Muslim religion includes the Muslim religious community as a voluntary union of all citizens that are followers of Islam and its religious institutions for spiritual management.»

Art. 4 of the Statute is especially important: «The Muslim religion and its institutions can not be used for preaching racial, religious or ethnic hatred and other anti-human activities.»

In the post communist transition period the situation in the leadership of the Muslim religion in Bulgaria was complicated. There are disputes within the Bulgarian Muslim community, especially on the officially registered Chief Mufti.

One of the groups in this religious denomination: Fikri Sali Hassan lodged a complaint before the ECHR in 1996 [32]. The dispute broke out as a result of the 2003 election of two different chief muftis by bodies which both claimed to represent the Muslim community. One of the 2003 conferences elected Fikri Sali as a new Chief Mufti to replace Selim Mehmed. Sali formerly held the position from 1992 — 1994. The other conference was convened by another former Chief Mufti, Nedim Gendzhev, and selected Ali Hadji Saduk to replace Mehmed. Both conferences submitted documentation to the Sofia Municipal Court listing their respective candidates as a new Chief Mufti. A registration controversy ensued, leaving no legally recognized successor to Mehmed.

On March 8, 2004, two Sofia Municipal Court rulings annulled the 1997 and 2000 conferences of the Muslim denomination, thereby invalidating the leadership elected by each of the conferences. On 19 July 2004, the Sofia Municipal Court appointed Fikri Sali, Ridvan Kadiov and Osman Osmailov as interim representatives of the Muslim community pending the settlement of some civil court cases related to the leadership dispute. On 5 November 2005, the Sofia Appellate Court overruled the appointment of the triumvirate, stating that the Muslim community leadership could be appointed only on its own initiative and not by the Sofia Municipal Court. In January 2005, the Supreme Court of Cassation upheld the ruling. The Supreme Court ruling combined with the March ruling of the Sofia Municipal Court effectively restored the pre-1997 Supreme Islamic Council, headed by Nedim Gendzhev, as the legal representative of the Muslims in the country. However, following the Supreme Court's January 2005 ruling, the Supreme Cassation Prosecution confiscated the case files, which prevented their being transferred to the Sofia City Court and thereby delayed Gendzhev's registration of the new leadership. In May 2005 the prosecution turned the case file over to the Sofia Municipal Court for 24 hours, allowing the Sofia Municipal Court to pass the five rulings affecting the leadership dispute. Gendzhev immediately appealed the registration of Mustafa Alish Hadji, and the ap-

peal was pending for the Prosecution's release of the case files. By decision of the Supreme Administrative Court form 8 of February 2008 the election of Mustafa Alish Hadji at the conference held in 2005 was declared null and avoid. The Sofia City Court has convoked *ex officio* a new Muslim conference after receiving a list with 1000 names. This represents an infringement of the Muslim's rules according to Ashim Hadji Hassan from the Supreme Muslim Council [33].

The Chief Mufti dispute was finally resolved by the decision of Sofia Appellate Court № 632/20.04.2011.

On 12.02.2011 there was an Extraordinary National Muslim Conference (ENMC) convened on the initiative and decision of the Muslims. It is expressed in a petition including the signatures of 215,000 adult Muslims, as well as the signatures of over 4000 members of Muslim trustees and imams, representing Muslim municipalities in Bulgaria (about 870 Muslim trustees).

For holding the conference there was a decision of the Supreme Muslim Council, elected by ENMC, held on 31.10.2009, the procedure for the registration of which has been pending since 08.12.2010.

The Members of the Supreme Islamic Council (SIC), elected at the National Muslim Conference in 1996, were informed of ENMC on 12.02.2011 and 4 people of them — Bekir Halil, Hadzhimurad Faik, Mustafa Nuri and Yusuf Ali attended the ENMC. Moreover, there are obtained written statements in support of the decision to hold ENMC. Due to the expired term of the Supreme Islamic Council (SIC) since 1996, they declared the inability of the body to meet regularly and to pass valid resolutions as well as the support for convening and active participation in organizing ENMC on 12.02.2011.

Convening the conference is announced in mosques, trustees, through the media, including publications in two national daily newspapers: «Dnevnik» and «Telegraph» newspapers.

At the meeting of the Extraordinary National Muslim Conference there were more than two thirds of the listed members, according to Art. 64, Para. 4 of the Statute of the religious denomination since 07/08/1996. The Muslim trustees in the country with the right to appoint delegates are 1217. The quorum required by the Statute is 812 people. The people that attended the meeting were 939, and their participation was attested by the signatures of each delegate. According to the agenda of the conference a new Statute was adopted, and under it a Chief Mufti Mustafa Alish Hadji was elected as well as a composition of the Supreme Islamic Council — Central Authority.

The Muslim religion is registered at Sofia Municipal Court officially, according to § 2, Para. 3 of the TFP of LR.

A new Statute of the Muslim religion was adopted on 12.02.2011.

The careful analysis of the judicial saga shows that the Sofia Appellate Court had twice applied the principle of secularization as a justified non-intervention in the affairs of the Muslim religion: in 2005 and in 2011. A special attention should be paid to the reasoning under the Judgment of 2011. The Court highlights the following:

«And as the right of religion, as a value of the highest order, includes the possibility of free exercise of religion, the regime for the registration of legal entities — beliefs — should be subject to the rule of non-interference in the internal affairs of the religious denominations community.»

«In the end, based on the assessment of the evidence and facts of the case as a whole, it is clear that the community is one that can adopt, amend and repeal rules or decisions regarding its structure and activity, as well as selecting certain governing bodies. The designated authority — collective or individual can not have more power than the community that it has chosen and empowered by its inherently belonging power. There is no legal prohibition on members of the denomination to adopt structural rules or change them. In this regard, it should be assumed that after the requested changes have occurred, subsequent to valid decisions of the community and not against the law and the statute of the denomination, they are subject to registration.»

«It should therefore be given a decision through which the will of delegates elected by the Muslim community in compliance with the requirements of the Statute of the denomination could be respected, through which there could be an unbroken right to a denomination to establish and maintain its religious community and institutions with a structure and method of representation that are appropriate to the free conviction of their members stipulated in Art. 13 of the Constitution of the Republic of Bulgaria, respectively, in Art. 6 of the Law on Religions expressed on 12.02.2011 at the Extraordinary National Muslim Conference. It is unacceptable to limit the rights of religion in violation of the provisions and of Art. 37 of the Constitution and Art. 8, Para. 1 of LR and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) of the Council of Europe. According to Art. 2, Para. 1 of LR, the right of religion is fundamental, absolute, subjective, personal and inviolable. The restriction of the right to religion is possible

only when there are certain conditions, respectively in Art. 37, Para. 2 of CRB and Art. 7 of LR, which are absent in the case. The conclusion of the Court of First Instance that the State, by an entry in the register, determines the means of representation and management of different faiths, cannot be shared. Assuming with its decision which authority is legitimate to convene a conference and which is entitled to represent the community, the court goes beyond the procedural powers, in particular contentious proceedings, and violates the principle enshrined in the Constitution for freedom of religion, which is also contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms and the established practice of the European Court of Human Rights.»

Despite the high degree of integration, the Muslim community (mostly the ethnic Turks) faces problems and challenges. According to the people interviewed [34], the main source of these problems is the ethnic and religious confrontation, the attempts for political isolation of the representatives of the ethnic Turks and their non-admission in the managing structures of certain ministries.

The sociological survey proves that the problems of the ethnic Turks are clearly economical. The respondents refer to the poverty and the low incomes as one of the most serious motives for creating negative attitudes among the ethnic Turks and the Bulgarian Mohammedans. Since they cannot find steady income sources, many of them turn to Turkey. And although they feel Bulgaria as their motherland, they prefer to work in Turkey so they can be better provided materially.

According to the respondents, in the last few years there is an increase of the xenophobic acts, and the acts of anti-Islamism become more daring. The original talks are provided by «Ataka» [35], which is the main propagator of anti-Islamic patterns of thinking. The clash between the activists of «Ataka» and the Muslims in front of the Sofia mosque on the 20th May 2011 raises serious concerns about the state of the reality of exercising religious rights in Bulgaria.

There are many attacks against mosques, arsons included, and not one case has been solved.»[36] According to the report of the chief mufti Mustafa Hadzhi in the period 1991–2009 59 cases of profanation of religious places of the Muslim confession were recorded.

VII. LAST ATTEMPTIONS FOR AMENDMENTS TO THE LAW ON RELIGION

In recent years there have been several attempts to amend the Law on Religions. The first was related to the problem of the legitimacy of the Chief Mufti. In a «Report on a Bill on amending and supplementing the Law on Religions, № 054–01–71, filed on September 3, 2010 by MP Tuncher Mehmedov Kardzhaliev and MP Chetin Kazak [36], there was a proposal on the creation of Para. 6 in Art. 19 The project was in close connection with the above-described specific case in Islam. As indicated in the «Report», «The opinion of the importers is that there is a serious gap in the Law on Religions and the statutes of the major religious communities in the Republic of Bulgaria, which in rare cases leads to the practical impossibility to «freely and unhinderedly exercise religion» as regulated in Art. 4, Para. 3 of the Law on Religions.

The main point of the proposed changes is the ability for Sofia City Court, at the request of more than a half of the registered local branches of the religion, upon the occurrence of exceptional circumstances, to convene the supreme body of the religious community.

The grounds of the importers make it clear that the specific reason for the bill are the problems in a particular religion — Muslim — and the alleged failure to convene the supreme body of religion. The proposed change, however, would affect all registered religious institutions. The importers themselves admit that their institutional structure can not be uniform, because it is rooted in the religious tradition, canons and dogmas laid down in their statutes.

After a discussion, the Commission on Human Rights, Religion, Complaints and Petitions of citizens with 2 votes «for», 3 votes «abstain» and 8 votes «against» proposed to the National Assembly not to accept the bill on amending and supplementing the Law on Religions submitted by Tuncher Kardzhaliev and Chetin Kazak during the first reading. It was rejected during the plenary vote of the National Assembly, too. 32 out of 138 MPs voted «for», 30 «against» and 76 «abstain».

The following bills amending and supplementing the Law on Religions concern the right of ownership and restitution proceedings. They provoked strong reactions in both the Holy Synod and the Chief Mufti's Office as well as among academics. As it is pointed out by Assoc. Prof. Dilian Nikoltchev, Professor of Canon Law at the Theological Faculty of Sofia University «St. Kliment Ohridski»: «Above all it must be said that the Bulgarian Orthodox Church was indeed particularly affected in its right of property, after a period of 40 years it was in a constant mode of a property dictate and no small part of its property was confiscated and expropriated. This is the situation on the one hand. On the other hand, the Orthodox Church was at the gate of the changes, unprepared and almost impossible to organize all those inherently property legal processes.

To a large extent this role was played by its senior picture — bishops, «born» from the womb of State Security and as this repressive communist authority, reborn in the most multifaceted economic and political lobbies and interests, shortly said, and quite current — oligarchic appendage, hiding behind the form of faith and cassock. This is confirmed by the numerous scandals of recent years, in large part associated with not quite transparent sales on transactions and swaps of church property» [37].

On July 16, 2013 members of the BSP, DPS (Movement for Rights and Freedoms) and «Ataka» led by the former parliament speaker Mihail Mikov tabled amendments to the Law on Religions, which provoked sharp controversy between the church and other institutions on ownership of religious temples. The idea of the importers was that the denominations should be owners of the temples, where they perform a liturgical activity. The draft of Mikov envisaged that the religions obtain ownership on such property and continue to manage and use them for the purposes of their religious activity, as their status of cultural or national monuments remains.

The Holy Synod expressed publicly its position to support the bill on amending the law that was introduced by the Chairman of the National Assembly Mihail Mikov and a group of MPs.

According to representatives of cultural institutions and museums, however, the texts were vague and unclear and one can see the desire of religions to gain ownership rights not only on existing temples and monasteries, but also on those built in time for this purpose, most of which are monuments of cultural heritage.

Then archaeologists and cultural heritage experts reacted very sharply, the law was not adopted by the Commission on Culture and it did postpone the discussion of the law during the first reading in the plenary hall of the National Assembly [38].

Then there was a submission of a new bill amending and supplementing the Law on Religions prepared by deputies of the Left Dimitar Dabov, Plamen Slavov and Tatiana Burudzhieva [39]. According to the draft bill of three deputies, the temples and religious properties that are cultural monuments will be state property and will not be reimbursed to the denominations.

The project was submitted to the parliament after protests in Karlovo against the return of the monument «The Bullet Mosque» to the Islam religion and the decision of Sofia City Administrative Court in the summer of 2013, which recognized the right of ownership of the Chief Mufti's Office on 1500 waqf properties. Meanwhile the status of the Memorial Church «St. Al. Nevski», built on state land with Russian gifts still remains unclear, along with other Orthodox churches, which are cultural monuments.

The Holy Synod took a formal position (statement of December 16, 2013), including a written statement to Chetin Kazak, Chairman of the Legal Affairs Committee of the 42nd National Assembly [41]. The main arguments of the Holy Synod are the following. First, there is a distortion of the general legal principle that the new law can not re-arrange pending legal relations (proposal outlining the proposed sites, which are excluded from the restitution action of § 5, Para. 1 of the Transitional and Final Provisions of the Law on Religions); it is an absolute subjective material right, such as the right to property. The next reason is that the bill is unconstitutional because it conflicts with Art. 17, Para. 1 of the Constitution, taking away the ability of religion to reclaim ownership of their their nationalized properties under the rules of § 5. «Since the object of the Bill is namely places of worship, the constitutional norm of Art. 13 is also violated» [40].

In the common position of the Chief Mufti, the statement of the Holy Synod was fully supported [41]. «Such a legislative initiative is not consistent with the interests of the whole Bulgarian people, it is biased in their intentions and anti-democratic», the position added [41].

The protests in Plovdiv, the escalation of tensions related to «The Bullet Mosque», the subsequent events in the Bulgarian political life prevented texts come onto the agenda on the 42nd National Assembly. «The Mufti office withdrew its proposals for amending the Law on Religions,» said the lawyer of the Chief Mufti Krasimir Ruev to «Nova TV» [42].

However, in 2013 there were several amendments to the Law on Religions, which affected the implementation of medical, social and educational activities of religions [43]. The general provision of Art. 30 enables registered religions to disclose medical, social and educational institutions. The amended Art. 31 empowers the Ministry of Health, Ministry of Labour and Social Policy and the Ministry of Education to ensure compliance with state requirements for carrying out the relevant medical, social and educational institutions of religion.

Another amendment affects the opening of theological schools of registered religions. According to Art. 33 «Registered faiths with the permission of the Minister of Education may establish religious schools for their ritual needs in accordance with the Public Education Act».

Education received in religious schools is considered a secular one in accordance with the Public Education Act.

Registered religious groups can detect secondary schools under the terms and conditions set out in the Public Education Act for private schools.

The admission to these schools is done through a written request by parents or guardians, except in cases when the student is at least 18 years old.

The educational establishments of the registered religious denominations can not hinder the provision of required levels of public education under the Constitution and the law.

The registered religious denominations may open universities under the terms and provisions of the Law on Higher Education.

Higher spiritual schools are established under a proposal to the management of registered religions with the permission of the Council of Ministers.

Some conclusions:

The detailed comparison of the structures of religious rights and freedoms in the Republic of Bulgaria and the relations between the Bulgarian state and religions gives grounds to assert that they comply with the obligations of the country undertaken according to the International Law and our EU membership. The Constitution of Bulgaria provides primacy of those obligations under the International Law (Art. 5, Para. 4 of C). The legislation on religious rights and freedoms consistently regulated the secularization principle as a fundamental one. The last presented case law of the Court of Appeal in Sofia and the Supreme Court of Cassation also demonstrates adherence to the separation of state from religion and the strict observance of religious rights and freedoms as fundamental, absolute, subjective, personal and inviolable.

The principle of equality and non-discrimination on the basis of professing religion or atheistic views is consistently developed and applied. References to «atheistic views» could be described as «obsolete» since the time of the totalitarian regime. But one can not ignore the objective fact of the large number of persons who have not declared their affiliation to any religion/religious denominations, according to the last census in 2011 [44]. Those having atheistic views are a relatively large part of the Bulgarian society and this fact can be explained by the forcible inculcation of atheism 25 years after the democratic changes in the country.

The Bulgarian legislation could be assessed as extremely democratic, especially in the section on the registration of religious denominations. The registration of the religious communities is not compulsory. The right of religion and faith can be practised through associations without registration. The widely criticized by some authors «privileged» position of the Bulgarian Orthodox Church is no exception to the legislation in other countries in Europe. The Bulgarian Orthodox Church is explicitly excluded from the procedure for registration and its legal capacity is the subject of direct settlement of the Law on Religions. This conclusion is confirmed by the Interpretative decision of the Supreme Court of Cassation that is analyzed in detail in the article. This «privileged» status does not always create legal stability, as evidenced by the problems surrounding the restitutions of church properties.

The latest amendments to the Law on Religions broaden the scope of various activities of religious denominations, but does not solve the complex problems associated with restitution claims.

Regarding the existing legal framework, one should take the reality into account. The Bulgarian state has the «tools» for influencing religions by the state subsidy [45], the regulation of other activities of registered religious denominations: medical, social, educational, etc. This, in my opinion, does not violate the principle of secularization, and it is an expression of the relationship between the State and the religious denominations.

It should be noted that the long schism in the Bulgarian Orthodox Church was overcome. The same is the situation with the leadership of the Muslim religion. This was chronologically in the same period: 2009 — 2011. In Bulgaria there is no specific sociological research on how the split in the two largest denominations led to negative consequences for the believers. But in any case, the unclear leadership and litigation hardly contributed to the full exercise of religious rights of the Orthodox believers and Muslims.

The current Law on Religions cannot be unambiguously assessed. The reason is the lack of assessment of the impact of legislation as *ex ante*, before its adoption, and *ex post*, regarding its operation for 12 years now. A proof of this is the case, filed by the so called Alternative Synod of Inokentiy at the European Court of Human Rights.

The case of Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria [46] ended with judgment for just satisfaction on 16 September 2010.

In a judgment delivered on 22 January 2009 («the principal judgment»), which became final on 5 June 2009, the Court held that there had been a violation of all the applicants' rights under Article 9 in that «the pertinent provisions of the 2002 Religious Denominations Act, which did not meet the Convention standard of quality of the law, and their implementation through sweeping measures forcing the community to unite under the leadership favoured by the Government went beyond any legitimate aim and interfered with the organisational autonomy of the Church and the applicants' rights under Article 9 of the Convention in a manner which cannot be accepted as lawful and necessary in a democratic society, despite the wide margin of appreciation left to the national authorities» [47].

A modern legal regulation of the religious rights and freedoms is at hand. The development of the recent events in our society, though, brings up the issue of the reality of exercising these religious rights and of the balance between the different groups of rights and freedoms.

A n n e x

Annex № 1 to Art. 6, Para. 4 of THE STATE BUDGET OF THE REPUBLIC OF BULGARIA ACT for 2014. Promulgated, State Gazette, No. 109 as of 20 December 2013, effective since 01.01.2014

Distribution of subsidies to religious denominations, registered under the Law on Religions, 2014

№	N a m e	Amount (thousands of BGN)
1	To support the Bulgarian Orthodox communities abroad and the priests working abroad	730,0
2	For the reconstruction and building of churches and monasteries of the Bulgarian Orthodox Church in the country	2000,0
3	For the reconstruction and building of places of worship of the Muslim community in the Republic of Bulgaria	230,0
4	For the reconstruction and building of churches and monasteries of the Catholic Church in the Republic of Bulgaria	35,0
5	For the reconstruction of synagogues and support of the Jewish Religious Community in the Republic of Bulgaria	30,0
6	For the reconstruction and building of temples of the Armenian Apostolic Orthodox Church in the Republic of Bulgaria	35,0
7	For the reconstruction and building of prayer temples for other registered denominations in the Republic of Bulgaria	50,0
8	For the reconstruction of religious buildings of the Bulgarian Orthodox Churches that are of national importance	350,0
9	For issuing religious literature and representative scientific publications	40,0
10	Reserve	500,0
10.1	including the creation of a register, cartotheque and cartography of all temples, prayer houses and monasteries on the territory of the Republic of Bulgaria	50,0
	Total:	**4 000,0**

References

1 State Gazette. — No. 39. — 26 May, 2009. — Amended SG. — No. 100. — 21 December, 2010. — Amended SG. — No. 9. — 28 January, 2011.

2 State Gazette. — No. 57. — 25 June, 1999. — last amended. — No. 38. — 18 May, 2012. — Suppl. SG. — № 15. — 15 February, 2013.

3 Source www.nsi.bg/census2011/index.php. For comparison with the former census, see, Otherwise different, ILEIVA, IRENA, Anti-Semitism, islamofobia and other forms of discrimination, Editor: the Centre for Comparative Studies. — P. 93–95. — [ER]. Access mode: www.tonioloricerca.it/index.php?...otherwise-different2ricerca.

4 To be compared to the data of the census in 2001: Bulgarian: 6,655,210 of the total 7,928,901 nationals, Turks with 746,664 people, followed by the Roma (Gypsies) with 370,908 people. In 2001 the percentage of the Turks was relatively constant representing 9.4 % of the country's citizens.

5 Some comments need to be made, in order to be precise in the use of the statistical methods and data on the minorities in Bulgaria. The first is on the existence of a 'Macedonian' minority in the country. The official Bulgarian position is that Macedonia is a geographical region, populated by Bulgarians. This region is now divided between Bulgaria, Greece and the Former Yugoslav Republic of Macedonia. Due to the fluctuating political qualifications of the region's population, there are differences in the census. Till 1943 the Macedonians were not considered an independent nationality. They were included in the censuses as Bulgarians. The se-

cond comment is on the differences between Romanians and Wallachians or Vlachs. From 1900 till 1975 they were included in the censuses as Romanians. The third comment is on the Cincares (Aromuns, Aromanians or Kutsovlachs). Between 1905 and 1934 they were included in the censuses as Roma. After 1934 the Bulgarian Muslims (Pomaks) have been listed as Bulgarians. From 1934 to 1965 the Tartars, Romanians, Slovaks and Serbs were not examined as independent ethnic groups.

6 For a more detailed analysis of Art. 27 ICCPR, see, ILEIVA, IRENA**,** Minorities on the Balkan. The International Protection, Open Society Foundation. — Sofia, 1994. — P. 41–52.

7 There are other relevant acts such as: Decree No. 86 as of 12th March 1997 on the certification of the state register of specialties according to the educational-qualification degrees, 1997; Regulations on the recognition of education received abroad, 2000; Law on the Protection of Consumers, 2005; Law on Community Centres, 1996, etc.

8 Analysis of the legal term «minority» in ILIEVA, IRENA, Legal regulation of the religious rights and freedoms in Bulgaria, in Liberta di coscienza e diversita di appartenenza religiosa nell'Est Europa. A cura di Giovanni Cimbalo e Federica Botti, Bononia University Press, 2008. — P. 81–82.

9 Promulgated, State Gazette. — No. 26 as of 1st April 1986. — last amend. SG. — No. 61 as of 25 July 2014.

10 Promulgated, State Gazette. — No. 86 as of 30th September 2003. — last amend. — No. 68 as of 2 August 2013.

11 Promulgated, State Gazette. — No. 48 as of 13th June 2000. — last amend. — No. 84 as of 27th September 2013.

12 Promulgated, State Gazette. — No. 86 as of 28th October 2005, into force as of 29th April 2006. — last amend. — No. 71 as of 13 August 2013.

13 Promulgated, State Gazette. — No. 67 as of 27th July 1999. — last amend. — No. 68 as of 2 August 2013.

14 Promulgated, State Gazette. — No. 56 as of 19th May 1998. — last amend. — No. 66 as of 26 July 2013.

15 Promulgated, State Gazette. — No. 112 as of 2001. — last amend. SG. — No. 61 as of 21 July 2014.

16 For a more detailed analysis of the antidiscrimination provisions, see, ILIEVA, IRENA, Regulation of the principle of equality and non-discrimination, in TSVETANA KAMENOVA, EMILIA DRUMEVA, IRENA ILIEVA. European and National Antidiscrimination Legal Regulation, second revised edition. S., 2004. — P. 137–176.

17 CIMBALO, GIOVANNI, Tutela individuale e colletiva della liberta di coscienza e modelli di relazione tra stato e confessioni religiose nei paesi dell' Est Europa, Liberta di coscienza e diversita di appartenenza religiosa nell' Est Europa, a cura di Giovanni Cimbalo e Federica Botti. — Bononia University Press, 2008. — P. 16.

18 Article 13. (1) Religious denominations shall be free; (2) Religious institutions shall be separate from the State; (3) Eastern Orthodox Christianity is a traditional religion in the Republic of Bulgaria; (4) Religious communities and institutions, or religious convictions, may not be used for political purposes. — [ER]. Access mode: http://www.vks.bg/english/vksen_p04_01.htm#Chapter One

19 Torres Gutierrez, Alejandro, An Introduction to the History of Religious Freedom in Bulgaria, Oriental Studies. Between East and West. Cultural and Religious Dialogue before, during and after the Totalitarian Rule, Scholarly papers. — University of Latvia, 2013. — Vol. 793. — P. 201.

20 State Gazette, No. 120 of 2002, last amend. SG No. 68 of 2 August 2013. For detailed analyses of the Law see Ilieva, Irena, Legal Regulation of the Religious Rights and Freedoms in Bulgaria, Liberta di coscienza e diversita di appartenenza religiosa nell'Est Europa, Acura di Giovanni Cimbalo e Federica Botti. — Bononia University Press, 2008. — P. 84–92.

21 State Gazette. — No. 66/2003.

22 According the data presented by Jasmina Donkova, senior specialist at the Direction «Religions» by the Council of Ministers by November 2006 85 religious denominations were registrated and 5 were in process of registration. www.pravoslavie-bg/content/view/4122/202. As to May 2008 there are 98 registered denominations. According the newspaper «Trud» there are 127 religious denomination registered as to 05.04.2014. — [ER]. Access mode: http://www.trud.bg/Article.asp? ArticleId=3940395, last visited on 12 August 2014.

23 See for more detailed Peteva, Jenia in Law and Religion in Post-Communist Europe, Editors: Ferrari, Silvio and Durham, W.Cole, Peeters, 2003, p. 37 and further; Donkova, Jasmina. About the Constitutionality of the Law on Religions, Jurisprudence World. — No. 2. — 2003. — P. 117–118.

24 [ER]. Access mode: http://www.vks.bg/vks_p10_81.htm

25 For more details, see, Otherwise different, CHENGELOVA, EMILIA and PETKOVA, ROSKA and MINCHEV, VESSELIN, Organization, Social Practices and Problems of Jewish and Muslim Communities in Bulgaria. — P. 17. — [ER]. Access mode: www.tonioloricerca.it/index.php?...otherwise-different2ricerca.

26 Hristo Matanov is a professor in History, Director of the Religious Denomination Directorate during the period April 1993 — October 1996, Head of the Department of «Byzantium and the Balkan people» at the Faculty of History at Sofia University «St. Kliment Ohridski».

27 The Bulgarian Muslims and the events of 1970s. Interviews, Matanov, Hristo, complier. — Sofia: Sofia University Publishing House «St. Kliment Ohridski». — 2014. — P. 5.

28 See the interviews taken by Ilian Iliev with Sabina Deneva as a respondent, born in Bania, living in Satovcha. — op. cit. — P. 107; respondent Slavi Uzunov. — P. 112, respondent Mancho Djurkin. — P. 116; respondent Mustafa Avdikov. — P. 122. — Respondent Kamen Drenkov. — P. 127.

29 For more details, see the history of creation of the autonomous statute of the Muslim community in Bulgaria, as well as the analysis of the Statutes from 1945 till 2008 in PETROVA, KRISTINA, Gli statute dell'Islam Bulgaro e il suo inserimento nell'ordinamento giuridico dello stato, Tesi de laurea in Diritto Ecclesiastico, Facolta di Giurisprudenza. — Universita di Bologna, Anno Academico 2007/2008. — P. 21 — 29; — P. 85–133.

30 Brief review of the leadership split of the Muslim community in ILIEVA, IRENA, Legal regulation of the religious rights and freedoms in Bulgaria, Liberta di coscienza e diversita di appartenenza religiosa nell'Est Europa, A cura di Giovanni Cimbalo e Federica Botti. — Bononia University Press, 2008. — P. 95–96.

31 [ER]. Access mode: http://www.grandmufti.bg/bg/aboutus/normativni-documenti/1225-ustav.html

32 Hassan et Tchaouch c. Bulgarie. — No. 30985/96.

33 Sega, 2008. — April, 24.

34 CHENGELOVA, EMILIA and PETKOVA, ROSKA and MINCHEV, VESSELIN**,** op. cit.

35 The political party «Ataka» was created on 17th April 2005 in Sofia and officially registered in the Sofia City Court in July 2005. It is self-identified as nationalist and patriotic. At the parliamentary elections in 2005 the party took 8,93 % of the votes and gained 21 places in Parliament. At the parliamentary elections in 2009 «Ataka» gained 9,36 % and 21 places. — [ER]. Access mode: www.ataka.bg.

36 [ER]. Access mode: http://www.dps.bg/news/events/183/diskusiya-po-zakonoproekta-za-izmenenie-i-dopalnenie-na-zakona-za-veroizpovedaniyata—predlozhen-od-dps.aspx

37 [ER]. Access mode: http://www.dnevnik.bg/intervju/2013/07/29/2110592_dilian_nikolchev_promenite_v_zakona_za/, last visited on 13 August 2014.

38 [ER]. Access mode: http://www.mediapool.bg/promeni-v-zakona-za-veroizpovedaniyata-sa-na-pat-da-skarat-bsp-i-dps-news214480.html, last visited on 14 August 2014.

39 The text is available on http://parliament.bg/bills/42/354–01–91.pdf, last visited on 14 August 2014

40 [ER]. Access mode: http://www.parliament.bg/pub/cW/20140102052249Stanovishte_Sv.Sinod_ZID_ZV.pdf, last visited on 14 August 2014.

41 [ER]. Access mode: http://www.mediapool.bg/svetiyat-sinod-i-glavnoto-myuftiystvo-sa-protiv-novite-promeni-v-zakona-za-veroizpovedaniyata-news214614.html, information of 12 December 2013, last visited on 13 August 2014.

42 Information from 18 February 2014. — [ER]. Access mode: http://www.hristiqni.com/novini/ot-balgariya/2246-myuftiistvoto-ottegli-predlozheniyata-si-za-izmenenie-zakona-za-veroizpovedaniyata#ixzz3AHlHILgP

43 State Gazette, No. 68 of 2013, in force since 2 August 2013.

44 According to the survey, only 13 % of East Germans are religious, as atheism is most prevalent among people aged up to 47 years. 72 % of them did not believe and have never believed in God. In Switzerland, the number of Christian believers has decreased in recent years, although still 45 % of them believe in God. Most Swiss have some spiritual and religious ideas, but their religion is not essential. In France, over 19 % said they were never believers. In the Netherlands and Norway respectively 15.3 % and 15.9 % said the same. Bulgaria is not included in the study. — [ER]. Access mode: http://www.dw.de/%D0 %B0 %D1 %82 %D0 %B5 %D0 %B8 %D0 %B7 %D0 %BC%D1 %8A%D1 %82-%D0 %B2-%D0 %BD%D0 %B0 %D1 %81 %D1 %82 %D1 %8A%D0 %BF%D0 %BB%D0 %B5 %D0 %BD%D0 %B8 %D0 %B5/a-15902093

45 See annex Nr. 1, data on the state subside for 2014.

46 Applications nos. 412/03 and 35677/04, Just satisfaction judgment of 16 September 2010.

47 Applications nos. 412/03 and 35677/04, §§ 159, 160, 169, 172, 174 and 179 and points 1–4 of the operative provisions, 22 January 2009.

И.Илиева

Болгариядағы мемлекеттік-діни қатынастардың қазіргі мәртебесі. Мұсылман қоғамдастығына назар аудару

Мақала мұсылман қоғамдастығына ерекше назар аудара отырып, заңнамаға талдау жүргізу арқылы мемлекет пен діни ұйымдардың арақатынасының ағымдағы жағдайына арналған. Зерттеу уақыт аралығымен шектеліп, 1989 жылдан кейінгі кезең: Болгариядағы тоталитарлық тәртіптен өтуден кейінгі кезеңді қамтиды. Соңғы 2011 жылғы халық санағының мәліметтері негізінде, «діни сенімге» қатысты тұрғындардың құрамы мұсылман қоғамдастығына ерекше назар аудару арқылы талдауға алынды. Теңдік, кемсітпеушілік және азшылық ұлттар мәселесін болгарлық құқықтық реттеудің маңызды ерекшелігі — Халықаралық жария құқыққа сәйкес міндеттемелердің басымдығын сақтау.

И.Илиева

Современный статус государственно-религиозных отношений в Болгарии. Фокусирование на мусульманском сообществе

Статья посвящена текущему состоянию отношений между государством и религиозными организациями на основе анализа законодательства, с уделением особого внимания мусульманскому сообществу. Исследование ограничено временными рамками и охватывает период после 1989 г.: переход от тоталитарного режима в Болгарии. На основе последних данных переписи 2011 г. состав населения по «религиозной принадлежности» будет проанализирован с особым вниманием к мусульманскому сообществу. Отмечена важная особенность болгарского правового регулирования вопроса равенства, недискриминации и отношений меньшинств — выполнение обязательств в соответствии с Международным публичным правом.

УДК 342

О.Л.Казанцева

Алтайский государственный университет, Барнаул, Россия
(E-mail: verwaltung@mail.ru)

Государственная власть и местное самоуправление: история и современность

В статье исследуются зарождение и формирование самоуправленческих основ в России. Анализируется опыт земств Российской империи, а также проводится сравнение взаимоотношений государства с земствами и органами местного самоуправления на современном этапе развития. Традиции и опыт становления местного самоуправления в России, отмечает автор, не учтены в полной мере, что приводит к проблемам, стоящим на пути развития местного самоуправления в настоящее время.

Ключевые слова: местное самоуправление, органы государственной власти, правовое регулирование.

2014 год насыщен событиями в научной жизни, приуроченными к 150-летию подписания Александром II «Положения о губернских и уездных земских учреждениях» от 1 января 1864 г. [1; 39] — уникальному историческому событию. Считается, что именно оно дало начало воссозданию органов местного самоуправления — земств, появление которых повлекло глубокие социальные трансформации, ставшие началом формирования гражданского общества в России. Земства стали национальным российским опытом организации местного самоуправления на принципах всесословности и самофинансирования. Опыт формирования местного самоуправления в Российской империи явился базой для развития современного местного самоуправления, его взаимодействия с государственной властью. Безусловно, напрямую заимствовать данный опыт можно только ограниченно. Главным здесь видится осмысление закономерностей и тенденций развития местного самоуправления, учет результатов взаимодействия с органами государственной власти в проводимых современных реформах.

Изучение истории земского самоуправления в России свидетельствует о том, что вопросы организации местного самоуправления, взаимодействия его с государством не потеряли своей актуальности и сейчас. Проводя параллель с сегодняшними реалиями, следует отметить, что создание местного самоуправления в России шло и идет по одному сценарию, а именно установлением «сверху». Согласно Конституции Российской Федерации от 12 декабря 1993 г. [2] органы местного самоуправления не входят в систему органов государственной власти, что может толковаться как некоторая автономность местных властей, формирование их «снизу-вверх», однако это не совсем так. В ст.ст. 5–6 Федерального закона от 06.10.2003 г. № 131-ФЗ «Об общих принципах организации местного самоуправления в РФ» указаны полномочия органов государственной власти Российской Федерации и ее субъектов, свидетельствующие о нормативном регулировании, контроле за деятельностью органов местного уровня [3].

Земская реформа была введена избирательно, а не повсеместно, что свидетельствует о том, что законодатель делал ставку на более урбанизированную часть страны, избегая огромных пространств Сибири и Дальнего Востока. С одной стороны, это может показаться несправедливым, поскольку отсутствует равноправие населения, а с другой точки зрения — оправданно, так как управление более мелкими административно-территориальными единицами является более эффективным. На данный момент наблюдаем обратный процесс, связанный с укрупнением сельских поселений, который исходит из чисто финансовых соображений.

Государственная власть оказывает воздействие на органы местного самоуправления, однако его пределы должны быть четко определены в законодательстве. Взаимодействие земств и органов местного самоуправления с государственными органами в Российской империи и Российской Федерации осуществлялось по различным направлениям.

1. *Государственная поддержка местного самоуправления*. Ресурсная база местного самоуправления в Российской империи (как и в Российской Федерации) не соответствовала объему возложенных на него задач. Это снижало его эффективность и приводило к зависимости от органов государственной власти. Целый ряд обязательных земских дел (предметов ведения) в Российской империи не имел непосредственного отношения к местному самоуправлению, хотя выступал главным источником расходов земского бюджета. На решение обязательных дел государство не выделяло земствам

достаточных средств, что сказывалось на эффективности решения вопросов местного значения, поскольку уменьшало материально-финансовые возможности земств. Около 75 % собственных доходов земство получало от правильной эксплуатации имущества. Земства помогали развитию местных ремесел, промыслов, выдавали льготные кредиты, закупали более дешевое сырье и передавали крестьянам, чтобы они производили продукцию и получали больше доходов, с которых и платился земский налог [4].

В Российской Федерации круг вопросов, решаемых органами местного самоуправления, также не всегда связан с муниципальными нуждами. В современных экономических условиях бюджеты муниципальных образований формируются сходным образом, т.е. доходная часть образуется из налоговых отчислений, средств от приватизации и реализации муниципального имущества и т.д. И все же местные бюджеты испытывают нехватку собственных средств, являются дотационными вследствие неэффективной реализации муниципальной собственности, неполучения налогов на доходы физических лиц и в силу иных причин. Сегодня без поддержки государства органы местного самоуправления не смогут эффективно участвовать в реализации проводимых государством реформ. Государственная поддержка местного самоуправления может выражаться: в правовом регулировании его организации и деятельности; контроле за соблюдением конституционных основ; оказании материальной и финансовой помощи его органам; информационном обеспечении; оказании методической поддержки; рассмотрении обращений его органов и должностных лиц; принятии и реализации целевых программ государственной поддержки и других мерах.

2. *Наделение органов местного самоуправления отдельными государственными полномочиями.* Исторически так сложилось, что в России органы местного самоуправления всегда исполняли некоторый объем государственных полномочий и государственных обязанностей. Так, к ведению земских учреждений, согласно Положению от 1 января 1864 г., подлежали раскладка государственных денежных сборов, исполнение возложенных на земство потребностей воинского и гражданского управлений, участие в делах почтовой повинности и другие дела, которые вверялись на основании особых уставов, положений или постановлений.

Возможность наделения органов местного самоуправления отдельными государственными полномочиями закрепляется в Конституции РФ. В соответствии с ней в компетенцию органов местного самоуправления помимо вопросов местного значения могут входить и отдельные государственные полномочия, которые им передаются государством. Согласно Федеральному закону № 131-ФЗ наделение органов местного самоуправления отдельными государственными полномочиями может производиться только законом: федеральным и региональным. Если полномочие содержится в ст.ст. 14–17 Федерального закона № 131-ФЗ, то оно является муниципальным, в противном случае — это государственное полномочие, которое требует отдельного финансирования.

Передача отдельных государственных полномочий органам местного самоуправления допустима в тех случаях, когда последние способны более эффективно их реализовать. Чаще всего на уровень местного самоуправления передаются государственные полномочия в следующих областях: государственная регистрация актов гражданского состояния; лицензирование розничной продажи алкогольной продукции; ведение государственного градостроительного кадастра и мониторинга объектов градостроительной деятельности; лицензирование образовательной деятельности муниципальных образовательных учреждений; медико-социальная экспертиза; формирование и организация деятельности административных комиссий на территориях субъектов Российской Федерации и т.д.

3. *Право законодательной инициативы органов местного самоуправления.* Земские учреждения, появившиеся в России в 60-е годы XIX в. и «дожившие» до 1917 г., не имели властных полномочий и возможности законодательных инициатив, однако смогли организовать систему мероприятий в области развития образования, медицины, благотворительности даже в условиях самодержавия. Сегодня представительный орган муниципального образования вправе вносить в законодательный орган государственной власти субъекта РФ проекты законов, собственные предложения по совершенствованию уже принятых законов. В законотворческом процессе органы местного самоуправления и государственной власти тесно взаимодействуют между собой. При принятии законов, затрагивающих интересы местного самоуправления или жителей муниципальных образований, органы государственной власти субъектов РФ обязаны проводить консультации с органами местного самоуправления, учитывать их мнение. Органы местного самоуправления обеспечивают исполнение законов и иных нормативных правовых актов на территории своего муниципального образования. Однако не всегда органы местного самоуправления используют это право на практике.

4. *Надзор за законностью деятельности органов и должностных лиц местного самоуправления*. Исторически надзор за работой земских учреждений осуществлялся всегда, формы его и виды претерпевали несущественные изменения. На современном этапе надзор за соблюдением органами местного самоуправления Конституции РФ, федеральных конституционных законов, федеральных законов, конституций (уставов), законов субъектов РФ, уставов муниципальных образований, муниципальных правовых актов осуществляют различные государственные органы. В соответствии с Федеральным законом «О прокуратуре Российской Федерации» [5] при осуществлении своих функций в отношении органов и должностных лиц местного самоуправления прокурор вправе: а) беспрепятственно входить по предъявлении служебного удостоверения на территории и в помещения органов местного самоуправления, иметь доступ к их документам и материалам, проверять исполнение законов в связи с поступившей в органы прокуратуры информацией о фактах нарушения закона; б) требовать от руководителей и других должностных лиц органов местного самоуправления предъявления необходимых документов, материалов, статистических и иных сведений; выделения специалистов для выяснения возникших вопросов; проведения проверок по поступившим в органы прокуратуры материалам и обращениям, а также ревизий деятельности подконтрольных или подведомственных им организаций; в) вызывать должностных лиц местного самоуправления и граждан для объяснений по поводу нарушений законов. Надзор за соблюдением органами местного самоуправления законности в отдельных сферах могут осуществлять и другие государственные органы.

5. *Создание координационных, консультационных, совещательных органов (комиссий, групп)*. Представители органов государственной власти Российской империи и Российской Федерации нередко избегали партнерства с органами местного самоуправления. Местное самоуправление не воспринималось как самостоятельный уровень публичной власти. В Российской империи неумение выстроить систему взаимодействия с земским самоуправлением порождало стремление государственной власти подчинить его себе, включить в систему государственной власти, что позволило говорить о преобладании государственных начал в осуществлении местного самоуправления. Усиление государственных начал в осуществлении местного самоуправления в Российской Федерации с 2003 г. должно быть дополнено расширением демократических механизмов его осуществления населением. Сегодня органы государственной власти и местного самоуправления участвуют в реализации координационных форм взаимодействия, что позволяет им реализовать свое социальное назначение.

6. Земствам не разрешалось взаимодействовать между собой, и они вынуждены были писать прошения, чтобы им разрешили доступ, например, к информации в сфере агрономии или статистики другого земства. Следует отметить активность органов земского управления, которые, несмотря на постоянные ограничения, контроль администрации государства за их деятельностью, пытались самостоятельно, под свою ответственность осуществлять полномочия по решению местных дел. На сегодняшний день устранена проблема во взаимодействии муниципальных образований, им разрешено объединяться в *ассоциации и союзы*, начиная от общероссийского и заканчивая объединениями муниципальных образований внутри субъектов РФ. Ассоциации и союзы муниципальных образований взаимодействуют с органами государственной власти по вопросам выработки согласованной политики в отношении местного самоуправления. Работа в объединениях позволяет повысить эффективность деятельности органов местного самоуправления, объединить усилия при решении совместных насущных проблем.

Подводя итоги, следует сказать о том, что значение земской реформы заключается, прежде всего, в возрождении в стране принципа народовластия. Анализ современного состояния местного самоуправления показывает, что имеются проблемы в его осуществлении, связанные, в том числе, с недостатком материальных средств, и, как следствие, формированием стойкой зависимости от государства. Поэтому столь многочисленны высказывания о том, что на практике местного самоуправления как такового не существует. В этой связи следует учесть исторический опыт, чтобы повысить эффективность деятельности местных органов, а также усовершенствовать концептуальные основы правового обеспечения взаимодействия органов государственной власти и местного самоуправления.

Список литературы

1 Местное самоуправление в России. Отечественный исторический опыт: Сб. документов (1861–1917 гг.). — М.: МОНФ, 1998. — 300 с.

2 Конституция РФ от 12 декабря 1993 г. // СЗ РФ. — 2014. — № 31. — Ст. 4398.

3 Федеральный закон от 6 октября 2003 г. № 131-ФЗ «Об общих принципах организации местного самоуправления в Российской Федерации» (с изм. и доп.) // СЗ РФ. — 2003. — № 40. — Ст. 3822.

4 Что делать? Уроки земства и современное местное управление. — [ЭР]. — Режим доступа: http://tvkultura.ru/video/show/brand_id/20917/episode_id/1082674 (14.11.2014)

5 Федеральный закон от 17.01.1992 № 2202–1 (ред. от 21.07.2014) «О прокуратуре Российской Федерации» Собрание законодательства РФ // СЗ РФ. — 1995. — № 47. — Ст. 4472.

О.Л.Казанцева

Мемлекеттік билік және жергілікті өзін-өзі басқару: тарих және қазіргі кезең

Мақалада Ресейдегі өзін-өзі басқарушылық негіздердің пайда болуы мен қалыптасуы зерттелді. Ресей империясының земстволарының (жергілікті өзін-өзі басқарудың сайланбалы органдарының) тәжірибесіне талдау және мемлекет пен земстволардың және қазіргі даму кезеңіндегі жергілікті өзін-өзі басқару органдарының арасындағы өзара қатынастарына салыстырулар жүргізілді. Ресейдегі жергілікті өзін-өзі басқару дәстүрлері мен тәжірибесі толық көлемде ескерілмеуі қазіргі уақытта Ресейдегі жергілікті өзін-өзі басқаруды дамыту жолында кедергі келтіретін мәселелердің туындауына әкеледі деп атап өтілді.

O.L.Kazantseva

Government and local government: history and present

In this article origin and formation of self-administrative bases in Russia are investigated. Experience of zemstvoes of the Russian Empire is analyzed, and also comparison of relationship of the state with zemstvoes and local governments at the present stage of development is carried out. It is specified that traditions and experience of formation of local government in Russia aren't considered fully that leads to the problems getting in the way of development of local government in Russia now.

References

1 Local government in Russia. Domestic historical experience. Collection of documents (1861–1917), Moscow: MONF, 1998, 300 p.

2 Code of laws Russian Federation, 2014, 31, Art. 4398.

3 Code of laws Russian Federation, 2003, 40, Art. 3822.

4 What to do? Lessons of a zemstvo and modern local management, http://tvkultura.ru/video/show/brand_id/20917/ episode_id/1082674 (14.11.2014)

5 Code of laws Russian Federation, 1995, 47, Art. 4472.

UDC 340.111:94

G.Z.Kozhakhmetov

Ye.A.Buketov Karaganda State University
(E-mail: galym.kozhahmetov@mail.ru)

The State Duma of pre-revolutionary Russia (1906–1917) and its attitude to agrarian question in the Steppes and Turkestan region

The activity of the first Russian parliament and consideration in its walls of agrarian crisis in Steppes is considered in the scientific article. Political and public forces of Russia and their relation to questions of resettlement policy of tsarism are shown. The most interesting speeches of deputies of region offering various ways of overcoming of crisis are lit. Support by revolutionary and democratic forces of Russia of interests of aboriginals of the Steppe region is shown. In article it is noted that the Duma couldn't solve in the conditions of tsarism of the tasks set for it, but it became a place of criticism of the autocratic mode. The historical value of the Duma concluded that thanks to it political life of region became more active and starts of parliamentary ideas were put.

Key words: agrarian question, State Duma, parties and fractions, Kazakh democratic intellectuals, land crisis, Imperial Parliament, deputies, democrats and revolutionaries, resettlement administration, opposition forces, national regions, the Steppe and Turkestan regions.

It is known that the agrarian issue was the cause of the Russian revolution I in 1905–1907. Noble tenure in agriculture and developed capitalist relations in the industry came into conflict, slowing down normal development not only for economy of the country, but for all its entire political system.

For national regions, one of which was the Steppes, sharpness of the land relations reached the highest limit. The trouble was that the Imperial government to ease tensions in the Central densely populated regions began to practice resettlement of hundreds of thousands of landless peasants in Kazakhstan and Siberia. This event became large-scaled with the construction of Trans-Siberian railway line. For these purposes, in the government of Nicholas II the Resettlement administration was created on the rights of the state Committee. The Fund Committee was enriched by the state budget, and with the coming to power of P.A.Stolypin in 1906, the budget of this department has become one of the most significant.

According to the plans of the Prime Minister P.A.Stolypin, solution of the land crisis in Russia consisted of two parts. The first is the division and capitalization of the rural community and establishing principles of private property by separating peasants in the villages and cuts. The second part of the reform was the strengthening of the migration movement in the Asian part of Russia and Siberia due to the active support of the state. According to Stolypin, resettlement issue worked out not only agrarian problems but increased outskirts of the Russian population, strengthened the positions of tsarism in these poorly developed regions. On these occasion, academician S.Z.Zimanov wrote that the Fund resettlement department was created at the price of the destruction of nomads who were expelled in arid and semi-arid regions, because of this the land issue in Kazakhstan was the most urgent [1; 33–34].

Not occasionally, that the establishment of the State Duma, in accordance with Manifest of October 17, 1905 with the legislative functions with the great hope was apprehended by the people of Kazakhstan. Agrarian requirements formed the basis of all requests made to Duma and activities of the deputies.

It was natural that the land problem which has become a key problem, has obliged the State Duma of the first convocation, and it is known it starts to work in the spring of 2006, to devote almost all of their meetings. For the basis of the discussion on the agrarian question in the State Duma I passed two bills: the project of 42 proposed by cadets, and 104 complied by the labor groups. There was one project of 33-s which has been nominated by the part of labor group and had with the previous project much in common in the field of landownership but was not accepted by the Duma I.

Project of 42-nd provided the solution of land crisis at the expenses of landowners' lands through their forced exclusion in favor of the peasants. However, the exclusion was subject to large tracts of land at fair assessment of their value at the expense of the state. Moreover, the number of notes created conditions for their preservation in those cases, if they had a useful value, due to employment under orchards, vineyards, gardens, industrial agricultural enterprises, etc. Without restrictions subject to the disposal of land, built back in the lease until January 1, 1906 or processed peasant inventory [2; 27]. In addition, cadet variant was identified as a means of exit from the crisis, the strengthening of the migration movement in Siberia and the

Asian part of Russia. If to speak about project in general, the cadets proposed elimination of feudal forms of landownership, which was a brake on social and economic development of Russia.

In comparison with cadets, labor workers proposed more radical measures. Their project involved the exclusion of all forms of private ownership of land, increasing labor norm, i.e. the elimination of large and medium ownership. It was also assumed the creation of a National Fund where the land committees, elected on the basis of a popular vote, distributed it among the population, distinguishing to all persons who wish to handle it on a labor norm. On the question of how to dispose gratuitously or at the expense of the state, there was no consensus among the labor group.

Discussion of the agrarian question in the Duma I took place, in general, in the democratic situation. Duma of the first convocation expressed its attitude to the agrarian question initially in the return address to the king. The reply address to the king was a program document of the parliamentary institution in which the MPs have set out a program of their activities on the key issues of the state. At the first place it aims to solve land crisis through compulsory expropriation of the landowners' estates. Certainly, the government could not arrange such program of legislative activity in the Duma, and therefore at the first and quite big speech to the Duma Prime Minister P.A.Stolypin in May,13 1906 stated that «the resolution of this question, proposed by the Duma, the reason, certainly, is unacceptable» [3; 322]. The Prime Minister announced the availability of its plan to resolve the land issue, based on the stratification of the community and the resettlement of peasants in Siberia and Kazakhstan. The speech of P.A.Stolypin clear gave to understand to the deputies that tsarism could not agree even with this moderate cadet project.

The representatives of the right-wing and monarchist parties, being in the minority, did everything to protect the landlord's property and support the line of the government. In speeches deputies tried to prove that with the elimination of the landlords' estates which the majority of the Duma I achieves, the country will inevitably comprehended by hunger, the cause of which, in their opinion will be incorporated in the peasants laziness and sloth. In addition, the lack of the basic skills in agriculture, technology in total will not allow them to reach level of production of large-scale landowner enterprises.

In the ranks of opposition forces to the government of the Duma I other radical demands were demanded. So, social-democratic fraction proposed its approaches for solving problems. In the Declaration, read out at the public meeting of the Duma in June 16, 1906, stated that the elimination of private land should be carried out without any repurchase in favor of the peasants. Deputies of the fraction from the tribune of the Duma proved by means of layering communities and resettlement of the peasants not to solve agrarian question, they called for revolutionary changes in the agrarian sector of economy, and through it in all political system of the state.

It should be emphasized that for activity of the Duma I was characterized that by the fact that the protection of the interests of the indigenous population of the Borderlands of Russia were often made by the representatives of the Russian democratic intellectuals, indicating that the democracy of the majority of the Duma and the desire to help national outskirts suffering from colonial and resettlement policy of tsarism.

The democratic part of the Duma I supported initiative of deputies of the regions in the request to the Government from July 4, 1906 on irregular formations of the resettlement areas in the Kyrgyz steppes [4, 1]. It condemned the resettlement policy of the government in the province, and demanded immediate land of the Kazakh population and the enactment of a law guaranteeing the rights of the indigenous population endowed it on the ground.

Kazakh population in their Mandates and requirements to the deputies of the Duma I pointed that the Duma developed the law on the lands of nomads. It should be noted that they did not want to tolerate tyranny, chaos in the desert. The report and the reports of government officials involved in cutting sites in the region indicate the reaction of the local population, interfering to survey the territory, not giving carts, tents, food, and so on [5; 142]. They, therefore, still expressed the peace protest to the government.

The Agrarian Commission, formed in the Duma I on the request of deputies in connection with importance of the question, was determined in the amount of 101 members, 10 of them were left MPs from Kazakhstan and Siberia, some of which have not yet arrived in the Duma. The Chairman of the Commission was a member of cadet party A.A.Mukhanov, for preparation of the bill three subcommittees on 15 deputies each were formed, who were engaged in study of specific questions [6; 1]. For 9 meeting the main part of agrarian project, going in line with cadet version of the solution of land crisis, was prepared.

In this situation, the imperial government, seeing democratically adjusted majority of the Duma I on permission of the land question, takes drastic measures, having published on June 20, 1906 the Stolypinsky

agrarian project. This publication was nothing else, as an ignoring of legislative rights of the Duma as Parliament, having caused indignation in democrats and the public.

The Duma II from the beginning of its activity, from February 1907 began to consideration of agrarian question, which owing to democratic structure, was raised more considerably. Speeches of deputies and projects of parties and groups became more concrete and accurate.

It is proposed in the Duma I was added project of 105 and compiled by the socialist party, whose ultimate goal was the socialization of the land. Unlike projects of labor groups, it represented something between the project of the 33rd and the 104th.

In the process of deliberations and discussions of projects the democratic majority of the Duma II, clearly unsatisfied cadet project moved on to more drastic measures to settle the land question, suggesting the procedure of elimination of estates without any ransom. The representatives of right-wing parties and the black hundreds parties are still fiercely repulsed attacks on government reform. In their speech they defending government policy, advocated benefits, promising the peasants, released in hamlets and cuts. Very positive feedback about the resettlement of peasants in Siberia and Kazakhstan, defining it as an event of national importance in the decision of land hunger in Russia. And, on the contrary, revolutionary parties and fractions subjected to the destroying criticism of the government resettlement policy. So, the deputy of St. Petersburg Aleksinsky in the speech about it described how the enticement of trustful peasants is carried out to Steppes and Siberia. To protect landowners' estates, Deputy says, by Government «...printed in the largest font, printed so bold to man froze, quivered and trembled from greed to this free land». Deputy Aleksinsky pointed that resettlement of peasants not to solve a land problem in Russia, that the only way is elimination of landowners' estates in favor of peasants [7; 1630].

Deputy of Urals region Kosmodemyansky, acting on May 16, 1907 in debate, depicted that real picture to which peasants immigrants get. A lot of place in the speech of the Deputy was given to the position of the Kazakh population, which the government resettlement refers cruelly, taking away his land, ignoring with the economic conditions, nor life, nor with the psychology of the nomads. The Government, according to the deputy, spreads culture alien to it and such withdrawal pains of the relations of internal tenor of life of nomads can lead to serious consequences [8; 628–631].

Democratic Russian intelligence of the Steppe region, realizing consequences of resettlement policy and considering the vital interests of the nomadic population, sought to help them. Some deputies understanding the futility of access to the government, tried to discover the meaning of resettlement before by Russian peasants, deceived by the government in the press, in the article «Danger to persons in the Steppe region» (there is reason to believe that it was written by Deputy N.Konshin), author of on the actual data proves inability to raise farm in harvested areas where there is no water, forests, roads, etc. The policy of the government, he reveals: «Let aimlessly bankrupt Kyrgyz, let carelessly run then immigrants from selected among the nomads of the earth — it's not important, if only to put somewhere now many thousands of peasants (those who are worried in Russia due to the lack of the earth» [9; 1–8]. The deputy urged peasants to think before moving to the Steppes which isn't promising anything kind, and to solve a problem in Russia at the expense of the landowners who are terribly interested in their resettlement.

Active protection of the interests of the people of Kazakhstan and of the peoples of Siberia in the Duma II made the Siberian group of MPs. The first request of Siberian group filed in April 2007 to the government regarding the increase of resettlement in Siberia, a similar request they intended to file on the Steppe region. Deputies of the Kazakh population, speaking for the urgency of the request, pointed out that although this request extended across Siberia, it has a lot in common for the region and its support by the deputies of the Steppe territory is an act of solidarity. Later in the III and IV the black-hundred Duma deputies of Siberian group showed its reciprocal solidarity with the peoples of Kazakhstan.

It should be mentioned that deputies of Kazakh population participated in the Duma II from the first day as elections passed in the region timely, then, as in the Duma I deputies arrived late — almost to the point of dissolution. To the Agrarian Commission, formed in the Duma II, deputies from Kazakhstan were composed — Karatayev B.B., Laptev I.P., Golovanov I.F., from Turkestan — Aframovich K.M.The Commission started its work from May 12, 1907. As we concerned above, except the projects which remained from the Duma I were brought the project of 105, and after 6 bills from the government representing the Stolypinsky agrarian program [10; 5].

Deputies of the Kazakh population in the Duma II, entering to the Muslim fraction, took active part in the protection of the interests of the region. So, deputy Karatayev B.B. in his speech on agrarian question at the meeting of May 16, 1907 expressed simmering pain of nomadic people called by the government's reset-

tlement and colonization policy. Resettlement, the deputy points, is initiative of government and the right-wing party of the state Duma for the protection of landowners' estates. It is carried out at the price of ruin of the Kazakh population expelled not only from lands, but also dwellings. Karatayev emphasized that such agrarian policy of the government is unfair. He finished his speech with words that that Kazakhs sympathize with the opposition to the government, parties, and factions «...we hope that the Russian working masses and the Russian intelligence will be able to respond where these Kyrgyz-Kaisaks are offended» [8; 675]. The speech of Karatayev is the unmasking of the colonial policy of tsarism, with the support of the democratic forces of the Duma II, demanding real reforms in the agrarian question.

It is interesting that some democratically-minded specialists with extensive experience in the agrarian question, particularly in the resettlement fact, offered their services to the Duma. Among them A. arising in the process of approval of the annual estimates of some offices and departments of the government, in particular, of the Main Department of land management and agriculture, resettlement administration, and other annual appropriations for certain activities of States in the region [11; 9]. Projects and plans came to the commissions.

Acceleration of the Duma II was inevitable. After the implementation of June 3, 1907 coup, government elected the State Duma III. The Duma III in its composition was bourgeois-landlord, i.e. is composed of those segments of the population who defended the existing system. Another innovation of the Duma was that the national regions were deprived of voting rights, including the Steppes and Turkestan region.

The land question, as in the first Dumas, was one of the most important in the activity of the Duma III because in the real life it was no less acute than before.

It should be mentioned that the Duma III (1907–1912), unlike the Duma IV (1912–1917) related in composition and character, was that its share has fallen to the implementation of the Stolypin agrarian reform.

The land question in the Steppe region again was the cause of discussions, there were a few: in most cases, disputes arising in the process of approval of the annual estimates of some offices and departments of the government, in particular, of the Main Department of land management and agriculture, resettlement administration, and other annual appropriations for certain activities of States in the region.

The imperial government by means of the black hundreds Duma intended to realize economic transformations in Russia in the spirit of Stolypinsky reform and by that to transfer autocracy to a way of a bourgeois monarchy. In particular, in 1908, they were made all previously rejected in the previous Dumas bills aimed at stratification of the community. The Decree on November 9, 1906 and others, concerning land management of peasants was discussed. Introduction of these bills caused a wide wave of criticism and condemnation of the democratic part of the Duma. In debate on this occasion acted practically all representatives of democratic and revolutionary forces in the person of cadets, Social Revolutionaries, democrat socialists, labor groups, Muslim fraction, etc. So, Muslim fraction, including other opposition forces boycotted the discussion of the bill passed right through most of the Duma III on June 14, 1910. Muslim fraction declared that the law was issued in political goals and works in interests of a small class of land owners [12; 1307].

The right-wing of the Duma III satisfied annual requests of the Government in multimillion sums for resettlement. One of the deputy of left-wing forces from the tribune of the Duma announced mission of the annual sums demanded by the Government. «Issue of loans to immigrants, — the deputy reads the reference of the government to the estimate for 1907, — tempted with promises of the current law special promotion of the resettlement movement, is necessary» [13; 1252].

Peasants, thanks to activity of the Duma III and government, in a mass order left native places. Record transition to the Urals was in 1908 and made 758 812, and in 1912 — 259 585 people. Came back in the same 1912 of 98 388 peasants [14, 7]. Every year the estimation of Resettlement Administration grew. In 1906, it amounted to 5.6 million rubles, 1907 — 13, 000000, 1908 — 19 000 000, and in 1912 already 27.955 million rubles [15; 133]. These figures, however, do not indicate a tangible assistance to the peasants — immigrants. They reflect the increased migration movement and coverage of the deeper regions of the metropolis. It should be noted that process of migration and conditions for resettlement were difficult and exhausting for the peasants. Disorder and largely spontaneous movement of peasants, have resulted in a number of regions of Kazakhstan to the indiscriminate use of land and plowing of topsoil, increased soil erosion, deforestation of valuable forests and drying of small lakes and rivers.

Bodies of local resettlement management «closed eyes» to occupation of the best lands by immigrants at the Kazakh population that caused disorders and disorders on places.Discussion of estimates of resettle-

ment management turned into hot debate which the oppositional part of the Duma used for criticism of an agrarian policy of tsarism in Kazakhstan.

The Government and the Right majority of the Duma III demanded greater expansion of the boundaries of the relocation deep in Turkestan. So, on December 19, 1908, the deputies of the right-wing have made a request to the government, which indicated that the regional administration prevents migration movement in the Semirechye region. The request was nothing more as carefully deliberate action of the government. Turkestan administration obviously didn't suit it as didn't create conditions for resettlement to the region. It more than anyone knew that carries with it the transfer of starving peasants in the region, and to what effect the withdrawal of land from the indigenous population. Reacting to the inquiry, the government changed from the post of General-Governor Grodekov N., his Deputy and also Governor of Semirechensk. At the Head of the region was set reactionary configured General Samsonov, who took resettlement under his auspices. Purishkevich V.M. — the leader of the black hundreds party, protecting extension of colonization and resettlement from tribune of the Duma, instead «... to stop the policy of cheap liberalism and cringe before the suburbs» [16, 3060–3065].At the same time, it was characteristic for defenders of the government reforms acting on an agrarian question in the region the manner of grandiloquent and big words of «compassion» and «pity» to the Russian peasantry which was in a difficult situation in resettlement places. Moreover, in their opinion, the cause of their position were foreigners. They looked at issues of land relations through the prism of the great Russian chauvinism.

The next step of the Duma III was legislated looting of the lands of the Kazakh population in the Turkestan region. Addition to the Article 270 of the Turkestan position in April, 1909 allowed to remove the «excess» of the nomads. Oppositional to the government, forces boycotted this bill, opening from a tribune of the Duma essence of the events held by tsarism. When the right-wings on the performance of the Democrats stopped the debate, one of the deputies of the Siberian group said: «the majority of the Duma clamps mouth to the opposition MPs who want to reveal in front of the Kyrgyz population, that it is going violence, with the blessing of the State Duma of the government is given the opportunity to perpetrate the robbery over the Kirghiz» [16, 2630]. In addition, the Democrats have made request about the illegal actions of the land parties in Kulundzhynskoye parish of Semipalatinsk region, introduced the bills on the establishment of land commissions in Kazakhstan and Turkestan, about restoration from the region in the State Duma.

The right wing, using their numerical advantage, not only didn't give the course to these inquiries, but also in process of toughening of repressions in Russia, strengthened pressure upon the democratic part of the Duma III protecting interests of the Kazakh population from its tribune. It is necessary to tell that such situation concerned not only public meetings of the Duma, but also the activity of the agrarian and resettlement commission which were engaged only in development of government projects.

In suppression of opposition the Duma IV went further away. The black hundreds were openly demanding the criminalization of criticism of the government by the left-wing deputies, trying to restrict the freedom of parliamentary words.

Democrats and revolutionaries, criticizing the government's agrarian reform in the region, demanded land management of Kazakhs and legislative protection of their rights and interests. Supporting each other in the process of discussion of the bills and requests, however, each party and fraction had its own approach to this issue. So, cadets and similar groups did not reject resettlement and colonization, but offered to see off on more legal grounds, excepting cruel government measures. The existing resettlement policy was condemned by them. And as one deputy of the party specified, it «doesn't promote russification of the native population, but rather even averts them from acceptance of the Russian customs and from acceptance of the Russian culture» [16; 3021]. The red line of the speech of cadets passed the idea of the right colonization, but not refusal of it.

Social-democrats, especially those who were in the Siberian group, often from a tribune of the Duma spoke out in defense of the rights of nomads and considered a problem from positions of revolutionary, and their extremely radical decision, according to the party program. Therefore, the fraction did not want to detail some measures proposed by other opposition forces, not relying on their implementation in the existing mode. Social-democrats emphasized that only elimination of autocracy will allow to start the cardinal solution of the land question.

The labor groups and Muslim fraction had a close relationship with the region and pointed out some practical steps within the existing system. In general, they did not reject the resettlement of peasants in Asian part of Russia and Siberia, considering it possible only after the land of indigenous people. The land norms proposed by the Government for those who wishing to settle nomads, criticized them as insufficient. So, the deputy of the Siberian region the labor group member Dzyubinsky V.I. in his speech pointed that the land

management needs to be carried out with the careful account and studying of the climatic, soil and other conditions of Kazakhstan, sharply fluctuating in the region, and on this basis it is necessary to give nomads on a mixed agricultural-pastoral norm, in his view, the most rational [16; 3095].

The representatives of Muslim fraction, complementing the views of labor reflect the views of the best part of the Kazakh intellectuals, it was determined that the nomadism of Kazakhs is not a fad, and the most acceptable and convenient form in the natural environment of Kazakhstan. «Not for the pleasure Kyrgyz engages in the cattle of breeding… historical and economic necessity forces him to wander through the steppe, for this purpose he sacrifices not only personal rest but his health and life», S.Lapin writes in his project in the Duma III [17; 83]. Muslim fraction from the tribune tried to prove that nomadism is not retarded and outdated form of the production, which Government and its supporting forced of Parliament tried to present. The fraction demanded land management on cattle breeding and settled norm. Its divergence with labor group was only that they demanded to identify land in the form of a shared ancestral property, while some members of the labor group believed that personal property is better as it will reduce the dependence of the simple nomads from large cattle owners. It is impossible not to notice in these proposals a sincere desire to help the Kazakh population.

Kazakh democratic intellectuals concerned about the strengthening of the migration movement in the region didn't remain away from the problems discussed in the Duma. She saw that the majority of the Duma did not intend to suspend the resettlement process and to reckon with the interests of the Kazakh population. The part of intellectuals used the seal, which promoted the advantage of settling among nomads on the regulation, which was agreed to give their government.

Alikhan Bukeykhanov in his articles, for example, «Nomads and settled norm» published in 1914 in «Kazakh» newspaper and others, convincingly proved that nomadic ways of managing is not accidental and persisting for many years in the territory of Kazakhstan passed a difficult way of self-development, reaching a high level of perfection. Nomadism formed not only special type of production, but peculiar way of life, culture and psychology. Its sharp change means breaking complex of interrelated threads of the Kazakh nomadic society. The climate of the region, as Bukeykhanov noted, allows lead the Kazakh agriculture in only few oases, where they successfully lead. And on the contrary, in the steppe regions, where the climate is arid, few lakes and rivers, and consequently, weak fertility of soils, is simply unprofitable to be engaged in agriculture, only occupation by cattle breeding is rational. Thus, he proved that the development of agriculture is possible where «...natural historical conditions, and economic conditions were favorable» [18; 22].

Ideas of Bukeykhanov A.N., coming from historical, economic and natural factors of feasibility of nomadic life, cautious approach to it and peculiarity of the spiritual and legal spheres, had actuality not only in the historical period of the development of Kazakhstan but also in later times, in particular, at establishment of the Soviet power in the region. It is known that command and administrative method of leadership, did not take into account conditions and specifics of Kazakh nomadic society, led ethnicity on the brink of existence in the period of forced collectivization and the pale of settlement, liquidation of the kulaks and bays as class, undermining the foundations of nomadic civilization.

It should be noted that decision of the land management in the Kazakh steppe demanded to the Government not only democratic part of the Duma but Kazakh population, but the right majority, their representatives offered to carry out the land-division forcibly, expanding not only rural but industrial colonization of Kazakhstan. Land management gave opportunity, in their opinion, to reveal number of the excessive lands suitable for further resettlement of peasants. They demanded consolidation of the land but on the resettlement standards. They approved the development of the private property which ultimately would lead to the destruction of the foundations of nomadic life.

Opposition parties and fractions of the Duma IV, remaining still in the minority, continued the protection policy of the Kazakh population. However, the political situation towards country forces and the Parliament remained unchanged. Tsarism made everything that some active members of opposition during elections did not pass in the Duma IV. All this, of course, could not affect their activity on the issue, although they continued to perform their duties and their parties ' programs to protect the interests of the region. The government and the right-majority had nothing to do, as by all possible means to support a large agrarian reform which was taken a number of practical measures, for example, for restriction of farmhouse and bran farms and others.

In summary, it should be noted that the State Duma in the conditions of tsarism, of course, could not be parliamentary power of people institution, because the dictatorship and parliamentarism are not compatible phenomenon. However, The activity of the State Duma of pre-revolutionary Russia, and participation of the people of national suburbs, in particular Kazakhstan and Turkestan, put sprouts of parliamentary ideas, gave a big impulse of political and public life of the region. Parliamentary practice showed that the most difficult and actual land question at that political moment could not be solved in the interests of the indigenous inhab-

itants. But its statement from a tribune of parliament, which caused support of various public forces of Russia, had far-reaching political value. It was the historical significance of the pre-revolutionary State Duma in the fate of the peoples of the Steppes and Turkestan.

References

1 *Зиманов С.З., Идрисов К.З.* Общественно-политические взгляды М.Сералина. — Алма-Ата: Наука, 1989. — 166 с.

2 *Герценштейн М.Я.* Земельная реформа в программе партии народной свободы (конституционно-демократической). — М.: Типография Г.Лисснера и Д.Скобко, 1906. — 46 с.

3 Государственная дума. Стенографические отчеты. Созыв 1. Сессия 1. — СПб.: Гостипография, 1906. — Т. 1. — 866 с.

4 Российский Государственный исторический архив. — Ф. 1278. — Оп. 1. — Д. 350. — Л. 1.

5 Революция 1905 — 1907 годов в Казахстане: Сб. документов / Под ред. Б.С.Сулейменова. — Алма-Ата: АН КазССР, 1949. — 251 с.

6 Российский Государственный исторический архив. — Ф. 1278. — Оп. 1. — Д. 223. — Л. 1.

7 Государственная дума. Стенографические отчеты. Созыв 2. Сессия 1. — СПб.: Гостипография, 1907. — Т. 1. — 2344 с.

8 Государственная дума. Стенографические отчеты. Созыв 2. Сессия 1. — СПб.: Гостипография, 1907. — Т. 2. — 1610 с.

9 Сибирские вопросы: периодический сборник. — СПб.: В.П.Сукачев, 1905 — 1913. — № 8 (6 мая) (1907).

10 Российский Государственный исторический архив. — Ф. 1278. — Оп. 1. — Д. 777. — Л. 5.

11 Российский Государственный исторический архив. — Ф. 1278. — Оп.1. — Д. 734. — Л. 9.

12 Государственная дума. Стенографические отчеты. Созыв 3. Сессия 2. — СПб.: Гостипография, 1908. — Ч.1. — 3143 с.

13 Государственная дума. Стенографические отчеты. Созыв 3. Сессия 1. — СПб.: Гостипография, 1908. — Ч.2. — 2962 с.

14 Материалы по земельному вопросу в Азиатской России. — Петербург, 1918.

15 Государственная дума. Стенографические отчеты. Созыв 3. Сессия 5. — СПб.: Гостипография, 1912. — Ч.4. — 3822 с.

16 Государственная дума. Стенографические отчеты. Созыв 3. Сессия 3. — СПб.: Гостипография, 1910. — Ч.3. — 3140 с.

17 Российский Государственный исторический архив. — Ф. 1396. — Оп. 1. — Д. 258. — Л. 83 об.

18 *Букейханов А.Н.* Киргизы // Формы национального движения в современных государствах / Под ред. А.И.Костелянского — СПб., 1910. — 600 с.

Ғ.З.Қожахметов

Революцияға дейінгі Ресейдің Мемлекеттік думасы (1906–1917 жж.) және оның Дала және Түркістан аймағындағы аграрлық мәселеге қатынасы

Мақалада алғашқы ресейлік парламенттің қызметі және онда Дала аймағындағы аграрлық дағдарысты қарауы туралы айтылды. Ресейдің саяси және қоғамдық күштері мен олардың патшалық жер аудару саясаты мәселесіне қатысы көрсетілген. Дағдарысты еңсерудің түрлі жолдарын ұсынған аймақ депутаттарының қызықты баяндамалары жарияланған. Ресей революциялық және демократиялық күштерінің Дала аймағының тұрғылықты халықтарының мүдделеріне қолдау көрсетулері қарастырылған. Сонымен катар патшалық кезеңдегі Думаның алдына қойылған міндеттерді шеше алмауы, бірақ самодержавиелік тәртіпті сынауға алу нысаны болғаны туралы атап көрсетілді. Думаның тарихи мәні аймақтағы қоғамдық-саяси көзқарасты жандандырды және парламентарлық идеялардың негізін қалады.

Г.З.Кожахметов

Государственная дума дореволюционной России (1906–1917 гг.) и ее отношение к аграрному вопросу в Степном и Туркестанском крае

В статье раскрываются деятельность первого российского парламента и рассмотрение в ее стенах аграрного кризиса в Степном крае. Показаны политические и общественные силы России и их отношение к вопросам переселенческой политики царизма. Освещены наиболее интересные выступления депутатов края, предлагавших различные пути преодоления кризиса. Показана поддержка революционными и демократическими силами России интересов коренных жителей Степного региона. В статье отмечается, что Дума не могла решить в условиях царизма поставленных перед ней задач, но стала местом критики самодержавного режима. Историческое значение Думы заключалось в том, что благодаря ей активизировалась общественно-политическая жизнь края и были заложены ростки парламентарных идей.

References

1 Zimanov S.Z., Idrisov K.Z. *Public and political views of M.Seralin*, Alma-Ata: Nauka, 1989, 166 p.

2 Gerstenshteiyn M.Ya. *The land reform in the program of the party of national liberty (constitutional and democratic)*, Moscow: The printing press of G.Lissner and D.Skobko, 1906, 46 p.

3 The State Duma. Verbatim records. Convocation 1. Session 1, Saint Petersburg: State Printing House, 1906, t. 1, 866 p.

4 Russian State Historical Archive (RSHA), f. 1278, i. 1, c. 350, s. 1.

5 Revolution of 1905–1907 in Kazakhstan.The collection of documents, edited by B.S.Suleimenov, Alma-Ata: Academy of Science KazSSR, 1949, 251 p.

6 Russian State Historical Archive (RSHA), f. 1278, i. 1, c. 223, s. 1.

7 The State Duma. Verbatim records. Convocation 2. Session 1, Saint Petersburg: State Printing House, 1907, vol. 1, 2344 p.

8 The State Duma. Verbatim records. Convocation 2. Session 1, Saint Petersburg: State Printing House, 1907, vol. 2, 1610 p.

9 Siberian issues: periodic collection, Saint Petersburg: V.P.Sukachyov, 1905–1913, 8 (May 6). (1907).

10 Russian State Historical Archive (RSHA), F. 1278, i. 1, c. 777, s. 5.

11 Russian State Historical Archive (RSHA), f. 1278, i. 1, c. 734, s. 5.

12 The State Duma. Verbatim records. Convocation 3. Session 2, Saint Petersburg: State Printing House, 1908, P. 1, 3143 p.

13 The State Duma. Verbatim records. Convocation 3. Session 1, Saint Petersburg: State Printing House, 1908, P. 2, 2962 p.

14 Materials on the land issue in the Asian Russia, Petersburg, 1918.

15 The State Duma. Verbatim records. Convocation 3. Session 5, Saint Petersburg: State Printing House, 19122, P. 4, 3822 p.

16 The State Duma. Verbatim records Convocation 3. Session 3, Saint Petersburg: State Printing House, 1910, P. 3, 3140 p.

17 Russian State Historical Archive (RSHA), f. 1396, i. 1, c. 258, s. 83 lb.

18 Bukeykhanov A.N. Kyrgyz. *Forms of national movement in the modern countries*, edit. by A.I.Kostelyansky, Saint Petersburg, 1910, 600 p.

UDC 342.5

N.S.Akhmetova, A.A.Mausymbayeva

Ye.A.Buketov Karaganda State University
(E-mail: lady_iyunskaya@mail.ru)

About the model of separation of powers in the Republic of Kazakhstan

In this article we analyzed all kinds of organization of state power, which in legal science taken to reduce to a few typological models, depending on the form of government. Within the framework of the modern legal integration the features of that models of separation of powers, which are implemented in the practice of developed countries in legal terms are disclosed that can detect a specific historical identity of each of these models. Detailed analysis of types of organization of the state power in terms of their membership of a particular model of separation of powers is theoretically possible to determine the potential and practically realized model of separation of powers and form of manifestation (implementation) in the Republic of Kazakhstan.

Key words: model of separation of powers, «checks and balances», the principle of separation of powers, a form of government branch, state power.

Finding the best forms of organization of power, the study of the mechanism of its implementation permeate the entire history of political thought. The rudiments of the doctrine of separation of powers is already discernible in the works of prominent thinkers Ancient Greece and Ancient Rome. Among them are Aristotle (384 — 322 BC.), Epicurus (c. 341 — c. 270 BC.), Polybius (c. 201 — c. 120 years. BC. e.). However, the authorship belongs indisputably two thinkers who have been to a certain extent the forerunners of the revolutionary changes in their respective countries: the Englishman John Locke (1632 — 1704) and Frenchman Charles Montesquieu (1689 — 1755) [1].

State formation and resulted in the specialization of power of different persons and institutions in which early discovered two stable trend: the concentration of power in the hands of one or a single institution and the need to share power, work and responsibility. Hence two consequences of this dual relationship to power:

a power struggle already separated institutions and against the division, on the one hand and the pursuit of arrange the division of powers and rid society of collisions between them on the other.

The first division of power began early in the secular state since the separation of the functions of professional power. Aristotle already noted the existence in it of the legislative body — the Judiciary (executing agency) and the judiciary. Is a division of power between central and local government, formed more complex political system of society, the authorities at different levels and with different functions. Development of the division of power was ultimately one of the institutional foundations of the state of modern times, which functions as a system of functional separation, and associated institutions, and government units. Developing at the same time, trade and industrial bourgeoisie supported at first absolutist monarchical center and helped strengthen it, but it was and access to power, which has proved to a certain measure, and divided between the classes and the classes and the access was opened, first of all, in the emerging central regulatory (legislative and representative) structure.

Further development of separated powers were several parallel paths:

1. being centralized parliamentary structures, displacement of parliamentarism in the center with all the ideology and technology of formation of representative government (its elective, principles of organization, etc.);

2. to strengthen and improve the central government executive power and especially its vehicles, staff of civil servants;

3. Complete the formation arose in the Middle Ages, feudal system of supervision and administration of justice, transfer the judicial functions of the ruling tops — socialized judicial body [2; 330].

Division of power to the branch, independent in relation to each other, is designed to ensure that eventually the necessary balance of interests, which makes the power of whole and united. The balance of power is not constant and unchanging. He is dynamic in the situation often changing political conditions and factors, retaining, however, the fundamental importance of their «circuits» [2; 329].

Historically, there were two typical model of separation of powers, which are based on the principle of separation of powers and forms of government: presidential and parliamentary. The main criterion that allows to distinguish between them is the degree of structural and functional separation of legislative and executive powers.

Parliamentary model of separation of powers in the form of a constitutional monarchy is the result of a long evolutionary process of transformation of the absolute monarchy in limited since the XVII century. The complexity of the analysis of this model is to understand the most important component of the British Constitution — constitutional agreements. It agreements are a form of expression mechanisms of containment and control branches. In other words, the principle of separation of powers and its logical continuation — a system of checks and balances — in the British Constitution establishes the first constitutional treaty [3; 27].

Model of separation of powers are divided into two types:

1) the horizontal model of separation of powers — this is the model of separation of powers, in which there are three branches of government, ie, legislative, executive and judicial;

2) the vertical separation of powers model — a model of separation of powers, describes the powers, which are distributed among the subjects of government at various levels. For example, this model of separation of powers widely used in federal states (Russia, USA), where the head of state federations are subject to the president of the federal subjects (states). And not only in this form of government, we can see the model, but also in the republics. For example, the chief executive — the Prime Minister, and by subordinate ministers are various spheres of activity of the state (economic, educational, military, transportation it.d.).

Thus, the model of separation of powers is the source of the form of government, as a form of government determines system organization supreme bodies of state power and interaction with each other for not difficult to determine the model of separation of powers.

Among the classical principles that distinguish the country with a parliamentary form of government, usually distinguished: the supremacy of Parliament; the formation of the executive branch on the basis of a parliamentary majority; Political responsibility of government to parliament; Institute of early dissolution of parliament as a kind of counterweight to the executive branch against «vote of no confidence.»

The rule of parliament determines its position as the supreme legislative body. 'But most of the bills passing through Parliament, belongs to the executive branch, which actively uses the right of legislative initiative. The government may apply to the bodies of the constitutional supervision, can «advise» the head of state have voted to return the bill to parliament for reconsideration. Of course, that the desired effect, these measures can provide only in the case when the government is based on a parliamentary majority.

Formation of the government in parliamentary states, usually the prerogative of the President. However, according to the head of state constitutional conventions in the appointment of members of the cabinet should opt for the member parties having a parliamentary majority. Thus, the government is increasingly dependent on the rules and usages adopted in the party than by constitutional norms. At the same time, it should take into account that the government even formed from the party leaders are not legally related party solutions. More over, cabinet of ministers actually performs the functions of the governing body of the parliamentary faction of the ruling party [4; 426].

In parliamentary countries, the head of state, usually directly involved in the management of the affairs of the state will not accept. The head of state is not the head of government and generally not part of the government. Institute kontrassignatury deprives the Head of State to act on your own. Monarch or president has a mostly ceremonial, and ceremonial duties. All acts formally posed by the head of state, prepared and implemented by the government. At the same time the head of state is endowed with considerable powers to enable it to provide coordinated functioning of public authorities, act as a guarantor of the Constitution, national independence and territorial integrity [5; 109].

Thus, «in the parliamentary forms of government, there are legal mechanisms for coordinated functioning of the legislative and executive authorities to ensure the necessary unity of action, as well as the constitutional mechanisms for resolving conflicts between them, restoring, maintaining their coordinated action, balance.» However, in the absence of a developed party system, a stable political regime sharply raises the question of the social base of the government. Direct dependence on the volatile public opinion in this case, turns permanent government crisis [6; 113].

Presidential form of government characterized by a large detachment of powers, independence in relation to each other, their formal equality. In order to ensure that all branches of the government formed a special mechanism of checks and balances.

Legal equality of the branches of government is manifested in the «hard» separation of functions and powers between the holders of power. Each of the state and government bodies responsible to the different categories of voters. Legislative power initiates and adopts laws. Executive power is the right of legislative initiative does not have. Its representatives have no right to not only participate in the discussion of the bill in the parliament, but even the right of access to the House of Parliament. The executive branch is involved in the legislative process through a suspense veneto, the president has the right to return to parliament normative act for a second discussion. Overcoming a presidential veto requires a qualified majority, which gather parliamentarians is not always easy.

At the same time secured the independence of the legal executive. Firstly, the executive bodies are formed independently of Parliament. The head of state, as the sole carrier of executive power, as a rule, popularly elected. Heads of government agencies actually only advisers and aides. The Cabinet of Ministers — an advisory and coordinating body under the president who does not have special competence. The decision on any matter falling within the jurisdiction of the constitution of the executive power, takes only the president. The head of state in a presidential republic plays a leading role in managing the affairs of the state. He is the head of the armed forces and the supreme leader of the administrative apparatus.

Second, in a presidential republic there is no institution of parliamentary accountability of the government. Parliament can not express no confidence in the government, and thus force him to resign. However, it should be noted that the structure of the executive departments parliament determined by the decision, and the appointment to senior military and civilian positions made president «with the advice and consent» of representative government. In addition, the executive denied the right to an early dissolution of Parliament and calling early parliamentary elections [7; 357].

One of the advantages of presidentialism — institutional and legal stability of the executive branch — acquires a negative value. President, relying on the armed forces, effectively deprives legislators real impact on public policy. Hypertrophy of the functions and powers of the president inevitably involves the transformation of the form of government in the super-presidential republic (with the particular combination of the presidency poludiktatorskim board). Power of the president in the case of a weakly controlled by other public authorities. A significant impact on the functioning of the government machinery has an army.

Thus, in a presidential form of government becomes particularly acute problem of interaction between the authorities, coordination, harmonization of their activities, conflict resolution, the successful solution of which is possible only with careful balancing of the functions and powers of the authorities, consolidating the legal forms of interaction. It is particularly important to create guarantees against degeneration presidential form of government in an authoritarian regime.

For the parliamentary model of separation of powers, of course, the most important is to rationalize the institutions of political accountability of the executive and the procedure of forming a government. In order to prevent a government instability in the absence of a stable majority, the constitution provides for a certain number of procedures (rules), providing the cabinet to a certain independence from the balance of power in parliament.

In particular, it is presumed that the government is in power, has the confidence of Parliament and remain in office until such time as there is no legally witnessed the opposite, that is, the government is not obliged to resign at any disadvantage for him vote in parliament. Distrust of deputies present composition of the Cabinet shall be recorded in a specially adopted resolutions of censure. In Germany, the presumption of trust transformed into a presumption of «positive majority.» This means that for the removal of the government to resign necessary Failure to register distrust deputies actions of the Cabinet, but a statement of fact that Parliament has developed a new majority [8; 110].

Traditionally, in a parliamentary system of government members do not participate directly in the formation of the government, because the government does not need a special trust, in order to begin his duties. Streamlined shape suggests a direct and immediate participation of the representative body in the process of forming a government (vote of confidence the newly formed government and its program, multiple consultations, etc.).

However, the collective nature of the government giving way to the sole authority of the Prime Minister. According to the head office is decisive in any decision. In case of differences of opinion Prime Minister may require the resignation of any minister.

Thus, the rationalization of the parliamentary system is, on the one hand, the restriction of Parliament, on the other hand, the formal expansion of its powers. Parliament loses the ability to impose its will on the government, however, reserves the right to constructive criticism of its activities, monitoring, adjustment and approval of policies and actions of the government. The government, acting as the initiator of most bills, aware of the comments of parliamentarians and take appropriate amendments in the policy. Emerging conflicts if it is not settled by compromise, shot by resignation of the cabinet or the dissolution of parliament and early elections [9; 107].

Constitutional model of the mixed form of government involves a complex structure of executive power, including the institution of the presidency and relatively independent government. The Government, as the highest executive authority, integrates and coordinates the activities of the executive departments. The President, as head of state, has a dominant role in relation to the government. Thereby overcome the possibility of dualism executive. If the parliamentary regime head of state plays the role of a neutral force, is intended only as national integration, a mixed form of government, head of state is central to the system of state-governmental bodies. It ensures compliance with the Constitution, the normal functioning of state bodies and the supreme representative of the country. It has real powers to implement these prerogatives [10; 112].

At the same time, the president is not the exclusive carrier of the executive power, as in the presidential form of government. Media executive power — the Government. Government as a collective body of senior management, is the chief administrator of credits assigned to it pursuant to the state budget at his disposal significant financial resources, administration and armed forces.

Activities of the government headed by the Prime Minister. He was appointed head of state discretion which is connected to the unwritten rule that the prime minister should take a person who enjoys the confidence of the parliamentary majority, as Parliament approves the proposed head of government cabinet ministers. In a parliamentary form of government, head of state can not displace the premiere of a credible parliament. Head of state of the mixed form of government, in principle, not bound by any obligations to the «majority party», it is allowed to displace the head office at any time.

The head of government to implement the law assigns to public office (if the appointment that is not the prerogative of the President), is responsible for national defense, determines the goals and objectives of public policy, gives instructions executive departments coordinate their work, playing the role of mediator between the executive and legislative authorities.

The principle of non-responsibility Head of State assumes countersigning his acts of the Prime Minister and the ministers responsible for them in front of parliament. Institute of accountability by government to parliament distinguishes this form of presidential republic and brings it with a parliamentary form of government [11; 37].

Mixed (semi) republic combines the features and the presidential and parliamentary republic. But the combination of this is different.

For example, according to the Constitution of the French Republic in 1958 President elected by the citizens and leads the government, which is characteristic of a presidential republic. At the same time, the government designee must enjoy the confidence of the lower house of Parliament -National Assembly, which is typical for a parliamentary republic. However, the President may dissolve the National Assembly in its sole discretion, which is not typical for either one or for the other species of the republican form of government.

Experience has shown that this form of government is effective, provided that the government based on a parliamentary majority, and the president share the same political orientation. Otherwise, between the President on the one hand and the Prime Minister and the parliamentary majority — the other may have a conflict, for which permission is not always sufficient constitutional means.

In a number of countries the president is elected by the citizens, which is characteristic of a presidential republic, and has a number of powers, giving him the opportunity to be actively involved in the political process, but in practice it does not use them. Examples are Austria, Ireland, Iceland.

Peculiar form of government in Switzerland. The government is appointed by Parliament and accountable to it, but the political responsibility of government to parliament constitutionally not provided, and the state regime, therefore, dualistic.

Institution in the government of the Republic of Belarus has significantly strengthened the presidential post in our society attention to the institution of the presidency in different political systems. Introduction of the institute opened a new stage in the development of Belarusian statehood. Meanwhile, out of 183 countries that were part of the beginning of 1993, the United Nations, more than 130 have in their polity presidency. On the one hand, this figure reflects the magnitude of the spread of the presidency in the modern world, but on the other — it is important to note that different countries have different amounts of presidential powers.

Separation of state power into legislative, executive and judicial (Art. 6 of the Constitution) does not mean the absence of the need to ensure their interaction. In this connection, usually abroad established the post of head of the state (the monarch, president), which is the official occupying the highest position in the government system.

Analysis of the constitutions of many other countries shows that the head of state or output over all branches of government, or included in the legislative and executive branches of government, or only in the executive branch.

Board monarchy Republic

It should be noted that in many constitutions of the term «head of state» is not explicitly mentioned. The literature usually meant is the monarch or president of the country. It is the head of state provides a higher representation of the country, often it is the symbol of the state and the unity of the nation.

As noted by MA Krutogolov doctrine presidential arbitration has clearly monarchist roots, where the head of state has a very important function — bringing together the public authorities, carrying out mediation between them, the President thus towers over all other government agencies. Although it should be noted that the powers of the head of a state depends on the form of government. Sometimes they are purely nominal, such as monarch in the UK, often — quite substantial, as in the US, France, Russia and Kazakhstan. Jure and de facto head of state is predetermined position as an emerging political conditions and historical traditions.

Usually operates individual head of state, but there are exceptions, for example, in Switzerland as head of state is a collegiate body of the Federal Council, composed of members elected by Parliament for a term of four years. Chairs the Federal Council fulfills President of the Swiss Confederation is elected by parliament for one year from among the members of the Federal Council.

Mediation President has rather political than purely legal nature: in fact, the Constitutional Court of Belarus in the legal sense has extensive rights, including in relation to the settlement of disputes on competence by examining the constitutionality of laws and regulations.

Above the President is the only final arbiter — the people. He is the source of state power and the bearer of sovereignty. In the case where the differences between the branches of government can not be removed, it is appropriate to his appeal to the people to ensure that the referendum issue was resolved in favor of one or another.

The President has sole authority only when not needed and do not need countersigning otherwise any part of another public authority (eg, suggestions, agreement).

A major impact on the shape of the state has a cultural level of the people, their historical traditions, the nature of religious worldviews, national characteristics of natural living conditions, foreign experience, sub-

jective factors, etc. Social causes to the fore more often during periods of revolutionary events, such as during and after the bourgeois revolutions in Europe and America: a young, progressive bourgeoisie, who led the general population, has made limited power of the monarch, the elimination of absolutism, establishing a dualistic or parliamentary monarchy, and sometimes the republic (for example, in the US). Following the US presidential republic established in Latin America. Finally, enhancing the role of parliament in several countries in Europe and Asia led to a parliamentary republic. After the collapse of totalitarian regimes since the beginning of the 90s, this process is developing in many countries in Africa. In the course of historical development were peculiar twists: republic under fascism, led by the Fuhrer, Duce, Caudillo little essentially different from the monarchy (although the legal form was different), and the republic in socialist countries, the countries of the socialist and capitalist orientation (mainly in Africa) with a one-party system and the proclamation of the Constitution leading role of one party retains the authentic republican littlefeatures.

Separation of monarchies and republics, and their internal classification of the absolute, dualistic, parliamentary monarchy, presidential and parliamentary republic always had and now have a fairly rigid.

In the previous chapter criteria for distinguishing forms of government and today retain their value, all of them (except clearly expressed Dual Monarchy) exist in different countries of the world. But based on them, and along with them by combining and new features are previously unknown form, and this trend is gaining momentum, " clean ', traditional forms, there are fewer and forms of governance in emerging countries (eg, the decay of the Soviet Union, Yugoslavia, Czechoslovakia), as a rule, connect different features. In this case, we are not talking about that in the developed capitalist countries, and sometimes in some developing countries, based on the democratization of political regimes have practically lost the distinction between monarchy and republic (nature of the monarchy in the UK or Japan are not much different from the Republic of France or Italy). Speaking of mixed and «hybrid» forms of government, we are celebrating the fact that lost rigidity of existing classifications and legal grounds: combine the features of the republic and the monarchy (eg Malaysia), absolute and constitutional monarchy (Kuwait), presidential and parliamentary republic (Colombia on the constitution in 1991).

There are several reasons. Firstly, the practice of recent decades shows that the controllability of the state, it is important not so much the separation of powers and the system of checks and balances (these moments provide democracy in governance, rule out the concentration of power in the hands of a single body) as required to establish relationships, interaction, consistency between the work of the supreme bodies of the state. The absence of this, as the experience of confrontation legislative and executive power in Russia (and partly — and within the executive branch), leads to a crisis of the entire political system. Creation of mixed and «hybrid» forms improves the interaction of the state, although this is either by reducing the role of Parliament, or by reducing the powers of the president, or by establishing a government submission both parliament and the president, which creates some uncertainty in its position. Some pros are almost always accompanied by certain disadvantages, such as the tendency of repression role of government sole authority of the Prime Minister in a parliamentary form of government.

Secondly, the «pure» form board have drawbacks such as the form. For example, a presidential republic tends to presidential authoritarianism. This is clearly evidenced by the emergence of super-presidential republic in Latin America, as well as presidential-monistic republics in Africa. For the same parliamentary republic is characterized by government instability, frequent government crises and resignation. As a parliamentary republic and a parliamentary monarchy government depends on the parliamentary majority (and it often is accomplished by coalitions of different political parties), the loss of this support leads to no-confidence vote. In Italy, for example, the government has held power in less than a year on average, although the party composition of the government is usually almost unchanged, and personal reshuffle insignificant.

However, the performance in favor of changing the form of government in this country in recent years have increased dramatically, and it seems that this time will not go in vain. The inclusion of elements of a presidential republic in parliamentary and presidential parliamentary, other methods helps to overcome the shortcomings of «pure» forms.

Third, the emergence of mixed, «hybrid» forms associated with the spread and the perception of a growing number of countries in the world of human values, the influence of humanistic ideas and institutions. Under the influence of these ideas in the emirates of the Persian Gulf (Kuwait, Qatar, Bahrain, UAE, in 1992 in Saudi Arabia — the state, the most stubbornly resisted the ideas of constitutionalism) adopted the constitution. However, these acts are not the constitution in the full sense of the word, because it does not limit the power of the monarch, because, even where they are not suspended and dissolved parliaments (in

Kuwait, for example, elections are held), the basic laws declare that all power comes from the monarch parliament actually even legally (Qatar, UAE and others.) is a consultative institution [12].

The acquisition of state sovereignty and education on the political map of the world of independent Kazakhstan led to the need of the domestic production model of the organization of state and government. President of Kazakhstan Nursultan Nazarbayev to determine the prospects of the process of formation of the modern Kazakh statehood, noting that now the people of Kazakhstan have «serious prospects on the basis of existing achievements formation of a new type of state in terms of... XXI Century» [13; 76].

Model of separation of powers determined by the structure and legal status of the supreme bodies of state power. Nature of the model of separation of powers depends on the organization of the supreme state power. The models differ depending on whether an supreme power in the state to one person, or it is carried out by means of various democratic institutions [14; 224].

Of all the elements of the form of the state is recognized as the most important model of separation of powers, which has a significant impact on the development process of a new state of the Republic of Kazakhstan, which is still in its infancy, the development and approval of state-political practice for the new Republic of legal and administrative controls.

At the same time, after fifteen years we can draw some conclusions and analyze the prospects of development of forms of government in the conditions held in the Republic of constitutional and administrative reforms.

Historical traditions of the Kazakh state, the recent history of state-legal formation of independent Kazakhstan determined the choice of country presidential form of government in which the President is the head of state and the executive branch, its highest official determining the main directions of domestic and foreign policy, and, in fact, a national leader. However, development of the democratic foundations of the constitutional system of Kazakhstan has necessitated further improve relations in the organization of the supreme bodies of state power, the redistribution of functions and powers in the executive branch, strengthening parliamentary control over the executive power, which led to a transformation of the form of government of the Republic of Kazakhstan in the presidential-parliamentary republic [15].

Formed in one state or another system of government institutions, the mechanism of their interaction has its own characteristics, which are explained by various factors and circumstances which, as a historically conditioned nature of the objective, and is influenced by subjective factors. The main subjective factor is the presence in the government figures, able to assume responsibility for the state.

Problems of formation and development of the presidential form of government consists in the organization. operation and interaction between the legislative, executive and judicial power with the institution of the President of the Republic of Kazakhstan. Detailed research deserve structural and functional aspects of implementing powers of the head of state, the search for new tools and technologies for their implementation [16].

Research of the republican model of separation of powers of the Republic of Kazakhstan at the present stage of its development due to the fact that the problem is complex both in practical and theoretical terms. The current state of scientific elaboration of the concept «Republican model of separation of powers» does not allow full use of it as a basic design for fundamental theoretical research. All this complicates the search for objective laws of development of the republican model of separation of powers in the formation of the new socio-political system of the Republic of Kazakhstan, Kazakhstan's model to examine the compatibility of the presidential system of government together historical, social, political and other prerequisites for its formation level of political and legal culture, mindset and psychology population, as well as a range of other social factors [4].

According h. 1, Art. 2 of the Constitution is a state with a presidential form of government. However, analysis of the content of the Constitution, in particular the system of state bodies, shows that in terms of the accepted classification model of separation of powers Kazakhstan is not presidential, and mixed republic functioning under a presidential type. As you know, in the classic presidential republics there is no institution of political responsibility of the Government to the Parliament and the President does not have the right to dissolve Parliament. The Constitution of Kazakhstan as we find the possibility of expressing a vote of no confidence in the Government (para. 6 and 7, Art. 53) and the possibility of dissolution of Parliament by the President (Art. 63) [17].

Thus, the first conceptual document, allowing the construction of its own state, has become a «Declaration of State Sovereignty of the Kazakh Soviet Socialist Republic», adopted on 25 October 1990. Head of the republic became president who possessed the supreme administrative — executive. Presidency was established by the Law of the Kazakh SSR on April 24, 1990. It pointed out that the president is the head of the

Kazakh Soviet Socialist Republic. The President does not belong to the executive branch. He had the right to grant the Supreme Council of the Kazakh SSR candidacy for the presidency of the Council of Ministers of the Kazakh SSR, as well as put before the Supreme Council of the Kazakh SSR question of resignation or accepting the resignation of the Council of Ministers. At that time the president was the head of the Kazakh SSR, which is part of the Soviet Union, so it reflects the peculiarities of the relationship status of the Union State with its part — the Federal Republic. (Nysanbaev A., M.Masha Murzalin J., A.Tulegulov. The evolution of the political system of Kazakhstan in 2 vols. — Almaty: Home Edition «The encyclopedia of Kazakh «, 2001 2 vol. — S. 201) 20 November 1990 signed the Law «On improvement of the structure of state power and control in the Kazakh SSR and amendments to the Constitution (Fundamental Law) of Kazakh SSR», according to which it was found that the president is the head of the Kazakh SSR highest executive and administrative authorities. The 1993 Constitution was established a clear subordination of government to the president, who became both head of state and the person heading the single system of executive power. Thus, in this Constitution referred to the establishment of a presidential form of government, but it is still important to be secured beginning of a presidential republic [18].

In Kazakhstan, for that matter, in other CIS countries, there was a time lag between the establishment of the institution of the presidency and the presidency. Since the election of Nursultan Nazarbayev to the office of President of the Constitutional fixing it took almost three years — April 1990 — 1993 years. From the outset, the President of Kazakhstan was declared head of state and head of the executive power, but until the middle of 1991, and he combined the post of first secretary of the Central Committee Communist Party of Kazakhstan.

This can be explained by the fact that currently give to know the Soviet Union took place in fusion state with a single party. At that time, there could be no question of division of party leader and head of state, without prejudice to the authority of the latter. When it became possible, «the presidency took on the role the supporting structure of the entire system of state power, replacing it as the Communist Party. So he better than anything else yet, focuses in itself and expresses the essence of what is happening in the post-Soviet societies. Through the prism of presidencies clearly seen similarities and differences in the lives of the former Soviet republics « [19; 5].

The 1995 Constitution legally enshrined the country's transition to a presidential model of separation of powers, according to which there was a fundamental overhaul of existing schemes in Kazakhstan distribution of powers. The Basic Law was made as a tool for the concentration of power in the executive branch. It has significantly strengthened presidential power, as expressed in a certain centralization of power. According to some researchers, the Constitution of 1995 «conclusively established in Kazakhstan presidential republic with all the ensuing political repercussions. Parliament Modern Kazakh Parliament replaced unicameral body of representative power — the Supreme Council, which was first formed on the basis of the Constitution of the Kazakh Soviet Socialist Republic in 1937, and then — on the basis of the Constitution of the Kazakh Soviet Socialist Republic in 1978 and the Constitution of the Republic of Kazakhstan in 1993. The Constitution of 1995, which proclaimed Kazakhstan presidential republic and constitutional law «On the Parliament of the Republic of Kazakhstan and the status of its deputies», «On the Government of the Republic of Kazakhstan», «On judicial system and status of judges» settled the status and function of each branch of government [20].

The formation of the new Kazakh model of realization of the government, based on the implementation of the principles of separation of powers and of «checks and balances», the decentralization of many governance issues. development of civil society led to the need to develop both theoretical background, management models of interaction between public authorities relating to its various branches, and tested these models in practice through direct state-power activities.

The Constitution of the Republic of Kazakhstan laid such structural-functional model of the exercise of public authority, which shall: a) ensure that state power belongs to the people of Kazakhstan: b) to ensure its stability and efficiency, the actual governance activity in the country using its capacity and resources: a) practically implement facing the state goal.

At the same time must recognize the need to improve many aspects of the interaction between the system of presidential power, the executive power with the institutions of the legislative (representative) power, the courts, the supervisory bodies, regional and local authorities.

To strengthen the interaction between different branches of government directed Decree of the President of the Republic of Kazakhstan № 1568 dated March 4, 2005 «On measures for the further use of the potential of the Constitution of the Republic of Kazakhstan.» The decree aims to further use of the potential

of the Constitution of the Republic of Kazakhstan, the implementation of a phased process of political modernization of Kazakhstan society and the state, increasing the role of the Parliament of Kazakhstan [21].

In conclusion, it should be noted that the above model of separation of powers for the implementation of effective powers of state bodies, the head of state and the relationship between them and the model of separation of powers is closely linked to the form of government state, because the model of separation of powers is the source of the form of government of the state. This can be explained by the fact that based on the form of government clearly divided powers between the branches of government that gives analyze and determine what will be the model of separation of powers.

Since Kazakhstan at the present stage of existence is a «young» state, the political reforms that are taking place in the world and in our country, directed on the gradual emergence and formation of a democratic and legal state with a socially relevant interests, development of society, which operates through the market and legal relationships education citizens.

References

1 Федеральный Конституционный закон «О судебной системе Российской Федерации» от 31.12.1996, N 1-ФКЗ, НГР: P9606130. — [ЭР]. Режим доступа: http://base.garant.ru/10135300/; п. 1 ст. 6 ФЗ «Об общих принципах организации законодательных (представительных) и исполнительных органов государственной власти субъектов Российской Федерации» от 06.10.99. N 184-ФЗ, НГР: P9503508P0003584. — [ЭР]. Режим доступа: http://base.garant.ru/10135300/

2 Политология: Энцикл. сл. / Общ. ред. и сост. Ю.И.Аверьянов. — М.: Изд-во Моск. коммерческого ун-та, 1993. — 432 с.

3 *Лузин В.В.* Парламентарная модель разделения властей (на примере Великобритании) // Право и политика. — № 6. — 2000. — С. 27–37

4 *Дайси А.В.* Основы государственного права Англии: Введение в изучение английской конституции. Пер., доп. по 6-му англ. изд. / Виноградов П.Г.; Пер. О.В.Полторацкая. — 2-е изд. — М.: Тип. И.Д.Сытина, 1907. — 707 с.

5 *Перегудов С.П.* Разделение властей по-британски // Мировая экономика и международные отношения. — 1993. — № 6. — С. 101–109.

6 *Суворов В.* Разделение властей: проблемы использования зарубежного опыта // Право и жизнь. — 1994. — № 5. — С. 107–126.

7 *Чиркин В.Е., Тихонов А.А., Рябов С.В.* Формы государства в буржуазных странах Латинской Америки. — М.: Наука, 1982. — 193 с.

8 *Чиркин В.Е.* Нетипичные формы правления в современном государстве // Государство и право. — 1994. — № 1. — С. 109–115.

9 *Стародубский Б.А.* «Рационализация» парламентарной системы в капиталистических странах Европы // Советское государство и право. — 1984. — № 7. — С. 105–112.

10 *Чиркин В.Е.* Нетипичные формы правления в современном государстве // Государство и право. — 1994. — № 1. — С. 112–115.

11 *Черкасов А.И.* Форма правления в странах современного мира (науч.-аналит. обзор) // РЖ ИНИОН РАН. — Сер. 4 (зарубеж., лит.). — 1995. — № 1. — С. 25–41.

12 [ЭР]. Режим доступа: http://bibliofond.ru/view.aspx? id=528773

13 *Назарбаев Н.А.* В потоке истории. — Алматы: Атамура, 1999. — 298 с.

14 *Бушуев И.И.* Разделение властей в федеративном государстве: Дис. ... канд. юрид. наук: 12.00.01. — М., 1997. — 224 с.

15 [ЭР]. Режим доступа: http://www.dissercat.com/content/forma-pravleniya-respubliki-kazakhstan-konstitutsionnaya-model-i-praktika-gosudarstvennogo

16 [ЭР]. Режим доступа: http://law.edu.ru/book/book.asp? bookID=1302826

17 Конституция Республики Казахстан от 30 августа 1995 года. — [ЭР]. Режим доступа: http://adilet.zan.kz/kaz/docs/K950001000_

18 *Ашимбаев М.* Институт президентства в Казахстане: становление и эволюция. — [ЭР]. Режим доступа: http://www.centrasia.ru/newsA.php? st=1027888740

19 *Кувалдин В.Б.* Президентство и демократия // Свободная мысль. — 1998. — № 2. — С. 4–5.

20 [ЭР]. Режим доступа: http://bibliofond.ru/view.aspx? id=539013#1

21 Указ Президента Республики Казахстан № 1568 от 4 марта 2005 г. «О мерах по дальнейшему использованию потенциала Конституции Республики Казахстан» (утратил силу Указом Президента Республики Казахстан от 28 августа 2007 г. № 400). — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/U050001568_

Н.С.Ахметова, А.А.Маусымбаева

Қазақстан Республикасындағы биліктің бөліну моделі туралы

Мақалада құқықтық ғылымда басқару түрлеріне байланысты бірнеше типологиялық модельдерге жататын мемлекеттік биліктің ұйымдастырылуының барлық түрлері сарапталған. Құқықтық дамыған мемлекеттердегі тәжірибе жүзінде қолданысқа енген қазіргі заман құқықтық интеграциясындағы биліктің бөліну модельдерінің ерекшеліктері зерттелген, осы ерекшеліктер негізінде әр модельдің нақты-тарихи өзгешелігі айқындалды. Биліктің бөліну модельдерінің қайсыбір түрлеріне жататынына байланысты мемлекеттік биліктің ұйымдастырылу түрлерінің терең сарапталынуының теориялық мүмкіндігі, тәжірибелік қолданылатын биліктің бөліну модельдері және Қазақстан Республикасындағы басқару түрлері анықталды.

Н.С.Ахметова, А.А.Маусымбаева

О модели разделения властей в Республике Казахстан

В статье проанализированы все разновидности организации государственной власти, которые в правовой науке принято сводить к нескольким типологическим моделям, в зависимости от формы правления. В рамках современной юридической интеграции раскрыты особенности тех моделей разделения властей, которые реализованы в практике развитых в правовом отношении государств, что позволяет обнаружить конкретно-историческое своеобразие каждой из таких моделей. Углубленный анализ разновидностей организации государственной власти с точки зрения их принадлежности к той или иной модели разделения властей позволяет определить теоретически возможную и практически реализуемую модель разделения властей и форму проявления (осуществления) в Республике Казахстан.

References

1 The Federal Constitutional Law «On the Judicial System of the Russian Federation» dated 31.12.1996, N 1-FKZ, NGR: R9606130 // http://base.garant.ru/10135300/; para.1, Art. 6 of the Federal Law «On general principles of organization of legislative (representative) and executive bodies of subjects of the Russian Federation» dated 06.10.99, N 184-FZ of LHR: // R9503508R0003584, http://base.garant.ru/10135300/

2 *Politics*: Collegiate Dictionary, common. ed. and comp. Yu.I.Averyanov, Moscow: Publishing House of the Moscow Commercial University. 1993, 432 p.

3 Luzin V.V. *Law and Politics*, 6, 2000, p. 27–37.

4 Dicey A.V. *Fundamentals of state law of England: An Introduction to the study of the English constitution*, transl. for the 6th edit. of the English / Vinogradov PG.; transl.: Poltoratskaya OV., 2nd ed., Moscow: Type. ID Sytina, 1907, 707 p.

5 Peregudov S.P. *World Economy and International Relations*, 1993, 6, p. 101–109.

6 Suvorov V. *Law and Life*, 1994, 5, p. 107–126.

7 Chirkin V.Ye., Tikhonov A.A., Ryabov S.V. *Forms of government in bourgeois countries of Latin America*, Moscow: Nauka, 1982, 364 p.

8 Chirkin V.Ye. *State and Law*, 1994, 1, p. 109–115.

9 Starodubsky B.A. *Soviet State and Law*, 1984, 7, p. 105–112.

10 Chirkin V.Ye. *State and Law*, 1994, 1, p. 112–115.

11 Cherkasov A.I. *RZh INION RAN*, ser. 4 (zarub, letter), 1995, 1, p. 25–41.

12 http://bibliofond.ru/view.aspx? id=528773

13 Nazarbayev N.A. *In the flow of history*, Almaty: Atamura, 1999, 298 p.

14 Bushuyev I.I. *The separation of powers in a federal state*, dissertation, Moscow, 1997, 224 p.

15 http://www.dissercat.com/content/forma-pravleniya-respubliki-kazakhstan-konstitutsionnaya-model-i-praktika-gosudarstvennogo

16 Internet resource: http://law.edu.ru/book/book.asp? bookID=1302826

17 The Constitution of the Republic of Kazakhstan. August 30th, 1995, http://adilet.zan.kz/kaz/docs/K950001000_

18 Ashimbayev M. *Institution of the presidency in Kazakhstan: formation and evolution*, http://www.centrasia.ru/newsA.php? st=1027888740

19 Kuvaldin V.B. *Free Thought*, 1998, 2, p. 4–5.

20 http://bibliofond.ru/view.aspx? id=539013#1

21 Decree of the President of the Republic of Kazakhstan № 1568 dated March 4, 2005 «On measures for further use of the potential of the Constitution of the Republic of Kazakhstan» (repealed by the Decree of the President of the Republic of Kazakhstan dated August 28, 2007 N 400), http://adilet.zan.kz/rus/docs/U050001568_

UDC 343.195 (574)

M.Sh.Kakimova, A.I.Birmanova

Ye.A.Buketov Karaganda State University
(E-mail: birmanova81@mail.ru*)*

Problems of strengthening the legality and legal order

This article deals with the role and its features of localization, regulation of regularity and law order in the public relations. Regularity and law order are necessary element of the constitutional state therefore based on regularity and the law; the state can provide unshakable steady level of discipline and turn its legal. And also the problems of improvement of the legislation are considered, its role and place in formation and development of the constitutional state. The problems of regularity and law order always pay attention of scientists and civil servants because the condition of the rights and freedoms of the person is directly connected with questions of definition of a political regime of society.

Key words: legality, legal order, democracy, legal state (constitutional state), state power, reform, subject.

Many works are written about legality. There is also a set of definitions about this phenomenon. But almost each of them is the most important thing that contributes the essence, the basis of legality — strict, steady observation, execution of the rule of law by the participants of public relations. It is inherent validity of any historical period, regardless of the conditions of place and time. In the concrete historical conditions of this entity is filled with specific content and acquires appropriate forms. Legality is proclaimed, and often is enshrined in law as a principle, the requirements to comply with legal regulations, addressed to the subjects of public relations. However, for various reasons, including measures of state coercion, legality (observance of the rule of law) is shown in concrete behavior, activity of the specified subjects, i.e. becomes the method of their activity. The result is a mode of social life, expressed in fact that the majority of participants of public relations observe and comply with public relations.

Thus, the validity can be defined as a principle, method and strict mode, strict observance, fulfilment of the rules of law by participants of public relations (state, its bodies, public and other organizations, labor unions, officials, citizens, -all of them, without exception). This principle acts as a ideal form of legality — all people have to respect the rule of law. Actually, not all legal rules and not all subject of law are respected and enforced, many violations of legality take place. Legality is closely related with other phenomenon — a legal order (law and order). The legal order is the condition of orderliness of public relations based on the law and legality. This is the end of the result of implementation of legal requirements and regulations, result of observance, compliance and enforcement of the legal norms, i.e. legality. The legal order represents the purpose of legal regulation, only for its achievement laws and other normative legal acts are published, improvement of legislation is carried out, measures of legality strengthening are taken place. It is important to be aware of the following circumstances:

– firstly, it is impossible to achieve law and order in other ways, in addition to the improvement of legal regulation and enforcement of law;
– secondly, legality strengthening naturally and inevitably leads to strengthening of a law and order;
– the concrete maintenance of a legal order depends on the maintenance of legality which, in turn, is defined by a number of the circumstances considered below [1].

Legality in the conditions of concrete historical period of concrete state, its political mode and etc. is filled with a specific content. The content of legality and legal order in the conditions of Eastern despotism, the Athenian slave-owning democracy, feudal absolutism democratic or totalitarian regimes of modernity has huge differences, although the legality is always compliance, enforcement of legal order- its result.

Differences in the maintenance of legality and legal order depend on its sides (elements): subject (legality carriers — that has to conform to legal requirements); subject (structure of subjects covered by the obligation to comply with legal regulations and the right to require such performance from other people); regulatory (a circle of legal instructions is obligatory for execution). Changing these aspects of legality and defines the different amount of content in the specific historical conditions, increase or decrease of its role in the society.

So, the main carrier of legality is its activity (behavior) of people. But through it property of legality, i.e. compliance with the law, get also other objects — normative and law-enforcement acts (such as the law

contradicting the Constitution, laws, establishing non-judicial or emergency order of consideration of certain categories of criminal cases) has been one of the major causes of mass unjustified repressions in the USSR in the 30's and early 50's. The maintenance of legality substantially depends on structure of its subjects. The majority of scientists connect concept of legality with activity of all participants of the public relations, i.e. the states, its bodies, public and other organizations, officials and citizens. However, there is an opinion which considerably narrows this structure, excluding from it citizens, and in certain cases and public organizations. But the exception of anyone from among the subjects of the law creates the illusion of not fulfillment of legal requirements. There is a narrowing of the sphere of legality, and it from all-social, political and legal turns into the phenomenon much narrower, connected with activity of a limited circle of subjects.

This narrowing of the range of subjects of legality in terms of the administrative-command system contributed to the emergence of «dead zones», is not subject to the law. And although it proclaimed the idea of «universality of legality», in fact, outside of its scope remained consistently the top party and state apparatus, and often the number of state bodies. In the period of Stalin's personality cult is led, in particular, to mass arbitrariness and lawlessness, and during stagnation to the development of corruption, the formation of the clan system for decades with impunity carrying out criminal activities. Similar phenomena take place in the present [2; 215].

Thus, narrowing of a circle of subjects of legality destroys idea of its generality, all-obligation of legal instructions, equalities of all before the law that in practice leads to the erosion of the mode of legality. The normative side of legality is determined by the nature and content of legal norms, observance and execution which form this concept. Most of authors connect legality with need of observance of all legal norms. However, there is an opinion that the meaning of legality is performed only norms formulated in the laws. Acceptance of this position would mean an exception of the sphere of legality of obligation of observance of subordinate regulations that eventually will inevitably lead to weakening of the mode of legality in the country.

Expressed the opinion that the concept of legality are themselves rules of law, the law itself. Legality really is closely connected with the right, with the legislation, can't exist without them: people observe, execute not abstract slogans, but concrete legal instructions. The contents of the legislation, thus, define the maintenance of legality, its standard party. However, legal norms itself are the prerequisite, but not an element of legality. Otherwise there is an illusion that strengthening of legality can be reached only due to improvement of the legislation. Also existence of the independent scientific concept other than the legislation which at the same time would reflect the transition mechanism from legal opportunity to legal reality is necessary.

The selection of the parties of the content of the legality allows for a fresh look at its historical development. Differences in the content of legality and legal order in the different historical conditions are determined primarily normative and subjective aspects of this content: firstly, the degree of regulation of certain aspects of social life, the concrete content of the legislation reflected the interests of different classes and social groups, etc., and secondly, the entities are obligated to comply with legal regulations and has the right to require such performance from the other, i.e., the range of authorized and obligated subjects of legality.

In any society the number of the persons obliged to observe strictly the law includes all representatives of enslaved classes and, as a rule, considerable part of a ruling class, and the relevant requirement is consistently supported by the compulsory force of the state. Thereby the vast majority of the population in the conditions of all social and economic structures and all political regimes is compelled to work according to the existing legislation. At the same time in specific historical conditions, at various political regimes some part of a ruling class and a top of government, having rights to demand from others observance of rules of law (that a people at large is often deprived), cannot adhere to requirements of legality, violate legal instructions. Here various options which depend on a political regime, the form of government, the level of culture of the population, especially political and legal, conditions of legal regulation and etc. But this does not affect the final conclusion that law and order exist under any political regime, and that their specific content socially determined and is shown in normative, objective and subjective sides of the legality. All this objectively causes that circumstance that formal legality and a legal order in certain conditions can turn into the contrast, having become «the lawlessness built in the law» [3; 4].

So, many negative things in our society were not only the result of violations of the laws.

There were a lot of regulations that are not consistent with the public interest. Their «strict observance» actually meant «strict violation», i.e., have resulted in negative consequences for the people, for the interests of social development. Therefore, improvement of legislation involves the creation of robust mechanisms to identify and reflect on the laws of the people's will and interests of the progressive development of society. Important for the theory and practice of strengthening the legality is the question of delimitation of the prin-

ciples and requirements of legality. The principles of legality are the main ideas, start expressing the content of the law, and the requirements of what «requires» legality, i.e. formulated in the general form of legal regulations, compliance, performance of which makes the phenomenon (behavior, act, etc.,) legitimate.

With this approach it is possible to identify four of the principle of legality: the rule of law, unity, feasibility and reality of law. The rule of law is usually interpreted as the rule of law in the system of normative acts. However, this principle must be understood much more broadly — as obedience to the law and all regulations and all acts of the implementation of the law (application, compliance, and performance), and all other objects. Only under these conditions, the principle of the rule of law becomes universal, throughout the entire fabric of society [4; 9].

Under unity (universality) of the law refers to a single direction of legislating and prevoiusly in the territorial and subject terms, i.e. on the whole territory covered by the respective normative act, in relation to the activity of all subjects of public relations. The feasibility of legality means choosing strictly within the law of the optimum, consistent with the goals and objectives of the company options for the implementation of legislative and prorealtime activity (behavior), the inadmissibility of the opposition to the legality and expediency. And, finally, the reality of law is an achievement actual performance of the legal requirements in all activities and will be held accountable for any breach of them.

The unity (generality) of legality is understood as a uniform orientation of law-making and realization of law in the territorial and subject plan, i.e. in all territory of action of the relevant statutory act, in relation to activity of all subjects of the public relations. Expediency of legality means need of a choice strictly within the law of the optimum, answering to the purposes and tasks of society options of implementation of the law-making and right realizing activity (behavior), inadmissibility of opposition of legality and expediency. And, at last, the reality of legality is an achievement of the actual execution of legal instructions in all kinds of activity and inevitability of responsibility for any their violation.

Requirements of legality (that demands legality) reflect its orientation which is caused by the content of rules of law. Unlike principles, expressing the content of the legality of the act in all its spheres, apply to all activities of any entity of public relations requirements associated with certain activities of certain subjects. For example, the requirements of the protection of rights and legitimate interests of citizens, publication of legal acts in the prescribed manner apply to the authorities of the state, etc. Along with the principles and requirements of the law we can distinguish two groups of features of the law that often, but without sufficient grounds are considered as its principles or requirements. This is, firstly, the characteristics of external relations of legality (the relationship with democracy, culture and so on), and, secondly, the ways and means of ensuring the legality (state control, citizen participation in strengthening the rule of law and so on). When considering communication principles and requirements of legality, you can come to the conclusion that each of the principles can be deployed in the totality of its requirements.

So, the principle of the rule of law is developed in the following requirements:

– all laws (and activities for their creation) have to correspond to the constitution and other higher laws;

– subordinate regulations (and activities for their creation) have to correspond to laws;

– acts of right application and law-enforcement activity have to correspond to laws and subordinate regulations based on them;

– acts of individual behavior have to correspond to the laws based on them to subordinate regulations and acts of right application [5; 32].

It is important that each of these requirements, in turn, can be developed in set of provisions which or are directly recorded in the law, or follow from its text: laws have to correspond to the Constitution.

Thus, we from the principle of the rule of law through the relevant requirements of the law came to specific legal regulations. In the same way based on the activities and outcomes can be deployed and other principles of law in the requirements, and then in certain legal norms. This allows you to define a clear list of requirements and to carry out their regulatory consolidation and specification that will create additional opportunities for strengthening the legality and legal order. The role of legality and legal order can be considered from different positions, and above all from the point of view of the state and individual. To state this role primarily is determined by the place that take legality and legal order in the legal regulation of social relations. Leading the society, the state uses a variety of methods and tools: economic, political, ideological, organizational, and others. Among them, the most important place takes the legal regulation of social relations. This method lies in the fact that the state publishes (or authorizes) the rule of law and provides universal compliance and enforcement, i.e., legality, and thereby achieves the legal order.

The special place of this method is connected, first, by that legal norms regulate all most important aspects of life of society: economy, political activity, property relations, questions of a family and marriage, etc. Therefore, compliance with the relevant rules determines the order and stability of the most important spheres of human activity, the existence of society itself. Secondly, other methods of state management of the society is often implemented through legal regulation. So, planning (organizational method) is often conducted through the approval of the plan regulation (for example, the budget law); wages (economic method) sets the regulatory basis of its size, the procedure of calculation and payment, etc. From the standpoint of personal legality and legal order act primarily as a means of protecting her rights, freedoms and legitimate interests. They protect people from the tyranny of the state and its bodies, and unlawful actions of other persons. Personal freedom degree, reality of its rights and freedoms, level and reality of democracy depend on a condition of legality and a legal order. And as in modern conditions interests of the personality become priority for the state, this party of legality and a legal order is also the most important purpose of the state activity [6; 5].

All this defines a special role of legality and a legal order for society in general: they act as a basis, an order kernel in society, as conditions and necessary elements of democracy, as the main universal values and, therefore, essential parts of legal and general culture. Strengthening of legality and legal order is an indispensable condition and means of formation of the constitutional state, and they — its necessary elements. The state will become legal only in the presence of a strong rule of law and stable, based on the law and the legality of the order.

In light of the above, it is possible to make some predictions about the development of legality in the formation of a constitutional state.

First, there will be a consecutive expansion of the subject party of legality, i.e. a circle of those objects which will gain property of legality. It will belong to different types of activity (behavior) of people, to legal acts (standard, law-enforcement and other acts of realization of the right), managerial and other documents, the relations of people and their organizations. Thus those objects which were traditionally considered as unlawful that is connected with implementation of the principle will fall within the scope of legality more and more: «Everything is authorized (i.e. it is lawful) that it isn't forbidden by the law».

Secondly, there will be changes in the subject party of legality. Formation of the constitutional state assumes that all subjects of the public relations, without exception (the state, its bodies, public associations, officials, and also labor collectives), really will become carriers as duties strictly to observe legal instructions, and the rights to demand respecting the rule of law from other subjects. Thus the reality of these rights and duties will constantly increase, won't become almost absolute yet. Thirdly, to improve the regulatory side of the law. This improvement will occur in at least three directions. On the one hand, the content of the legislation is increasingly will correspond to the actual conditions and the progressive trend of social development (change management economy, the democratization of social life etc). On the other hand, the legislative process will be improved itself, which is primarily due to its democratization, participation by the wider public, with the expansion of its scientific base. And at last, the structure of the legislation radically has to change. The law has to become the main source of the right in practice. Thus, unlike many existing, new laws have to be, as a rule, laws of direct action that will make unnecessary the edition of the supplementing and concretizing instructions and will allow to realize the principle of rule of law in practice. Law enforcement doesn't happen spontaneously. It demands purposeful impact on behavior (activity) of subjects of the public relations, i.e. is administrative process [7; 64].

Successful influence on this process requires knowledge of mechanisms of the implementation of legal norms in activity of people; factors which influence on behavior, defining its legitimacy or illegality, and also means by which it is possible to operate this behavior, providing its compliance to legal instructions and requirements.

In legal literature reality, provision of law is traditionally considered as a result of influence of guarantees of legality: general (economic, political, ideological) and special (normative and organizational-legal). Thus, however, the following circumstances aren’t considered.

Firstly, in the theory of guarantees negative impacts, without knowledge of that an effective activity on strengthening the legality is impossible.

Secondly, really guarantees work as set of any phenomena, the processes including both positive, and negative impacts (so, public prosecutor's supervision is realized in activity of numerous prosecutors in which shortcomings and violations also take place).

The problem of law enforcement demands knowledge and the accounting of all variety of the factors influencing behavior of people — both positive, and negative, both legal, and material, political, organizational, psychological, etc. The problem of strengthening of legality is, thus, not only legal, it has complex character. For implementation of effective measures for strengthening the legality it is important to know the mechanism of action of all factors in relation to different social levels, to different types and directions of activity of all subjects of public relations.

Unity of the specified factors possesses all signs of social system: forms unity of elements inseparably connected among themselves, has the ordered hierarchical structure, develops under certain laws of social development. This system is multi-level, in which intensive management processes flow, complex information streams exist.

Influence of the factors entering into this system can be as the positive, i.e. promoting lawful behavior and strengthening of legality, and negative, pushing people on the illegal acts breaking the legality mode.

It is possible to allocate four main levels of system of these factors: all-social, regional (region, district, etc.), group (collective, family, etc.) and individual. While the same factor in different conditions, in combination with other factors, including the qualities and characteristics of an individual, may have a different impact (positive or negative) or it can be applied to the case of neutral.

The factors influencing realization of all rules of law by all participants of the public relations in all territory of the country belong to all-social level. The considerable part of social processes and the phenomena renders on behavior of people (and, therefore, on a condition of legality) generally positive influence and acts as that as legality guarantees — economic, political, legal and others (positive sides and elements of economy, policy, culture, «good» laws, etc.). But there are many all-social factors having opposite impact on a condition of legality (shortcomings of economy, mistakes in the political management of the country, omissions in activity of various government bodies and so forth) which define the general reasons of offenses.

At the regional level, as well as on social action of many factors becomes a «variable»: their impact on the legal human behavior can vary according to the nature and intensity (the state of the production and distribution of wealth; the degree of compliance of legal norms of social relations and so on).

It is important to bear in mind that various factors (economic, political, legal and so on) interact with each other and the end result (the behavior of subjects) in each case is determined by the combined influence of many factors related to different social levels and interconnected complex causal, functional and other dependencies.

The factors operating at the group levels represent specific conditions of activity of the relevant group. So, in relation to public bodies of region, city, district, etc., as such act, the level of their material and technical equipment, activities guide, local and departmental regulations, the level of general and professional culture of the employees, etc. Impact of all factors on the concrete act of legal behavior is carried out on two channels [8; 13].

Firstly, under the influence of conditions (all-social, regional, group) acquired traits, properties, qualities of a person that determined the character of his behavior in the legal situation i.e. the personality possessing a certain level of legal, political and moral consciousness is formed.

Secondly, system of these factors determines the specific life situation, perceiving and evaluating which the person chooses a certain option of behavior (lawful or unlawful). So, at intention to make, for example, residential theft entity assesses the possibility and probability of circumstances, such as availability and response of the alarm, the responsiveness of the police, the state of detection of such crimes in the region, secure sales kidnapped, etc.

Influence of different factors on legal behavior can be direct, when under their direct impact is generated by the person or when they are directly taken into account by the person when making a decision about a particular variant of behavior.

Thus, the problem of strengthening the legality is complex, is associated with many phenomena and processes of social life and can be successfully solved only in the context of overall stability in the country.

References

1 Конституция Республики Казахстан. 30.08.1995 г. — [ЭР]. Режим доступа: http://adilet.zan.kz/kaz/docs/K950001000_

2 *Шабуров А.С.* Законность и правопорядок. Теория государства и права. — М.: Норма, 1997. — 457 с.

3 *Бахрах Д.Н.* Вопросы законности в государственном управлении // Правоведение. — 1992. — № 3. — С. 3–5.

4 *Степанов В.М.* О социалистической законности // Правоведение. — 1977. — № 3. — С. 9–11.

5 *Абузяров Н.А.* Механизм обеспечения законности. — Алматы Жеті жарғы, 2001. — 49 с.

6 *Ким Ю.* За упрочение демократических устоев и конституции законности // Юридическая газета. — 1999. — 25 авг. — С. 7.

7 *Лукашева Е.А.* Социалистическое правосознание и законность. — М.: Юрид. лит., 1973. — 344 с.

8 *Виссаров А.В.* Правопорядок и субъекты его обеспечения (теоретико-правовой аспект): Автореф. дис. ... канд. юрид. наук. — М., 2003. — 22 с.

М.Ш.Кәкімова, А.И.Бірманова

Заңдылық және құқықтық тәртіпті нығайту мәселелері

Мақалада заңдылық пен құқықтық тәртіптің атқаратын қызметі, олардың қоғамдық қатынастарды құқықтық реттеудегі орны мен өзгешеліктері қарастырылды. Заңдылық пен құқықтық тәртіп құқықтық мемлекеттің қажетті элементтері болып табылғандықтан, мемлекет мызғымас заңдылық пен құқыққа негізделген қалыпты деңгейдегі тәртіп жағдайында ғана құқықтыққа айналатынын анықтай отырып, оның орны мен рөлі, заңнаманы жетілдіру мәселесінің көкейтестілігіне байланысты заңдық себептері анықталды. Заңдылық және құқықтық тәртіп мәселелері әр уақытта ғалымдардың және іс жүзіндегі қызметкерлердің көңілін өзіне аударады, себебі жеке адамның құқығы мен еркі — қоғамның саяси тәртібін анықтаудың тікелей нысаны.

М.Ш.Какимова, А.И.Бирманова

Проблемы укрепления законности и правопорядка

В статье рассматриваются роль и особенности локализации, регулирования законности и правопорядка в общественных отношениях. Законность и правопорядок — необходимые элементы правового государства. Авторы отмечают, что, основываясь на законности и праве, можно обеспечить непоколебимый устойчивый уровень дисциплины и превратить государство в правовое. Также рассмотрены проблемы совершенствования законодательства, его роль и место в становлении и развитии правового государства. В статье освещены проблемы закономерности и правопорядка, всегда привлекающие к себе внимание ученых и госслужащих, поскольку состояние права и свободы человека напрямую связано с вопросами определения политического режима общества.

References

1 The Constitution of the Republic of Kazakhstan. 30.08.1995 г., http://adilet.zan.kz/kaz/docs/K950001000_

2 Shaburov A.S. *Legality and law and order. Theory of the state and the right*, Moscow: Norma, 1997, 457 p.

3 Bakhrakh D.N. *Jurisprudence*, 1992, 3, p. 3–5.

4 Stepanov V.M. *Jurisprudence*, 1977, 3, p. 9–11.

5 Abuzyarov N.A. *Mechanism of providing of regularity*, Almaty: Zhety zhargy, 2001, 49 p.

6 Kim Yu. *Legal newspaper*, 1999, August, 25, p. 7.

7 Lukasheva Ye.A. *Socialist sense of justice and legality*, Moscow: Yuridicheskaya literatura, 1973, 344 p.

8 Vissarov A.V. *Legal order and subject of its provision ensure (theoretical and legal aspects)*, abstract, dissertation, Master in law, Moscow, 2003, 22 p.

UDC 343.26

B.A.Amanzholova

Ye.A.Buketov Karaganda State University
(E-mail: archie_kim@list.ru)

The personality features of convicted women and their influence on incarceration Conditions in the medium security institutions

This article considers some of criminological characteristics of women personality, who have committed crimes and serving sentences in maximum security penal colonies. This article considers the characteristic of educational work in a correctional institution for alimentation of convicted women, that should be taken into account to certain extent, and differ from the educational work with the convicted men. The positions of new Penal Execution Code of the Republic of Kazakhstan on the question of alimentation of convicted mothers and the opportunity of creation of orphanages, where the convicted mothers could spend the time with their children. The article describes the significant corrections of criminal-executive policy towards its humanization.

Key words: convicted women, the medium security institutions, deprivation of freedom, correction, self-education, incarceration conditions.

The actuality of selected theme is largely determined by changes in social, economic and legal marks of Kazakhstan society, the new character of social relations. In accordance with this, the criminal-executive field is targeted to international standards of methods of treatment of convicts to deprivation of freedom. The new Criminal Executive Code of the Republic of Kazakhstan, which will come into force on January 1, 2015 [1] marked the beginning of a significant correction of criminal-executive policy towards its humanization in order to create more favorable conditions for the successful correction of convicted women in prisons.

The country's economic and political reforms have led to a crisis of society and a sharp drop in the standard of living of the population. Accordingly, it has affected the level of crime. The particular concern is caused by female criminality, which has a significant influence on the general crime situation, especially on the crime among the younger generation. Therefore, it is necessary to find the most effective ways, forms, means and techniques of neutralization of female crime [2; 22].

Correction of convicts in the process of execution and punishment is a main task among the others in the medium security institutions. Educational and correctional processes in security institutions occurs under conditions of physical isolation of convicted women from society and family. Their spiritual relationship with society is also restricted. The realization of the principle of process of education of the convicts with life is carried out according to the law and the regulatory regime of the colony and it has its own specific forms.

Isolation of convicted women from society, the specific conditions of isolation have a profound influence on their psyche, make them to experience their stay in the colony. This mental state of convicted women creates a certain climate, which is reflected in the correctional process. In this aspect, the study of problems of the penalty of deprivation of freedom of women has particular relevance and importance.

The phrase «convicted woman» consists of antonyms — words, which are hard to combine into one concept. Nevertheless, it exists in the third millennium, and even fairly widespread not only in Kazakhstan, but also in civilized foreign countries. The condemnation and isolation of the person in places of deprivation of freedom puts him in a difficult situation. Gender characteristics of women determine additional negative consequences associated with the difficult circumstances of their life while execution of the criminal sen-

tence. Only some of them can independently solve a difficult situation and return to a normal life after the liberation. This implies the irreversible losses for the woman, her microenvironment, family, society as a whole. Obviously, the convicted women need a special complex help, i.e. legal, psychological, educational, social help. The system, which shows the essence and features of social work with them.

The conditions of execution of deprivation of freedom in security institutions depend on the type of institution, which is defined by the court and by the behavior of the convicted woman. The better behavior of convicted woman gives the greater benefits to her and stimulates her correction, inspires self-education, discipline [3; 112].

In the Articles 103–118 of the Criminal Executive Code of the Republic of Kazakhstan [1] are indicated in detail the conditions and procedure for execution of sentence of deprivation of freedom in different types of security institutions.

Of course, one has to agree with the statement of scientists that the activity of correctional institutions is primarily educational activity. Under the educational work with convicted to deprivation of freedom should be understood purposeful organizational psychological and pedagogical activity of correctional officers, public associations, providing re-socialization of convicts, and the whole solution of the correction of their views and beliefs, formation of perceived need for labor, formation of respect for the society, the law, rules and traditions of human coexistence.

The education in general and professional educational institutions is not only a mean of ensuring acquisition and development of convicted women a certain base of knowledge, but also it actively influences on the formation of the ideology, moral qualities, positive motives for socially useful activity, which in turn has only a positive effect on the behavior of the convicted, and, consequently, it improves the conditions of execution of deprivation of freedom. With the increase of the level of general education and culture of convicts, it is achieved a better understanding of the various aspects of labor, social and educational activity; it develops such qualities as self-discipline, the ability to overcome difficulties, sense of purpose, it ensures the formation of emotional -positive attitude towards them [4; 186]. Education is one of the most important social factors. Despite the lack of regular dependence between the growth of education and reducing crime, the prison statistics of different countries of the world shows that the structure of «prison population» is dominated by less-educated part of the society. Obviously, the relatively high level of education in the period of social and economic instability is not able to neutralize the effect of a complex of other negative factors. The level of education of women, deprived of their liberty, testifies not only to the presence of professional qualifications, life experience, formed consciousness and value-motivational sphere, priorities in satisfaction the needs, but also the general culture, development, awareness, including the problems of motherhood, childhood, education and training. From this perspective, the state and dynamics of the level of education of this category of convicts in Kazakhstan is characterized by inconsistency: the average educational level decreased, but significantly increased the number of those with higher and specialized secondary education (professional) education. Differentiation of convicted mothers on this indicator testifies the predominance of those with secondary and secondary special (professional) education. However, the «group of risk» includes every third convicted, as they have only primary or lower secondary education. In combination with other adverse social factors lower level of education often acts as a determinant, which predetermines criminogenic way to resolve difficult situations.

The educational work in the security institutions can not be done without the spiritual influence of society, without the participation of close relatives of convicted woman (parents, husband, children, and others.) and labor collective (sadly, now help from them is very weak).

Undoubtedly, the relationship between convicts and parents, children and other close relatives creates and strengthens their sense of guilt in front of them, helps to realize the error of their behavior, causes the desire to change it. In addition, such a relation provides information about life in freedom, about the prospects for the future, reducing the sharpness of isolation, helps prepare women for life in freedom.

It should be noted some importance and the educational role of the rights of convicts to religion, its practical effectiveness in the results of correction and re-socialization of convicted women.

Many convicted women participate in the group of psycho-correction work, which includes technology of relaxation training, self-hypnosis, the regulation of mental states; there are conducted various trainings, repeated tests, which have very positive effect on the behavior of convicts and to the terms and treatment. Convicts communicate with a great desire with psychologists.

In addition to the psychological preparation of the convicted woman to the life and activities on freedom, personnel of medium security institutions during imprisonment helps in formation of moral, legal, la-

bor, physical, aesthetic and other education of convicts, which contributes to their correction and resocialization.

The moral education is a very important and complicated matter, because the lack of stable moral principles led convicted women to the crime. Moral education is closely connected with all areas of the educational influence, since it concentrates in itself a manifestation of their influence on the individual. The most important personal characteristics of convicted women, which depend on their living conditions, education and development, are the needs and interests which motivate them. For all categories of convicted is characteristically a negative content of value-normative system, neglect of social norms, lack of volitional conscious aspiration and its compliance. Convicts clearly in favor of a certain anarchism or personal freedom in deciding between good and evil, they doubt whether they should work if it is not needed. It is clear that they have no value attitude to labor and tolerant forms of communication, and there dominate the forms of aggressive or passive adaptation.

The majority of convicted women shows no interest in politics, economics; the increase of the educational and cultural level is not value for them. The limitation of their interests leads the part of convicted women to closing them on their personality and leads to egocentrism, to distorted idea of their importance, to the inability to critically assess their capabilities (high self-esteem of the person). Others, on the contrary, lose all confidence, underestimate their strength, do not believe in the possibility of returning to a normal life because of the destruction of old relations, loyalties, family and kinship.

It is known that assessment of other people is important for women and what impression they produce, many are characterized by demonstrativeness. Convicted women do not constitute an exception among them. But the rise of demonstrative behavior of such persons at the same time combined with a reduction of control over it. Demonstrativeness, which determines criminal manifestations, including aggressive nature, performs protective functions and helps them in the self-affirmation. The criminals' need for the self- affirmation becomes obsessive and it has a significant influence on their whole lifestyle. It's not just the desire to please men or other women or to look better, it's a need to be confirmed, as if it fixes their existence, place in life in general.

The convicted women are characterized by sharpness of some character features. The shamefacedness is manifested in special way. In some cases, natural shamefacedness is disguised as defensive reaction in the form of a sharp irascibility, acrimony, sometimes rudeness. In other cases, shamefacedness is associated with increased vulnerability and emotional instability (tears, crying, offishness). In third group of convicted women almost complete lack of shamefacedness is observed, loss of sense of feminine pride, dignity, which is manifested in the vulgar behavior, bravado of their position.

The convicted women are characterized by certain deviations in the character, for some — hysterical, for others — a psychopathic manifestations. These features women develop faster than men. Sometimes they take extreme forms as roughness, imbalance, tearfulness, blatancy, etc. Contradictory character, its uncertainty is more clearly manifested in convicted women. However, there are masculine features are observed in behavior of convicted women. They even try to imitate men, their gait, clothing, mannerisms, speech, etc. Over time, this behavior becomes a habit, it becomes the norm.

One of the typical features of convicted women is their amorality. Egoism and selfishness, laziness and inertness, secrecy, anger and hostility to the surrounding define their relation to the collective, to the administration, to other people, it expresses their anti-social nature. Therefore, no coincidence that every six misconduct in women's prisons is related to the immoral behavior, and every fifth is expressed in fights, misbehavior, disobedience to the administration. [5; 14].

The legal education of convicts involves the formation of their sense of justice, including knowledge of the principles and norms of law, as well as belief in the need to follow them. In addition, it involves organization of lawful, responsible, socially active behavior of convicts [6; 12].

In educating of convicted women prominent place takes the participation in the amateur performances (according to the new legislation — voluntary organizations of convicts) that has a significant influence on the spiritual, professional and physical development; stimulate useful initiative of convicts, participation in issues of labor organization and leisure of convicts: the assistance the administration of the institution in maintaining of discipline and order, the formation of a healthy relationship between the convicts, providing social help for convicts and their families.

It should be noted that the labor of persons sentenced to deprivation of freedom is the primary means of correcting them. One should not forget a huge positive influence of labor for convicts as a necessary condi-

tion of their life. Attitude to work is an important indicator of the convicts. The overwhelming majority of convicted women express the desire to work in any field [7; 282].

In educational work with convicted women the phenomenon of acceleration should be taken into account, which manifests itself in a faster physical development of the body (weight gain, growth, etc.), as well as in the earlier puberty. Studies show that in social and moral, intellectual and educational development convicted women lag behind their peers, that is, the gap, which is caused by the acceleration, is shown here especially real. Therefore, in the absence of strong moral beliefs and clear principles of social behavior, young offenders often before entering the colony acquire a negative sexual experience. For many entry into early sexual relations is accompanied by the use of alcohol in the criminal groups, so some of them are abused by their partners. Early sexual relations for many convicted women were often accompanied by pregnancy and criminal abortions, which affected their health. Some of convicts, as a result of promiscuous sexual lifestyle, are sick with venereal diseases and was registered in venereal disease dispensary, some of them are subject to compulsory treatment of sexually transmitted diseases in correctional institutions. Negative sexual experience is the cause of amoral behavior of convicts in the colony, the most dangerous form of which is manifested in very common sexual perversion in the women's correctional institutions. Therefore, to the issue of counteraction to the sexual perversions should be given special attention.

The addiction to alcohol, drugs and smoking has a major influence on the physical condition of the woman's body, which is more destructive for body of women than men. Although the percentage of women among alcoholics and drug addicts is less than the percentage of men, but the transition from domestic drinking to alcoholism and associated decay of personality occur much faster. In recent years, demographers, psychiatrists, sociologists, educators are concerned about the growth of drug addiction and alcoholism among women.

The dismissive attitude of the convicted women to their health leads to the fact that they do not comply with hygiene requirements, do not protect themselves from catarrhal diseases, which causes various complications of gynecologic diseases. All this requires a combination of awareness-raising work with the organization of specific medical services for convicted women.

The anatomical physiological features of women are taken into account in the organizations, which execute the sentence, in a disciplinary practice, labor and living conditions of convicted mothers. This is also reflected in the criminal executive law. Thus, in accordance with the Art. 16 of the new Criminal Executive Code of the Republic of Kazakhstan, institutions, which execute sentences of convicted women with children, can organize the orphanage. In the orphanages institutions provide the necessary conditions for normal life and development of children. Convicted women and their children under the age of three years, are placed in the orphanage and communicate with children in their spare time without any restrictions. They are allowed to live together with their children. Convicted pregnant women and nursing mothers can receive food parcels in the amount and range defined by a medical report. Convicted pregnant women, women in childbirth and the postpartum period are entitled to specialized medical care. In institutions' orphanages children are provided with food, daily necessities, individual beds, bedding, clothing, underwear and shoes for the season, taking into account gender and climatic conditions due to budgetary funds.

Thus, taking into account the features of the person of convicted woman is important to the process of correction and re-socialization. Proper organization and maintenance of the punishment, the involvement of prisoners in labor activities, educational activities, training, the use of incentives and penalties, **conditional release ahead of time** and other forms of early release, the implementation of various forms of post-penitentiary activities to consolidate the results of corrective treatment — all these invariably involve thorough knowledge of personality of each convicted woman.

In contrast to the execution of punishment, serving it by convicts consists of coercive measures applied to them by the administration of the security institution on behalf of the state. In this case, if the punitive part of the sentence, from the objective side, is serving almost uniformly (excluding prominent violators of the regime), then the subjective attitude to this process can be quite different. Therefore, the criterion and the mark of convicts' relation to the sentence is strict observance of the regime and the individual educational work, in the aggregate, reveals the positive and negative personality features, the degree of stability to the crime and the nature of the changes during the period of serving the sentence in a medium security institutions.

References

1 Уголовно-исполнительный кодекс Республики Казахстан. Кодекс Республики Казахстан от 5 июля 2014 года № 234-V ЗРК. — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/K1400000234

2 *Аванесов Г.А., Алексеев А.И., Антонян Ю.М., Вицин С.Е.* Криминология и профилактика преступлений. Учебник / Под ред. А.И.Алексеева. — М.: Изд-во ВШ МВД СССР, 1989. — 430 с.

3 Осужденных в Казахстане разделят на примерных и злостных нарушителей. — [ЭР]. Режим доступа: http://tengrinews.kz/kazakhstan_news -256553

4 *Антонян Ю.М., Еникеев М.И., Эминов В.Е.* Психология преступника и расследования преступлений. — М.: Юристъ, 1996. — 336 с.

5 *Серебрякова В.А.* Криминологическая характеристика женщин-преступниц // Вопросы борьбы с преступностью. — М.: Юрид. лит., 1971. — № 14. — С. 3–16.

6 *Ветров Н.И.* Уголовное право. Общая часть. — М.: Юнити-Дана, Закон и право, 1999. — 415 с.

7 *Дементьев С.И.* Лишение свободы: тюрьмы, лагеря, колонии, тюрьмы. — Краснодар, 1996. — 310 с.

Б.А.Аманжолова

Сотталған әйелдердің тұлғалық ерекшеліктері және олардың қауіптілігі орташа мекемелерде ұстау шарттарына әсері

Мақалада қылмыс жасаған және қатаң тәртіптегі колонияларда жазаларын өтейтін әйелдер тұлғасының кейбір криминологиялық ерекшеліктері қарастырылды. Соттылығы бар әйелдерді ұстау үшін түзеу мекемелеріндегі тәрбиелік жұмыстардың сипаттамасы берілді, ол кейбір дәрежеде соттылығы бар ер адамдардың тәрбиелік жұмысынан айрықшалануы және ескерілуі қажет. Соттылығы бар аналарды ұстау және соттылығы бар аналардың өз балаларымен уақыт өткізе алатын балалар үйін құру мүмкіндігі сұрақтары бойынша Қазақстан Республикасының жаңа Қылмыстық-атқару кодексінің ережелеріне өзгерістер енгізілді. Автор қылмыстық-атқару саясатының гуманизация бағытына қарай маңызды өзгерістерін көрсетіп сипаттады.

Б.А.Аманжолова

Особенности личности женщин-осужденных и их влияние на условия содержания в учреждениях средней безопасности

В статье рассматриваются некоторые криминологические особенности личности женщин, совершивших преступления и отбывающих наказания в колониях строгого режима. Дается характеристика воспитательной работы в исправительном учреждении для содержания женщин-осужденных, которая должна в некоторой степени отличаться от воспитательной работы с мужчинами-осужденными. Отмечено, что положения нового Уголовно-исполнительного кодекса Республики Казахстан предусматривают вопрос содержания осужденных-матерей и возможность создания домов детей, в которых осужденные-матери могли бы проводить время со своими детьми. Автор показывает существенные положительные изменения уголовно-исполнительной политики в сторону ее гуманизации.

References

1 The Criminal Executive Code of the Republic of Kazakhstan dd. July 5, 2014. № 234-V The Law of the Republic of Kazakhstan, http://adilet.zan.kz/rus/docs/K1400000234

2 Avanesov G.A., Alekseyev A.I., Antonyan Yu.M., Vitsyn S.Ye. *Criminology and crimes' prophylaxis*, tutorial, edit.: Alekseyev A.I., Moscow: Publishing house of HS of USSR MIA, 1989, 430 p.

3 *Convicted in Kazakhstan will be separated to exemplary and the malicious infringer*, http://tengrinews.kz/kazakhstan_news -256553

4 Antonyan Yu.M., Enikeyev M.I., Eminov V.Ye. *Psychology of the criminal and investigations of crimes*, Moscow: Yurist, 1996. — 336 p.

5 Serebryakova V.A. *Issues of fighting against criminality*, Moscow: Law literature, 1971, 14, p. 3–16.

6 Vetrov N.I. *Criminal law*. The general part, Moscow: Unity-Dana, The law and the right, 1999, 415 p.

7 Dementiev S.I. *Deprivation of freedom: prisons, camps, colonies and prisons*, Krasnodar, 1996, 310 p.

ҚЫЛМЫСТЫҚ ПРОЦЕСС ЖӘНЕ КРИМИНАЛИСТИКА
УГОЛОВНЫЙ ПРОЦЕСС И КРИМИНАЛИСТИКА

УДК 343.137.9

Р.М.Жамиева[1], Р.Ф.Дадашов[1], Б.А.Жакупов[2]

[1]Карагандинский государственный университет им. Е.А.Букетова;
[2]Карагандинская академия МВД РК им. Б.Бейсенова
(E-mail: roza_mus@mail.ru)

Проблемы применения принудительных мер медицинского характера

В статье освещаются некоторые проблемы производства по делам о применении принудительных мер медицинского характера к невменяемым. Авторы проводят краткий сравнительно-исторический обзор. Рассматриваются вопросы начала и окончания досудебного расследования по таким делам. В частности, уделено внимание вопросам ознакомления невменяемого с материалами дела. Авторы считают, что нет необходимости преждевременно прекращать уголовное дело, так как не каждое психическое расстройство исключает вменяемость. Критике подвергается критерий общественной опасности деяния как основание неприменения мер медицинского характера. При этом анализируется как национальное, так и международно-правовое законодательство. Авторы считают, что такое решение следует принимать только с учетом выводов судебно-психиатрической экспертизы.

Ключевые слова: невменяемый, принудительные меры медицинского характера, судебно-психиатрическая экспертиза, общественная опасность деяния, ознакомление с материалами дела, прекращение уголовного дела в отношении невменяемого.

Как правило, преступления совершаются людьми, по той или иной причине переступившими человеческие ценности и моральные устои. Но в жизни встречаются случаи, когда общественно опасные противоправные деяния совершаются невменяемыми лицами — родившимися с психическими патологиями или заболевшими позже. Иногда, потрясенные содеянным или наступившими для них неблагоприятными последствиями, обвиняемые заболевают душевными болезнями, которые не дают им руководить своими действиями и отдавать себе в них отчет. В таких ситуациях перед судом встает вопрос о необходимости их лечения принудительно.

Принудительное лечение — это особый вид государственного принуждения, особая мера социальной защиты от действий душевнобольных. Также принудительные меры медицинского характера применяются судом в отношении лиц, совершивших общественно опасное деяние и страдающих алкоголизмом, наркоманией или токсикоманией.

Рассмотрение института применения принудительных мер медицинского характера, на наш взгляд, целесообразно начать с исторического обзора, что позволяет проанализировать зарождение данного института, тенденции его развития.

В средние века в Казахстане существовал свод законов Тауке хана — Жеті Жарғы, но он не затрагивал вопросов о невменяемости подсудимых [1]. В средневековой же России, в отличие от стран Западной Европы, не было жестокого преследования душевнобольных («бесных», «юродивых», «блаженных») [2; 52]. После появления в ст. 79 «Новоуказных статей о татьбах, разбойных и убийственных делах» Соборного уложения царя Алексея Михайловича (1649 г.) положения о невиновности «бесного», совершившего убийство, встал вопрос о дальнейшей судьбе указанных лиц [3; 15]. Из истории отечественных монастырей известно, что многих «бесных», совершивших общественно опасные деяния, помещали в монастыри для «изгнания бесовства» ещё на основании Церковного устава Великого князя Владимира от 996 г. О том же упоминает письменный памятник XII в. «Житие Феодосия Печерского». Отечественные монастыри использовались в качестве мест покаяния, отбывания

ссылки и заключения, вплоть до XVIII в. Впрочем, далеко не всегда «бесные» попадали под опеку монастырей [4;. 20].

В советский период в 1922 г. в УК РСФСР были закреплены нормы о «мерах социальной защиты», заменяющих по приговору суда наказание. Практика применения данных норм была чрезвычайно непоследовательна. Суды часто путались в своих решениях, не имея возможности уяснить себе, к кому же должно быть применено принудительное лечение. Статьи УПК РСФСР 1922 г., касавшиеся лиц, совершивших преступные деяния в невменяемом состоянии или заболевшие психическим расстройством после совершения преступления, были разбросаны по всему кодексу и не систематизированы [5].

УПК РСФСР 1960 г. впервые ввел главу 27 «Применение принудительных мер медицинского и воспитательного характера», где была дана более подробная регламентация уголовно-процессуальной деятельности в отношении лиц, совершивших общественно опасные деяния в состоянии невменяемости или заболевших психическим расстройством после совершения преступления, делающая невозможным исполнение наказания. Появились основания применения принудительных мер медицинского характера, уголовно-процессуальные гарантии (обязательное участие защитника, обязательное производство предварительного следствия) лиц, в отношении которых велось такое производство [6].

В УПК КазССР 1959 г. имелась глава 20 «Особенности предварительного следствия в отношения лица, признанного невменяемым», где также была дана регламентация уголовно-процессуальной деятельности в отношении лиц, признанных невменяемыми. В этой редакции УПК была своя особенность, а именно в диспозиции ст.193, где говорилось: «Если при производстве предварительного следствия материалами дела, в том числе и судебно-психиатрической экспертизой, будет установлено, что лицо, привлеченное или подлежащее привлечению в качестве обвиняемого, совершило общественно опасные действия в состоянии невменяемости или заболело душевной болезнью после совершения преступления, то следователь продолжает следствие по делу» [7].

Производство предварительного следствия в отношении невменяемых лиц имеет ряд особенностей, вызывающих научные дискуссии и сложности правоприменения. В научной литературе вопрос о начале досудебного расследования в отношении лица, имеющего психическое расстройство, трактовался неоднозначно. Так, Т.Д.Михайлова считает, что «душевная болезнь лица, совершившего общественно опасное деяние, не может служить основанием для отказа в возбуждении уголовного дела, а также в связи с совершением общественно опасного деяния необходимо выяснить, не представляет ли лицо общественной опасности и не подлежит ли в связи с этим принудительному лечению. Установить это можно только в результате проведения полного и всестороннего предварительного следствия» [8; 32].

Среди ученых высказано мнение, что факт наличия психического заболевания лица является обстоятельством, исключающим возможность возбуждения уголовного дела. Однако наличие у судебно-следственных органов таких данных, как правило, не исключает не только возможность, но и необходимость возбудить уголовное дело, так как трудно бывает определить, вменяемо это лицо или нет [9; 105].

Конечно, часто уже в начале расследования очевидно, что деяние совершено лицом, не отдающим себе отчёта в своих действиях из-за душевной болезни, и что это лицо не представляет опасности для общества [9; 106].

Мы разделяем позицию тех ученых, которые считают, что наличие психического расстройства лица не препятствует началу досудебного расследования, и, более того, считаем, что начало досудебного расследования в отношении лица, страдающего психическим расстройством, в каждом конкретном случае является обязательным. Такая позиция обусловлена рядом причин.

Во-первых, на стадии проверки сообщения о преступлении у следователя, даже при наличии медицинских справок об имеющемся у лица психическом расстройстве, нет оснований для вывода о том, что лицо совершило общественно опасное деяние в состоянии невменяемости или что у данного лица уже после совершения преступления возникло психическое расстройство, препятствующее назначению наказания или его исполнению. Это, в свою очередь, исключает возможность отказа в возбуждении уголовного дела по основаниям, предусмотренным ст. 37 УПК РК (за отсутствием состава (субъекта, субъективной стороны) преступления). Для установления указанных выше обстоятельств необходима судебно-психиатрическая экспертиза, производство которой возможно уже по возбужденному уголовному делу [10].

Во-вторых, при решении вопроса о возбуждении уголовного дела в отношении конкретного лица, имеющего психическое расстройство, нельзя исключать возможность, что данное лицо могло быть использовано в качестве орудия преступления других, вменяемых лиц. Данное обстоятельство может быть установлено только в ходе предварительного расследования уголовного дела путем производства ряда следственных действий.

Прекращать уголовное дело за отсутствием состава преступления (субъекта) преждевременно, так как не каждое психическое расстройство исключает вменяемость. Осведомленность руководителя следственного органа, следователя, дознавателя о наличии у лица психического расстройства по смыслу действующего законодательства не является основанием для отказа в возбуждении уголовного дела, а выступает основанием для обязательного назначения и производства судебно-психиатрической экспертизы.

С нашей точки зрения, вполне соответствующей действующему законодательству, в каждом конкретном случае при наличии события общественно опасного деяния (преступления), независимо от того, страдает ли лицо психическим расстройством или нет, уголовное дело должно подлежать возбуждению.

В УПК имеются определенные особенности окончания предварительного следствия по уголовным делам в отношении лиц, совершивших общественно опасное деяние в состоянии невменяемости, а также лиц, у которых после совершения преступления возникло психическое расстройство, делающее невозможным назначение наказания или его исполнение.

Окончание предварительного следствия является важным этапом в расследовании уголовного дела. Значимость данного этапа объясняется тем, что именно в этот временной отрезок консолидируются все собранные по уголовному делу доказательства и иные процессуальные документы. На этом этапе следователь принимает окончательное решение о полноте расследованного уголовного дела, а также о дальнейшей его судьбе.

По окончании предварительного следствия в отношении лица, совершившего преступление и заболевшего психическим расстройством, следователь должен ознакомить заинтересованных участников с материалами уголовного дела, после этого составить постановление и направить уголовное дело прокурору согласно п. 5 ст.514 УПК РК. Далее прокурор рассматривает уголовное дело и при соблюдении необходимых требований направляет уголовное дело в суд для рассмотрения по существу [10].

В связи с тем, что формой окончания предварительного следствия в отношении невменяемого лица, у которого психическое расстройство возникло после совершения преступления, выступает направление уголовного дела в суд с постановлением, то немаловажным является вопрос, связанный с ознакомлением данного лица с материалами уголовного дела, признав, что все следственные действия по уголовному делу произведены, а собранные доказательства достаточны для принятия решения о направлении уголовного дела в суд для решения вопроса о применении принудительных мер медицинского характера.

Некоторые авторы придерживаются мнения, что предъявлять материалы уголовного дела для ознакомления невменяемым не нужно, поскольку невменяемое лицо в силу своего психического расстройства не способно осознавать фактического характера своих действий, правильно воспринимать объективную действительность и попросту понимать содержание предъявляемых ему процессуальных документов [9; 118].

Другие авторы предлагают принимать решение об ознакомлении невменяемого с материалами уголовного дела, в зависимости от психического расстройства лица и состояния его здоровья, в момент окончания предварительного следствия [9; 118].

Ознакомление с материалами уголовного дела является важной гарантией защиты прав и законных интересов лица, так как после такого ознакомления расширяются возможности защиты, которая гарантирована Конституцией РК в отношении всех граждан без исключения. Ограничив лицо в праве ознакомления с материалами уголовного дела, мы тем самым лишаем его права на эффективную защиту.

Однако когда лицо в силу своего психического расстройства не способно правильно воспринимать объективную действительность, понимать и осознавать содержание предъявленных ему процессуальных документов, вряд ли целесообразно давать ему материалы уголовного дела для ознакомления. В данном случае ознакомление с уголовным делом выступает лишь формальностью и не является гарантией защиты прав и законных интересов, а лишь затрудняет работу следователя. На наш

взгляд, в случае, если состояние лица таково, что ознакомление не имеет смысла, достаточно ограничиться ознакомлением с материалами уголовного дела защитника и законного представителя.

При улучшении психического состояния лица, имеющего психическое расстройство, должен решаться вопрос о его возможности принимать участие в следственных и иных необходимых процессуальных действиях. Эго необходимо потому, что следователь или суд не вправе ограничивать в правах лицо, которое в силу своего психического состояния не способно принимать участие в уголовном деле. Не установив данное обстоятельство и ограничив в правах лицо, мы тем самым лишаем его последнего права самостоятельно защищать свои права и законные интересы.

В связи с этим возникает вопрос о том, каким образом установить возможность невменяемого лица принимать участие в ознакомлении с материалами уголовного дела. По общему правилу данное обстоятельство выясняется в ходе производства судебно-психиатрической экспертизы. В то же время судебно-психиатрическая экспертиза — это весьма длительный процесс, порой занимающий не один месяц. Следовательно, проводить судебно-психиатрическую экспертизу специально для решения вопроса о возможности ознакомления лица с материалами уголовного дела не представляется возможным.

В сложившейся ситуации, на наш взгляд, будет наиболее правильным непосредственно перед решением вопроса о целесообразности ознакомления невменяемого с материалами уголовного дела проводить психолого-психиатрическое освидетельствование этого лица с целью принятия обоснованного решения о возможности ознакомления такого лица с материалами уголовного дела. Подобное освидетельствование может быть проведено специалистом в области психиатрии.

У лиц, в отношении которых ведётся производство о применении принудительных мер медицинского характера, психическое расстройство не всегда исключает возможность принимать участие в следственных и иных процессуальных действиях. Так, по мнению С.Н.Шишкова, «глубокое психическое расстройство в момент совершения общественно опасного деяния в силу ряда причин (кратковременность болезни, чередование болезненных приступов с ремиссиями и т.п.) может уже через несколько дней значительно смягчиться или исчезнуть совсем, так что лицо, невменяемое в отношении инкриминируемого ему деяния, оказывается способным участвовать в производстве по уголовному делу» [11; 14].

Окончание досудебного расследования по новому УПК РК от 4 июля 2014 г., который вступил в силу с 1 января 2015 г., возможно в нескольких формах — обвинительный акт, постановление о прекращении уголовного дела и постановление о направлении дела в суд для применения принудительных мер медицинского характера [12].

Наряду с общим порядком окончания предварительного следствия по уголовному делу в рамках особого производства в отношении невменяемых существуют определённые особенности этого этапа, регламентированные ст. 518 нового УПК РК.

Так, согласно этой статье по окончании предварительного следствия следователь выносит постановление:

1) о прекращении дела производством в случаях, предусмотренных ст. 35 и частью пятой ст. 288 нового УПК, а также когда болезненные психические расстройства не связаны с опасностью для себя или других лиц либо с возможностью причинения иного серьезного вреда;

2) о направлении дела в суд для применения принудительных мер медицинского характера [12].

Здесь представляет интерес проблема прекращения уголовного дела в рамках такого особого производства. В процессуальной литературе существуют различные точки зрения о возможности прекращения производства по делам о невменяемых, не представляющих общественной опасности.

Большинство придерживается мнения, что иногда как невменяемость лица, так и явная нецелесообразность постановки вопроса о применении к такому лицу принудительных мер медицинского характера очевидны уже на стадии предварительного расследования, и поэтому направление уголовного деда в суд в таких случаях ничем не оправдано [9].

В науке уголовного процесса существует и противоположный взгляд на данный вопрос, заключающийся в том, что следователь не вправе прекращать уголовное дело в отношении невменяемых на том основании, что лицо не представляет общественную опасность, так как такое право принадлежит только суду. Данной точки зрения придерживается и С.В.Гусева, аргументируя свою позицию следующим образом: «Окончательное решение о признании лица, совершившего общественно опасное деяние, невменяемым принадлежит только суду. Суд в процессе судебного разбирательства по уголовному делу должен не только решить вопрос о том, является ли лицо опасным для общества и нуждается ли оно в применении принудительных мер медицинского характера, но и проверить:

а) насколько полно, всесторонне и объективно проведено предварительное следствие; б) доказан ли факт, что именно это лицо совершило общественно опасное деяние; в) установлено ли наличие психического расстройства, в связи с которым лицо не осознавало фактического характера и общественную опасность своих действий (бездействия); г) с соблюдением всех ли требований закона проведена судебно-психиатрическая экспертиза и правильно ли дана оценка заключению экспертов; д) не нарушались ли в ходе производства по уголовному делу права и законные интересы невменяемого и других участников процесса. Только суд может дать окончательную оценку собранным по уголовному делу доказательствам с точки зрения их достаточности для достоверного вывода об общественной опасности лица, совершившего противоправное деяние, и о необходимости или нецелесообразности применения к нему принудительных мер медицинского характера» [13; 182, 183].

На наш взгляд, точка зрения С.В.Гусевой является не совсем оправданной, поскольку обосновывается лишь тем, что при решении вопроса о наличии общественной опасности лица суд будет более объективным, нежели следователь.

Следователь, равно как и суд, подвергает доказательства оценке с точки зрения их достаточности для достоверного вывода об общественной опасности лица, совершившего противоправное деяние, и о необходимости направления уголовного дела в суд либо о прекращении уголовного дела при наличии законных оснований. Более того, законодатель сам наделяет властных субъектов, осуществляющих предварительное расследование, правом прекращения уголовного дела.

Говоря об установлении общественной опасности психического расстройства лица, следует отметить, что следователь, равно как и суд, изучив выводы судебно-психиатрической экспертизы и доказательства, собранные по уголовному делу в отношении невменяемого, может решить вопрос о наличии или отсутствии общественной опасности лица, в отношении которого ведётся данное производство. Общественная опасность — это категория юридическая и исходит от совершённого деяния (способ, объект посягательства), что, безусловно, входит в круг вопросов, подлежащих установлению следователем при производстве по уголовному делу, а значит, следователь способен дать оценку общественной опасности лица.

Однако следует отметить, что общественная опасность лица связана не только с совершённым преступным посягательством, но и с психическим расстройством лица. Именно поэтому следователь, вынося постановление о назначении судебно-психиатрической экспертизы, среди прочих ставит вопрос о том, представляет ли психическое расстройство лица опасность для себя или окружающих. Получив заключение эксперта, следователь, оценив его в совокупности с имеющимися в уголовном деле доказательствами, в полной мере может решить вопрос об общественной опасности лица с учётом его психического расстройства.

С точки зрения действующего законодательства, если причиной совершения преступления является психическое расстройство, то такое расстройство уже по определению представляет опасность для окружающих, так как конечным результатом, его следствием является совершение общественно опасного деяния. Преступление, независимо от его тяжести, законодателем рассматривается как деяние, представляющее общественную опасность.

На наш взгляд, такой подход нельзя признать верным. Степень психического расстройства невменяемого лица не всегда соответствует степени совершённого деяния. Например, по заключению судебно-психиатрической экспертизы невменяемое лицо имеет тяжёлое психическое расстройство, которое может представлять опасность для самого невменяемого и окружающих, совершает общественно опасное деяние небольшой тяжести. Может быть и наоборот, когда лицо совершает тяжкое общественно опасное деяние, но в момент производства судебно-психиатрической экспертизы его психическое расстройство не представляет опасность в связи с улучшением его самочувствия. Как мы указывали выше, психическое расстройство может изменяться. Так, глубокое психическое расстройство в момент совершения общественно опасного деяния в силу ряда причин (кратковременность болезни, чередование болезненных приступов с ремиссиями и т.п.) может уже в течение нескольких дней значительно смягчиться или исчезнуть вообще, в связи с чем может встать вопрос о целесообразности применения принудительных мер медицинского характера.

Представляется, что при принятии решения о принудительном лечении лица за основу должен приниматься факт наличия психического расстройства, которое, по заключению экспертов, может представлять опасность для самого невменяемого и окружающих. В первую очередь, необходимо исходить из медицинского показателя — степени психического расстройства, о чём может свидетельствовать заключение судебно-психиатрической экспертизы [9].

На международном уровне действуют «Принципы защиты психически больных лиц и улучшения психиатрической помощи» (резолюция Генеральной Ассамблеи ООН от 17 декабря 1991 г. № 46/119) [14]. При этом принципы защиты психически больных лиц конкретизированы и развиты в соответствии с особенностями правовой системы РК. Так, например, в части 5 ст. 123 Кодекса РК «О здоровье народа и системе здравоохранения» предусмотрено, что психиатрическое освидетельствование лица может быть проведено без его согласия или без согласия его законного представителя в случае, когда обследуемое лицо совершает действия, дающие основание предполагать наличие у него тяжелого психического расстройства (заболевания), которое обусловливает: 1) его непосредственную опасность для себя и окружающих; 2) его беспомощность, т.е. неспособность самостоятельно удовлетворять основные жизненные потребности, при отсутствии надлежащего ухода; 3) существенный вред его здоровью вследствие ухудшения психического состояния, если лицо будет оставлено без психиатрической помощи [15]. При этом следует отметить, что законодатель в данном случае не отождествляет общественную опасность психического расстройства лица с совершением общественно опасного деяния и, более того, с тяжестью совершённого общественно опасного деяния. Поэтому считаем, что общественная опасность психического расстройства лица и вид принудительного лечения лица должны определяться судебно-психиатрической экспертизой. А тяжесть совершённого общественно опасного деяния лица может выступать лишь вспомогательным элементом при решении указанных вопросов.

Действующий же УПК РК не только определяет общественную опасность психического расстройства лица через призму тяжести совершённого им деяния, но и рассматривает её в качестве основания для применения принудительных мер медицинского характера. Подтверждением этому может выступать ч. 2 ст. 5517 УПК РК. Так, ч. 2 указанной статьи предусматривает, что если лицо не представляет опасность по своему психическому состоянию либо им совершено деяние небольшой тяжести, то суд выносит постановление о прекращении уголовного дела и об отказе в применении принудительных мер медицинского характера. Такой же позиции придерживается Верховный суд РК [16]. Следовательно, суд вправе отказать в применении принудительных мер медицинского характера как в случае отсутствия общественной опасности лица, так и в случае, когда лицом совершено общественно опасное деяние небольшой тяжести — вне зависимости от наличия психического расстройства лица и степени его опасности.

Нам такой подход представляется неверным. Но следует признать, что новый УПК ограничился критерием опасности лица, определяя основания для прекращения дел такой категории. Так, в ч. 2 ст. 521 УПК от 4.07.2014 г. сказано, что если признанное невменяемым лицо не представляет опасность по своему психическому состоянию, то суд выносит постановление о прекращении дела и о неприменении принудительных мер медицинского характера [12].

Полагаем, что факт совершения лицом, имеющим психическое расстройство, общественно опасного деяния небольшой тяжести, не устраняет опасность психического расстройства этого лица. Если же следовать смыслу ч. 2 ст. 521 УПК РК, то в данном случае освобождение лица от уголовной ответственности и от принудительного лечения ставит под угрозу безопасность жизни и здоровья окружающих лиц и самого невменяемого. Например, суд принимает решение о конкретной принудительной мере медицинского характера с учётом опасности лица. Опасность лица, согласно действующему законодательству, в значительной мере характеризуется тем, что оно уже совершило. Если в ходе рассмотрения уголовного дела в суде станет известно, что общественно опасное деяние совершил не невменяемый, а кто-то другой, при таких обстоятельствах суду необходимо отказывать в применении принудительных мер медицинского характера, независимо от наличия у лица психического расстройства, представляющего опасность. Об этом же свидетельствует и ч. 3 ст. 521 УПК РК, где сказано, что в случае, когда суд признает, что участие данного лица в совершении деяния не доказано, равно как и при установлении обстоятельств, предусмотренных пунктами 1–12 части первой ст. 35, частью первой ст. 36 нового УПК, суд выносит постановление о прекращении дела по установленному им основанию, вне зависимости от наличия и характера заболевания лица.

В этом проявляется гуманность нашего законодательства, потому что названные лица в силу психического расстройства оказываются неспособными осознавать фактического характера и общественную опасность своих действий (бездействия) или руководить ими. Таких людей нужно лечить, а не наказывать. Это будет справедливо, потому что лицо, страдающее психическими расстройствами, действующее неосознанно, невиновно. Применение наказания за совершение деяния при отсутствии вины нельзя признать справедливым.

Привлечение к уголовной ответственности и назначение наказания в отношении лица, совершившего общественно опасное деяние в состоянии невменяемости, нецелесообразно, поскольку в таких случаях наказание не достигнет таких важных целей, как достижение социальной справедливости, исправление осужденного и предупреждение совершения новых преступлений со стороны иных лиц.

Список литературы

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

2 *Фейнберг Ц.М.* Принудительное лечение и призрение душевно больных, совершивших преступление, в дореволюционной России. — М.: Юрид. изд-во, 1946. — 52 с.

3 Соборное уложение 1649 г. царя Алексея Михайловича. — [ЭР]. Режим доступа: http://www.bibliotekar.ru/sobornoe-ulozhenie-1649/

4 *Шаляпин С.О.* Монастырская ссылка в России XV–XVIII вв.: Автореф. дис. ... канд. ист. наук. — Архангельск, 1998. — 20 с.

5 УПК РСФСР от 25.05.1922 г. — [ЭР]. Режим доступа: http://base.consultant.ru/cons/cgi/online.cgi? req=doc; base=ESU; n=4006

6 Уголовно-процессуальный кодекс РСФСР от 27 октября 1960 г. — [ЭР]. Режим доступа: http://www.consultant.ru/document/cons_doc_LAW_34492

7 Уголовно-процессуальный кодекс Казахской ССР от 22 июля 1959 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1004281.

8 *Михайлова Т.А.* Производство по применению принудительных мер медицинского характера. — М.: Всесоюз. науч.-исслед. ин-т проблем укрепления законности и правопорядка, 1987. — 76 с.

9 *Коптяев А.Ю.* Производство о применении принудительных мер медицинского характера: Дис. … канд. юрид. наук. — Тюмень, 2010. — 196 с.

10 Уголовно-процессуальный кодекс Республики Казахстан от 13 декабря 1997 г. // ИС Параграф http://online.zakon.kz/Document/? doc_id=1008442#sdoc_params

11 *Шишков С.Н.* Психические расстройства как обстоятельства, подлежащие доказыванию. — М.: Изд-во ИГиП АН СССР, 1982. — 179 с.

12 Уголовно-процессуальный кодекс Республики Казахстан от 4 июля 2014 г. // ИС Параграф http://online.zakon.kz/Document/? doc_id=31575852#sdoc_params

13 *Гусева С.В.* Особенности предварительного следствия по делам невменяемых и лиц, заболевших психическим расстройством после совершения преступления: Дис. … канд. юрид. наук. — М., 2000. — 221 с.

14 Принципы защиты психически больных лиц и улучшения психиатрической помощи. Приняты резолюцией 46/119 Генеральной Ассамблеи от 17 декабря 1991 г. № 46/119. — [ЭР]. Режим доступа: http:// www.un.org/ru/documents/decl_conv/conventions/mental_helth_care.shtml

15 Кодекс Республики Казахстан от 18 сентября 2009 г. № 193-I «О здоровье народа и системе здравоохранения» // ИС Параграф WWW http://online.zakon.kz/Document/? doc_id=30479065#sdoc_params

16 Нормативное постановление Верховного суда Республики Казахстан от 9 июля 1999 г. № 8 «О судебной практике по применению принудительных мер медицинского характера» // ИС Параграф http://online.zakon.kz/Document/? doc_id=1013955#sdoc_params

Р.М.Жәмиева, Р.Ф.Дадашов, Б.А.Жақыпов

Медициналық сипаттағы мәжбүрлеу шараларын қолдану мәселелері

Мақалада медициналық сипаттағы мәжбүрлеу шараларын есі дұрыс емес адамдарға қолдану туралы істер бойынша жүргізудің кейбір мәселелері көрсетілді. Авторлар қысқаша салыстырмалы-тарихи шолу жүргізді. Осындай істер бойынша сотқа дейінгі тергеу-тексерудің басталуы мен аяқталуының мәселелері каралды. Атап айтқанда, есі дұрыс емес адамның қылмыстық істің материалдарымен танысуына аса назар аударылды. Авторлар қылмыстық істі мерзімінен бұрын тоқтатудың қажеттілігі жоқ деп санайды, себебі, психикалық бұзушылықтың әрбіреуі адамның есі дұрыс еместігін жоққа шығармайды. Қоғамға қауіпті әрекеттің критерийі медициналық сипаттағы шараларды қолданбаудың негізі ретінде сынға алынады. Осы жерде ұлттық және халықаралық-құқықтық заңнамалар талданады. Авторлар мұндай шешімді тек қана сот-психиатриялық сараптаманың қорытындысын ескере отырып, қабылдау қажеттігін ескертеді.

R.M.Zhamiyeva, R.F.Dadashov, B.A.Zhakupov

Application problem of compulsory measures of a medical nature

This article expound some problems of proceeding for the application of compulsory medical measures to non compos. The authors conducted a brief comparative historical overview. The questions about start and end of the pre-adjudicative investigation of such cases are considered.. In particular, paid attention to the deranged acquaintance with the case. The authors believe that there is no need to prematurely terminate the criminal case, as not each mental disorder excludes putability. Criticism of the criterion of socially danger of act as the basis of non-use medical measures. In this case analyzed both national and international law legislation. The authors believe that such a decision should be taken only based on the findings of forensic psychiatric examination.

References

1 Levshin A.I. *Description the Kirghiz-Cossack or the Kirghiz Kaisatsk Hordes and Steppes*, under the general (common) edit. of acad. M.K.Kozybaev, Almaty: Sanat, 1996, 656 p.

2 Fyeinbyerg Ts.M. *Compulsory Treatment and Charity is Sincere the Patients Who Have Committed a Crime in Pre-revolutionary Russia*, Moscow: Legal Publishing house, 1946, 52 p.

3 Cathedral Code 1649 of Tsar Alexey Mikhajlovich, http://www.bibliotekar.ru/sobornoe-ulozhenie-1649/

4 Shalyapin S.O. Monastic The Reference in Russia XV–XVIII c.c., Thesis abstract… PhD, Arkhangelsk, 1998, 20 p.

5 Code of Criminal Procedure of RSFSR of May 25, 1922, http://base.consultant.ru/cons/cgi/online.cgi? req=doc; base=ESU; n=4006

6 Code of Criminal Procedure of RSFSR of October 27, 1960, http://www.consultant.ru/document/cons_doc_LAW_34492

7 Code of Criminal Procedure of Kazakh SSR of July, 22 1959, http://online.zakon.kz/Document/? doc_id=1004281.

8 Mikhailova T.A. *Proceedings on Applying the Compulsory Medical Measures*, Moscow: All-Union Scientific Research Institute of problems of strengthening the rule of law, 1987, 76 p.

9 Koptyayev A.Yu. *Proceedings about The Application of Compulsory Medical Measures*, Abstract thesis… PhD, Tyumen 2010, 196 p.

10 Code of Criminal Procedure of Republic Kazakhstan of December, 13, 1997, IS Paragraph, http://online.zakon.kz/Document/? doc_id=1008442#sdoc_params

11 Shishkov S.N. *Mental Disorders, as Circumstances to Be Proven*, Moscow: Publishing house Institute of State and Law, Academy of Sciences of the USSR, 1982, 179 p.

12 Code of Criminal Procedure of Republic Kazakhstan of July, 4 2014, ИС Paragraph, http://online.zakon.kz/Document/? doc_id=31575852#sdoc_params

13 Guseva S.V. *Features Preliminary Investigation of Cases on Non Compos and Insane Individuals Ill Mental Disorder after Committing The Crime* // Thesis…PhD, Moscow, 2000, 221 p.

14 «Principles of Protection on Persons With Mental Illness and for The Improvement of The Mental Health Care», are accepted by the resolution 46/119 UN General Assemblies from December, 17th, 1991 № 46/119, http: // www.un.org/ru/documents/decl_conv/conventions/mental_helth_care.shtml

15 The Code of Republic Kazakhstan from September, 18th, 2009 № 193-I «About health of people and system of public health services», IS Paragraph WWW http://online.zakon.kz/Document/? doc_id=30479065#sdoc_params

16 The Regulatory Decision of the Supreme Court of Republic Kazakhstan from July, 9th, 1999 № 8 «About judiciary practice on application of compulsory medical measures», IS Paragraph http://online.zakon.kz/Document/? doc_id=1013955#sdoc_params

UDC 343.147

L.K.Arenova

Ye.A.Buketov Karaganda State University
(E-mail: super.hamka@mail.ru)

Basic elements of the mechanism of committing terroristic and religious extremist crimes

The way of committing crimes, connected with the activity of non-traditional religious confessions and cults, in the first place is interdependent with the implements of crimes committing. Of the considered group and is determined as the system of actions which are chosen for criminal aim achievement and conditioned by the character of nontraditional religious activity, therefore the choice of crime implements is different from forensic characteristics of crimes, committed outside confessions and cults. Also these actions are conditioned by the circumstances, subculture, presence of professional crime experience, and personal physiological and psychological qualities of criminal — adherents.

Key words: non-traditional religious confessions, the circumstances, subculture, presence of professional crime experience, and personal physiological and psychological qualities of criminal adherents.

At the present stage of development of post-Soviet states, members of the CIS, there is the most urgent question about technologies for the identification, detection and investigation of terrorist and religious extremist oriented crimes, i.e., the crimes which are related to the activities of non-traditional religions and cults. The threat of religious extremism and terrorism is a new phenomenon not only in Kazakhstan society, but also it affects the whole world community.

In these kinds of socially dangerous acts, clearly traced their connection with the spread in our society non-traditional religious ideas and views of the Islamic, Christian and other directions. This factor, in turn, allows to combine them into a group that can be defined as crimes related to the activities of non-traditional religions and cults. It defines the problematic issues of theoretical and practical nature, understanding the essence of the phenomenon, the development of scientific and applied recommendations for their identification, detection, investigation and counteraction.

However, the concept of counteraction to extremism, particularly to religious extremism, as a reaction of the state to the spread of negative influences of violence in all its forms, is not quite adequate.

The counteraction traditionally means the committing of actions, which impede to other actions. For terrorism and religious extremist oriented crimes, counteraction is ineffective, and often has the opposite effect. This is due to the specificity of religious activity, delicate question of the inner world of the human, which affects the mental and psychological sphere, his consciousness, the level and individual needs of the religious consciousness, a system of values, religious beliefs, personal feelings and spiritual needs.

Indicated determines not only the specifics of the process of detection and investigation of the crimes, but also awareness of the basic elements of criminal characteristic of crimes as scientifically grounded technology of production of legislative actions of the competent authorities of the state.

In this regard, it is necessary to solve arising issues of investigation with the scientific sources of the elements of criminalistic characteristics of the crimes and analysis of its basic elements, the dominant of which is the method and instruments of committing acts, which have the fundamental informative function.

«The method of committing a crime is a system of interdependent adjustably determined actions to prepare, commit and conceal the crimes related to the use of appropriate instruments and means, as well as the time, place and other circumstances, which contribute to the objective situation of crime» [1; 15, 16].

The knowledge of the method and instrumentalities of crimes related to the activities of non-traditional religions is important, due to three specific and interrelated plans, which take into account the psychological aspects: criminal law, criminal procedure, criminology.

In the criminal law aspects, the meaning of the method of committing a crime is not uniquely determined.

For example, A.N.Trainin pointed out that from the perspective of dogmatic interpretation of the text of the rules of the Special Part of the Criminal Law, «the method of committing a crime is considered as a facultative element of the objective side of a crime, as it is mentioned not in all dispositions» [2; 98, 99].

V.N.Kudryavtsev, continuing the discussion, determines the method «as a certain order, the method, the sequence of movements and techniques used by a person, which are qualitatively characterize the criminal act» [3; 71].

G.G.Zuikov proceeds from the following content of criminal law meaning of the method of committing a crime:

- on the basis of method of committing crimes, the legislator differentiates criminal acts from each other (eg, theft, murder, escape, etc.);
- method of action is used by legislators as the main criterion for establishing criminal liability for acts that will be executed in other ways and involve only administrative or civil liability;
- in some cases the method of committing a crime is provided in dispositions of articles of the Special Part of criminal law as a circumstance, which qualifies deed;
- some of the methods of committing a crime are aggravating circumstances;
- the method of committing a crime is taken into account by the court in the individualization of punishment, because the method characterizes the deed, subject of a crime and the subjective side [1; 6].

But criminal law understanding of the meaning of the method during the investigation is not enough.

Criminal procedural meaning of the method of committing a crime is expressed in the contents of the subject of proof. The method of crime must be determined and proved by the factual data, obtained as a result of investigative actions in order to establish objective truth in the criminal case.

The criminal procedural aspect of the method of committing a crime is considered «as a complex of acts committed by the offender in a certain sequence and leads to criminal result» [1; 20]. In this sense, the method of committing a crime is the part of the objective truth, established in a criminal case, and play an auxiliary role in the verification and assessment of evidence, established in the subject of proof, what shows its criminal procedural meaning.

In criminalistics, the method of the crime committing is determined by its informative and deterministic factors, which are important in the investigation of criminal cases of different types and groups of crimes. «The criminalistic science studies the method of crime committing, essentially as informative phenomenon of reality, and on the basis of knowledge of the laws of its formation, causes and forms of repeatability develops tools, techniques and methods for detecting, gathering, research and assessment of forensic evidence» [1; 11, 12].

G.G.Zuikov pointed out that the criminalistical meaning of the method of crime committing and the possibility of considering it as evidence of laws of occurrence of evidence, based on the determinacy and repeatability of the methods of crime committing» [1; 12].

The factors, which determine the methods of committing of terrorist and religious extremist oriented crimes according to the foregoing provisions can be classified according to external expressions, related to the environment, where the offender acts, and internal, related directly to his personality, psychological characteristics and motivations of behavior.

The content of external determinate factors of committing terrorist and religious extremist crimes can be defined as crime object's features, the subject of a criminal assault, the objective conditions of prevailing situation of crime committing, the objective relationship or its lack thereof between the object of criminal assault and the offender. External factors perform their functions through the mental state of the offender, his emotions, outlook, feelings, intellectual potential. Further, the mental state is determined by such feelings, which characterizes the external environment, determine the individual decision-making on certain events and form their significance.

The internal factors include: the motive and purpose of committing a crime, personal characteristics and qualities of the object of crime, his mental and psychological type and features. Internal and external factors are in constant interrelation and interact with each other, what defines individuality of the method of the crime committing in the sphere of religious activity by that or other person.

These factors, in our opinion, in practice of investigation of terrorism and religious extremist oriented crimes should be considered together, inseparably from each other, in order to clearly establish the event of the crime and the method of its committing.

Necessary to consider, that indicated factors change with time, what is typical for faith in the irrational, which is inherent to human and while saving the integrity of objective setting of committing a crime, some of its elements change or end their existence and they are replaced by another ones, taking into account that the subject of crime carries out a criminal intent.

The process of determination of methods of committing terrorist and religious extremist crimes lies in the fact, that means homogeneous, similar criminal acts committed by the same person (for example, the spiritual leader of the confession) will not coincide with each other in all its elements. This leads to a decision of necessity to substantiate the assumptions of «similar methods have to coincide in number of characteristic features», as well as «the reflection of events of crime has situational character in the external environment, depends on conditions, in which it took place».

«The reflection may be incomplete, or changed in the external world, and the information about the event and the evidence may remain unknown» [4; 132].

Repeatability of the method of crimes committing, which is related to the activity of non-traditional religions and cults, based on determinacy, defined by the conditions and the nature of this process.

As any other phenomenon of the society and the result of the activities of the individual, the repeatability of an action, let alone related to the field of faith in the irrational, based on the separating laws governing the process of a certain complex of motivated actions. In turn, this motivation is shown in the choice of the best way of committing a crime that «does not exclude deviations, reflected in the fact that any person may commit a crime, which wasn't committed earlier, or by other method or partially modified method» [1; 15].

Thus, the dependence on the prevailing circumstances is the base for the choice of method of committing terrorist and religious extremist oriented crimes, which is formed by actively preached idea of a specific non-traditional religious confession.

Such an assumption, at the present stage of religious activity may be the theoretical basis of various types of criminalistic recommendations in the practice of investigation of crimes related to the activity of non-traditional religions and cults.

In our opinion, the concept of method of crime committing of terrorist and religious extremist oriented crimes requires first and foremost an intellectual approach to the process of identification, detection, investigation and prevention of crime and countering them, and assumes understanding its psychological effect, which is a system of determinate actions, classified into three separate parts: the action — activity, directly action, action — the operation. In this case, all three types function as a movement or activity in relation to the investigation — as technology.

A.N.Leont'yev, Yu.D.Panov indicated in their research, that «the term» activity «- is a complex of processes of association aimed at achieving the result that assumes the committing of action» [5; 328]. Actions are relatively independent processes, subordinated to independent goal, but correspond to the idea of the activity to which they belong. Operation is part of action, which corresponds to action, but not to its purpose, as one and those same operations can perform different actions. Actions and operations find their expression in the movements and their combination, which can not belong to a specific operation or a single action [5].

As properly noted G.G.Zuikov «the detection of the method of committing a crime in a particular criminal case is to identify the system of movements and operations, by which the actions were committed, as well as the system of action, united by a common purpose and activities of its constituent» [1; 16].

General regularities of criminal activity of missionaries, preachers and adherents can determine criminalistic characterization of terrorist and religious extremist oriented crimes, and generally related to the activities of non-traditional religions and cults. The content of the characteristics and its data allow to visualize its differences from the criminological characteristics of crimes, which are not related to the activity of non-traditional religious and cult.

Criminalistic characteristic of crimes includes the system of important information about the elements of a crime of a particular type, group, subgroup, which reflects the natural connections between them, which helps to construct and verify the investigative leads in the investigation and establish objective truth in a particular criminal case.

Criminalistic characteristic of terrorist and religious extremist oriented crimes should include a system of information about the preparation, committing and conceal the of crime, and the typical consequences of its commission, the identity of the possible criminal, the possible motives and purposes of crime, the identity of the possible victims of crime, and other circumstances of the crime, which include time, place, situation, motive, purpose.

However, the way the commission of crimes of considered type and group as an element of criminalistic characteristics has not only criminalistic significance due to its informational content, but also because at the initial stage of the investigation, the competent public authorities have information about the method and the instrument of its commission.

Terrorist and religious extremist oriented crimes committed by persons, who carry out non-traditional religious missionary activity, as well as adherents, to avoid leaving material traces, they select the method of crime committing by adapting it to the specific situation, emerging criminal situation, that is, in most cases, they prepare to commit a wrongful act in advance.

Method of committing crimes in the sphere of non-traditional cultic religious activity has its own specific feature — initially it has the nature of the psychological impact, it is thoroughly planned, and it is based on psychological performance, i.e. it has a psychological nature, using methods of influence on human consciousness and mental activity in general.

For this purpose, the social environment, the potential and the mentality of society are studied for possible selection of adherents, who are more susceptible to new non-traditional cultic-religious ideas, with a weakened nervous and mental activity, infantilism and emotional instability, credulity, and who can be used in crime committing.

Particular attention is paid to the geographical location of the area where the localization of a religious organization or group is planned, character of actions by the public authorities, which carry out registration, analyzes the experience of the implementation of activity in other regions of the involvement of adherents.

Using as a method of committing the crimes the conditions such as trance, hypnotic influence, including the use of psychotropic substances, as well as the technology of psychological impact and the manipulation of attention, conscious and unconscious part of the human psyche, the formation of persistent concepts of world perception through the prism of the irrational in the natural fears and desires. Such techniques of third-party impact can reshape personal properties, destroy the existing system of values (The world model) and the human psyche.

The analysis of practice leads to the conclusion that the method of committing terrorist and religious extremist oriented crimes is a kind of dynamic stereotype of human behavior, i.e., it is based on psychological laws. This is confirmed by the fact, that repeatability of the method or its part, which were previously used by confession, denomination or cult to commit a crime, are observed in commission of such crimes.

Furthermore, the process of committing crimes depends on the physiological and psychological characteristics of the criminal-adherent, his nervous and mental disorders, psychological traumas which have a significant value to the manipulation of attention and exposure to outside influence of the human psyche.

The general laws of the method and the choice of instruments of committing crimes, related to the activities of non-traditional religions and cults depend on the specific purpose, which is determined by them.

The main elements of the method of committing terrorist and religious extremist oriented crimes are the preparation, commit and conceal, characterized by the specificity of instruments and means of committing socially dangerous acts.

It is necessary to emphasize the dependence of the method of commission, preparatory actions and concealment of crimes on the criminal's personality features. Such dependence has a special significance, which is caused by the nature and direction of particular nontraditional religious denomination or cult (e.g. Islamic type, Protestant type, Hinduism, etc.), its geographic location, origin and disposal, adopted traditions, where the leading role is played by the adherents' individual features which are caused by a number of factors. Among the latter it should include a specific orientation of religious denomination and cult, adherents' individual features as the subject of the crime, witnesses and witnesses from among the adherents-parishioners, their relations with society, personality structure of the inner world, the specifics of the situation where the illegal acts are committed. Repeatability of crimes committing, the ability to use, acquire and improve the criminal experience subsequently lead to the formation of skills of concealment of crimes. Moreover, 92 % of persons belonging to non-traditional religion, denomination or cult, which have the features of a criminal organization, are random, they haven't been previously convicted, haven't been prosecuted, haven't been driven, and they are characterized as positive in the workplace\study, residence. Concealment of crimes in this sphere in 89 % of cases was carried out before the initiation of criminal proceedings, 4 % — at the initial stage of the investigation, at the subsequent stages the concealment was not carried out at all, and in 7 % of cases — during the trial [6]. At the same time the absence of a suspect (accused) in detention affects the activity of concealment of the crime and counteraction to investigation, i.e. a preventive measure does not provide isolation from denomination, and society as a whole [6].

The practical experience leads to the conclusion that in most cases, persons who commit terrorist and religious extremist oriented crimes clearly aware of the social danger of their actions, and deliberately destroy the traces which remain on the scene of the crime, unlike other types of socially dangerous acts. The exception in this case is a person who by virtue of mental disorder is not able to realistically assess the threat

of his actions and does not pursue venal motives, what is partly characteristically for such crimes (for example, a well-known cult, Pskov hermits in Russia that took place in spring 2010) [6].

Information about instruments of terrorist and religious extremist oriented crimes in criminalistics characteristic of the method of the crime is necessary, which is due to specificity of the act in question.

Research shows, that complex of instruments of committing crimes determines the direction of non-traditional religious denomination or cult. The instruments, which are used in crime in this area complement each other, thereby form a complex structure, which includes elements, such as the human, as a biological species, technical and other means (e.g., toxic, psychotropic and narcotic substances). In this regard, a person acts as a highly effective instrument of crime, capable of independent choice of the optimal spatial dislocation for criminal intent before the criminal result. This is especially important when explosive devices are used and achieving the criminal result of terrorism act.

The choice of tools and methods of committing a crime depends on the personal features of the criminal, his psychic abilities, physical strength, skills, belonging to a certain category of adherents or missionaries and it is directly related to the nature of the wrongful act. For example, non-traditional religious denominations of the Islamic orientation, tend to use equally mental impact and training in the use of firearms and explosives, and eclectic cults, which use psychotropic drugs and other substances, as well as modern methods of psychological effects on humans in order to achieve altered states of consciousness.

Professional skills appear in the method of crime committing, that highlight the choice of instruments of crime and crime's concealment, e.g. a person who has no skills in the use of firearms, will not use a weapon to commit a crime.

Personal features of adherents assume the originality of the ways of crimes' concealment. There are various forms and methods of crimes' concealment, ranging from **refusal of giving evidence**, giving **deliberately false testimony**, use of conspiracy methods and the physical destruction of the witnesses. The rules of non-traditional religions and cults, the presence of a subculture and informal rules of conduct forbid witnesses-adherents, victims and offenders to be proactive in the process of investigation. Despite the fact that the passivity leads to a deterioration of their situation related to the possible appointment of punishment, situation awareness, as extremely dangerous to life, mental, physical, health and property of the person and his family.

In the committing of non-obvious terrorist and religious extremist crimes, a way of concealing the crime is a constituent part of the crime committing method.

In the committing of the obvious crimes the method of the crimes' concealment as a purposeful activity may be absent, and **refusal of giving evidence** acts as the implementation by adherents of informal behavioral norms and legislation, such as the announcement of the information obtained during confession, including the public one.

Religious criminals can be subdivided into three categories, which are characterized by individual laws of crimes' concealment.

The first category is prone to premeditated methods of concealment of the crimes, what is reflected in the fact that criminal active adherents deliberately mislead the investigation, thereby winning time, destroy the material traces of their actions, as well as take actions to shift responsibility to other dependent adherents, for example, those parishioners who received financial aid from confessions or cult. They elect the methods of committing crimes as well as its concealment, as a rule, it is murder, where the cadaver is destroyed by some methods.

The second category of religious-cult criminals rarely conceals traces of the crimes, because of imbalance and instability of personal qualities of criminals. During the investigation, they can often change their evidence, perjure against other adherents or members of their families, as forced them to commit crimes.

The third category of adherents in dissimilar cases uses different methods, i.e., they act spontaneously, after committing the crime they may conceal the crime, and may not conceal it. The determining factor here is the specific situation after committing the crime, and the psychological reaction of the person to act committed by him in real time and place. The method of concealment in such cases will be an independent element of criminal activity and is not covered by specific intent. Such criminals are characterized by the following actions: inducement of witnesses to give false evidence, reenactment of non-criminal event, concealment of instruments of the crime, etc.

The analysis has revealed following regularity, which consists in the fact that persons with a higher degree of criminal activity, spend on preparation for the crimes in the area of non-traditional religious cult activity quite considerable time, adapting the method of crime committing and choice of instruments of its

commission to the situation at the time of the crime commission. Adherents with a high degree of criminal activity in the non-traditional religious and cult activity, use during the preparation for the crimes complicated conspiratorial methods of action, which include a special control of conspirator-adherents, the preliminary imitation of any conspiratorial actions, including actions with criminal nature to determine the behavior of the observed person in situation as close as possible to the operatively-search and investigative activities.

Adherents involved in the crime by unfavorable situation, spend on preparation for the crime small amount of time.

Adherents with unstable personality characteristics don't have precise time limits. It should be noted that the crimes committed in the group in 96 % of cases are prepared in advance.

The preparation for crime commission in the area of non-traditional religious and cult activity, terrorist and religious extremist orientation, means making or acquisition of instruments of crime, preparation of an alibi and unspoken consultation with persons, which have special knowledge in various scientific and practical areas such as psychology, jurisprudence, religious studies and so forth. The preparation for the commission of crimes can also include a definition of crimes' concealment.

The method of crime committing is largely elected by adherents-criminals according to the situation, which in our opinion should be attributed to the scene of the crime situation.

The most common type of instruments of the crime in non-traditional religious cult activity is the variety of print media of propagandizing and provocative nature, firearms, explosives (explosive devices, video records, audio record, etc.). In our view, all of the instruments and methods that aimed at the physical destruction of people, or a threat, and also psychological, ideological training should be attributed to the instruments of crime. In this sense, the investigation of crimes related to the activity of non-traditional religions and cults can distinguish the means and the instruments of crimes, which are characterized by an increased danger of its use in the physical and psychological sense. The criterion for distinguishing the concept of high danger of instrument (object or method of influence), which is used in the commission of this group of socially dangerous acts, in this case is the degree of possible damage and power and its spread. For example, an act of terrorism by its threat to society entails a greater harm than the actions of psychotropic substances or changed states of consciousness of adherents with the purpose of taking possession of their property, but the use of substances or methods directly precedes to psychological preparation of the individual's consciousness to actions aimed at the physical destruction of a person or its threat. However, there is a common basis, namely the use of religious and cult activity and psychological methods of influence on a person for criminal purposes.

The instruments of committing crimes reflects not only the professional skills of the criminal, but also his intellectual and emotional potential. Relation of personal features to the use of instruments of committing crimes determines the amount of preparatory activities (time, scene of the crime, accomplices, the nature of material traces, the method of committing a crime, and so on.).

Thus, the basic elements of the mechanism of committing terroristic and religious extremist crimes are the method and the instruments of its commission, which can be defined as a system of actions chosen by the criminal for criminal purpose, and due to the nature of the non-traditional religious activity, and in accordance with this choice of instruments of crime, which is other than the data of criminological characteristics of crimes committed outside the denominations and cults, as well as the situation, subculture, the presence of a professional criminal experience, personal physiological and psychological features of the criminals adherents.

References

1 *Зуйков Г.Г.* Установление способа совершения преступления. — М.: ВШ МВД СССР, 1970. — 143 с.

2 *Трайнин А.Н.* Общее учение о составе преступления. — М.: Наука, 1957. — 104 с.

3 *Кудрявцев В.Н.* Объективная сторона преступления. — М.: Госюриздат, 1960. — 71 с.

4 *Брайнин Я.М.* Уголовная ответственность в уголовном процессе. — М.: Наука,1963. — 132 с.

5 *Леонтьев А.Н., Панов Ю.Д.* Психология человека и технический прогресс // Философские вопросы физиологии высшей нервной деятельности в психологии. Философия и психология. — 1963. — № 2. — С. 75

6 По материалам практической деятельности правоохранительных органов Республики Казахстан, http://knb.kz/r

Л.К.Аренова

Діни-лаңкестік және террористік бағыттағы қылмыстарды жасау тетігінің негізгі элементтері

Мақалада қылмыстың жасалу әдісі, оның қылмыс қаруын таңдаумен байланысы дәстүрлі емес діни конфессиялар және культтердің қылмыстық-жазаланатын әрекеттерін тергеу тәжірибесінің, ішінара террористік және діни-лаңкестік бағыттағы әрекеттерінің негізінде қарастырылатындығы айтылған. Осыған байланысты, қылмыстардың қос түрін жасау әдісі және қылмыс қаруын таңдау, яғни, діни-культтік әрекеттермен байланысты қылмыстардың криминалистикалық сипаттамасынан өзгеше және қарастырылып отырған қылмыстарды жасау тетігін құрайды. Сондай-ақ террористік және діни-экстремистік әрекеттер бағытындағы қылмыстың жасалу әдісі, оның қылмыс қаруын таңдауы қылмыс жасалу ахуалымен, субмәдениетпен, кәсіби қылмыстық тәжірибемен, қылмыскер-адепттің жеке психологиялық және физиологиялық қасиеттерімен тығыз байланысты болады.

Л.К.Аренова

Основные элементы механизма совершения преступлений религиозно-экстремистской и террористической направленности

Отмечено, что в практике расследования уголовно наказуемых деяний, связанных с деятельностью нетрадиционных религиозных конфессий и культов, в том числе террористической и религиозно-экстремистской направленности, основное — это рассмотрение способа совершения преступления и его взаимосвязь с выбором орудия. Автор подчеркивает, что в этой связи выбор способа и орудий рассматриваемого вида преступления отличается от элементов криминалистической характеристики преступлений, не связанных с религиозно-культовой деятельностью, и составляет механизм совершения преступлений данного вида. Кроме того, в статье определено, что выбор орудия и способа совершения преступлений террористической и религиозно-экстремистской направленности обусловливается обстановкой, субкультурой, наличием профессионального преступного опыта, физиологическими и психологическими свойствами личности преступников-адептов.

References

1 Zuikov G.G. *The establishment of the method of committing a crime*, Moscow: VS MIA USSR, 1970, p. 143.

2 Trainin A.N. *The general study of corpus delicti*, Moscow: Nauka 1957, p. 104.

3 Kudryavtsev V.N. *The objective side of the crime*, Moscow: State legal edition, 1960, p. 70–73.

4 Brainin Ya.M. *Criminal liability in criminal process*, Moscow: Nauka, 1963, p. 131–134.

5 Leont'yev A.N., Panov Yu.D. *Philosophical matters of physiology of higher nervous activity in psychology. Philosophy and Psychology*, 1963, 2, p. 326–330.

6 According to the materials of practice of law enforcement agencies of the Republic of Kazakhstan, http://knb.kz/r

UDC 343.1

G.B.Sultanbekova, M.T.Abzalbekova

Ye.A.Buketov Karaganda State University
(E-mail: gulia-sultan@mail.ru)

Investigating judge — new party to a proceeding in criminal justice of the Republic of Kazakhstan

Article examines the issues of establishment and development of judicial control in the Republic of Kazakhstan, introduction of new party to a proceeding in criminal justice of Kazakhstan — investigating judge. There are issues, related to future expansion of powers of investigating judge, about place and role of judge, who executes the operative judicial control; issues are examined, related to legal nature of investigating judge. Here are also examined the issues on authorization of investigating judge for sanctioning of non-public investigatory actions.

Key words: investigating judge, judge for introductory investigation, operative control of pre-trial procedure, optimization of pre-trial procedure in criminal justice of the Republic of Kazakhstan, legal status, judicial control of observance of rights, freedoms and interests of people in criminal justice.

One of the main ways to improve the criminal justice system, according to the developers of the project of Criminal procedural code of Kazakhstan, should be the introduction of investigating judge. Position of investigating judge became a legal fact in the criminal trial of a number of CIS and Baltic countries, such as, for example, Latvia, Lithuania, Republic of Moldova, Ukraine. During the visit of the delegation of Kazakhstan to Ukraine, much attention was paid to the problematic issues of the new Criminal procedural code of Ukraine, introduced in 2012. Members of the delegation were interested in innovative performance. According to the ex-chairman of the Supreme Court of the Republic of Kazakhstan Beknazarov B.A., the new Code of Criminal Procedures of Kazakhstan will be ninety percent similar to the Ukrainian Code. Ways of reforming the procedural law of Ukraine and Kazakhstan, according to Beknazarov B.A., are pretty similar. Ex-chairman of the Supreme Court of the Republic of Kazakhstan paid particular attention to such new procedural institution as investigating judge.

On the question of Ukrainian journalist about the necessity of judicial authorization of covert investigative actions, the former head of the entire judicial system of the Republic of Kazakhstan said: «According to the newly introduced Code, the court shall authorize only the arrest and a number of activities that have little effect on the course of investigation. Therefore, the experience of Ukraine in solving off these procedural issues is very important for us. Here I am once again convinced that Ukraine has made significant steps to protect the rights of citizens. Not those of governmental and law enforcement bodies, but the citizens'« [1; 2].

Beknazarov B.A. expressed his confidence that the judicial control over the pre-trial proceedings in Kazakhstan will be improved, emphasizing the fact that the Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020 includes the prospect of further expansion of judicial control over the pre-trial proceedings. Scientists also support the practices, they hope that in the future investigating judge will be endowed with additional powers that allow him to protect fully the constitutional rights of citizens [2; 83]. We would not be so optimistic, as we recall, that at the introduction of the jury we also had high hopes for the further expansion of the powers of this court. The Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020 as an effective criminal policy of the State provides the gradual extension of the categories of criminal cases, examined by jury. However, in practice, in the newly adopted Criminal procedural code of the Republic of Kazakhstan of 07.04.2014, in Part 1 article 631 Jurisdiction of jury, we find that this court will consider the case of crimes for which the death penalty or life imprisonment are provided by criminal law. And earlier, according to Criminal procedural code of the Republic of Kazakhstan of 13.12.1997, the Jury examined the cases of extremely serious crimes, and there was provided the further expansion of the powers of jury up to its examination of all categories of serious offenses.

That is the very thing that we would like to pay attention to. It is too early to talk about the effectiveness of new procedural institutions in the Baltic States, CIS, where our legislator borrowed the new rules. These procedural institutions are not enough approved by practice. As Suleimenova G.Zh. noted: «References to the alleged positive experience of such countries as Italy, Spain, Russia, Georgia, Tajikistan, Uzbekistan, based on the example of certain provisions of the Criminal procedural code of these States do not hold water,

because in these countries search for the most optimal model of the criminal process is still going on». «Reforms carried in the Republic convince that it is unacceptable to use foreign legal institutions, no matter how attractive at first glance they are, as well as their mechanical transfer in Kazakhstan's legal environment, without taking into account certain objective factors. These reasons are the sort of barriers that prevents their overcoming and creation of structure modeled on foreign countries, due to the specific socio-economic opportunities of the republic, national peculiarities, human resources — social structure, religion, level of legal awareness and legal culture, traditional mentality and its socio-cultural characteristics, etc.» [3].

In the Russian Federation there are held active discussions on the necessity of introduction of figures of «court investigator» or «investigating judge» to criminal proceedings of Russia. Some researchers advocate the need to introduce the abovementioned public persons to Russian criminal proceedings, and others do not see a special need to do this, and foresee the negative consequences of such innovations [4; 15]. But, the majority of scientists and practitioners tend to proposal for the introduction of investigating judge (Muratova N.G., Nikolyuk V.V., Derishev Yu.V., Demidov I.F.).

In contrast to the neighboring republic, where the discussion is not finished and new Criminal procedural code of the Russian Federation is not adopted, in the Republic of Kazakhstan on January 1, 2015, a new procedural figure — investigating judge will appear in criminal proceedings. Despite this, however, on the pages of scientific publications, conferences, round tables the discussion of novels of the criminal procedure law still continues, the issues of introducing of the institution of investigating judge, questions about the nature, place and role of investigating judge in criminal proceedings of the Republic of Kazakhstan are still being debated. In Ukraine, where, according to the ex-president of the Supreme Court of the Republic of Kazakhstan Beknazarov B.A., up to 90 % of innovations related to investigating judge are borrowed up, despite the fact that the institution of investigating judge has worked since 2012, there is still debate about the legal nature of the investigating judge. There are researchers who believe that the content of control function of the court is to protect the constitutional rights of citizens (Tumanyants A.R.). Skrypina Yu.V., Tishchenko S. believe that judicial control is aimed to: 1) protection of human rights and freedoms, which is «prevention», i.e. the prevention of unlawful and unjustified restrictions on human rights; 2) protection of human rights and freedoms, namely, their restoration it in case of violation [5; 163].

In Kazakhstan, the investigating judge, in the exercise of its powers in the course of pretrial proceedings, will, like other state bodies, be guided by the objectives of the criminal process. These tasks are described in Article 8 of the Criminal procedural code of the Republic of Kazakhstan [6; 30]. The objectives of the criminal process is the prevention, impartial, prompt and full disclosure, investigation of criminal offenses, expose and bringing to justice of those who have committed them, a fair trial and the correct application of the criminal law, the protection of individuals, society and the state from criminal offenses. The legally defined procedure in criminal cases must ensure the protection from unwarranted prosecution and conviction, unlawful restriction of the rights and freedoms of man and citizen, and in case of illegal prosecution or conviction of an innocent — his immediate and complete rehabilitation, as well as the possibility to strengthen the law and order, prevent the criminal offenses, form the respect for the law.

The main task of investigating judge, in our opinion, should be the protection of constitutional rights, freedoms and legitimate interests of citizens in pre-trial proceedings. Introduction of investigating judge in Kazakhstan, according to some scientists, will contribute to the efficiency of the administration of justice and fair trial, complete and objective disclosure of crimes [7; 178]. Supporters of the introduction of this institution consider that such a procedural figure (judge for preliminary investigation) — may impartially and independently carry out the function of judicial control over the procedural activities of the preliminary investigation bodies, the prosecutor, and, as well, help the lawyer to become a full participant in the process of proving in pre-trial proceedings [2; 83]. Meanwhile, there are those who believe that the prospects of this institution still look very vague. In their opinion, powers of introduced investigating judge are very limited. «It upsets the stronger, when it is known that most of functions, provided to this subject of Criminal procedural code (for example, authorizing the arrest and examinations of complaints of trial participants), is already is the competence of the judiciary for a long time. It turns out that the whole force of loudly announced reform of judicial control is really just «a thing of the horn», — said a member of the Presidium of the Republican Bar Association Daniyar Kanafin [8].

The lawyer complained that the real powers of investigating judge in sphere of control and human rights protection are limited to decorative condition. According to the new Criminal procedural code of the Republic of Kazakhstan, authorization of the most right-limiting investigation (including «covert») actions that restrict the fundamental rights of the individual, as now, is the responsibility of the prosecution bodies.

We have heard a lot about inefficiency and bias of prosecutor's supervision in this area. The conflict between the functions of the Prosecutor's Office, which, on the one hand supervises the legality, and on the other organizes the investigation and maintenance of charges in court, leads to the fact that investigative and accusatory component in its activities unnecessarily often suppresses a supervisory, regulatory and right-providing components. The lawyer believes that these functions should be taken by the investigating judge.

In Russia, there are advocates of the position that judicial control should look only like appeal actions of the criminal prosecution. With this approach, it will actually be reduced to a duplication of prosecutorial supervision. This approach looks like unacceptable, since at such construction of pre-trial investigation, arbitration method of legal regulation inherent to competitiveness, is not implemented in full. Petruhin I.L. in this regard said: «With a well staged judicial control, prosecutorial control in some ways becomes superfluous. There is no need to share the same control functions among different bodies» [9; 12].

According to the point 47, Article 7 of Criminal procedural code of the Republic of Kazakhstan of 04.07.2014, investigating judge — judge of the Court of First Instance exercising powers, provided by Criminal procedural code of the Republic of Kazakhstan during pre-trial proceedings. According to law, investigating judge is a judge of the district and equivalent court exercising the powers provided by the Code during the pre-trial proceedings.

Thus, this definition establishes the legal status of the investigating judge as equal with the other judges of the country, the level of court (district, city or specialized) and the power to administer justice, limited by pre-trial stage of criminal proceedings. The latter provision indicates that the investigating judge would not have the right to examine criminal cases on the merits in the main proceedings, as well as civil ones, administrative and others that go beyond the criminal pre-trial proceedings, and will focus exclusively on the implementation of the operational judicial control of the criminal prosecution bodies. The current Criminal procedural code of the Republic of Kazakhstan of 13.12.1997 already contains such a rule that limits the possibility of participation of the judge in a criminal trial in which he was involved in authorizing a procedural decision.

At presentation of project of new edition of Criminal procedural code of the Republic of Kazakhstan in December 2013, General prosecutor’s office, among other novels, touched the issue about investigating judge.

According to the supervisory authority of the country, a figure of investigating judge is entered to the Kazakh criminal proceedings in order to enhance the judicial control over the pre-trial proceedings.

The powers of the investigating judge will include the consideration of applications for authorization of preventive measures in the form of detention, house arrest and the extension of their terms, forced placement of person, who is not under arrest, to a medical institution for forensic psychiatric examination, exhumation of the corpse, seizure of property, international search, placement of minor to a specialized institution

In addition to authorizing of certain investigative actions his responsibilities will also include the examination of complaints and petitions of the parties at the stage of pre-trial proceedings.

Expanding of the limits of judicial control, along with the procurator’s control, according to the General Prosecutor’s office of the Republic of Kazakhstan, will provide an efficient two-stage mechanism of the state protection of the constitutional rights and freedoms of citizens during the pre-trial proceedings.

With the aim of prompt respond to the facts of the application of illegal methods by criminal proceeding body, the procedure for responding of judge to messages on torture is regulated [10].

For a more widespread use of alternative preventive measures, which are not connected with isolation from society and reduce the prison population index, by analogy with the Criminal procedural code of Ukraine the Project fixes the rules, which make investigating judge to determine the size of the lien, which can be made at any time, to release the person from custody, when authorizing remand in custody, except the cases of extremely grave crimes.

As well, lien will not be applied for people, who committed the actions, caused the death of the complainant; actions being the member of criminal group; terroristic and extremist actions; as well as for those, who breached the lien before.

Let us get acquainted with powers of investigating judge, defined in the article 55 of Criminal procedural code of the Republic of Kazakhstan, entering into the legal force on January 1, 2015.

1. During the pre-trial activities, investigating judge examines the following issues in cases, provided in the Code:

1) sanction of imprisonment;

2) sanction of home arrest;

3) sanction of suspension;
4) sanction of prohibition on imminence;
5) sanction of extradition arrest;
6) prolongation of terms of imprisonment, home arrest, extradition arrest;
7) application of lien;
8) sanction of sequestration;
9) compulsory positioning of person, who is not under the imprisonment, to the medical organization for execution of forensic psychiatric and (or) forensic medical expertise;
10) at definition of fact of mental affection, about the transfer of person, for whom the imprisonment was applied, to special medical organization, which renders the psychiatric assistance, suitable for taking of patients to strict isolation;
11) exhumation of corpse;
12) announcement of international search of supposed criminal, accused.
2. In cases, provided by this Code, investigating judge:
1) administers the complaints for activity (inactivity) and decisions of investigator, investigation body, interrogation officer and prosecutor;
2) administers the issues on application of material evidences, which are quickly damaged, or whose long storage up to solving of criminal case, requires significant material expenses;
3) during the pre-trial procedure, consigns the evidences of victim and witness;
4) imposes the monetary redress to persons, who do not execute or poorly execute the procedural liabilities in pre-trial proceedings, except lawyers and prosecutors;
5) considers the issue on collecting of court costs subject to criminal case, under the presentation of prosecutor;
6) under the motivated prayer of the lawyer, participating as defender, considers the issue on vindication and inclusion into criminal case of any information, documents, things, important for criminal case, excluding the state secrets, in case of rejection of execution of request, or absence of decision for it in three days;
7) under the motivated prayer of the lawyer, participating as defender, considers the issue on expertise, if the criminal investigation body rejects the satisfaction of such prayer with no reasons, or no decision was made in three days;
8) under the prayer of the lawyer, participating as defender, considers the issue on compulsory attachment of prior examined witness to body, executing the criminal process, if the appearance of witness for presentation of evidences, is difficult;
9) executes other powers, provided by this Code.
3. Decree of investigating judge may be appealed and protested according to the article 107 of Criminal procedural code of the Republic of Kazakhstan.

As can be seen, many of the above proceedings are not widespread in practice and do not cover the entire spectrum of issues, limiting the constitutional rights and freedoms of citizens, which are subject to judicial review.

As for the issues of authorization of detention, house arrest and their extension, the current Criminal procedural code is already assigned such powers to the court, as we pointed out above. At the same time, the bill provides the possibility of cancellation or modification of these preventive measures authorized by investigating judge, prosecuting authority, with the consent of the prosecutor; this rule is contained in part 5, Art. 153 of the project. Under the legislation in force, this decision is impossible without judicial review.

In addition to the power to authorize a number of the abovementioned proceedings, the competence of the investigating judge is offered to include the following: considering of complaints against actions (inaction) and decisions of the investigator, investigation body, the interrogator and the prosecutor (the analogue of Art. 109 of Criminal procedural code of the Republic of Kazakhstan); the Prosecutor's applications for forfeiture of property, obtained by illegal means, before the sentencing; the depositing of testimonies of persons during the pre-trial, if there is a reason to believe that their later questioning may be impossible due to objective reasons or in order to avoid the psychotraumatic impact on them during the interrogation in the main proceedings; imposing of monetary penalties on individuals, who do not execute or poorly execute the procedural obligations in the pre-trial proceedings; considering of the issue on the recovery of procedural costs in a criminal case on the proposal of the body conducting the criminal trial.

In the new Criminal procedural code of the Republic of Kazakhstan a whole chapter is devoted to the newly introduced covert investigation actions. It would be logical to lay the sanctioning of the covert investigative actions, such as the secret control, audio and video surveillance of the person or place, interception and collection of information, secret obtaining of information about the connections between users, a secret control of mail and other sending, tacit penetration and site survey and others on the investigating judge. However, according to the newly introduced code it is possible only with the sanction of a prosecutor, not a judge.

Lots of scientists, practitioners and legal society do not agree with such situation.

In this regard the experience of Ukraine is remarkable, which was one of the first among the CIS countries who votes for of a radical reform of the criminal procedural law and a significant expansion of the powers of the court at the pre-trial stage of the criminal process. For example, in Ukraine, where in 2012 a new Criminal procedural code was adopted, the competence of investigating judges to authorize covert actions affecting the constitutional rights and freedoms of citizens is applied.

In the Criminal procedural code of the Republic of Moldova of 13.03.2003, significant modifications were made, providing the competence of the investigative judge to issue permits for execution of a number of important special investigative measures, including inspection of the house and installation of the audio, video, photo and cinematographic equipment for surveillance and recording, monitoring of the housing, tapping and recording of conversations, monitoring of connections related to the wire and electronic communications, collection of information from providers of services of electronic communications and others (Art. 132–2 of Criminal procedural code of Moldova).

According to Criminal procedural code of the Russian Federation dated 18.12.2001, a house-check, the seizure of postal and telegraph mailing, their inspection and seizure in post offices, control and recording of conversations, as well as obtaining of information about the connections between users is possible only upon the base of court solution.

Position of these countries regarding the legislative consolidation of powers to authorize the covert investigative activities to courts reflects the understanding of the necessity of real protection of constitutional rights and freedoms of citizens in criminal proceedings and a serious expansion of judicial control at the pre-trial stage of criminal proceedings.

Basing upon the experience of these countries, in new Criminal procedural code of Kazakhstan it would be logic to transfer the sanctioning to investigating judge fully, but not partially.

References

1 *Закаблук М.* Новый УПК Казахстана почти на 90 % будет похож на украинский кодекс // Закон и бизнес. — 2013. — № 25 (1115). — С. 2.

2 *Сулейменова Г.Ж.* Правовой статус санкционирующего судьи // Специализированный ежемесячный журнал «ЮРИСТ». — 2008. — № 4. — С. 82–83.

3 *Сулейменова Г.Ж.* Заключение научно-правовой экспертизы Концепции проекта Уголовно-процессуального кодекса Республики Казахстан. — [ЭР]. Режим доступа: http://pravo.zakon.kz/4520192-zakljuchenie-nauchno-pravovojj.html

4 *Ковтун Н.Н.* О понятии и содержании термина «судебный следователь» (следственный судья) // Российский судья. — 2010. — № 5. — С. 15.

5 *Тищенко С.* Правовая природа следственного судьи в уголовном процессе Украины // Legea Si Viata. — martie 2014. — С. 163.

6 Уголовно-процессуальный кодекс Республики Казахстан: Практ. пособие. — Алматы: Норма-К, 2014. — С. 30.

7 *Шамшинурова С.М.* Перспективы закрепления правового статуса следственного судьи // Международный научный журнал «Наука и мир». — 2014. — Т. 2. — № 3 (7). — С. 178.

8 *Радловский Я.* Верховный суд разъяснил полномочия следственного судьи в Казахстане. — [ЭР]. Режим доступа: http://tengrinews.kz/kazakhstan_news/verhovnyiy-sud-razyyasnil-polnomochiya-sledstvennogo-sudi-v-kazahstane-264585/

9 *Петрухин И.* Прокурорский надзор и судебный контроль за следствием // Российская юстиция. — 1998. — № 9. — С. 12.

10 Презентация Проекта новой редакции Уголовно-процессуального кодекса Республики Казахстан (г.Астана, Служба центральных коммуникаций при Президенте РК, 18 декабря 2013 г.). — [ЭР]. Режим доступа: http://m.prokuror.kz/rus/novosti/press-releasy/prezentaciya-proekta-novoy-redakcii-ugolovno-

Г.Б.Сұлтанбекова, М.Т.Абзалбекова

Тергеу судьясы — Қазақстан Республикасының қылмыстық өндірісінің жаңа процессуалдық тұлғасы

Мақалада Қазақстан Республикасындағы соттық бақылаудың қалыптасуы мен дамуы, Қазақстанның қылмыстық сот өндірісіне жаңа процессуалдық тұлға — сотық судьяның енгізілуі сұрақтары қарастырылды. Сонымен қатар болашақта тергеу судьясының өкілеттіктерін кеңейту сұрақтары, тергеу судьясының жедел соттық бақылауды жүзеге асыруға байланысты құқықтық табиғатына, оның орны мен рөлі туралы мәселелер да қозғалған. Тергеу судьясына жасырын тергеу әрекетін санкциялау өкілеттіктерін беру сұрақтары да назардан тыс қалмаған.

Г.Б.Султанбекова, М.Т.Абзалбекова

Следственный судья — новая процессуальная фигура в уголовном судопроизводстве Республики Казахстан

В статье рассматриваются проблемы становления и развития судебного контроля в Республике Казахстан, введение в уголовное судопроизводство Казахстана новой процессуальной фигуры — следственного судьи. Затронуты вопросы, связанные с расширением в будущем полномочий следственного судьи, о месте и роли судьи, осуществляющего оперативный судебный контроль. Авторами показана правовая природа следственного судьи, отмечено наделение следственного судьи полномочиями по санкционированию негласных следственных действий.

References

1 Zakabluk M. *Law and business*, 2013, 25 (1115), p. 2.

2 Suleiymenova G.Zh. *Specialized monthly magazine «LAWYER»*, 2008, 4, p. 82–83.

3 Suleiymenova G.Zh. Conclusion of scientific and legal expertise of Concept of project of Criminal procedural code of the Republic of Kazakhstan, http://pravo. zakon.kz/4520192-zakljuchenie-nauchno-pravovojj.html

4 Kovtun N.N. *Russian Lawyer*, 2010, 5, p. 15.

5 Tishchenko S. *Legea Si Viata*, 2014, martie, p. 163.

6 *Criminal procedural code of the Republic of Kazakhstan*, practical guide, Almaty: Publishing house «Norma-K», 2014, p. 30.

7 Shamshinurova S.M. *Science and world*, International scientific magazine, 2014, 2, 3 (7), p. 178.

8 Radlovskiy Ya. *Supreme court explained the powers of investigating judge in Kazakhstan*, http://tengrinews.kz/kazakhstan_news/verhovnyiy-sud-razyyasnil-polnomochiya-sledstvennogo-sudi-v-kazahstane-264585/

9 Petrukhin I. *Russian justice*, 1998, 9, p. 12.

10 Presentation of project of new edition of Criminal procedural code of the Republic of Kazakhstan (Astana city, Service of central communications at the President of the Republic of Kazakhstan, December 18, 2013), http://m.prokuror.kz/rus/novosti/press-releasy/prezentaciya-proekta-novoy-redakcii-ugolovno-

UDC 347.61.64

Zh.T.Kumysbekova

Caspian University, Almaty (E-mail: kumisbekova@yandex.kz)

The responsibility of spouses for personal and common obligations

In the article, the author considers the personal and general obligations of the spouses of property character, determines the characteristics of the legal regime of jointly acquired property and personal property of the spouses, investigates the mechanism of execution of personal and general obligations of the spouses, reveals the sequence and priority of execution of obligations of spouses including the share of the joint property, and concludes imperfection of family law that provides the guarantees for the rights of creditors in relation to the marriage contract.

Key words: spouses, obligations, marriage, property, the legal regime of marital property, contractual regime of the spouses, marriage and family law, creditor, marriage contract, liability, divorce.

Spouses, being married, try to provide the well-being of their children and the family through the conduct of commonly joint property, and the formation of a common budget, etc. As the owners of different types of property, spouses often enter into various civil transactions, acquire shares in the capital of companies and etc. As a result, between spouses and between them (or one of them) and third parties there are special obligations — legal ties, the specifics of which are identified by existing laws and contract regime of marital property. These obligations of the spouses can be common or personal.

The property, acquired by spouses during marriage, is their commonly joint property. Commonly joint property is the property of two or more people which cannot be divided without changing its purpose (indivisible thing), or cannot be divided by law (4 of art. 209 of the Civil Code of the Republic of Kazakhstan).

The shares cannot be determined, because the relationship between husband and wife, as a rule, have the nature of personal trust. As E.M.Vorozheikin wrote, «family relationships that do not have the personal trust are artificial» [1; 25]. Y.I.Funk. in his work clarifies, that «joint marital property indicates that for certain property «stands» more than one person, but two, between which there is a personally-legal relationship, based on trust relationships prevail, rather than legal regulation» [2; 48]. The size of the share, introduced by each spouse to the acquisition of the property funds, does not matter, even if there is a difference in income. It should be noted that the right to commonly joint property also belongs to the spouse who did not take part in the formation of the property due to legitimate reasons, for example, housekeeping, childcare, and so on. To determine the legal regime of marital property in literature, they use the term «acquired property». Apparently, the marriage itself is not enough for the occurrence of commonly joint property. The couple should have common household by making the input in the form of labor or other activities.

The most important point here is that the marital property can become commonly joint only when the spouses live together.

It would be illogical to recognize the things that the couple purchase individually at a time when they live apart from each other to be «commonly joint property». Here we talk about the time when they are not formally divorced, but stop the marriage by living apart from each other, do not have common economy and do not intend to keep the family in the future.

Domestic matrimonial law identifies the following items as the property, acquired by the spouses during the marriage:

1) the income of each spouse from employment and business activities. In academic circles, there are still several opinions about the moment from which the income, earned by spouses, can be considered common or joint property. This issue is still not resolved in the current legislation. There are different opinions. Some scientists believe that the ownership for the income, received by the spouses, occurs when they have the right to receive them. The income is included in total assets from the moment when the spouse has a right to demand the payment. But there is an argument against this view that the requirement of obligation can not be owned, otherwise not only the worker, but also his or her spouse would be entitled to demand payment of salary or debt from the third parties.

Other scholars argue that the ownership of the income arises only after the real (physical) receipt of the income and its inclusion into the family budget. As the proponents of this opinion believe, the spouse, who receives the income, has the right to spend a part of it before it will be included into the family budget, as the joint property can consist from the money that has not been spent yet. This approach is arguable, as the proponents of this view assume that all the funds that are not included into the family budget by spouses are treated as the personal property of each spouse, which is contrary to law. For example, if the spouse sold the car, which had been acquired before the marriage or had been received as a gift, and he or she spent the income from the sale on a cottage, without transferring the proceeds from the sale into the commonly joint property, the cottage would be recognized as the property of the spouse, the former owner of the car.

There is an onion, we think, the most correct and informed one, that the resources, received by one spouse, become common joint property from the moment of the real direct receipt of the resources by one of the spouses.

2) The income from the intellectual activity. A.M.Nechayeva notes that the royalties for intellectual work in all respects equivalent to the wages and salaries. It is considered that the award issued during the marriage, even if the creative work began and was completed prior to the marriage, is a common property of the spouses. Conversely, the income for intellectual activity, created during the marriage, received after the divorce, is not included into commonly joint property. Works of art, the author of which is one of the spouses do not become joint property. However, the money, raised from the sale, is a material source of the family, and is joint property [3; 131].

3) The income from commonly joint property and personal property of each spouse.

4) Received pensions, social payoffs of the spouses.

Received payments that do not have a special purpose (material aid, a compensation for disability due to injury or other damage to health, and others).

5) Movable and immovable property, acquired from the common income of the spouses. In this case, it does not matter who is an official owner of the property.

6) Securities, shares, deposits, shares in the capital, made to the credit institutions or other commercial organizations, and any others, acquired by the spouses during the marriage property, regardless the ownership or money input.

7) The property of each spouse that obtains a significant increase in value during the marriage due to the input, made by one or both spouses in the form of money or labor. For instance, repairs, reconstructions, alteration, and so on (Article 36 of the Code of RK). This condition is applied not only to immovable property, but also to cars, expensive tools and equipment, to business institutions and companies in general. Unfortunately, the legislator does not give an explanation of «a significant increase in value of the property» and how you can determine this criterion.

There is an exception from the rule, according to which, the property of each spouse, or personal property contains the following:

- Property, owned by each spouse before the marriage, and property, acquired though the marriage, on personal money of one of the spouses;
- Property, received by one spouse, before and during the marriage, as a donation, or inheritance or other gratuitous transactions. The gifts given to each other by spouses are considered separate property too. The concept of «gift» should be considered as a concept that includes any gratuitous transfer of property to the ownership of the spouse, if the transition is associated with a special purpose. There must be a direct indication that the gift is made in favor of only one of the spouses. This property also includes bonuses and other payments of an incentive nature.
- Things for personal use (clothes, shoes, etc.). Under the law, the things for personal use does not imply any thing that one of the spouses personally enjoys, but only those things that aim to satisfy household

needs, excluding jewelry and other luxury items, even if they are acquired during the marriage on common funds of the spouses.

By jewelry, as a rule, we mean articles of precious and semi-precious metals and stones. By luxury items — valuable things, works of art, antiques and unique things, that are not necessary to fulfill basic needs of the members of the family. Is not always easy to determine what items are luxury items, so the court determines each case individually, basing on the general conditions of life of the spouses and other circumstances. Certificates, checks, receipts and others may be the proof of the ownership of the property by one of the spouses.

- Items, purchased only to meet the needs of minor children (clothing, shoes, school and sports equipment, musical instruments, children's library, etc.) are transferred without compensation to the spouse with whom the children live.
- Deposits, made by spouses for their common minor children, considered as belonging to these children and are not included in the division of marital property.
- Property, acquired by each of the spouses during the period of separation due to the actual termination of the marriage (marriage).
- Objects for professional activity of the spouses [4; 15].

Joint marital property can be divided during the marriage and after the divorce by concluding an agreement on the division of property. In accordance with the family law, the shares of the spouses are considered equal. However, the court may retreat the equality of shares of spouses in two cases. Firstly, it is allowed to increase the share of the spouse with whom the minor children stay. Secondly, the share of the spouse can be reduced if throughout the marriage, the spouse did not participate in the accumulation of the common property without a good reason, expended the property of the family recklessly, and led an immoral life. Thus, the common opinion that the division of property between spouses (former spouses) is «equal», is only partly true.

Let’s get back toresponsibility of spouses for obligations. Property owned by the spouses during the marriage (commonly joint property, personal property), includes not only things and property rights, but also obligations.

As individual or personal obligations of the spouses we may considered those which have arisen independently at each of them before the marriage, or during the marriage, but in order to meet the personal needs of a spouse, as well as due to the debt on property, by inheritance the property during the marriage by one spouse (debt of the testator). In this case «the spouse undertakes the obligation as a regular subject of civil rights» [5; 312], and should act in accordance with the rule contained in article 20 of Civil Code of the Republic of Kazakhstan, — «a citizen is responsible for its obligations with all its property, except property which, in accordance with the legislative acts, can not be levied» [6].

Legislation regulates that the property might be levied only from the spouse who has obligations with this property. If the value of the levied property is not high enough, the creditor has a right to demand the share of the spouse, which would be given to him or her in the process of the division of the joint property in order to cover the debt. This process must be strictly followed.

Thus, the obligations occurred in business activities by one spouse shall be treated as personal obligations. If one of the spouses uses the commonly joint property of the family in the process of business activity, which leads to debts that occurred when the spouse-entrepreneur tries to satisfy personal needs, these obligations will be considered as his or her personal. However, if it is proven that the income was used for the needs of the family, the obligations may be turned to the second spouse in the commonly joint property. Family Code does not disclose the concept of «family needs.» Because of their diversity, it is impossible to do. Presumably, the expenses on the family needs are the following: food, clothing, housing and medical care, acquisition of property for living together (in the contract of sale, rent), repair of the home, school fees of children, and so on. In other words, these expenses include the costs to maintain the necessary level of living of the family as a whole and of each of its members.

In cases, when one of the spouses uses joint property to proceed personal business activities, he or she must have a permission from the second spouse [7]. This permission may be considered in the marriage contract, or by making a written agreement, preferably notarized.

The obligations both spouses entered into can be considered as common obligations. Civil and family law regulates that the possession, use and disposal of commonly joint property is carried out by mutual agreement of the spouses. For example, debts on rent, debts arising from the harm, caused by them together.

Whenever one of the spouses processes any transactions with the property, it is assumed that he or she is acting with the consent of the other spouse. This presumption is based on the ordinary order of family affairs.

The spouse is not obligated to prove his or her right to proceed the transaction by demonstrating the consent every time it happens in the daily life. However, when transferring or pledging the property, it is required to have the consent of all adult family members, which must be expressed in writing and notarized. Moreover, a consent for minor family members is given by the state the guardianship authority in order to protect their property interests.

The obligations entered into by both spouses based on transactions, committed by them jointly, can also be considered as common obligations. Thus, both of the spouses are responsible for them. In case of the exaction based on common obligations, executives take into consideration the joint property of the spouses at first. If the value of the property is not high enough, they start considering personal property of each spouse.

The exaction of the joint property or a part of it is possible if it was acquired or increased at the expense of funds received by one spouse in a crime (Article 4 of the Code of RK 44) [4].

The requirement to establish facts of unlawful receipt of these funds only by a court verdict is a guarantee against illegal withdrawal of marital property in such cases. The court applies this rule in cases of compensation for damages (material and moral) caused by the crime of one of the spouses.

The exaction of the joint property of the spouses may happen as a claim for compensation for damage caused by their minor children to life, health and property of other people.

Thus, on the basis of the above, the following legal norms are applied to a married person in relation to transactions with other people:

- If one spouse enters into an obligation at the expense of his personal property, the one commits only oneself and his or her responsibility for the obligations can only be at the expense of their personal property, as well as the share in the joint property (Sec. 3 of Art. 223 of the Civil Code of the Republic of Kazakhstan).
- If one spouse enters into a personal obligation for the personal benefit, but at the expense of the joint property, the spouse, who made a deal, remains responsible, and the liability is possible only at the expense of his personal property and share in the joint property;
- If one spouse enters into a commitment at the expense of personal property, but in the interests of the whole family (if there is no disapproval of the transaction by the other spouse), the party of the transaction remains the spouse, who makes a deal, but the responsibility for the obligations can be partially charged on the second spouse, which means, the exaction may be taken from the share in the common property.
- If one spouse enters into a commitment at the expense of the common property in the interests of the whole family, then the party of a spouse, who makes a deal, is considered responsible for the obligations, but the second spouse becomes «the actual party» of the transaction too. The responsibility for the obligations comes at the expense of commonly joint property. If the value of the property is not high enough, the spouse who enters the transaction, fulfills the obligations at the expenses of the personal property.
- If both spouses are parties of the transaction, both spouses are responsible to deal with all their personal and commonly joint property.

In continuation about the responsibility for the overall debts, it should be noted that if a court in criminal case finds out that the couple's property was acquired or increased at the expense of funds received by one of the spouses by criminal means, the execution may be levied on all property or that part of it, which was acquired in this manner (Article 44 § 2 of the Code of RK).

Nowadays property legal regimes of marital property are divided into two main groups: the contract regime and the legal regime of marital property, which we have discussed.

The contract regime of marital property is set by agreement between the spouses on the question of order of ownership, use and (or) disposal of all or individual movable and (or) immovable property, property rights and obligations acquired during their registered marriage [5; 434].

The marriage contract can be concluded in relation of existing marital property, as well as the property, which is planned to be acquired in the future.

In the marriage contract, the spouses can determine their rights and obligations, ways of participation in income of each other, the responsibilities for family expenses by each of them; determine the property that will be transferred to each of the spouses in case of divorce, and include in the marriage contract any other issues relating to matrimonial property regimes. A special feature of the marriage contract is that spouses may establish a joint, shared or separate property regime to all the couple's property, on its part or on the property of each spouse.

The regime of joint ownership means that any property, including acquired before marriage together becomes common and the right to joint matrimonial property is established. However, how A.A.Ivanov specifies, the regime of joint ownership can be established for one or a few things. Within the legal regime of marital property, this makes sense only for those things that do not enter the joint property (personal property). If in the marriage contract there is the regime, described above, set in relation to things, the couple owned individually before the marriage, legal regime is retained in relation to the rest of the property [5; 435].

The regime of share ownership means that the couple's property goes into their common ownership. In the marriage contract, under this regime, the shares' size should be reflected, while usually taken into account property investments or labor costs of each spouse. The main feature of the separate property is that all the property, regardless of the time and manner of its acquisition, as well as all the income derived from it, is generally considered separate property of the spouse.

The contract regime of common or separate property is rarely found in its pure form. In most cases, the couple prefers to create a mixed regime that combines some elements of separateness and unity. For example, a spouse may provide that their joint housing will be the joint property, but income and other property will be separate property.

The appearance of the marriage contract in Kazakhstani marriage and family law institute has prompted the development of special rules that protect the interests of creditors of the debtor-spouse in transactions. Lenders, if enter into a deal with one of the spouses, should be aware of the existence of the marriage contract and be aware of the contents of this contract, as stated by Article 45 of the Code of RK. Within the meaning of this norm, the lenders should have information on how to spread the couple's property, because it affects the amount of property on which they can rely, if the obligations of the spouse-debtor will not be fulfilled in the necessary volume. Creditors must be notified about any changes or cancellation of the marriage contract. If these changes have worsened the financial situation of the debtor (property of the debtor-spouse became the property of the other spouse, or became the joint property of the spouses, or the share of the spouse in the common property reduced), the creditor must be able to take all necessary measures to protect their interests.

If the lenders know about changes in the marriage contract, according to which the insolvency of the debtor became apparent, they have the right to demand changes in the terms or termination of contract between the spouses (Art. 45 of the Code of RK).

A failure to comply with this requirement makes it impossible for the spouse-debtor in the future (in the case of a property dispute with creditors) to invoke the provisions of the marriage contract as to the circumstances that prevent the fulfillment of his or her obligations. Therefore, the property of the spouse-debtor may be levied regardless of the content of the marriage contract.

Setting the guarantees of the rights of creditors in relation to the marriage contract, the law does not provide the conclusion of an agreement on the spouses division of common property. It is obviously, that this agreement may infringe upon the interests of the creditors not less than the conclusion of the marriage contract. Because of the agreement on the division of joint property of the spouses, we get the right of individual property of each spouse and terminate the right of joint property. According to A.A.Ivanov, «The subsequent termination of the agreement on the division of property does not automatically restore the right of commonly joint property on subjected to the division of property. To do this, they need the marriage contract».

In this context, it makes sense to make an addition to marriage and family law (Article 45 of the Code of RK) and identify the guarantees of the rights of creditors at the conclusion, amendment or termination of the marriage contract as well as the agreement on the division of marital property.

References

1 *Ворожейкин Е.М.* Семейные правоотношения в СССР. — М.: Юрид. лит. 1972. — 336 с.

2 *Функ Я.И.* Брачный договор. Имущественные отношения супругов, их участие в хозяйственных обществах и товариществах (по законодательству Российской Федерации и Республики Беларусь). — Минск: Амалфея. 2000. — 348 с.

3 *Нечаева А.М.* Семейное право. Курс лекций. — М.: Юристъ, 1998. — 336 с.

4 Кодекс Республики Казахстан «О браке (супружестве) и семье» 26.12.2011. № 518-IV. — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/K1100000518

5 *Сергеев А.П., Толстой Ю.К.* Гражданское право: Учебник: В 3 т. — Т. 3. — 4-е изд., — М.: ТК «Велби», Изд-во Проспект, 2004. — 784 с.

6 Гражданский кодекс Республики Казахстан. Общая часть. Принят Верховным Советом Республики Казахстан 27 декабря 1994 г. (с изм. и доп. по состоянию на 10.06.2014 г.). — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/K940001000_

7 Закон Республики Казахстан «О частном предпринимательстве» от 31 января 2006 г. № 124 (с изм. и доп. по сост. на 09.03.2013 г.). — [ЭР]. Режим доступа: http://adilet.zan.kz/rus/docs/K1100000518

Ж.Т.Күмісбекова

Ерлі-зайыптылардың жеке және жалпы міндеттемелері бойынша жауапкершіліктері

Мақалада автор ерлі-зайыптылардың жеке және мүліктік сипаттағы жалпы міндетемелерін қарастырды, олардың жеке және бірге жинаған мүліктерінің құқықтық тәртібінің ерекшеліктерін анықтап, ерлі-зайыптылардың жеке және жалпы міндеттемелерінің орындалу тетігін зерттеді. Бірлескен мүліктегі үлестерін ескере отырып, ерлі-зайыптылардың өз міндеттемелерін орындауының бірізділігі мен кезектілігін ашты, сондай-ақ неке шартына қатысты несие берушілердің құқықтарына кепілдік беретін отбасы заңнамасының ақаулықтары туралы тұжырым жасады.

Ж.Т.Кумысбекова

Ответственность супругов по личным и общим обязательствам

Автор в статье рассматривает личные и общие обязательства имущественного характера супругов, определяет особенности правового режима совместно нажитого и личного имущества супругов. Исследуется механизм исполнения личных и общих обязательств супругов, раскрываются последовательность и очередность исполнения обязательств супругов с учетом доли в совместном имуществе. Сделан вывод о несовершенстве семейного законодательства, предоставляющего гарантии прав кредиторам применительно к брачному договору.

References

1 Vorozheikin Ye.M. *Family relations in the USSR*, Moscow: Legal literature, 1972, 336 p.

2 Funk Ya.I. *The marriage contract. Property relations of the spouses, their participation in economic societies and associations (under the legislation of the Russian Federation and the Republic of Belarus)*, Minsk: Amalphea, 2000, 348 p.

3 Nechayeva A.M. *Family Law*, the course of lectures, Moscow: Yurist, 1998, 336 p.

4 The code of the Republic of Kazakhstan. 26.12.2011. № 518-IV. «About marriage and family», http://adilet.zan.kz/rus/docs/K1100000518

5 Sergeyev A.P., Tolstoy Yu.K. *Civil law*, Textbook in 3 parts, 3rd part, 4th ed., Moscow: TK «Velbi», Publishing Prospect, 2004, 784 p.

6 The Civil Code of the Republic of Kazakhstan (general part), adopted by the Supreme Council of the Republic of Kazakhstan in December 27, 1994 (with amendments and supplements from 06.10.2014.), http://adilet.zan.kz/rus/docs/K940001000_

7 Law of the Republic of Kazakhstan from January 31, 2006. No. 124 (with alterations and amendments from 09.03.2013.) «On Private Enterprise» // http://adilet.zan.kz/rus/docs/Z060000124_

UDC 343.347

Sh.T.Baiykenzhina, G.A.Il'yassova

Ye.A.Buketov Karaganda State University
(E-mail: baikenzhina89@mail.ru)

Mediation as a tool for the settlement of civil legal disputes

The general types of alternative methods of regulation of civil disputes are considered in the article. The authors, giving examples of types of civil disputes among natural persons and legal entities in particular, consider on conciliation procedure of mediation. The sphere of application of the mediation in foreign countries, its positive aspects are given and outstanding moments of the domestic legislation are considered. New approaches to the research of this problem are expressed by the authors in the formulated theoretical positions, also in the proposals to improvement of the legislation.

Key words: mediation, civil dispute, alternative, arbitration, international arbitration, mediation, meditative agreement, mediator, corporate dispute, property dispute, negotiations.

Referring to the new history, it should be noted that the widespread use of mediation procedures emerged in the late 70s — early 80s. the last century. At that time, there was confidence in the universality of the procedure, which is based on the assumption and possibly accurate. That a competent mediator may conduct the mediation process in a variety of fields. Is it true or not, but we can talk about creating a «house industry». In addition, the process of «localization» of mediation («balkanization») for dozens of application areas, each of which has its own culture, organization, qualification requirements, performance standards, the specifics of the market, etc.

According to Jim Melamed, a renowned expert in the field of mediation, the potential of mediation and conciliation procedures in the future the next few years will increase, and an appeal to the mediation will be massive. He writes: «We help people solve problems, and we do it faster, better and cheaper (compared with the court) beyond doubt. A quiet revolution has taken place. Policy, in fact, give preference to double mediation, no doubt. Our culture has changed. We changed. Our time has come» [1; 24].

In fact, the term «commercial conciliation» should be interpreted broadly to cover matters arising from all relationships of a commercial nature, whether contractual or non-contractual [2]. Relationships of a commercial nature include:

- any trade transaction for the supply of goods or services or the exchange of goods or services;
- distribution agreements;
- commercial representation or agency;
- factoring;
- Leasing;
- construction of industrial facilities;
- Advisory services;
- Engineering;
- licensing;
- investing;
- funding;
- banking;
- Insurance;
- exploitation agreement or concession;
- joint ventures and other forms of industrial or business cooperation;
- carriage of goods or passengers by air, sea, rail or road.

Disputes relating to the divorce, family mediation, as well as the attitudes of parents with children is very difficult to bring a legal resolution [3], especially in a crowded ships. In this case, we believe it is more appropriate to speak of «suppression» of such disputes, and not allowing them on the merits. Alas, not in the best position are service custody and guardianship, as well as the courts of other countries, when faced with a conflict between the spouses — of different nationalities. Note that the overall settlement of the family, as well as organizational disputes can hardly be referred to legal services. The first — a family mediation, the relationship of parents with children, conflicts related to inheritance of property; second — labor mediation,

organization of the working space. And then, and another is almost impossible to «resolve» — here it is more appropriate to speak of the «settlement».

Collective labor disputes cannot be resolved in court, in principle — the court may only recognize labor strike illegal, and the decision of labor arbitration is advisory in nature [4]. So, for example, only these two types of conflicts we are convinced of the futility of judicial method «resolve» the dispute — battles continue after court act, is often not satisfied with any of the parties. It resembles a complex corporate dispute, the only way to settle which is the withdrawal of all claims and reaching a settlement agreement [5].

Great demand mediation among school adolescents. In Ukraine, Russia and Moldova are widely known textbook for students and teachers to resolve conflicts Daniel Shapiro. Teenager and school mediation would be an organic complement to the juvenile justice system, focused on education and prevention of deviant behavior. Deviant behavior — doing things that are contrary to the norms of social behavior in a particular community. The main types of deviant behavior are, above all, crime, alcoholism and drug addiction, as well as suicide, prostitution. According to the French sociologist Emile Durkheim, R.D.Benjamin probability of deviations of behavior increases substantially when going on at the level of society weakening regulatory oversight. List of applications of mediation and conciliation procedures can be extended: it is, for example, medical services (in particular, cosmetology), consumer conflicts (especially after the abolition of the mandatory product certification), disputes with banks and insurance companies, conflict behavior of the parties at the stage of pre-contractual disputes (purchase and sale of business, real estate), protection from unfair practices in the negotiations (in particular, the administrative and «corruption» of the resources), etc.

The draft law on conciliation, we can say a few «overripe». Without waiting for the legal framework and government support domestic mediators have long been working in the field of conflict resolution, as demand far outstrips supply. On state mediators can not speak. More alarming: in order to «organize» activities mediators each specialist intermediary will have to be accredited to be included in the list of specialists for specific court a particular area or to work as an assistant referee (assistant mediator) for three years, or consist in self-intermediary organizations, including not less than one hundred members, the payment of contributions hundred thousand commercials, with compulsory insurance professional naturalness somewhere million for three, etc. And all this is done, of course, in order to «weed out random people». If such a «streamlining» of the market will begin mediation, the judicial corruption in in the Republic of Kazakhstan will not be defeated, and the economy will continue to throw a trillion rubles annually on civil disputes, with the index of confidence in the justice one of the five, and even worse. Economy in which to properly collect the debt and to protect property rights is necessary to «make friends» with the judge and the bailiff, and along with the authorities and would be nice — with criminals — has no future, and this country is doomed to stagnation.

In the United States of America there is a government program to stabilize the market residential real estate. Over the past two years Congress and the Legislature of California (California Legislature) passed laws aimed at the extension of the foreclosure on the mortgage and to encourage lenders to restructure the loan, in order to develop milder conditions (Mortgage Foreclosure Crisis). In the «authoritarian» China 20 % of disputes resolved using mediation procedures [6].

As for the domestic market, the worldwide «industry-house» by virtue of homegrown Kazakhstan citizens and the language barrier while «do not notice.» Quality services at the appropriate dispute resolution (ADR (Alternative Dispute Resolutilon — alternative dispute resolution, as they jokingly called «Appopriate Dispute Resolution» — «proper» Dispute Resolution) is very small. Pure Harvard method of principled negotiation does not work.

For example, a party may shy away from dialogue, to use psychological pressure and other unfair practices, prevent the application of objective criteria, or to insist on the criteria that are not satisfied with your opponent. In addition, in the Republic of Kazakhstan is still lacking many institutions within the market economy.

Register unfair partners is far from reality, and membership in the SRO (Self-regulating organization) does not mean anything. Some ratings during the crisis simply paradoxical, and ethics in business trying to replace certificates and diplomas (for example, a professional accountant: see. Example below). Marshals Service can be a law-abiding citizen with a gun and did not recover in time paid a fine of 5000 tenges, and at the same time to put «under the carpet» writ of half a million tenges against the firm-by-night (or «friendly» companies). Arbitration practice is often at odds with the practice of courts of general jurisdiction. One example — the consequences of termination and non-performance of the obligation secured earnest money. The arbitral tribunal shall recover from the debtor two deposit and the total — only one, because of «doubts

as to whether the amount earnest money» — it is called «advance», even if the debtor used the word «deposit» in the contract and the receipt a few times.

In the Russian Federation reviewed annually approximately 10 million cases in civil proceedings. These cases are not connected with the relations of power and subordination, tax, administrative or criminal legal relations or complaints against officers — and therefore, these conflicts can be resolved by means of extrajudicial (pre-trial) procedures and alternative methods. About 500 thousand Russians annually participate in labor disputes in the past two years [7].

How much is the dispute in a court? At least 10 thousand tenges — in the form of payment of a Representative or loss of working time to the conflict. This is in the case of individual disputes. If there was a conflict between the organizations involved in a whole team of lawyers and managers. Total courts, there are three, plus the ability to appeal to the Supreme Arbitration Court of theRepublic of Kazakhstan. Often files are returned for re-examination. The cost of a corporate dispute resolution may be millions of Tenges. In our opinion, we can start from a conservative estimate of 60 thousand Tenges on each side for all the courts to resolve the «average» of the conflict.

Here, incidentally, does not include labor disputes, which in some countries are moving in the mass actions of protest and social costs to the economy is very expensive (as, for example, strikes in Greece).

Now the state judicial system allows 99 % of civil legal conflicts in the society. This state of affairs — a monopoly on justice. Official statistics show that one has to judge about 140 cases in the last month. Whether it is appropriate in this situation, talk about the quality of services to resolve disputes? Not surprisingly, the level of trust the Kazakhstan citizens to justice is very low: in 2006, only one in five citizens expressed confidence in the domestic justice; target indicator in 2007 — one of four.

Unfortunately, in recent years tracked only of costs on the judicial system, but not its efficiency. Well-known methods of sociological research (the questionnaire for respondents parameters, indicators, scales) since 2007 have ceased to apply to assess the effectiveness of this program. Realistic painting — is primarily indicator of public confidence in justice, the proportion of claims of citizens, shall not be considered on the merits, the ratings of specific corruption courts and possibly the judges. All this is easily measurable and scientific research, but not investigated.

On the other hand, described a social problem very poor dispute resolution offers huge opportunities for the professional activities of mediators and professional intermediaries.

How much can earn a mediator? If Republic of Kazakhstan will overtake even China, where the proportion of disputes dealt with «properly» (ie, using ADR), is 20 %, the market neutral intermediary services will be about 20–30 million Tenges per year. We made the assumption that reward professional mediator is only 10 % of the costs of the conflicting parties, the cost of dispute resolution services. Explains that for the calculation of the service market neutral intermediaries (of their remuneration) are taken 10 % of the 20 % share of the company's annual losses as a result of civil disputes.

For comparison, the consulting market in Russian Federation in the pre-crisis 2008 amounted to 65–70 million rubles [8]. Suppose that in the first years after the adoption of the Law «On mediation, conciliation procedures» about ten thousand professionals whose activities are somehow linked to the ADR will satisfy the market demand for this specific market — Or an average of 2,4 million. Rubles revenue for each. If we take the analogy of the work of management consultants, where the share of the wage fund is about 50 % of revenue, the annual salary of an «average» neutral intermediary of 1.2 million rubles or 100 thousand rubles monthly net personal income tax. Of course, in megopolis fee will be higher in the periphery — is below. Of course, «not all brokers are equally successful»: in some cases will be painted for many weeks in advance, while others — calm. Achievement indicators developed capitalist countries the share of disputes governed by «properly» (ie, 70–80 %), offers opportunities for work in the market for ADR (It has been assumed that 80 % of civil disputes submitted to the decision of prof. Intermediaries whose remuneration is approximately 10 % of the price of the conflict, and that the market operates about 100 000 of them professional intermediaries). On average, this amounts to 960 thousand Rubles revenue for each. The number of housing of such specialists will be comparable to the judges, and the quality of their services for the resolution of disputes objectively can only get better, as guaranteed by the voluntary request of a party to the conciliation procedure, selecting the best option of settlement, the ability to terminate the conciliation procedure at any time. Finally, turn on the mechanisms of competition, which, perhaps, will make our «avenging justice,» Introducing one acquittal of one hundred, to turn toward the interests of the conflicting parties. Note that it is assumed that the increase in the number of «players» in the market reduces the revenue of each of them — compare the remuneration of the first «ten-thousand».

The business community and the citizens are willing to pay for quality services. They do not want the verdict to be submitted within six months, and even later, and often are not satisfied with any of the parties to the dispute. Solvent populations are unlikely on their own to the court where there is no wardrobe, rude on the phone, searched at the entrance (this is called «examination»), where on the bench have to sit for hours, waiting for the overloaded judge between the two criminal cases take the time to consider, for example, the division of property of the spouses. Such social groups choose paid, but more economical alternative, allows you to select a mediator to declare him a «challenge» (ie stop conciliation at any time), and to co-own solutions (mediator recommends a hand — selected). Once again, let us explain: Litigation costs include not only the state taxes, but the main thing — the loss of personal time, nerves and energy.

Ideally, from the court of general jurisdiction of the arbitral tribunal shall withdraw completely civil disputes (for this and created an alternative in the form of professional intermediaries.) Courts will be able to better focus on the consideration of administrative, antitrust, tax, criminal cases. This will remove the seriousness of the problem of judicial corruption.

As for the poor, give aware that in most cases justice for them simply is not available. Even if they find the money to pay the state tax, which has risen about twice, it will be unable to make a claim, does not overcome the obstacles in the form of «form and content» claim will not understand «ciphers» that evading court determinations. Even if they are lucky enough to pass these «filters» of domestic justice, the «test» before a judge for knowledge «judicial ceremony» — a special vocabulary and symbols of behavior that distinguishes the from «alien» in the courts, they have clearly failed. If the citizen begins to cry and express all of the judgment that «boiling», it will be fined for contempt of court and will withdraw from the hall.

Some readers may object, saying that how some ordinary citizens and reach to the Constitutional Court, and to the European? Reasonable question. These people were defending the best lawyers and attorneys who worked pro bona (for the benefit of society) — free of charge or for a nominal fee, that is primarily for reasons of image, self-promotion or professional motivation. In any case, to reach the highest courts of the unit, and requires assistance to millions. And while in the Republic of Kazakhstan conditions are created for non-profit organizations that provide professional assistance to the poor, will not allocate funds to pay good lawyers and lawyers, you can forget about access to justice for citizens insolvent. At best, their choice is not rich: Call to free (usually novice) lawyers who give the poor 'tied'; seek legal advice where they work student interns (the result will be no better than a novice lawyer); Finally, you can declare a hunger strike right in court — sometimes helps. This is not cynicism, and a huge social problem, and it is hardly fair to blame the mediators that their services are not available to everyone.

However, even the mediators work pro bona, helping the poor to a limited extent — also for reasons of professional motivation or desire to resolve the «beautiful conflict.» However, before they should think about the business acquisition of solvent clientele: after all, no rent, no communication services, no furniture to office equipment they will not provide one free of charge, as opposed to those same judges — is the question of equal starting conditions.

That situation is no alternative promotes judicial corruption. The best alternative if a negotiated agreement (NEA) becomes the formation of the coalition parties to the dispute with the judge, whether it makes sense to negotiate? Bulkiness of procedural rules, their unacceptably slow reform, consideration of the allotment to a judge himself, contrary to the principle of Roman law «nemo iudex in causa sua» (no one can be judge in his own case), the emphasis on paper work in the courts, when a higher court quietly returns appellant in cassation decision, indicating the absence of the required solutions (so-called «art of making a determination of abandonment of the case without the motion based on inconsistencies in form and substance of the claim» the whole is a complex of obstacles and barriers makes it easy to hide the most egregious violations of the law under the beautiful «ceremonial», only simulating justice. most important thing — the entrepreneurs and citizens almost no choice: only about 1 % of the cases dealt with in the arbitration courts and using alternative dispute resolution methods. Such a low figure can be attributed to measurement error. If your opponent is tight «friends» with the judge, police officer, prosecutor, and along with the authorities and management, as well as criminals, you will agree, short courses mediation and knowledge gained from their Western colleagues mediators is of little help in this situation. International Certificate of mediator in the Kazakh reality can be put on the shelf next to the other shelf-ware (from the English. Shelf-ware — Literature for «far shelf» or long box, similar to the soft-ware — software, hardware — «iron»). But there is a way out — it is to attack fraud opponent.

It is easy to teach mediation, beautiful classical principles, about which so much has already been said. Difficult to prepare practitioners (we call them «professional intermediaries»). They are not neutral, their

task — to protect the weak side of the conflict, they have a good command of the arsenal to counter «dirty tricks.» As soon as the dialogue, the role of a professional mediator is transformed into the role of a neutral mediator — the mediator, because the deal worked out by the parties voluntarily and without coercion will be stronger.

And business people and ordinary citizens when they bury «the hatchet» and begin to openly discuss problems become compliant and grateful (this applies even to persons related to the criminals with his peculiar subculture). However, to overcome the unnecessary layers — that is the complexity and art.

As for the upper classes of Kazakh society, they have long been «put an end» to the domestic justice. The inability of the Kazakh substantive and procedural law to the practical needs of the business turnover has led to the fact that entrepreneurs are trying at all costs to avoid the courts. Those who «can choose» establish nonresident legal entities, in order to be able to use English law, which is «soft» in the selection of the design contract, but «hard» in the performance of their obligations. Business is forced to conclude contracts in foreign jurisdictions and there to seek protection in the courts of arbitration.

If we talk about meeting the massive demand of the middle class Kazakhstan citizens to resolve conflicts, the role of the mediator is difficult to overestimate.

In the apt observation of Robert Benjamin (Robert D.Benjamin holds a degree in Social Sciences, a member of The Straus Institute for Conflict Resolution, Pepperdine University School of Law Practitioner mediator and consultant in conflict management since 1979.), many people view art as something a little more scenery, designed to close an empty wall space. Some artists, so serve this market and paint pictures of comfortable, pleasant and peaceful scenes [9]. Like them, some mediators are limited to «pleasant» conflicts that can be resolved by inviting people to the «round table» in an atmosphere of peace and good intentions. However, the greatest art is often made in the resolution of conflicts is complex, and the greatest mediation — to be in their midst. And artists and mediators in conflicts should be knowledgeable and able to consider the vital question with different levels. Both of them rely on the opportunity to feel the nuances, subtleties and ambiguity of the case, both should develop an internal sensitivity and speak in plain language. Any negotiator, mediator or manager conflicts can learn artistic vision of the dispute. Internal reaction to conflict, uninterruptible analysis and presented visually, provide fertile ground for mediators penetrated and learned to think from different perspectives. Plenty of opportunity for creative ways to select the resolution of the conflict often lie in the least expected places. Here is an excerpt from the publication of D.Melamed. He asks the rhetorical question: «Can increase the benefits of mediation in these difficult times? From my direct experience of everyday answer is undoubtedly «Yes!» Mediation has established itself as «the best, fast and economical» alternative, but these market quality are relevant more than ever. «Especially in a time of crisis, when the demand for alternative dispute resolution exceeds supply (Traditional trial), out of court (pre-trial) conflict resolution is not part of the legal services.

The world's biggest corporation («General Electric», «Motorola», «Toyota» and many others) agree that more than 50 percent of disputes resolved through mediation. In the USA there is a National Institute for resolution of disputes, which is developing new methods of mediation, there are both private and public service mediation. Has a great influence American Arbitration Association (American Arbitration Association), which adopted its own rules of arbitration (arbitration) and mediation are used, including the consideration of internal disputes. The conciliation procedure with a neutral mediator is very popular in the UK, there is even a special service — hotline where you can call from any part of the country, characterized by conflict, their preferences for a mediator, and offers a list of professionals that are suitable to your requirements. In terms of the mandatory procedure Britain went on a compromise: if a party waives the proposed court mediation, it shall bear all legal costs, even if won. In Germany, mediation harmoniously integrated into the justice system. For example, mediators are working directly in the courts, significantly reducing the number of potential lawsuits. Today, mediation is integrated in the German courts, not only in family matters, but to the ordinary courts, administrative courts, etc. In most German law schools introduced a permanent course of mediation. That is, everyone who comes to the law school, is undergoing mediation. In India, the agreement reached during the mediation have the same effect on arbitration (arbitration) decisions, regardless of whether the procedure is excited within the already existing legal proceedings or not. Mediation procedure, in particular, mediation as a tool to resolve internal disputes have traditionally has been common in Japan. Commitment to the business community in Japan Alternative dispute resolution has traditionally been associated with the ethical side — the negative attitude to the choice of the state court as a way to resolve the differences [1; 23].

Mediation in the Republic of Kazakhstan — is a new perspective, new opportunities, it is the humanization of our society. Even discussed the problem of mediation at a meeting of the Council of Legal Policy under the President of the Republic of Kazakhstan in September 2007. It was considered appropriate to develop conciliation procedures in criminal and civil proceedings. Are there any prospects of mediation in Kazakhstan? I hope there is some. This is a global trend and it wanted to be also apparent in Kazakhstan.

References

1 *Давыденко Д.Л.* Европейский союз закладывает основы развития примирительных процедур // Закон. — 2003. — № 12. — С. 23–35.

2 Типовой закон Комиссии Организации Объединенных Наций по праву международной торговли о международной коммерческой согласительной процедуре, принятой резолюцией 57/18 Генеральной Ассамблеи от 19.11.2002. — [ЭР]. Режим доступа: http://www.un.org/ru/documents/instruments/docs_ru.asp

3 8 вопросов, которые Вы должны спросить у Брюса Дермена и Уэнди Грексена. — [ЭР]. Режим доступа: www.edogovor.ru.

4 Трудовой кодекс Республики Казахстан. 15.05.2007. № 251. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/?doc_id=30103567

5 *Балашова А., Лавицкий В., Киселева Е.* Система присоединилась к уму // Коммерсант. — № 37 (4337) от 04.03.2010. — [ЭР]. Режим доступа: http://www.kommersant.ru/daily

6 *Роберт А., Мерринг Р.* Ипотечный кризис: можем ли мы договариваться? // Журнал Lawyer округа Ориндж. — 01.01. 2010. — № 521. — С. 9. — [ЭР]. Режим доступа: www.edogovor.ru.

7 *Бизруков П.В., Бизрукова В.А.* Лейбористские конфликты в кризисе. — [ЭР]. Режим доступа: http://www.trudprava.ru/index.php? id=1671

8 *Казьмин Д.* Без консультантов // Ведомости, Москва, 2009. — 23 марта. — № 51 (2320). — [ЭР]. Режим доступа: http://www.rfci.ru/data/File/file/787.pdf

9 Красота конфликта: Уроки Искусства, нестандартное мышление и творческое решение задач Р7Д7 Бенджамина // Журнал «Посредничество», Висконсинская ассоциация посредников (ВАП). Красота конфликта: художественные уроки, комплексный подход к проблеме и творческое решение проблем. — [ЭР]. Режим доступа: http://www.edogovor.ru

Ш.Т.Байкенжина, Г.А.Ілиясова

Делдалды келісу азаматтық-құқықтық дауларды шешудің құралы ретінде

Мақалада азаматтық-құқықтық дауларды шешудің кең тараған баламалы тәсілдердің түрлері қарастырылды. Авторлар жеке және заңды тұлғалар арасындағы даулардың түрлеріне мысал келтіре отырып, жаңадан пайда болған делдалдық тәртібіне кеңінен тоқталды. Келістіру тәртібінің басқа шетел елдерде қалай қолданылатынына, оның артықшылықтары мен заңда бекітілмеген олқылықтарына талдау жасалды. Авторлардың осы проблеманы жаңа тұрғыдан зерттеуі теориялық тұжырымдарында, сондай-ақ заңнамалық жетілдіру бойынша ұсыныстарында жан-жақты айқындалды.

Ш.Т.Байкенжина, Г.А.Ильясова

Посредничество как инструмент урегулирования гражданско-правовых споров

В статье рассматриваются основные виды альтернативных способов урегулирования гражданско-правовых споров. Авторы, приведя примеры гражданско-правовых споров между физическими и юридическими лицами, в частности, рассматривают примирительную процедуру посредничества. Выделена сфера применения процедуры посредничества в зарубежных странах, приводятся ее положительные стороны, а также неурегулированные пробелы в отечественном законодательстве. Новые подходы к исследованию данной проблемы выражаются в сформулированных авторами теоретических положениях, а также в предложениях по совершенствованию законодательства.

References

1 Davydenko D.L. *Law*, 2003, 12, p. 23–35.

2 Model Law United Nations Commission on International Trade Law on International Commercial Conciliation, adopted resolution 57/18 of the General Assembly on 19.11.2002, http://www.un.org/ru/documents/instruments/docs_ru.asp

3 *Are You Really Ready for Divorce? The 8 Questions You Need to Ask by Bruce Derman, Wendy Gregson*, www.edogovor.ru.

4 Labor code of the Republic of Kazakhstan. 15.05.2007. № 251, http://online.zakon.kz/Document/? doc_id=30103567

5 Balashova A., Lavitskiy V., Kiseleva Ye. *«Kommersant»*, № 37 (4337) on 04.03.2010. // http://www.kommersant.ru/daily

6 Robert A., Merring R. *Orange County Lawyer magazine*, 2010 January, Vol. No. 521, p. 9, www.edogovor.ru.

7 Bizrukov P.V., Bizrukova V.A. *Labour conflicts in crisis*, http://www.trudprava.ru/index.php? id=1671

8 Kaz'min D. *Vedomosti*, Moscow, 23.03.09, 51 (2320), http://www.rfci.ru/data/File/file/787.pdf

9 The Beauty of Conflict: Art Lessons, Lateral Thinking, and Creative Problem Solving by by RD Benjamin // The Mediation Journal, the Wisconsin Association of Mediators (WAM). Beauty conflict: art lessons, a comprehensive approach to the issue, and creative problem-solving. Translation Vasilyeva, http://www.edogovor.ru

UDC 346.548(574)

A.S.Kizdarbekova[1], R.Yu.Mamedov[2], A.A.Baiymanova[1]

[1]Ye.A.Buketov Karaganda State University;
[2]Academy of police of the Ministry of Internal Affairs of the Azerbaijan Republic, Baku
(E-mail: alua76@mail.ru)

Development of the legislation on consumer protection

The questions connected with development of the legislation of Kazakhstan on consumer protection are considered in the scientific article. Each statutory act which was carrying out at different times legal regulation of these relations is consistently analyzed. Along with the positive moments also those parties of standard material which didn't answer realities of time are noted and were replaced with new laws. The list of bodies and organizations which are capable to consider and resolve disputes with participation of consumers for their protection is provided in work. All mechanism of consumer protection is considered. The conclusion that in general the legislative base about consumer protection developed becomes a result of work.

Key words: customer satisfaction, protection, interests, liabilities, unscrupulous seller, service, works, goods, buyer, legislation development.

The modern Kazakhstan legislation on consumer protection inherited some lines of the legislation of the Soviet period.

Legal regulation of the relations on satisfaction of material and cultural requirements in the USSR was always carried out by the acts of the civil legislation which were base for a regulation of consumers' rights. These acts established the rights, duties and responsibility of subjects of the contractual relations with participation of citizens. Thus, according to point 1, 3 and 4 Article 77 Bases of the civil legislation (1991) the buyer to whom the thing of improper quality is sold, had the right to demand at the choice if the seller didn't stipulate its shortcomings at sale, replacements of a thing with a thing of appropriate quality, gratuitous removal of defects or compensation of charges of customer for their correction, or proportionate reduction of purchase price. The buyer could also instead of the requirements specified in point 1 of this article of Bases to dissolve the contract and, having returned a thing of improper quality to the seller, to demand from him the return of the sum paid, and if satisfaction of these requirements did not cover his losses, he was right to require their compensation. An important guarantee of consumer protection was the rule about invalidity of conditions of the contracts of household hire and the household order limiting the rights of citizens in comparison with the conditions provided by standard contracts, etc. provided in Kazakh SSR [1].

However along with the positive moments, the civil legislation wasn't specially calculated on regulation of the questions connected only with protection of the rights of citizens. Being the general legal base for the special norms directed towards protection of the rights of citizens, acts of the codified civil legislation are called to give a general character to basic formulations of the agreements given in a division «Obligation

right» with that they were counted not only on the relationships with consumers. That is why in these acts there were no specifics of relationship of consumers with the enterprises entering them into the contractual relations.

The classification of civil contracts given in the codified civil legislation before adoption of the new Civil Code didn't embrace all actually existing system of contracts. Such a situation existed in Bases of 1961, the same it remained in Bases of the civil legislation of 1991. So, neither Bases of the civil legislation nor CC KazSSR didn't regulate numerous contracts in the field of cultural, sports service of citizens at all. In the sphere of consumer services the codified civil legislation only provided a possibility of the approval by the Government of the standard contracts governing the relations with participation of citizens (household hire, the household order) and contained special rules about storage by the organizations of the things belonging to citizens. Such a situation demanded allocation of a number of other contractual views with an independent legal regulation.

In acts of the codified civil legislation there was no special system of guarantees of protection of the rights of citizens in the contracts directed on service of their requirements. Meanwhile the need of creation of such system was dictated from the late 80s began to early 90s, first of all, with transition of manufacturers of consumer goods, spheres of trade and service of the population to the market relations. In the conditions of freedom of business activity when the profit became the most important indicator of efficiency of their managing manufacturers of goods, performers, service providers, using the position in the consumer market, began to dictate to consumers the unprofitable terms for them, to violate the rights and interests of consumers. Thus, the classical civil legislation was never specially made for regulation of consumer protection. In these conditions there was an imperative need in creation and development of the special legislation on consumer protection providing the priority of interests of consumers in their relationship with manufacturers, sellers and service providers on a commodity market and services.

One of special lines of the legislation governing the relations with participation of citizens consumers was the plurality of regulations following, first of all, from incompleteness of coverage of the relations developing in services industry acts. It inevitably attracted filling of the being available gaps with subordinate (generally departmental) regulations. At plentiful departmental rule-making there was a possibility of the publication of the acts which weren't relying on the relevant standards of the law. For example, along with standard contracts by separate types of household hire whose acceptance belonged to maintaining Council.

However not only incompleteness by itself, but in some cases and direct transfer of the major questions of legal regulation of these relations by the Government under the authority of branch governing bodies, aggravated position of consumers. Until quite recently in certain cases the departmental regulations affecting the rights of consumers were accepted with obvious violation of the law. For example, Standard rules of an exchange of the industrial goods bought in retail network of the state and cooperative trade were accepted by the Ministry of Trade of the USSR in 1974 though the Bases of the civil legislation of 1961 (Art. 41) operating at that time provided definition of a procedure of the rights of the consumer in this case only the legislation of the republics [2].

The legislation existing before adoption of law on consumer protection did not also fully correspond to the international level of protection of their rights: first, the main questions concerning protection of the rights of consumers weren't solved at the legislative level, or if decided at this level, were solved by traditionally industry legislation without a priority of protection of their rights; secondly, not all international and recognized rights of consumers were properly protected (the right for information, the right for safety of life and the health, the right for indemnification caused by goods and services of inadequate quality). But also those rights which received rather full regulation, had no reliable mechanism of implementation; thirdly, not fully there corresponded to the international level regulation of responsibility of producers, trade enterprises and service before consumers in case of infliction of harm of their life, to health or property; fourthly, the questions concerning the organization and activity of the organized consumer movement, including public formations of the consumers created for collective protection of interests of citizens were insufficiently settled. There were no special government bodies on consumer protection as well.

The first serious attempt of the complex solution of questions of legal regulation in the field of consumer rights protection was development in 1988 of the bill USSR «About quality of production and consumer protection» [3]. The most part of this project was devoted to problems of ensuring quality of goods and services, and only one section contained the norms directed towards protection of consumers' interests. The downsides of the project were the following: first, it didn't make the distinction between the consumer citizen and the consumer legal entity; secondly, all its norms were anyway connected with quality of goods and

basic rights of consumers were formulated concerning ensuring the right for quality. Nevertheless, emergence of this bill was the first step in creation of the consumer legislation. For the first time the need of acceptance of the norms establishing guarantees of the state protection of interests of consumers admitted [4].

The foundation of implementation of the fundamental rights of the consumer was laid with adoption of law of the USSR of May 22, 1991. «About consumer protection» which, however, didn't come into force in connection with collapse of the USSR [5]. This law contained a set of the provisions which aren't developed in the civil legislation and also the mechanism of realization of its norms, directly forbade creation of the departmental documents infringing on interests of consumers, affirmed the right of citizens for compensation of the done moral harm.

So, the need of acceptance in the Republic of Kazakhstan of the special law directed to the protection of interests practically of all population was caused by that all legislation existing earlier was based on a priority of the interests of the manufacturer and seller which were the state organizations, and not numerous legislative norms which were available in the field of protection of interests of the consumer were blocked by departmental regulations and practically didn't work.

In many countries, first of all in industrially developed, similar laws already worked rather long ago. The problem of protection of the consumer rights gained the international value, and in April 1985. The United Nations General Assembly accepted «The guidelines for protection of interests of consumers» as a basis for development by the governments of policy and the legislation in this area [6; 4].

The beginning of reorganization of our society, orientation of economy to needs of the person, naturally, demanded the maximum expansion of the rights of consumers and the main thing, fixing of the measures providing their real implementation at the legislative level.

Value of the Law on consumer protection is not only in strengthening of social guarantees of the citizen. The law objectively increases the responsibility of producers, sellers and performers for quality of work that in the conditions of lack of the developed competition will promote improvement of quality of production and services, social and economic development of the country.

The legislation of the Republic of Kazakhstan guards interests of conscientious consumers.

The regulatory base consists of the Law RK «About Consumer Protection» of May 4, 2010 [7], Resolutions of the government of RK «About the Approval of the Instruction about Quality and Safety of Food Staples and Foodstuff» of November 29, 2000 [8], «About the approval of Rules of the organization of activity of the trade markets» of February 5, 2003 [9], the Standard resolution of the Supreme Court of RK «About Practice of Application by Courts of the Legislation on Consumer Protection» of July 25, 1996 № [10], the Law of the Republic of Kazakhstan «On regulation of trade activity» of April 12, 2004 [11], the Resolution of the government of the Republic of Kazakhstan «About the approval of Rules of domestic trade» of April 21, 2005 [12], the Resolution of the government of the Republic of Kazakhstan «About obligatory confirmation of compliance of production in the Republic of Kazakhstan» of April 20, 2005 [13].

Besides, in a number of regulations there are articles and sections devoted to consumer protection. For example, in Laws RK «About Safety of Chemical Production» of July 21, 2007 [14], «About communication» of July 5, 2004 [15], «About natural monopolies and controlled markets» of July 9, 1998 [16], in resolutions of the government of the Republic of Kazakhstan «About the adoption of regulations in the field of power industry of December 7, 2000 [17].

Innovation is development of special technical regulations, such as: The technical regulation «Requirement to packing, marking, labeling and their correct drawing» approved by the Resolution of the government of the Republic of Kazakhstan of March 21, 2008 No. 277 [18].

The above regulations protect the rights of consumers, however, the majority of norms is devoted to protection of interests of buyers.

The law RK «About Consumer Protection» of May 4, 2010 fixes legal, economic and social bases, and also guarantees of consumer protection. It already the second law adopted during the sovereignty of the Republic of Kazakhstan.

According to the Law RK «About Consumer Protection», it is intended for regulation of the relations between the consumer and the seller or the operator and services, establishment of their rights and duties, permission of questions of consumer protection and is directed on realization of the following tasks:

1. Recognition of a priority of legitimate interests of citizens before interests of manufacturers and sellers.

2. Implementation by consumers of the rights for information, quality of production, an exchange of goods of appropriate quality, and also the rights of consumers in case of sale of goods of inadequate quality to them.

3. Protection of the consumer against dangers to his life and health.

4. Expansion of the international and interrepublican cooperation in protection of interests of consumers.

5. Assistance to creation and activity of independent groups (societies of consumers).

The positive moment of this law is existence of a conceptual framework. In the section 3 «Rights of Consumers and Their Protection» in Art. 7 the rights of consumers of production are specified. The positive moment of this Law is also possibility of collecting moral harm.

The moral harm done to the consumer owing to violation by the seller (the manufacturer, the performer) of his rights and legitimate interests provided by the legislation of the Republic of Kazakhstan on consumer protection is subject to compensation in the presence of fault of the seller (the manufacturer, the performer) in a size determined by court if other isn't provided by laws of the Republic of Kazakhstan.

Protection of the rights and legitimate interests of consumers is carried out within competence by the appropriate government bodies and court, arbitration or the arbitration court.

Judicial claims for desire of the consumer are considered in the location or the claimant, or the respondent or in a place of infliction of harm.

At satisfaction of requirements of the citizen the court besides resolves an issue of collecting from the seller, manufacturer (their representatives), the performer of a penalty in the income of the relevant budget at a rate of the claim price for refusal of voluntary satisfaction of its requirements.

In case of infliction of harm of life, to health or property of the citizen the sum of a penalty can be increased to the fivefold size of the price of the claim at realization of substandard foodstuff and to the triple size at realization of industrial goods and services with the subsequent involvement of the seller, the manufacturer (performers) to responsibility [7].

Some kind of self-defense is the right of consumers for association in societies (unions) of consumers. Citizens of RK have the right to unite on a voluntary basis in societies (unions) of consumers. Societies of consumers can unite in the unions (federations) in areas, the cities, areas and in the republic in general.

These associations of consumers work according to the charters adopted by general meeting of members of society or meeting of authorized societies of consumers and are legal entities.

Protection of the rights of citizens by public organizations of consumers is carried out as follows. At the request of citizens, or on own initiative societies, consumers unions have the right to handle the claim to the seller (the manufacturer, the performer) of production of inadequate quality or realized at inflated prices about elimination of violations and compensation to citizens of the damage caused by these violations in a voluntary order. If within 10 days the manufacturer (the performer, the seller) doesn't give the answer to a claim or will refuse to eliminate violations and to indemnify the caused loss in a voluntary order, public organizations of consumers have the right to appeal to court.

In case of satisfaction of the imposed requirements the court passes the decision on collecting from the manufacturer (the performer, the seller) in the income of the relevant budget a penalty at a rate of the price of the claim and for compensation to public organizations of consumers of the suffered expenses.

Public organizations of consumers have the right independently or through the prosecutor to make the claim in court for recognition of actions of the seller, manufacturer (their representatives), the performer, and also governing body illegal concerning an uncertain circle of consumers (the collective claim) and the termination of these actions.

At satisfaction of the collective claim the court obliges the offender to bring through mass media or otherwise to data of consumers a judgment in due time.

The judgment which entered into force in the collective claim is obligatory for the court considering the claim of the consumer for civil consequences of actions of specified persons.

Features of consumer protection are shown in specifics of the subject — the consumer. Action of the legislation on consumer protection doesn't extend on consumers — legal entities, and also on consumers — natural persons (citizens) if they use, get, order or have intention to get or order goods, (work, service) for the enterprise purposes, and also on the contractual relations between citizens concerning satisfaction of their needs.

Thus, it is possible to draw a conclusion that in general in the Republic of Kazakhstan there was a regulatory base of protection of the violated rights of the consumer.

References

1 Основы Гражданского законодательства Союза ССР и республик (утверждены Постановлением Верховного Совета СССР 31 мая 1991 г. № 2211-I) (утратил силу). — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1005773

2 Закон СССР от 08.12.1961 г. (ред. от 12.06.1990) «Об утверждении Основ гражданского законодательства Союза ССР и союзных республик». — [ЭР]. Режим доступа: http://base.consultant.ru/cons/cgi/online.cgi? req=doc; base=ESU; n=241

3 Законодательное обеспечение основных и сопутствующих задач управления качеством и конкурентоспособностью. — [ЭР]. Режим доступа: http://eclib.net/37/41.html

4 Закон РФ «О защите прав потребителей». Практический комментарий. — М.: Юрист, 2006. — 190 с.

5 Закон СССР от 22.05.1991 № 2184–1 «О защите прав потребителей». — [ЭР]. Режим доступа: http://base.consultant.ru/cons/cgi/online.cgi? req=doc; base=ESU; n=5257

6 *Парций Я.Е.* Комментарий к Закону РФ «О защите прав потребителей». — М.: Юрид. лит., 2006. — 225 с.

7 Закон РК «О защите прав потребителей» от 4 мая 2010 г. № 274-IV. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=30661723

8 Постановление Правительства РК «Об утверждении Инструкции о качестве и безопасности продовольственного сырья и пищевых продуктов», 29 ноября 2000 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1020771

9 Постановление Правительства РК «Об утверждении Правил организации деятельности торговых рынков», 5 февраля 2003 года. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1036497

10 Нормативное постановление Верховного суда Республики Казахстан «О практике применения судами законодательства о защите прав потребителей» от 25 июля 1996 г., № 7. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1006739

11 Закон Республики Казахстан «О регулировании торговой деятельности» от 12 апреля 2004 г., № 544-II. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1047488

12 Постановление Правительства Республики Казахстан «Об утверждении Правил внутренней торговли» от 21 апреля 2005 года, № 371. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=30009216&sublink=900

13 Постановление Правительства Республики Казахстан «Об обязательном подтверждении соответствия продукции в Республике Казахстан» от 20 апреля 2005 года № 367. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=30009157

14 Закон РК «О безопасности химической продукции» от 21 июля 2007 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=30113861

15 Закон РК «О связи» от 5 июля 2004 года. — [ЭР]. Режим доступа: http://online.zakon.kz/document/? doc_id=1049207

16 Закон РК «О естественных монополиях и регулируемых рынках» от 9 июля 1998 г. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1009803

17 Постановление Правительства Республики Казахстан «Об утверждении нормативных правовых актов в области электроэнергетики от 7 декабря 2000 года. — [ЭР]. Режим доступа: http://online.zakon.kz/Document/? doc_id=1020873

18 Технический регламент «Требования к упаковке, маркировке, этикетированию и правильному их нанесению», утвержденный Постановлением Правительства Республики Казахстан от 21 марта 2008 г. № 277. — [ЭР]. Режим доступа: http://online.zakon

А.С.Қыздарбекова, Р.Ю.Мамедов, А.А.Байманова

Тұтынушы құқықтарын қорғау заңнамасының дамуы

Мақалада тұтынушы құқықтарын қорғау туралы Қазақстан заңнамасының дамуымен байланысты мәселелер қарастырылған. Осы қатынастардың әр түрлі уақытта құқықтық реттелуін жүзеге асыратын әр нормативтік құжат кезегімен талданды. Нормативтік материалдың оң тұстарымен қоса, уақыт талабына жауап бермеген, жаңа заңдармен ауыстырылған кездері де орын алды. Авторлар тұтынушыларды қорғау мақсатында, олардың қатысумен дауларды қарап және оларды шеше алатын органдар мен ұйымдардың тізімін көрсеткен. Тұтынушылардың құқықтарын қорғаудың тетігі зерттелген, нәтижесінде тұтынушылардың құқықтарын қорғау туралы заңнама базасы толықтай қамтылған.

А.С.Киздарбекова, Р.Ю.Мамедов, А.А.Байманова

Развитие законодательства о защите прав потребителей

В статье рассматриваются вопросы, связанные с развитием законодательства Казахстана о защите прав потребителей. Последовательно анализируется каждый нормативный акт, осуществлявший в разное время правовое регулирование данных отношений. Наряду с положительными моментами отмечаются и те стороны нормативного материала, которые не отвечали реалиям времени и были заменены новыми законами. В работе приводится перечень органов и организаций, которые способны рассматривать и разрешать споры с участием потребителей в целях их защиты. Рассматривается весь механизм защиты прав потребителей. Итогом работы становится вывод о том, что в целом законодательная база о защите прав потребителей сложилась.

References

1 Bases of the Civil Legislation of USSR and the republics (are approved as the Resolution of the Supreme Council of the USSR on May 31, 1991 No. 2211-I), http://online.zakon.kz/Document / (became invalid)//? doc_id=1005773

2 The law USSR of 08.12.1961 (an edition of 12.06.1990) «About the statement of Bases of the civil legislation of USSR and federal republics», http://base.consultant.ru/cons/cgi/online.cgi? req=doc; base=ESU; n=241

3 Legislative providing the main and accompanying problems of quality management and competitiveness, http://eclib.net/37/41.html

4 The act of the Russian Federation «About consumer protection». Practical comment, Moscow: Yurist, 2006, 190 p.

5 The law USSR of 22.05.1991 No. 2184–1 «About consumer protection», http://base.consultant.ru/cons/cgi/online.cgi? req=doc; base=ESU; n=5257

6 Partsy Ya.Ye. *The comment to the Act of the Russian Federation «About consumer protection»*, Moscow: Yuridicheskaya literatura, 2006, — 225 p.

7 Law Republic of Kazakhstan «About consumer protection», on May 4, 2010. No. 274-IV //http://online.zakon.kz/Document/? Doc_id=30661723

8 Resolution of the government of RK «About the Approval of the Instruction about Quality and Safety of Food Staples and Foodstuff», on November 29, 2000, http://online.zakon.kz/Document/? Doc_id=1020771

9 Resolution of the government of RK «About the Approval of Rules of the Organization of Activity of the Trade Markets», on February 5, 2003, http://online.zakon.kz/Document/? Doc_id=1036497

10 Standard resolution of the Supreme Court of the Republic of Kazakhstan «About practice of application by courts of the legislation on consumer protection» of July 25, 1996, 7, http://online.zakon.kz/Document/? Doc_id=1006739

11 The law of the Republic of Kazakhstan «On regulation of trade activity» of April 12, 2004, 544-II //http://online.zakon.kz/Document/? Doc_id=1047488

12 The resolution of the government of the Republic of Kazakhstan «About the approval of Rules of domestic trade» of April 21, 2005, 371, http://online.zakon.kz/Document/? Doc_id=30009216&sublink=900

13 The resolution of the government of the Republic of Kazakhstan «About obligatory confirmation of compliance of production in the Republic of Kazakhstan» of April 20, 2005, 367, http://online.zakon.kz/Document/? Doc_id=30009157

14 The law Republic of Kazakhstan «About Safety of Chemical Production» of July 21, 2007, http://online.zakon.kz/Document/? Doc_id=30113861

15 The law Republic of Kazakhstan «About Communication» of July 5, 2004, http://online.zakon.kz/document/? Doc_id=1049207

16 The law Republic of Kazakhstan «About Natural Monopolies and Controlled Markets» of July 9, 1998, http://online.zakon.kz/Document/? Doc_id=1009803

17 The resolution of the government of the Republic of Kazakhstan «About the adoption of regulations in the field of power industry of December 7, 2000, http://online.zakon.kz/Document/? Doc_id=1020873

18 Technical regulations «Requirement to packing, marking, labeling and their correct drawing» approved by the Resolution of the government of the Republic of Kazakhstan of March 21, 2008, 277, http://online.zakon

UDC 347.155 (574)

M.Yu.Prudnikova

Ye.A.Buketov Karaganda State University
(E-mail: marishakrg@mail.ru)

Problems and prospects of development of legal regulation of medical service in the Republic of Kazakhstan

The article is devoted to the problems of legal regulation of medical service in the Republic of Kazakhstan in the modern time. The author examines current issues of healthcare quality and development prospects of the legislation on the healthcare. In the context of modernization of the existing legislation, the theme of the article is actual, and the study of these issues is timely.

Key words: patient, medical service, quality of medical care, expertise, insurance.

Providing patient's right to qualified medical care — the main goal of the state, which establishes norms, regulating relations arising on the provision of medical services. Until recently, the problems of legal regulation of medical services were studied partially and the prospects of development of legislation on

healthcare were rather indeterminate. For a long time, legislation which regulates medical services had a public law nature; declarative norms were aimed at providing the rights of the patient and they were not the constituent part of the civil law.

Occurred in Kazakhstan after the collapse of the USSR, the social, political and economical reforms, including the formation of priority of market economy, have had an impact on the medical services organization system. Existing in the past, a clear management hierarchy disintegrated with the collapse of the command-administrative system of governance. In an attempt to improve the efficiency of the healthcare system and increase the potential of the medical service branch, the state and its institutions have tried to change the system of organization, management and financing of healthcare. The absence of precise, elaborate and reasonable development strategy of the healthcare was among the many shortages and mistakes during the reformation of the healthcare system in the previous years. As a result, according to historical, political, social and economic determinants, the healthcare system of Kazakhstan had three models: the budgetary model, budget and insurance model, program budget model, with the elements of paid medical services at all stages of development.

The system of social and economic crisis of the 90th determined the reduction of many indicators of social health and healthcare. Experiencing the economic difficulties of the intermediate period, the national budget allocated for the national healthcare system less than 2 % [1; 45]. The underfunding of the healthcare led to reduction of medical organizations and workplaces, led to the aging of the material and technical base, led to reduction of equipment, instrumentation, products and tools for medical purposes. The total lack of medicines and dressings, insufficient supply of laboratories, the inability to provide a varied and balanced nutritional care of patients, low salaries of healthcare workers did not allow to reach the required level of quality and efficiency of medical service [1; 46].

The achievement of Kazakhstan of the path of sustainable economic growth and the macrostabilization formed a real ability to implement Art. 29 of the Constitution of the Republic of Kazakhstan (30 August 1995), which states:

1. Citizens of the Republic of Kazakhstan shall have the right to protection of health.

2. Citizens of the Republic shall be entitled to free, guaranteed, extensive medical assistance established by law.

3. Paid medical treatment shall be provided by state and private medical institutions as well as by persons engaged in private medical practice on the terms and according to the procedures stipulated by law.

The main social task and duty of the state became the strengthening of the state regulation and appropriate financial provision of guarantees in the sphere of public health.

Today Kazakhstan has all prerequisites, which are required for the development of legal regulation on the provision of medical services. Meanwhile, some representatives of national medical science consider that doctor-patient relationship should be regulated by ethical and moral norms, believing that the legislative regulation has a secondary role in medical professional part. Without denying the value of medical ethics, it must be emphasized that today the management of health and also the relations arising during medical healing directly between the patient and the doctor (medical institution) require in the legal regulation, because it affects the high-priority interests of citizens and society in general. Analysis of the current legislation, the study of theoretical and monographic sources of right in medicine, as well as the generalization of judicial practice in cases related to improper medical services lead to the necessity of further improvement of legal regulation of relations in the providing of medical services in relation to emerging legal issues.

The first and perhaps the most actual of these problems, in our opinion, is the solution of the question of responsibility of executors of medical services, which allows to take into account the interests of the executors of medical services and patients.

The increased responsibility for improper medical services can be imposed on executor, not only because of the rule of Art. 359 of the Civil Code of the Republic of Kazakhstan (The Grounds of Responsibility for Violating an Obligation), but also in accordance with Art. 947 of the Civil Code of the Republic of Kazakhstan, which provides the liability for damage to life and health of the person or as a result of defects of services, as well as due to inaccurate or incomplete information on the services; Art. 931 of the Civil Code of the Republic of Kazakhstan on responsibility for the damage caused by activity, creating greater danger to others. The using of X-ray machines, radon baths, cobalt guns, laser devices, ultrasonic devices, poisonous, narcotic, potent drugs, explosive and flammable medicines (ether and others), electrical current, medicines or medical technologies in implementation of medical experiments are considered to be the sources of high risk in the executors of healthcare activity.

Thus, the current legislation provides a range of exceptions to the general rule of responsibility on the basis of guilt by virtue of which the executors of medical services may be held responsible in the absence of fault in the improper performance of the obligation. This position of the legislator is often criticized. A number of scientists note that this approach «... the naturally followed an unfavorable outcome of the disease can terminate the responsibility for medical personnel,... the doctors who undertake treatment of the most seriously ill patients will be more responsible; there is a motivation for abandoning risky treatment, which creates the prerequisites to paralyze the initiative in providing emergency assistance» [2]. In our opinion, under current conditions increased responsibility for causing harm by the executors of medical services seems justified and meets the interests of patients. At the same time it is necessary to consider the interests of executors of medical services in cases when harm is caused by accident.

The optimal solution of the problem of increased responsibility of executors of medical services, which allows to take into account the interests of medical services executors and patients, is the use of the responsibility Insurance Institute of medical service executors'.

For that purpose the experience of foreign countries can be used, where it was established and was being successfully operated for a long time. The problem of professional responsibility insurance of medical institutions has been the subject of discussion in the literature for many years [3]. Seems not only advise but also necessary to study the experience of professional responsibility insurance of medical services executors in those countries, where this institution has been widely used and for the years of its use the dignity and disadvantages have been studied.

Along with the action of the insurance institution, the system of compensation of harm which was caused to life and health of the patient was developed in several countries. This system was originally introduced in New Zealand. Its use is based on the fact that in some cases, when harm to patients is not caused by the negligent actions of the medical personnel, and can be explained by unfavorable circumstances, unexpected reactions of the patient, and other unpredictable factors. Complaints of patients are considered by The Accident Compensation Corporation of New Zealand; if the Corporation finds out that there is no accident, and that those are responsible actions of the doctor, the patient can apply for compensation in the courts. Consequently, the compensation system is not a substitute for professional responsibility insurance for physicians, it complements professional responsibility insurance institute [4; 172].

A similar system operates in Sweden, Finland and Norway. There are statements about necessity of using foreign experience on this issue in Russia [5; 50].

The introduction of such system in practice of national healthcare should be considered justified and useful, as it is in the interests of patients and medical services executors.

One of the most actual issues of today, which is decided by the state, regulating relations in the sphere of social health, is the problem of providing quality of medical services.

Fact, that the quality of healthcare is under constant attention of the Head of the State Nursultan Nazarbayev, it was confirmed in his Address «Strategy» Kazakhstan-2050 «: New political course of the established state». Leader of the nation emphasized that «we are creating necessary conditions to ensure high-quality healthcare services in all regions of the country. As part of a long-term modernization of the national healthcare system we must introduce throughout the country unified standards of quality of medical services, improve and unify the material and technical equipment of medical institutions». [6] The President gave a precise instruction: «Set at the legislative level holding an international accreditation of medical high schools and institutions» [6].

The purpose of accreditation is ensuring continuous improvement of the social healthcare services' quality through the introduction of effective management and medical technologies in accordance with international approaches in the practice of medical institutions. The expected results of the participation of healthcare organizations in accreditation programs are increase of management efficiency, increase of planning and analysis activities, personnel's participating in solving of problems of medical institution, improving the structure of healthcare organizations (modernization of premises and communications, landscaping), improving the quality of medical documentation, reducing risks for patients in obtaining medical service. These aspects are included in the standards of accreditation and primarily in the self-assessment it identifies compliance or noncompliance with these requirements.

Committee of control of medical and pharmaceutical activity of the Ministry of Healthcare and Social Development of the Republic of Kazakhstan has held the accreditation of medical institutions since 2009, which was aimed at ensuring the safety and quality of medical services.

Further, it should be noted that the problems associated with imperfect mechanisms of medical services examination exist worldwide. Different countries have taken different approaches to the examination according to the peculiarities of national healthcare systems. However, nowadays there is no universal scheme that fully satisfies both sides — the patient and the medical services executor. In this regard, all the countries work continuously to improve the assessment of medical services' quality. Our country is no exception.

Since 2009, Kazakhstan has made the introduction of new mechanisms for quality examination of medical services. The first one relates to the activities of the internal audit service, which was established in all medical institutions according to the Code of the Republic of Kazakhstan On People's Health and Healthcare System. The aim of creating this service in medical organizations is ensuring the rights of patients to receive timely, qualitative and safe medical service in the required volume. Representatives of the internal audit service solve problems (complaints) of patients in optimal time (5 days) as they occur (Art. 58 of the Code of the Republic of Kazakhstan On People's Health and Healthcare System) [7]. In case of dissatisfaction with the quality of medical services, violations of the ethics principles and deontology, as well as the suggestions for improving the medical service execution, the patient can go to any of the members the internal audit service, information on which is placed open in the medical organization.

The mechanism of external examination of the medical services' quality has undergone a number of significant changes, which are connected with the creation of independent experts institute for objective assessment of quality of medical services provided to patients in the Republic of Kazakhstan.

However, despite this, the disputes about the quality of medical services today, as previously, are solved mainly with involvement of forensic medical experts. At the same time, answering these questions, experts often use terms, the exact meaning of which they do not know or assess the circumstances when such an assessment is not their competence or conversely they use such terms, the exact meaning of which is not always obvious to the parties.

The complexity of such cases related to the fact that the court has to evaluate very specific matters arising in the field, when the judges have almost no idea. In these circumstances, the forensic medical examination almost always decides the outcome of the dispute, so the quality of forensic medical examination becomes extremely important.

Nevertheless, patients, protecting the right to qualified medical services, point out at esprit de corps of the medical profession members, the uncertainty and inconsistency of expert opinions, which leads to the fact that one case is assigned to several forensic examinations and prolongation of trials on «medical affairs» for years.

Appeals of citizens for the independent examination promotes an objective assessment.

The establishment of independent experts institute in the Republic of Kazakhstan is aimed at the realization of the rights of patients and medical workers. Currently the association of independent experts successfully functions protecting the rights of patients associations, associations of people with various diseases (diabetic, oncological, cardiological, and others), professional NGOs. These institutions are actively involved in solving problems of arising social issues.

The registry of independent experts accredited in the established order was created on the site of the Ministry of Healthcare and Social Development of the Republic of Kazakhstan.

Independent experts may be involved in conducting of external and internal examinations as part of the internal audit service.

In order to comply the principles of the independence of the expert's examination, such as openness, objectivity and transparency, the experts are part of the Commission, which investigates people's complaints about the quality of medical services; experts conduct an examination of deaths for the volume of payment for services rendered; experts are involved in the examination of candidates' certification cases, who passes examinations for qualifying category, as well as the experts are part of the commission for the examination of specialists with higher and secondary medical education.

Insufficiently developed in our country, in our view, the prejudicial dispute resolution mechanism in cases related to citizens' medical services. Foreign experience shows that the function of the prejudicial disputes is executed by independent or neutral medical expert commissions, which analyze and handle the medical errors of professional associations of doctors, as well as so-called conciliation commissions, supported by consumer protection associations and physicians' associations. In Germany, approximately 90 % of the expert opinions of such commissions lead to prejudicial conflict solution [8; 34].

It should be emphasized that the problem of legal regulation of the quality of medical services is now one of the most debated and undeveloped problems; it needs a deep and comprehensive study with experts in

various fields (lawyers, economists, doctors, experts in healthcare management, etc.). In particular, it is necessary to develop the concepts of quality of medical services, determine drawback and significant drawback of medical services, as well as the consequences of the provision of medical services with drawback, determine patients' and the clients' rights in this situation.

The further improvement of the existing legislation on the healthcare is also associated with the solution of existing problems in the field of organs trafficking and tissues for transplantation, accessibility of new methods of reproductive technologies for needy patients, ensuring the rights of people with HIV, AIDS, alcoholism, drug addiction and others.

Obviously, that the healthcare system of the Republic of Kazakhstan needs further reformation. Among the directions of reformation is the conversion of the healthcare system on a market basis, the possible creation of a health insurance system, a precise division of free and paid medical care, etc. Experts agree that the market of paid medical services in Kazakhstan will develop dynamically, therefore, the role of medical services contract as the legal form of ensure the implementation of citizens' right to medical services will be increasingly growing.

In our view, Kazakhstan provides necessary basis for the development and the legal regulation of the provision of medical services. Much has been done to ensure the right of citizens to receive qualitative medical aid. However, some problems still exist, and further work on improving the efficiency of existing norms of medical service will contribute to their operative solution.

References

1 *Девятко В.Н., Аканов А.А.* Здоровье народа и здравоохранение Казахстана в переходный период: опыт, уроки, проблемы. — Алматы: Жеті жарғы, 1999. — 140 с.

2 *Строгова В.Б., Григорьев И.Ю.* Юридическая и моральная ответственность медицинских работников // Здравоохранение. — 2011. — № 10. — С. 168–175.

3 *Михайлова Ю.В.* Страхование профессиональной ответственности медицинских работников за рубежом // Здравоохранение. — 2002. — № 9. — С. 157–161.

4 *Васильева Е.Е.* Договор возмездного оказания медицинских услуг по законодательству Российской Федерации: Дис. … канд. юрид. наук. — Томск, 2004. — 192 с.

5 *Жилинская Е.В., Коротких Р.В., Лукова Н.Х., Симакова Н.В.* Страхование профессиональной ответственности как форма социальной защиты медицинских работников // Здравоохранение. — 2009. — № 7. — С. 49 — 64.

6 Послание Президента Республики Казахстан — Лидера нации Н.А.Назарбаева Народу Казахстана «Стратегия «Казахстан — 2050»: Новый политический курс состоявшегося государства» от 14.12.12 г. — [ЭР]. Режим доступа: www.kaznmu.kz

7 Кодекс Республики Казахстан от 18 сентября 2009 г. № 193-IV «О здоровье народа и системе здравоохранения» (с изм. и доп. по состоянию на 08.01.13 г.). — [ЭР]. Режим доступа: www.economika.astana.kz

8 *Жаров В.В., Фадеев С.П.* Практика возбуждения гражданских и уголовных «врачебных» дел // Здравоохранение. — 2010. — № 9. — С. 165–171.

М.Ю.Прудникова

Қазақстан Республикасында медициналық қызмет көрсетуді құқықтық реттеудің даму келешегі мен мәселелері

Мақала қазіргі кезеңдегі Қазақстан Республикасында медициналық қызмет көрсетуді құқықтық реттеудің мәселелеріне арналған. Автормен медициналық қызмет көрсетудің сапасын қамтамасыз етудің өзекті сұрақтары және денсаулық сақтау туралы заңнаманың даму басымдықтары қарастырылған. Қолданыстағы заңнаманың жаңартылуы жағдайында мақаланың тақырыбы өзекті, ал көрсетілген мәселелерді зерттеуі заман талаптарына сай болып табылады.

М.Ю.Прудникова

Проблемы и перспективы развития правового регулирования медицинского обслуживания в Республике Казахстан

Статья посвящена проблемам правового регулирования медицинского обслуживания в Республике Казахстан в современный период. Автором рассматриваются актуальные вопросы обеспечения качества медицинского обслуживания и перспективы развития законодательства о здравоохранении. В условиях обновления действующего законодательства тема статьи представляется актуальной, а исследование указанных вопросов — своевременным.

References

1 Devyatko V.N., Akanov A.A. *People's health and health care in Kazakhstan during the intermediate period: experience, lessons, problems*, Almaty: Zhety Zhargy, 1999, 140 p.

2 Strogova V.B., Grigor'yev I.Yu. *Healthcare*, 2011, 10, p. 168–175.

3 Mikhailova Yu.V. *Healthcare*, 2002, 9, p. 157–161.

4 Vasilyeva Ye.Ye. *Contract on the provision of medical services under the laws of the Russian Federation*, dissertation of legal sciences candidate, Tomsk, 2004, 192 p.

5 Zhilinskaya Ye.V., Korotkikh R.V., Loukova N.Kh., Simakov N.V. *Healthcare*, 2009, 7, p. 49–64.

6 Address by the President of the Republic of Kazakhstan, Leader of the Nation, N.A.Nazarbayev to the people of Kazakhstan «Strategy Kazakhstan 2050»: New political course of the established state». dd. 14. December 2012, www.kaznmu.kz

7 The Code of the Republic of Kazakhstan On People's Health and Healthcare System (has been amended for the 08.01.2013), www.economika.astana.kz

8 Zharov V.V., Fadeyev S.P. *Healthcare*, 2010, 9, p. 165–171.

UDC 347.02:338.22

G.B.Assetova

Ye.A.Buketov Karaganda State University
(E-mail: gulnur_asetova@mail.ru)

The legal regulation of the purchase and sale agreement in the sphere of entrepreneurship

The article considers the conditions of ordering business relations, namely the legal conditions of sale and purchase, especially the implementation of constancy between entrepreneurship subjects. Conditions provide useful remedies that satisfy the interests of the involved subjects. Only the terms of payment achieve the impossible condition using administrative legal bodies, to guarantee the discipline, consistency and to organize in economic circles, for обеспечения of mutual interests based on legal regulations.

Key words: term, buying-selling terms, entrepreneurship, momentous rules, consumer, seller, buyer, businessman.

The concept of the subject has its origins in the legal Rome and today is many faces and entrenched notion. It is considered from three perspectives: emergence of legal relations, based on this it is the legal relations, and of course as the form of perception of the legal relations. In the Roman legal system the term includes two bases: firstly, conventio or consensus, and secondly, special contract basis in the form of specific purpose (causa) [1; 120].

In modern theory of law the term «term» (condition) is used in various basis. Namely, according to some authors, the term is, firstly, appearance, change and termination of relationship, namely, legal argument and, secondly, formation of these foundations are legal relationships themselves. According to other authors, the term is despite of legitimate data and contingent liability, it is a document proving securing binding of legal relationship.

In the theory of law seeing restrictions on the content of the theory concepts of «law», in order to solve the question, firstly, we should look through it's legal concept. Therefore, according to the Republic of Kazakhstan's civil laws the term is understanding the emergence of legal obligations. The relevance of conditional orderings of business relations are:

– regarding the importance of the business in today's economic conditions;
– of the lack of opportunities to streamline the public relations without the aforementioned legal form;
– general provisions of the conditions in property turnover of legal orders;
– the emergence of new subject responsible for the implementation of the common rules of entrepreneurial business;
– inadequate treatment of common doctrine of the term (in comparison with the development of special rules);
– the emergence of constant debate between procurers bills of Kazakhstan and legal scholars on the above issues.

The most common type of relationship in business relationships are sales. Sales are the main mode of conveyance or other legal ownership transfers.

Nowadays, the sales are used among businesses, the most common civil turnover, as well as the condition it is praising the relationship between owner and user (retail sale).

Under the terms of the sales first party (seller) undertakes to transfer to the other side (buyer) of the property (goods) for farming or track return, and the buyer agrees to take the property (goods) and pay a certain amount (it's cost) for it [2]. Above mentioned is the basis for determining the importance of sales in the entrepreneurial business.

The purpose of this study is to determine the importance and the place of conditions of sale appearing in the Entrepreneurship.

Society and social — political and economic relations develop new ways of arranging legal economic relations which require concentration of norm publishers on the civilization doctrine, namely on the conditional rights. Considering legal innovations ordering, conditional rights regarding market today has led to a rapid increase in the conditional ordering business relationship, experiencing difficulties with the development of trade. The formation of spreading emergence and development of the current conditional rights of the Republic of Kazakhstan appear to destroy the global market competition.

For writing research work as the research method were used legislator and law subordinate acts, regulations, residential and foreign famous lawyers' monographs, as well as periodicals. Methodological basis are taken from legal research methods, historically legal, officially legal, legal and relatively discussion phenomenon laws.

To discuss this topic in Russia and Kazakhstan, we are interested in the study of Russian scientists on this issue. Namely, firstly, the similarities between the two countries economic basis, and secondly, the similarities in the legal reforms of farming.

Conditions of sale make it possible to form the material basis for the implementation of business. Also, with the help of mentioned terms products manufactured by entrepreneurs are in demand among customers, and appears confidence of future implementations. And all these themselves help to develop production. Mentioned examples are based on nowadays sells term's rising.

Conditions of sale are shown as the main form of participation of civil revolutions. Current changes in the economy emerge from the needs to reduce the mandatory drafting contracts, and now the state of the latter will be solved by the parties after the ordering law. Basic labeling is based on the ordering of possible and necessary disciplines of human behavior within the law as an example.

Formation forms provided determine importance of goals of today's conventional rights: find new ways to aspirations of the national economy and raise competitiveness in the global economy, under monopolization of developing of the production needed to support the freedom of entrepreneurship.

The Civil Code of Kazakhstan explains the sale as a concept embracing all kinds of obligations that rip it out of the property of the estate for a certain amount. The most common types of sales are: retail sale (RK CC 445 p.), terms of delivery (RK CC 458 p.), conditions of signing contracts (RK CC 478 p.), conditions of energy supply (RK CC 482 p.), conditions of sale of the enterprise (RK CC 493 p.). Anyway, it can not be argued that the above conditions are sufficient, because RK CC doesn't take the main role, and it shows that there are other types of law and acts according to the law (securities, currency values, the rights for property and other sells RK CC 406 p. 2 t.- 5 t.) [3; 128].

Naturally sale is consensual (as if parties reached an agreement subject to all the rights, contracts is thought to be concluded), valuable (the commitments while transferring of goods are the purchase price, or vice versa dissatisfaction), mutual (sinallagmatichesky) (both parties have subjective rights and obligations).

To fulfill the conditions under the law in written and oral form, it can be performed only when approving obligation of saving special forms under the conditions of sale of businesses. Namely, according to RK CC point 494, as a property complex of the enterprise sales executed in writing form, and is mandatory to state registration, and since registration is performed [2]. This form applies to all contracts for real estate. In other cases, the conditions of sells are carried out according to the general rules of negotiation.

In accordance with the conditions of sale the seller and the buyer could be anyone: citizens, entities or government. But, they can be restricted in private cases by law, and also features provided legal entity.

The only condition of sale is its subject. The subject is the property that shall be given by seller to buyer. The subject is determined by term «goods». Nowadays the subject can be any property, it includes allowed to sell movable and immovable property. The contract may be signed in the cases that the goods available to the seller is not labeled differently in legislation or differ from the description, as well as in the case that goods are missing, but these are products which can be manufactured or bought in the future by entrepreneur (buyer). If contract covers names and quantity of goods, the subject of sells is thought to be agreed.

The quantity of goods specified for the buyer shall be indicated in special measures or in the form of money. Also, determining the amount of the goods may be agreed in the contract. It should be noted that the reference amount is required and not indicating the quantity means no signing of the contract.

If terms concerning is quantity of goods specified in the contract are broken, the buyer, unless otherwise specified contract, has the right to refuse to pay, but if paid, is entitled to claim a refund and compensation [4; 37].

In the contract of sale there may be listed species, samples, volumes, colors and other settings. Under such contract, the seller must deliver the goods to the buyer at a specified species (RK CC 420 p.).

Looking through the local and international experience, the seller is strictly liable under the Civil Code of the RK for the quality of the delivered goods and the lack of conformity requirements.

Product quality is a set of standards, technical norms, patterns, standards, other regulations and conditions of the agreement embodied quality of goods. Quality of goods sold must meet the requirements of the contract. In the absence of agreed quality goods in the contract, the seller must deliver the goods fit for use.

Delivery of defective goods significantly harm the interests of the buyer, where there are different types of protection, it is Article 428 of the Civil Code of the RK and RK Law on «Consumer Protection». Thus, in the case of product defects are not indicated, the buyer has accepted a defective product, at its discretion:

– replace the defective product to the appropriate contract;
– at the appropriate time to troubleshoot free;
– reduce the price at the appropriate level;
– refuse to comply with the conditions of the contract and to demand compensation for the amount paid;
– the right to demand reimbursement for troubleshooting;

It is important to guarantee the quality of goods. One must be able to distinguish between legitimate and agreed quality assurance [5].

The stipulated safeguards used in the contract. The guarantee of the legality of the CC RK displayed in the following values: goods must conform to the required quality, at the time of transfer of goods from seller to buyer, unless other terms determine the quality of the contract within the period to be delivered, goods must be appropriate for use.

When the quality assurance specified in the contract, seller shall provide the goods of appropriate quality which is specified in the contract terms.

The importance of the warranty period is defined as follows: First, they extend the time to make it possible to establish quality requirement, Secondly, compared with the other terms provide the possibility to protect the interests of the buyer. Namely: a) it is not necessarily to proof the goods are defected, b) in the absence of evidence of damage to the goods after the transfer from seller to buyer, when not used properly, storage, transfer to third parties or unforeseen circumstances, be entitled to claim a refund or replacement of defective goods, c) the burden of proof rests with the seller.

It is important to be able to differentiate the shelf life of quality from the assurance. The shelf life, in laws, in accordance with state standards and other regulations, is unfit for use beyond the expiration date from the date of manufacture.

The seller is obliged to sell the goods subject to the expiration date.

In accordance with the contract of sale the seller must deliver the goods suitable model treaty, if the contract does not specify the data collection of goods shall be determined subject to working time or usually distinguished according to requirements.

In case of violation of the condition of the commodities specified in the contract and violation of the condition of realization of commodities lead to such consequences as: purchaser at his discretion has the right to demand compensation from the seller to the extent or acquisition of goods due to time. If the seller understaffed goods within a specified time, the buyer has the right to request a replacement of the product understaffed to staffed or refuse to perform the contract or to demand the return of the amount paid.

It is important to note that the indication of inappropriate quantity, type, quality, completeness and packaging, is a violation of the contract of sale by the seller.

Price of the contract of sale is a certain amount of money, paid by the buyer to the seller and also is an integral part of the contract, the buyer's obligation is to pay the purchase price to the seller. According to point 438 of CC RK, in the absence of the rules of contract and appropriate law, in order to determine the price for the goods, when making a contract with similar situations usually goods are sold at the price of a similar product.

The length in the contract of sale acquires the importance in the consent of the parties or as specified by law, and deadlines are important in the loss or damage of goods in transit.

The main purpose of the seller is to transfer the goods to the buyer. Correct execution, as it is said, has a direct relation to the legitimacy of the product. Therefore, the seller must deliver the goods to the buyer in accordance with the following: appropriate quality; agreed quantity; agreed type; appropriate staffed and bundling; related thereto device and documentation; outside third party rights.

In normal cases, the market provides, with the help of the law and regulations, not only the buyer’s rights, but also the rights of the seller for his goods. Acceptance of goods by the buyer ordering and paying for it is important, especially in the current situation of preventing the execution of payment.

The duties required by law or a contract for the payments by buyer include the payment, using possible methods (letter of credit stipulated in the contract, bank guarantees, etc.) of payment and to ensure the preservation of any forms. The buyer is obliged to pay a certain price for a product or a specific contract method specified in the contract. If the price is not stipulated, the buyer must fulfill the obligation to pay the price for the goods under similar situations [6; 325].

While doing business there widely used these types of sales as a retail sale, delivery of goods, the signing of the agreement, energy provision and sale of businesses. Correct execution of the above-mentioned legal ordering sales contract leads to proper management of business between entrepreneurs and consumers.

When doing research on the issue came as such conclusions as:

– problem regarding mandatory and non-mandatory standards in the legal agreements regarding entrepreneurial relations;
– equality of legal ordering; namely, signing a contract and along with the general rules and principles of the performance of the contract formed special rules of current contracts to organize objects and duties;
– along with the traditional instruments of the state-planned clerks there have distributed control system and there are many other types of contracts relating to the legal requirements of the ordering;
– along with the needs of the state, demands of firms are intensive standardizing contractual rights used in practice, namely to facilitate the signing of the contract, performs standard contracts relating to other requests;
– inherently an agreement on business differs from family, work and other legal branches of the contract. In this regard, the legal ordering of social relations should not oppose each other and can not connect to civil contracts, but occupying important places in the ordering of social relations must organize social relations within the business rights.

The contract of sale is a legal way to meet the needs of the parties with the help of the second party. Therefore at achieving the above objects used within the business contract is able to provide consistency and organizational discipline. The freedom of parties takes up a general framework definitions of the rights to the contract which is closely associated with an autonomous institution. But the distinctive features of different types of sales contracts determine the features of objective and subjective methods. And, under the terms of the contract there must be clearly indicated the penalties for unfulfilled obligations of the paragraphs.

If you fill the above disadvantages proposed by circumstances occupied in the back of the property, it would have increased the role and meaning of property relations as a legal ordering device.

References

1 *Новицкий И.Б.* Основы римского гражданского права: Учебник для вузов. Лекции. — М: ЗЕРЦАЛО, 2000. — 400 с.

2 Қазақстан Республикасының Азаматтық кодексі (Жалпы және Ерекше бөлімдері). — Алматы: Юрист, 2010. — 352 б.

3 *Киздарбекова А.С.* Предпринимательское право: Учеб. пособие. — Караганда: Изд-во КарГУ, 2010. — 198 с.

4 Гражданское право. Учебник. Т. 2. — 3-е изд., перераб. и доп. / Под ред. Ю.К.Толстого, А.П.Сергеева. — М.: Проспект, 2000. — 736 с.

5 Қазақстан Республикасының «Тұтынушылардың құқықтарын қорғау туралы» 2010 жылғы 4 мамырдағы № 274-IV Заңы (2014.13.01. берілген өзгерістермен). — [ЭР]. Қолжетімділік тәртібі: http://online.zakon.kz/Document/? doc_id=30711870

6 Гражданский кодекс Республики Казахстан (Особенная часть). Комментарий (постатейный): В двух книгах. Кн. 1 / Отв. ред. М.К.Сулейменов, Ю.Г.Басин. — Алматы: НИИ частного права КазГЮУ, 2006. — 872 с.

Г.Б.Әсетова

Кәсіпкерлік қызмет саласындағы сатып алу-сату шартының құқықтық реттелуі

Мақалада кәсіпкерлік қатынастарды шарттық реттеудің ерекшеліктері, оның ішінде сатып алу-сату шартының құқықтық қырлары, кәсіпкерлік қатынас субъектілері арасындағы тұрақтылықты қамтамасыз ету ерекшеліктері қарастырылды. Шарт шарттық қатынастардағы субъектілердің мүдделерін қанағаттандыру шегіндегі тиімді құқықтық құралдардың бірін көрсетті. Тек шарт қана қатал әкімшілік-құқықтық құралдардың көмегімен мүмкін емес негіздерге қол жеткізуге, экономикалық айналымда тәртіп пен тұрақтылық, ұйымдастырушылық секілді тәсілдерді қамтамасыз етуді құқықтық реттеудегі тараптардың өзара мүдделерін негіздейді.

Г.Б.Асетова

Правовое регулирование договора купли-продажи в сфере предпринимательской деятельности

В статье рассматриваются условия упорядоченности предпринимательских отношений, а именно юридические условия купли-продажи, особенно внедрение постоянства между субъектами предпринимательства. Отмечено, что условия обеспечивают полезные средства, которые удовлетворяют интересы вовлеченных субъектов. Автор определяет, что административные, правоохранительные органы призваны гарантировать обеспечение взаимных интересов сторон договора, основанных на правовом регулировании, при совершении сделки.

References

1 Novitskiy I.B. *Basics of Roman civil law*, textbook for high schools. Lectures, Moscow: ZERTSALO, 2000, 400 p.

2 Civil Code Republic of Kazakhstan (common and different chapters), Almaty: Yurist, 2013, 352 p.

3 Kizdarbekova A.S. *Business Law*, study literature, Karaganda: Publisher KSU, 2010, 198 p.

4 Civil law, Tutorial. vol. 2. Third edition, revised and enlarged, edit. Yu.K.Tolstoiy, A.P.Sergeyeva, Moscow: Prospect, 2000, 736 p.

5 'Consumer Protection' law of Republic of Kazakhstan № 274-IV from 4 May, 2010 (2014.13.01. changed), http://online.zakon.kz/Document/? doc_id=30711870

6 The Civil Code of the Republic of Kazakhstan (Special Part). Comment (itemized): In two books, 1, edit. M.K Sulejmenov, Yu.G.Basin, Almaty: Institute of Private Law KazHJU, 2006, 872 p.

UDC 343.985.7

D.S.Kussainov

Karaganda academy of the MIA of the Republic of Kazakhstan named after B.Beiysenov
(E-mail: kussainovd@mail.ru)

The structural elements of criminalistics characteristic of swindle with the real estate

The studies about criminalistics characteristic of crimes, as an initial theoretical and informative base of construction of privately-methodical recommendations, being component part of finishing section of criminalistics — criminalistics methodology, in particular as it applies to a swindle in the sphere of housing relations are considered in the article. Criminalistics characteristic of crimes is the system of information about the typical elements of situations of committing crime of certain categories, criminal meaningful connections between these elements and features of mechanism of investigation.

Key words: criminalistics description, swindle, crime in the field of housing relations, real estate.

Speaking about a «criminal act», it is necessary to consider this question in all his displays, taking into account his multidimensionalness. In jurisprudence questions of interpretation of concept «crime», namely his essence, structure, kind and form examined by such disciplines as a criminal law, criminology, criminalistics, operatively-search activity [1; 6].

Complex of cognitions about essence of crime and, in particular, information of characterizing him, such as finding out terms and reasons, abetting, analysis of personality of criminal etc. will serve a reliable instrument in realization of work sent to the exposure, discovery, opening and investigation of crime. To that end for complete and objective investigation of crimes, at presence of similar signs of criminalistics character, criminal lawyers are use a term «criminalistics description». This term was applied in 1927 by P.I.Ljublinsky, that asserted that for the successful opening and investigation of crimes the presence of knowledge and skilful application of logic are needed. Not insignificant is ability of application of technique of the use of proofs, criminalistics, judicial medicine, criminal psychology and judicial abnormal psychology, behave to that. According to P.I.Ljublinsky's opinion, exactly on their basis criminalistics description of one or another crime must be made, in particular falling under the article of investigation.The chart of similar description reached to us from Ancient-Roman times as the seven members Roman formula «Who, that, where, with whose help, why, how, when». P.I.Ljublinskyasserted: «Making off investigation, it is necessary to make sure, whether all is done for establishment of correct criminalistics description, whether with sufficient validity answers are given for questions making the brought formula over» [2; 32, 33]. On this question, J.F.Karelia also spoke out and asserted that: «Criminalistics description is beginning for the construction of methodology of investigation, because allows to set the method of commission of crime, used instruments and facilities, where and what information an investigator can get about the investigated event, indicative direction of investigation» [3; 4]. To the same opinion I.F.Gerasimov adhered, asserting that methodology of investigation of criminal act must be begun with criminalistics description of crime in beginning of actions of investigator [4; 7]. As a rule criminalistics description of crimes is examined in two aspects: as a general-abstract concept and as criminalistics description of certain groups (kinds) of crimes.In first case, criminal description is totality of knowledge about a concept, essence and value of this category. As a rule,

static not changing category.Group criminalistics description of crimes is the dynamic concept, based on data of practical activity, representing the features of certain crime.

It would be desirable to mark the justice B.P.Smagorinsky's opinion, that asserted that criminalistics description of separate types of crimes must be not only reliable and valuable but also timely.

The presence of reflection of the last updates of practical activity, maintenance of criminalistics analysis of one or another type of crimes, is needed [5; 252].

In this connection it is necessary to consider criminalistics description of certain type of crime.In legal science criminalistics description of crime is understood scientists differently.For example, A.G.Filippov understands criminalistics description of crime as a system inherent to one or another type of crimes of features, having a most value for investigation and stipulating application criminalistics methods, receptions and facilities [6; 242, 243]. From the point of view of professor R.S.Belkin criminalistics description of crimes is this abstract, scientific concept, result of scientific analysis of certain type of criminal activity, generalization of his typical signs and features [7; 317]. Professor A.P.Rezvan examines criminalistics description of crime as functionally-pragmatic model of crime, created on the basis of science and practice with the purpose of orientation of subject of investigation in the features of initial information about tracks of event of crime, characterizing the state, properties and signs of the article of criminal trespass, circumstance of commission of crime, personality of criminal and victim, method of feasance and concealment of crime [8; 51]. In opinion of A.V.Sharov, criminalistics description of crimes is the system of typical data about the elements of crime and about appropriate connections between them, that can take place in every certain crime of this kind [9; 9]. From position of S.I.Bedrin criminalistics description this scientific and systematized description of conformities to law, founded on the base of empiric material, characteristic for the process of preparation, feasance and concealment of these crimes, and also intercommunications and cooperations of their structural elements used by the subjects of investigation for optimization of activity on their investigation [10; 18].

Hopes on that scientists, when or, will come to single opinion, concerning essence of criminalistics description of crime, is not.However in the variety of foregoing decisions it is possible to catch a presence general the sign of this decision.Summing up this question, it be possible to say, that to the most general signs of criminalistics description of crimes the system of basic structural elements, their associateness and interdependence, typicalness of signs of crimes, conformity to law of connections, behave between them, increase of efficiency of activity on opening of crimes [11]. Presence of data it is possible to find a sign and in the conclusions of otherscientists [1; 5, 4; 76, 12; 45].

Absence of universal decision to the concept criminalistics description of crime is possible to explain two suppositions.First — this consideration of this question is excessive narrowly. Second, accordingly, is interpretation in wide sense.In addition it is impossible to ignore circumstance that some scientists go near interpretation to criminalistics description of crime depending on the specific of certain crime. In this case we deal not only with mandatory members but also with elements characteristic for the certain type of crime.For example, the same A.V.Sharov in criminalistics description of swindle includes information about the specific of object and object of crime, place, time and method of feasance of criminal act. It can draw conclusion following, that depending on the type of crimes, taking into account their features and methodologies of investigation, the elements of criminalistics description of criminal act can change. That's why, this concept of the crime closely associated with a certain kind.It would be desirable yet to mark that, speaking about criminalistics description of crimes, it is necessary to mark the third element is criminalistics description of circumstances of one certain crime. In addition, it is necessary to take into account the utility of similar sort of approach for legal teach to practical activity.At one of time R.S.Belkin marks that there is not practical meaningfulness in criminalistics description of certain crime, as functions are absent peculiar to criminalistics description as element of criminalistics methodology [13; 737]. A.G.Filippov agrees with this point of view, as according to his opinion similar receptions, methods and recommendations, are applicable only to the certain kinds and groups of crimes [14; 243]. Not agreeing with opinion foregoing scientists, it would be desirable as an example to advance arguments of A.A.Fokina, that was predisposed to opinion, that about criminalistics description of certain crime talking is needed, as a separate crime is component part of separate types of crimes.This deduction takes place to be, as general description what or it is possible to give only defining description of separate structural elements entering with composition of single unit. In other words, on by the means of study of separate units, it is possible to make typology description general. Expressing the opinion, it would be desirable to mark that for establishment of criminalistics description of separate types of crimes, it is necessary to distinguish private elements, educe the presence of connections between them and character of cooperation with another phenomenon.Only giving criminalistics descriptions to

the great number of separate crimes it is possible to define criminalistics description of separate type (kind) of crimes.Nevertheless, taking into account that term criminalistics description concept an abstract (in opinion of R.S.Belkin), single crime can not come forward an orienting criterion.Only the study of great number of crimes of one kind will allow to define properties of methods of committing crime, tracks of crime, persons accomplishing criminal acts, persons harmed that or damage etc., are distinctive.There is a concept criminalistics model in the scientific world, that is offered to as an alternative criminalistics description. In the work «Basis of criminalistics methodology of investigation of the illegal credit» N.R.Gerasimov marks criminalistics model of the illegal credit drawing [15; 15]. This concept is presented as a synthesis of criminalistics description and mechanism of criminal activity. However in our view a concept a «model» means something certain, the family template something. In turn «description» is description of distinguishers of object. Thus, it is possible to draw conclusion, that «criminalistics description» a concept is far wider, than term «criminalistics model».

There is a next polemic through question of criminalistics description of crimes in criminalistics at the beginning the XXI century.Analysing her problems, R.S.Belkin came to the conclusion about the necessity of either quality perfection of criminalistics description or (what an author was predisposed to) abandonment from her and return to development of criminalistics list of circumstances subject to establishment on one or another category of criminal cases. «We begin to be predisposed to this radical decision, — he marked, — but as yet finally not sure of his rightness, we abandon a choice after a reader» [13]. Doubts of R.S.Belkin were conditioned by that criminalistics description only then has a substantial practical value, when in her cross-correlation connections are traced between elements, what is not present in swingeing majority of the offered descriptions. Exactly absence of scientific developments on establishing cross-correlation connections pointed author on such ideas.On absence of solid empiric base on the basis of that it was possible to trace all intercommunications between the elements of criminalistics description of crimes, other authors specified.

Intercommunication between the elements of criminalistics description assist establishment of unknown circumstances on by the means of the fixed facts, that presents not small practical meaningfulness in turn. It is possible to draw conclusion for itself, that an exposure of cross-correlation connections between the elements of criminalistics description is an obligatory action.Results following: criminalistics description of crimes serves for the construction of methodology of investigation of crimes; for her construction it is necessary to investigate a not certain crime, and type of crimes. The circumstances reflected in criminalistics description of separate crime can be both typical and offtype.In the scientific world more or less single opinion is absent concerning the structure of criminalistics description of crimes. So N.P.Jablokov in maintenance of criminalistics description distinguishes three elements: criminalistics lines of method of commission of crime, inquisitional situation, character of information subject to finding out [16; 38]. Associate professor V.V.Radayev in the structure of criminalistics description distinguishes information: about the typical elements of situation of committing crime of this category, about criminalistics meaningful connections between these elements and information about the features of mechanism of investigation [17; 8]. O.V.Volokhova marks that in maintenance of criminalistics description of crimes must enter situation of feasance crime (terms, time, place etc.), method of feasance and concealment of crime, mechanism of his feasance (certain actions of subject of crime), object and article of criminal trespass, personality of criminal, personality of victim, circumstances and terms, abetting [18; 15]. A.V.Sharov takes the features of object and object of criminal trespass to the number of elements of criminalistics description (in particular, he talked certainly about the crimes of the studied category), method of feasance of swindle, place and time of his feasance, feature of mechanism of investigation, personality of criminal and victim [9; 9]. In our view it is needed to listen to opinion of A.F.Lubin, that distinguishes two approaches of construction of criminalistics description on the example of crimes in the field of economics. First — element, based on description of some elements. Second — phase, related to description of phases of criminal activity.In first case human and objective factors are included in the structure of criminalistics description. The second approach implies description of the stages and stages of development of criminal activity [19; 49–52]. On the essence element fitting for reflects the constructions of criminalistics description in itself the points of view are above enumerated scientists with a difference only in separate elements. Phase approach must be subjected to some criticism and necessary to agree with opinion of A.V.Sharov in opinion of that presence only intention on the feasance of illegal act can not serve as founding for bringing in to criminal responsibility. Consequently description of similar activity can not be named criminalistics description of crimes [9; 8]. In our case phase approach is unacceptable as description of features of development of the stages of crime (preparation,

feasance and concealment) does not represent another signs of illegal act. The variety of opinions of structure of criminalistics description of crime is explained first of all by an uncertain highway structural elements. Secondly, by an underestimation by some authors of axioms position about the necessity of consideration for private methodologies of investigation only of such elements the complex analysis of that assists opening and successful investigation of crimes [20; 20]. Thirdly, that is over-estimated factor of different disciplines of object of research of crime and frequently in criminalistics description include the elements related to the article of study of another sciences.In continuation of the examined question, it is necessary to expose to the analysis the separate elements of criminalistics description, being of interest for most scientists (inquisitional situation, reason, aim, reason and condition, abetting). For example litigions is a question — whether an inquisitional situation enters in the structure of criminalistics description. It is possible to listen to opinion of such scientists as N.G.Shurukhpov, N.A.Selivanov asserting, that an inquisitional situation must not enter in the complement of structure of criminalistics description [21; 25, 22; 30]. This statement is explained by that an inquisitional situation characterizes matter-position, situation in different moments of inquisitional actions and all motion of investigation. In other words collection of information is conducted about terms activity of the criminal proceeding comes in that true.

Thus, description of process of investigation of crime (inquisitional situation) can not be a structural element by criminalistics description of crime, as does not describe the process of commission of crime. However not looking on it such scientists as V.V.Aleshin are asserted, that an inquisitional situation is a basic element by criminalistics description of investigation of crime [20; 44].

It is impossible to go round a side and a question about including of reason and aim of crime in the structure of criminalistics description of crime as a component element. And in this case scientists did not come to single opinion. For example V.V.Trukhachev asserts that reason of illegal act is the mandatory member of criminalistics description [23; 11]. O.V.Volokhova sticks to neutrality asserting, that reason and aim it maybe to leave as an element of criminalistics description only on separate kinds to the crimes. Next litigions element of criminalistics description it is a mechanism of investigation. Separate category of scientists examine him within the framework of method of commission of crime. However in our view these elements must be examined on a separateness.It is not just to assert that typical tracks are related to the certain method of commission of crime. It is necessary to take into account that the process of forming of tracks often passes independently.In support of this position it would be desirable to quote expression of scientist of V.A.Obraztov: their «Practical value at times is so great, that opening of many crimes often begins not from tracks of application of certain method, and from the data constrained, for example, with personality of victim, characterizing his way of life, connection, intention» [24; 25]. B.A.Standards asserted justly, that there are quite a bit examples in practice, when a crime opens up on the way of collection and analysis of information about a victim, namely what he engaged in the day before, with whom contacted, where was etc. And frequently a that person appears a criminal with that victim that or by another character contacted shortly before the commission of crime [24; 25].

Now we will consider the debatableness of question of the touching plugging in the structure of criminalistics description of such element as reasons and terms assisting a feasance to the crime. On this question of opinion of scientists divided into three categories. First category of scientists predisposed to opinion that reasons and terms must be plugged in criminalistics description of crime as independent element [25; 204, 26; 104]. The second group of scientists asserts that reasons and terms must not be included in the complement of criminalistics description of crime [27; 65]. The third opinion says of that reasons and terms of commission of crime must be examined within the framework of research of situation of commission of crime [28; 81, 20; 39].

It would be desirable to express the opinion in behalf on position of salient on a side independence of reasons and terms, assisting the feasance of illegl act, as a structural element of criminalistics description of crime. Made decision stipulated by the row of reasons.Foremost it that reasons and terms of commission of crime assist the safe opening and investigation of swindle. It is impossible not to agree with opinion M.S.Strogovich in opinion of that, crime detection, discovery and exposing of persons committing crime does not exhaust the direct tasks of preliminary investigation, business can be considered investigated full then, when an investigator will find out reasons and terms, abetting or hampering his timely discovery and suppression [29; 67]. In addition, this element sets conformities to law of investigation of crime that is determined by cause and effect connections as the phenomenon is social [8; 82]. Importance of reasons and terms, abetting, contingently ability to decide methodical and tactical questions at investigation of illegal act

and prevent the feasance of similar crimes in the future. Influence on reasons and terms of crimes more scale action is sent to warning of feasance of illegal act [30; 13].

Summing up foregoing it would be desirable to do a next conclusion, that in the complement of criminalistics description of swindles, in the field of housing relations, in our view, it is necessary to include next structural elements:

– Taking about the article of criminal trespass;

– Crimes given about the situation of feasance;

– Taking about the method of commission of crime;

– Information about the mechanism of investigation;

– Information about personality of criminal and victim;

– Data about reasons and terms of abetting.

In addition it is necessary to take into account cross-correlation character of basic structural elements of criminalistics description of swindle in the field of secondary accommodation.

In conclusion, on the basis of the stated, we will make the authorial decision of concept «Criminalistics description of crimes», that, as we consider, acceptable to the decision of criminalistics description of swindle in a housing sphere. We suppose that appropriately at once to set forth the decision of criminalistics description of the studied category of crimes and present him in a next release.

Criminalistics description of swindle in the field of housing relations is totality of associate and interdependent elements characterizing an object, method, mechanism of investigation, personality of criminal and victim, situation of commission of crime, reasons and terms, abetting, cross-correlation connections between that carry appropriate character and their establishment determines methodology of exposing and investigation of swindle in the field of housing relations.

Thus, set forth criminalistics description writing up the certain type of crimes, in particular, swindles in the field of housing relations, decision of her components being in close intercommunication and interdependence with each other, establishment of level of correlation between them has a practical value for persons carrying out the pre-trial hearing on criminal cases.

The practical setting of criminalistics description of the studied crimes consists in making of methodical recommendations on their exposing and investigation, because she is methodical basis in the choice of direction of investigation, especially on the primary stage; to organization and tactics of realization of inquisitional and judicial actions, and also decisions of tasks on warning of these crimes. Individuality of the studied crimes does not eliminate general lines inherent to all crimes. Repetition of separate signs is absolute, circumstances and different displays in the feasance of swindle in a housing sphere.

Usually in them general conformities to law show up in preparation, method and disguise of crimes. It allows to educe typical, that finds a reflection in criminalistics description that in this connection it is conditionally possible to consider the program of actions of investigator on t exposing of these crimes.

References

1 *Ермолович В.Ф.* Криминалистическая характеристика преступлений. — Минск: Амалфея, 2001. — 304 с.

2 *Крылов И.Ф.* Криминалистическая характеристика и ее место в системе науки криминалистики и в вузовской программе // Криминалистическая характеристика преступлений. — М.: Правоведение, 1984. — 180 с.

3 *Карелов Ю.Ф.* Расследование мошенничества. Лекция. — Ташкент: Юрист, 1981. — 21 с.

4 *Герасимов И.Ф.* Криминалистические характеристики в методике расследования преступлений // Межвуз. сб. науч. тр. — Свердловск, 1978. — Вып. № 69. — С. 7–11.

5 *Смагоринский Б.П.* Криминалистика: Учебник. 2-е изд., доп. и перераб. — Волгоград: Высш. след. шк., 2003. — 574 с.

6 *Филиппов А.Г.* Криминалистика: Учебник. — М.: Высш. образование, 2000. — 442 с.

7 *Белкин Р.С.* Курс криминалистики. — М.: Юрист, 1991. — 512 с.

8 *Резван А.П.* Правовые и криминалистические проблемы борьбы с хищениями предметов, имеющих особую ценность: Дис. ... д-ра юрид. наук. — Волгоград, 2000. — 441 с.

9 *Шаров А.В.* Расследование мошенничества в сфере оборота жилища. — М.: Юрлитинформ, 2005. — 208 с.

10 *Бедрин С.И.* Расследование группового мошенничества в жилищной сфере. — Волгоград: ВА МВД России, 2003. — 104 с.

11 *Малыгина В.В.* Особенности расследования мошенничества в жилищной сфере: Дис. ... канд. юрид. наук. — Волгоград, 2008. — 229 с.

12 *Яблоков Н.П.* Криминалистика. Информационные основы расследования и криминалистическая характеристика преступлений. — М.: Юрист, 2005. — 781 с.

13 *Белкин Р.С.* Курс криминалистики: Учеб. пособие для вузов. — 3-е изд., доп. — М.: Юнита-Дана, 2001. — 837 с.

14 *Филиппов А.Г.* Криминалистика: Учебник. — М.: Спарк, 2000. — 543 с.

15 *Герасимова Н.Р.* Основы криминалистической методики расследования незаконного получения кредита: Автореф. дис. ... канд. юрид. наук. — Ниж. Новгород, 2004. — 210 с.

16 *Яблоков Н.П.* Общие положения методики расследования и научно-технический прогресс. — М.: Юриспруденция, 2003. — 376 с.

17 *Радаев В.В.* Криминалистическая характеристика преступлений и ее использование в следственной практике. Лекция. — Волгоград: Изд-во ВСШ МВД СССР, 1987. — 23 с.

18 *Волохова О.В.* Современные способы совершения мошенничества: особенности выявления и расследования. — М.: Юрист, 2008. — 263 с.

19 *Грабовский В.Д.* Криминалистика: расследование преступлений в сфере экономики: Учебник. — Ниж. Новгород: НЮИ МВД РФ, 1995. — 390 с.

20 *Алешин В.В.* Преступления, связанные с отчуждением жилья граждан. — М.: Экзамен, 2006. — 108 с.

21 *Шурухпов Н.Г.* Криминалистика: Учебник. — М.: ЭКСМО, 2005. — 720 с.

22 *Пантелеев И.Ф., Селиванов Н.А.* Криминалистика: Учебник. — М.: Юрид. лит., 1993. — 592 с.

23 *Трухачев В.В.* Мотивация как элемент криминалистической характеристики преступлений: Автореф. дис. ... канд. юрид. наук. — Саратов, 1990. — 22 с.

24 *Образцов В.А.* Теоретические проблемы раскрытия преступлений, связанных с ненадлежащим исполнением профессиональных функций в сфере производства. — Иркутск: Изд-во Иркут.ун-та, 1985. — 108 с.

25 *Носов А.В.* Криминалистическая характеристика хищения денежных средств в кредитно-банковской сфере и ее использование в следственной практике: Дис. ... канд. юрид. наук. — Волгоград, 1995. — 336 с.

26 *Корнелюк В.С.* Криминалистическая характеристика краж автотранспортных средств и ее использование в следственной практике: Дис. ... канд. юрид. наук. — Волгоград, 1997. — 266 с.

27 *Быков В.М.* Криминалистическая характеристика групповых преступлений // Криминалистическая характеристика преступлений: Сб. науч. тр. — М.: Юрист, 1984. — 70 с.

28 *Маматханова Е.В.* Криминалистические и правовые проблемы расследования незаконного предпринимательства и лжепредпринимательства: Дис. ... канд. юрид. наук. — Волгоград, 2004. — 220 с.

29 *Строгович М.С.* Курс советского уголовного процесса. — Т. 2. — М.: Наука, 1970. — 468 с.

30 *Герасимов С.И.* Концептуальные основы и научно-практические проблемы предупреждения преступности: Дис. ... д-ра юрид. наук. — М., 2001 — 446 с.

Д.Ш.Құсайынов

Жылжымайтын мүлікпен байланысты алаяқтықтың криминалистикалық сипаттамасының құрылымдық элементтері

Мақалада тұрғын үй қатынастары саласындағы алаяқтыққа қатысты криминалистикалық әдістеме — криминалистиканың соңғы бөлімінің құрамдас бөлігі болып табылатын жеке әдістемелік ұсынымдарды құрудың бастапқы теориялық және ақпараттық базасы ретінде қылмыстарды криминалистикалық сипаттау туралы ілімдер қарастырылған. Қылмыстардың криминалистикалық сипаттамасы белгілі санаттағы қылмыста жасау жағдайларында типтік элементтер туралы мәліметтер жүйесін, із қалдыру тетігінің ерекшеліктері мен осы элементтер арасындағы криминалистикалық маңызы бар байланыстар туралы мәліметтердің жүйесін білдіреді.

Д.Ш.Кусаинов

Структурные элементы криминалистической характеристики мошенничества с недвижимостью

В статье рассмотрено учение о криминалистической характеристике преступлений как исходной теоретической и информационной базы построения частно-методических рекомендаций, являющихся составной частью завершающего раздела криминалистики — криминалистической методики, в частности, применительно к мошенничеству в сфере жилищных отношений. Отмечено, что криминалистическая характеристика преступлений представляет собой систему сведений о типичных элементах ситуаций совершения преступлений определенных категорий, криминалистически значимых связях между этими элементами и особенностях механизма следообразования.

References

1 Yermolovich V.F. *Forensic characterization ofcrimes*, Minsk: Amalfeya, 2001, 304 p.

2 Krylov I.F. *Forensic characterization of crimes*, Moscow: Jurisprudence, 1984, 180 p.

3 Karelov Yu.F. *Fraud investigations. Lecture*, Tashkent: Jurist, 1981, 21 p.

4 Gerasimov I.F. *Interuniversity collection of scientific papers*, Sverdlovsk, 1978, Issue № 69, p. 7–11.

5 Smagorinsky B.P. *Forensic science*, textbook. (2nd ed.), Volgograd: Vys.sl.shk, 2003, 574 p.

6 Filippov A.G. *Forensics*, textbook, Moscow: Vyssheye obrazovaniye, 2000, 442 p.

7 Belkin R.S. *Course of criminalistics*, Moscow: Yurist, 1991, 512 p.

8 Rezvan A.P. *Legal and forensic issues to combat theft of items of particular value*, dis. ... dr. jurid. sciences, Volgograd, 2002, 441 p.

9 Sharov A.V. *Investigation of fraud in the turnover of the home*, Moscow: Yurlitinform, 2005, 208 p.

10 Bedrin S.I. *Fraud investigation group in the housing sector*, Volgograd: VA Russian Interior Ministry, 2003, 104 p.

11 Malygina V.V. *Features of investigation of fraud in the housing sector*, dis. ... candidate jurid. Sciences, Volgograd, 2008, 229 p.

12 Yablokov N.P. *Forensics. Information bases investigation and forensic characteristics of crimes*, Moscow: Yurist, 2005, 781 p.

13 Belkin R.S. *Course of criminalistics*, uch. manual for high schools (3rd ed.), Moscow: Unita-Dana, 2001, 837 p.

14 Filippov A.G. *Forensic science:* textbook, Moscow: Spark, 2000, 543 p.

15 Gerasimova N.R. *Fundamentals of forensic investigation techniques illicitly obtaining credit*: avtoref. dis. ... candidate jurid. Sciences, Nizhny Novgorod, 2004, 210p.

16 Yablokov N.P. *General the methods of investigation and scientific and technical progress*, Moscow: Jurisprudence, 2003, 376 p.

17 Radayev V.V. *Forensic characterization of crimes and its use in investigative practice*, lecture, Volgograd: Publishing ISB MVD of the USSR, 1987, 23 p.

18 Volokhova O.V. *Modern ways of committing fraud: features detection and investigation*, Moscow: Yurist, 2008, 263 p.

19 Grabowski V.D. *Forensics: investigating crimes in the economic sphere*, textbook, Novgorod: NUITS Interior Ministry, 1995, 390 p.

20 Aleshin V.V. *Crimes related to the transfer of property of citizens*, Moscow: EKSMO, 2006, 108 p.

21 Shuruhpov N.G. *Forensics*: textbook, Moscow: Penguin Books, 2005, 720 p.

22 Panteleev I.F., Selivanov N.A. *Forensic science*, textbook, Moscow: Yuridicheskaya literatura, 1993, 592 p.

23 Trukhachev V.V. *Motivation as an element of the crimes of criminal characteristic*: Abstract, dis. ... candidate jurid. sciences. Saratov, 1990, 22 p.

24 Obraztsov V.A. *Theoretical problem solving crimes related to the improper performance of professional functions in the sphere of production*, Irkutsk: Irkut University Press, 1985, 108 p.

25 Nosov A.V. *Forensic characterization of misappropriation of funds in the credit and banking and its use in investigative practice*, dis. ... candidate. jurid. sciences, Volgograd, 1995, 336 p.

26 Kornelyuk V.S. *Forensic characterization of thefts of motor vehicles and its use in investigative practice*, dis. ... candidate jurid. sciences, Volgograd, 1997, 266 p.

27 Bykov V.M. *Forensic characterization of crimes*: Collection of scientific papers, Moscow: Jurist, 1984, 85 p.

28 Mamatkhanova Ye.V. *Forensic and legal problems of investigation of illegal business and pseudo-entrepreneurship*, dis. ... candidate. jurid. sciences, Volgograd, 2004, 220 p.

29 Strogovich M.S. *Course of Soviet criminal procedure*, vol. 2, Moscow: Nauka, 1970, 468 p.

30 Gerasimov S.I. *Conceptual bases of scientific and practical problems of crime prevention*, dis. ... dr. jurid. sciences, Moscow, 2001, 446 p.

UDC 35.081(574)

G.K.Kaliyeva

Kazakh Humanitarian Law University, Astana
(E-mail: kalievag@list.ru)

The features of public servants' activities in public opinion on the territory of Kazakhstan at the end of the XIX century

The article is devoted to the public service and its activities studied in the works of Kazakh intellectuals and exiles of the end of the XIX century. The author carried out a retrospective analysis of the scientific works and research. Special attention is paid to the peculiarities of the public service in the territory of Kazakhstan which was one of the Russian Empire outskirtsin the characteristics of national intellectuals and exiles. The first attempt to create not just a look of the imperial servant, but real, in accordance with the time, characteristics of a public servant and the public service as a whole was taken. Based on this research, the author concludes that, the public service on the territory of Kazakhstan was both similar to the whole empire, and had its own peculiarities.

Key words: state service, exiles, national intelligentsia, empire, public servant.

The time when we can actually talk about public service in one of the regions of the Russian Empire, the territory of Kazakhstan, occurred when the tsarist government, following the path of harmonizing legal and legislative system, finally turned into a colony.

By the mid-60s of the XIX century, almost the entire territory of Kazakhstan became part of the Russian Empire. And the initial task of the colonial authorities was the unification of governance systems in different regions of Kazakhstan and its adaptation to the imperial administrative system [1; 156].

Despite the fact that the Provisions of 1867–68's were taken as temporary, only for 2–3 years, they were in force for several decades in Kazakhstan. The changes in the administrative and legal system with the Provisions of 1886, 1891 did not affect the basic principles of governance.

As we know from the works of the specialists investigating governance and administrative structure in Kazakhstan, changes in the structure of the Kazakh state began with the reforms of 1822–1824s with the elimination of Khan's power, if we do not take into account the reforms in the late XVIII century which were unsuccessful and had no serious consequences. Further reforms will completely change governance in the region and pave the way for the creation of a uniform administrative system in the remote regions of the Tsarist Russia.

As a result of the region reforming, governance organs and systems in Kazakhstan operated as a public service in the sense that could be qualified as a professional activity of public officers realizing official powers in order to achieve the objectives and functions of the state.

According to the Code of Public Service, it was differentiated into civilian and military, and, according to Cherepanov, also to religious service in the central regions of the Russian Empire State, when in Kazakhstan public officers combined these functions and the region was governed by the officers of the tsarist Russia. The existing hierarchy of positions divided powers so that the upper branches of power were occupied by Military Administration (Governor-General, Vice-Governor, Military governor, district chiefs), and minor posts were presented by the indigenous population (volost trustee, aul chairman). Besides, the positions, starting with the Governor-General and ending with the district chief were appointed either by the emperor or the governor of the region, the position of the volost trustee was elective.

One aspect of the public service characteristics, from our point of view, is the opinion of the Kazakh intelligentsia, exiles and notes of the officials who were engaged in research activities.

According to the reforms of the second half of the XIX century volost trustees were granted greater powers. This position was elective.

Indirect control system involved the use of local human resources to govern nomadic communities. They were elected by the colonial authorities, and it created a certain amount of freedom for traditional management structures functioning and traditional political culture reproduction. It seems to us, that the practice of election campaigns in Kazakhstan in the second half of the XIX century and early twentieth century demonstrates the principles of opposition among different nomadic groups. These principles were manifested

depending on the officer election (volost trustee, aul chairman or elective) where traditional patterns of thinking determined nomads' political behavior [2].

One of the nineteenth century's contemporaries Abai Kunanbayev noted that hostility and opposition were inherent to Kazakhs, highlighting it as a feature characteristic only for them. «The Kazakhs are not similar to any of the people in their quest for wealth, power, boasting or hostility» [3; 38].

The main position which focused the attention of the election company was a position of the volost trustee. Almost all pre-revolutionary historiography unanimously claimed that the figure of the volost trustee was of prime importance in volost. The colonial system itself prepared such a role for the volost trustee legally, when based on the 1867–1868's reform and other reforms, the volost trustee concentrated administrative and fiscal functions, as well as court decisions implementation. According to the reformers, such concentration of power in the same person would give an opportunity to the upper branches of authorities to centralize governing nomads. However, the first years of volost trustees governing their rural municipality showed firstly that these officials are the source of official corruption, and secondly, spontaneous processes as «party struggles» occurred at this level of the administrative system which did not yield any regulation [2].

This division into the parties is described in Abay's notes: «We bear malice, litigate, divide into parties, bribe influential supporters to have an advantage over opponents, fighting for ranks» [3; 12].

The leader of the dominant segment was usually elected a volost trustee which lobbied the interests of their nomadic groups using colonial administration functions entrusted to him. First of all, it concerned the use of pastures, the process of taxation and judicial execution. Such a situation could not satisfy other villages (auls) and in this regard, such forms of struggle as complaints, intrigues, fraud and the like were used in election campaigns [2].

For example, Abai, referring to the Kazakhs, writes: «We are at enmity, ravage each other, watching each other, not giving our neighbors a rest. Shall we live like this, trapping each other, remaining the meanest of all the peoples on the earth? Or will bright days come when people forget stealing, cheating, backbiting, enmity and begin to get wealth by honest means». And he himself answers to the questions posed to his contemporaries: «These days will hardly come. Two hundred people crave for one hundred heads of cattle. Will they calm down until they destroy each other?» [3; 39].

The nomadic groups or, in other words, parties that had economic superiority usually won in the election campaign. This group was led by economically stronger auls that usually meant the possession of a significant number of cattle and therefore having an economic impact on other groups. Another side of the benefit, which was used by the winning party was the right to control the collection of taxes by volost trustee. According to the legislation of the second half of the XIX century the statements on the number of nomad tents (kibitka) in the parish was made by elected rural municipality, which in turn were made up on the list of auls, provided by aul superiors. Thus, the lists of kibitkas which determined the amount of the collection and the collection of taxes itself, caused intergroup struggle at all stages of taxation. Ultimately, these statements were signed by the volost trustee, and the results of the collection depended on him. The main tax burdens laid on the losing party. This suggests the conclusion that most lower levels of the administrative system were managed not by homogeneous collectives, but by internal ones having a conflict. This conflict was detected in opposition of the smallest groups to each other who defended their economic interests. In this regard, the figures of elders or chairmen were controversial. In conflicts with other auls they expressed the interests of the auls but inside of it they expressed the interests of their genealogical segment, as it was noted before [4; 250].

The role of elders was minimal at the township level, but it increased in the nomadic communities. Aul elders were leaders of the main socio-economic cells of nomadic associations, in which the most active social and domestic practices between individuals took place. They sought for the settlement of relations between these cells in the highest degree possessing regulatory and judicial rights, and usually thanks to their personal qualities. In this regard, the activities of the elders was apparently multi-aspect. They solved agrarian issues, social conflicts, carried intergenerational continuity of traditional values based on adat [5; 288].

The interdependence of small nomadic groups on each other in nomadic livelihoods determined appropriateness of solutions to a greater extent than in groups with larger degree of integration: «Over time inequality in the distribution of pastures is the decision of the elders. One Kyrgyz having a numerous offspring has cramped Koryks, another's family is not increasing — and he has extensive pastures. Clan's elders gather and ask to give up part of thier pastures to land-hungry owners, they can not compel: Koryk is made as the owner property, which he owns in his own way, but due to established traditions. The case usually ends in

mutual satisfaction: he who owns much land cedes a part of his pastures to land-poor one, defines new boundaries, prick sheep doing bata, etc...» [2].

The degree of the Russian administration influence on the sphere of traditional relations is of great interest and attention from the higher ranks of the region. Military governor of the Turgay region A.K.Heins devoted many pages to this issue. He wrote in «Motivated time instruction to the superiors of the Turgay region» in 1878:»Some of these offices are located in cities where the Kyrgyzs have only short visits, others like Turgay regional governance have their location even outside their subordinate areas. Constant absence from the area of their activity deprives the governor and officials of the regional board all the impressions of a local nature which makes up living knowledge and forms a true view of the Kirghizs governance. For lack of other means, it is necessary to get to know the Kirghizs better to be based on the paper side of things». The conclusion made by A.K.Heins was the fact that the basis of the Russian control in the steppe are only county chiefs whose real value in the steppe is poor. In this regard, he also said: «Fundamentals of the Russian administration in the steppe should be the district chiefs, not volost trustees, as it is the case now» [6; 211].

Many of the materials say that the district chiefs could not control the situation in their assigned districts. A.G.Arandarenko, an official in the administration in Turkestan General Government, described his impressions on the district chiefs: «Our district is 500 verst long and 300 verst across, inhabited by the Kyrgyz clans Alchin, Naiman, Kipchak, and is called Ust-Kamenogorsk district, along the main river Uhl. Our district chief and his management live not in the center of the Kyrgyz pastures but in the Russian population city of Ust-Kamenogorsk, and in the provincial city on the edge of the district. Russian authorities do not go to our camping grounds, and whether they know anything about our life is unknown. Our head, having a quiet voice, thin, comes over to camping grounds every three years when elections come...» [7; 17].

Often, district chiefs were seen having relationships with volost trustees that were not prescribed by law. For example, in one of the complaints of 1894 from 700 kibitka owners of Bien — Aksu district of Kopal volost on improper election to volost trustees of Myrzagulov. In particular, the complaint to the Steppe governor-general said: «... we complained about the harassment to the district chiefs and confiscation of livestock by our governor Tileubay Myrzagulov. After filing the complaint, the district chief gathered the people for the election of officers, governor and others. The district chief announced to people that they had to elect a decent and good man, and he announced to Myrzagulov that he could not be admitted to the election because of the people's complaints. In the evening of the same day, the Kyrgyzs of the Arasan volost together with our governor Tlyaubay were at our district chief's, and the next day for some unknown reason people close to the governor were elected election trustees of Truspek and, without the consent of the society Tleubay was elected a governor, and his brother Tuganbay as a candidate. There were a lot of such complaints for the district chiefs, which suggests that their role in the election campaign was not just neutral. If this evidence suggests that the relationship, though not legitimate, but is still present, Abay offered not to elect volost trustee but to appoint them by the district chiefs on a statutory basis: «Watching people immersing into conflicts farther away, I came to a conclusion: let volost trustees be appointed by district superiors and military governor. This would be useful in many ways....., volost trustees would not depend on the whim of the local nobility, and subordinate only to higher authorities» [2].

The control of the lower structures by upper branches of administration was very limited, since the above processes of «party struggle» that took place in volosts is not a result of certain groups of people and individuals activities. They were a new form of traditional political relations of groups with different levels of integration. Russian administrative and political system was considered by the group consciousness of the Kazakhs as an additional source of dominance in the competition for certain resources. Belonging to a particular genealogical group, the value of which depended on the particular situation determined individuals' political behavior.

The bureaucracy also showed certain independence in judiciary sphere dictated by social features that influenced their role in society. According to Abay, biys-judges election in each volost was useless: «Not everyone is able to administer justice. To keep the board, as they say, «at the top of Kultobe» one needs to know the code of laws inherited from ancestors.... But they are outdated over time, demand changes, and there are a few of infallible rulers among people, and may be there are no» [3].

Ch. Valikhanov's opinion seems very interesting to us. As S.Udartsev said, Ch.Valikhanov is a prominent Kazakh enlightener-democrat, a scientist — orientalist, philosopher and social activist, who left an imprint on the history of political and legal doctrines. Some hints and parallels in a long educational and democratic tradition of disguised criticism of Russia's order and policy in the guise of China criticism can be seen

in the works of East Turkestan and his other writings. In this case, we would like to highlight a kind of thoughts about the servants, so-called officials. If we assume the reality of Ch. Valikhanov's allegoricality, we will get a very interesting characteristics of civil servants and their activities. For example: «Chinese officials demand bows from citizens, they separated people and do not do anything. They receive salaries, and the people work hard to pay taxes and do not starve to death. Officials possessing the laws of inheritance have large capital collected from the people in the continuation of many years of harassment and extortion, they own vast lands, gardens, have several houses. Minor officials are as wealthy as noblemen, although they do not have family estates» [8; 102].

Unreasonable fees of the Chinese and native government and uneven distribution of taxes make it even more pressing by illegal fees that are imposed by native officials together with the Chinese mandarins. Thieves are made governors of the provinces in which they raged. Every Chinese official gets different life supplies for free, has customers of the natives, who are in their possession as slaves. Suspicion of Chinese and native officials has no limits. The police is vigilant and knows its business. Kashgar officials are chosen by the Chinese. They are strangers to the people they govern, they care only about their own benefit, to make a fortune, and as their power depends on the Chinese, then please their patrons in everything. Having learned only bad sides of the Chinese civilization, they are not available and are important to their subordinates, they humble themselves before the Chinese and spend their days in drunkenness. Minor officials copy the higher ones, but they are more rude and insolent. The officials are polite but evasive and suspicious with foreigners. The Chinese know abuse of indigenous officials well and treat them haughtily, but nevertheless they encourage their actions, because it is in their policies. The Chinese trust only those who oppress, therefore, they have nothing to do with the people. Most of all they are afraid that the officials did not combine their interests with the interests of the people; then they would be dangerous for them. Residents of six cities occupy the top places rarely, especially Kashgarians which are not considered to be the most reliable nationals. Generally, government officials, up to the sixth degree, can not serve at home. Thus, the Chinese achieve their goal: they make officials absolutely loyal to them. So, people hate the Chinese and the beks. The officials are for the mediation of foreigners in commercial matters. The natives, if they have ranks or money become inaccessible [9; 212].

Ch.Valihanov himself felt the tyranny of the officials during his intentions to become sultan-governor of Atbasar District. He wrote to F.M.Dostoevsky about his unrealized hopes: «I had an idea to become a sultan, to devote myself to work for the benefit of my fellow citizens, to protect them from officials and from the despotism of the rich Kirghizs (Kazakhs G.K.). At the same time I thought more likely to show the example to my countrymen how it can be useful for them to have an educated sultan-governor. They would see that the Russian official, under the action of which they made up their minds about the Russian education. To this end, I agreed to be a candidate in the senior sultans of Atbasar district, but the elections could not be held without some bureaucratic tricks» [10; 524].

The exiled intellectuals characterized governors as administrators which enabled bribery and theft flourish. Such notions as bribery and corruption came to the territory of Kazakhstan together with the control system. Although in some ways social — legal essence of corruption was that giving something for a gift was perceived by the Kazakh society as a tribute to the tradition of testimonial. And at the same time, the Russian officials which headed the regions of the state was not an exception in this case.

As it was noted by M.Bakunin:»… beginning from the top of the pyramid and up to its foundation, all the officials steal the most cynical way». Despite the fact that criminal responsibility was allowed for the so-called «bribery and extortion» among public servants, the only thing that the chief could reproach his subordinate was «grafts higher than his rank». According to Bakunin, the bribery was the norm to the extent that «an honest man must die among thieves». If the officer observes the moral principles of duty, and fulfills his responsibilities perfectly, «he must leave, he is a Jacobin, he does not want to take bribes». According to M.Bakunin: «Visibility is everything that is required from a good officer in Russia; visibility brings an advance in rank, order and money, essentially brings to Siberia» [11; 576].

N.Konshin in his «Archival essays» based on the secret information about police advisers and governors describes the activities of the Semipalatinsk governor Galkin. For example, it appeared in the gendarmerie reports that the Governor -General Galkin held very liberal views. This was manifested in ignoring their requests for delivery of information to the gendarmerie management and in open sympathy for political exiles. As a representative of the administration, Galkin had no effect on the elections to the Duma and did not fulfill service requirements in this regard which manifested his rejection of the autocracypolicy on Political Rights. Then the gendarmerie office noted hostility of the Semipalatinsk governor to persons who adhered to

the legal direction. Proceedings were initiated against Galkin. «Illiberal part of society was extremely dissatisfied with the activities of General Galkin «who patronized unreliable persons. As a result, Galkin was transferred to the post of military governor of Samarkand region. In general, the characteristic given to the governor by the Assistant Chief of Gendarmerie Levanevskyi was that there was no case when General Galkin applied to any of the people convicted of criminal activities, the power of temporary governor — general (repression, closing opposition media G. K.). Galkin's power during the liberation movement resultedin inaction, or to the policy of non-intervention» [12; 304].

Thus, even among top rank senior officers there were persons that can be attributed to the liberal circle of educated society.

For example, N.Ya. Konshin who was a correspondent of Petrograd newspaper and conducted his own investigation of police abuses as a lawyer and wrote an article about the detective department, lawlessness and violation of detainees' rights who were arrested at Troynitskyi governor. Police officers' guilt was confirmed during investigation. They themselves created obstacles.

As Konshin notes, people with a very shady past were appointed in the detective department. It was told about prisoners' torture in the department. He found that «the Kazakhs were usually beaten in Klarin's office, they were taken out of town to waste dumping ground, where they were tortured into confessing for an uncommitted crime. They extorted money». There also were people among Russian officials who sympathized the views of the liberal intelligentsia and patronized them as far as possible [13; 120].

Explorer and ethnographer, official of the Agricultural and obrok departments at Syr-Darya regional board O.A.Shkapskyi's observation is interesting. The fact that there were honest people among the representatives of the Russian administration who do not blindly follow the orders of their superiors, is confirmed by the description of O.A.Shkapskyi's activities as the head of Semirechensk party to divest resettlement sites by M.Tynyshpayev. Then he led the Resettlement Directorate of the Vernyi city. And as the head of the administration he reported the head of agriculture and land management Schvanebach in his studies that there is no land free from the Kyrgyzs in Semirechensk area. That he, Shkapskyi, was appointed to take the best land from the Kirghizs, and whether it is done by law or under the law — is not his business. After his dismissal Shkapskyi, as a political exile, believed that his duty was benefiting society as a man who was in the public service. His works are not without imperial ambitions, at the same time one cannot describe him just as «colonial administration officer». His works on local history had high scientific assessment [7; 286].

Thus, society's traditional nature reflects the specificity of domestic policies by lower-level officials, causing corruption and abuse of their official position. Feature of bureaucracy functions affected the social character, displaying the position of lower-level administrative — police apparatus on the steppe territory in the ranks of the elite positions among the traditional society. The higher ranks of the colonial system, turning a blind eye to the kind of self-management of the steppe, generated rivalry among ethnic society on the principle of «divide and rule», despite the complaints of non-compliance to the charter of officials governing on place, strengthened the colonial power and weakened the resistance to the power in general. Personal qualities of the officials except for separate cases were insignificant. The main thing in this situation was the superiority of property, as the votes for elections were bought. The members of the same clan or tribe had authority, justice, and interests protection which displeased others. This injustice gave rise to search for more equitable solutions particularly in the Russian administration, thus popularizing and characterizing the colonial policy of the tsarism positively.

References

1 *Абиль Е.* История государства и права Республики Казахстан с древнейших времен до начала XX века: Курс лекций. — Астана: Фолиант, 2000. — 188 с.

2 Центральный государственный архив РК г. Алматы (ЦГА). — Ф.44. — Оп. 1. — Д. 3237, 3293, 3257.

3 *Кунанбаев А.* Книга слов / Абай. Записки забытого / Шакарим. пер. с каз. К.Серикбаевой, Р.Сейсенбаева. — Алматы: Жазушы, 1992. — 270 с.

4 *Зиманов С.* Полное собрание сочинений: В 10 т., т. 2, 3. — Алма-Ата: Медиа-корпорация «Зан», 2009. — 439 с.

5 Материалы по обычному праву казахов. — Астана: Алтын кітап, 2007. — 288 с.

6 *Гейнс А.К.* Собрание литературных трудов. — Астана: Алтын кітап, 2007. — 211 с.

7 *Хабижанова Г.Б., Валиханов Э.Ж., Кривко А.Л.* Русская демократическая интеллигенция в Казахстане. (Вторая половина XIX – начало XX вв.) / Под ред. М.К.Койгельдиева. — М.: Рус. книга, 2003. — 288 с.

8 *Ударцев С.Ф.* Политические и правовые взгляды Чокана Валиханова // Валиханов Ч.Ч. Записки о судебной реформе. — Алматы: Әділет, 1999. — 102 с.

9 *Бейсембиев К.Б.* Из истории общественной мысли Казахстана второй половины 19 века (Ч.Валиханов, И.Алтынсарин): Монография. — Алма-Ата: АН КазССР, 1957. — 212 с.

10 *Валиханов Ч.Ч.* Собрание сочинений в пяти томах. — Алма-Ата: Гл. ред. Казахской сов. энцикл., 1985. — Т. 5. — 524 с.

11 *Бакунин М.А.* Избранные философские сочинения и письма. — М.: Мысль, 1987. — 576 с.

12 Ссылка и каторга в Сибири (XVIII – начало XX вв). — Новосибирск: Наука, 1975. — 304 с.

13 *Здравосмыслов Б.В.* Уголовно-правовые взгляды русских революционных демократов / Под ред. С.А.Покровского — М.: Госюриздат, 1959. — 120 с.

Г.К.Қалиева

XIX ғасырдың соңында Қазақстан аумағында қоғамдық көзқарастағы мемлекеттік қызметкерлер қызметінің ерекшеліктері

Мақала XIX ғасыр соңындағы жер аударылғандар мен қазақ зиялыларының жұмысында көрініс тапқан мемлекеттік қызметке арналған. Автор зерттеулер мен ғылыми еңбектерге ретроспективті талдаулар жүргізді. Қазақстан аумағындағы Ресей империясының шеткері жатқан ұлт зиялылары мен жер аударылғандарына, мемлекеттік қызметтің ерекшеліктеріне көңіл бөле отырып, сипаттама берді. Алғаш рет империялық қызметке жай әрекет жасау ғана емес, шынайы сол кезеңге сәйкес мемлекеттік қызметкерге және біртұтас мемлекеттік қызметке сипаттама жасалды. Автор өзінің жасаған зерттеулері негізінде Қазақстан аумағындағы жер аударылғандар мен қазақ зиялыларының еңбектеріне сәйкес мемлекеттік қызметтің империялық қызметпен жалғасуының ұқсастықтары және ерекшеліктері бар екенін қорытындылады.

Г.К.Калиева

Особенности деятельности государственных служащих в общественном мнении на территории Казахстана в конце XIX века

Статья посвящена деятельности государственной службы, отраженной в работах казахской интеллигенции и ссыльных конца XIX в. Автором проведен ретроспективный анализ научных трудов и исследований. Основное внимание акцентируется на особенностях государственной службы на территории Казахстана как одной из окраин Российской империи, отмеченных в характеристиках, данных национальной интеллегенцией и ссыльными. Впервые делается попытка не просто создания облика имперского служащего, а дается реальная, в соответствии с эпохой, характеристика государственного служащего и государственной службы в целом. На основании проведенного исследования автор делает вывод, что государственная служба на территории Казахстана, кроме основных характеристик деятельности в Империи, имела и свои особенности.

References

1 Abil Ye. *History of State and Law of the Republic of Kazakhstan from the earliest times to the beginning of the XX century*, Series of lectures. Astana: PCF «Foliant» 2000, 188 p.

2 Central State Archive of the Republic of Kazakhstan, Almaty (CSA), f. 44, op. 1, d. 3237, 3293, 3257.

3 Abay. The book of words: Notes of the forgotten; Shakarim, transl. from Kazakh by K.Serikbayeva, R.Seysenbayeva, Alma-Ata: Zhazushy, 1992, 128 p.

4 Zimanov S. *Complete Works*: 10 volumes, vol. 2, 3, Alma-Ata: Media-corporation «Zan», 2009, 439 p.

5 Materials on Kazakh customary law, Astana: Altynkitap, 2007, 288 p.

6 Heins A.K. *Collection of literary works*, Astana: Altynkitap, 2007, 211 p.

7 Khabizhanova G.B., Valikhanov E.Zh., Krivko A.L. *Russian democratic intelligentzia in Kazakhstan (The second half of XIX cent. – early XX cent.)*, edit. by M.K.Koygeldiyev, Moscow: Russkaya kniga, 2003, 288 p.

8 Udartsev S.F. *Ch.Ch.Valikhanov. Notes on judicial reform*, Almaty: Adilet, 1999, 102 p.

9 Beysembiyev K.B. *From the history of Kazakhstan's social thinking in the second half of the 19th century (Ch.Valikhanov, I.Altynsarin)*, Alma-Ata: Kaz. SSR Academy of sciences, 1957, 212 p.

10 Valikhanov Ch.Ch. *Collection of works in five volumes*, Alma-Ata: Ch. Ed. Kazakh Soviet Encyclopedia, 1985, 5, 524 p.

11 Bakunin M.A. *Selected philosophical works and letters*, Moscow: Mysl', 1987, 576 p.

12 *Deportation and hard labor in Siberia (XVIII-beginning of XX c.)*, edit. by L.M.Goryushkin, Novosibirsk: Nauka, 1975, 304 p.

13 Zdravosmyslov B.V. *Criminal legal views of the Russian revolutionary democrats*, edit. by S.A.Pokrovskiy, Moscow: Gosjurizdat, 1959, 120 p.

УДК 323

Д.Б.Байсагатова

Академия финансовой полиции, Астана
(E-mail: Ameliezet@gmail.com)

Комплекс мер по дальнейшей разработке уголовного законодательства Республики Казахстан в сфере противодействия терроризму и экстремизму

В статье затрагивается актуальная проблема современности — борьба с терроризмом и экстремизмом. На основе правового анализа норм Уголовного кодекса Республики Казахстан о терроризме автор предлагает ряд существенных поправок, важных для понимания степени общественной опасности терроризма и экстремизма. Ключевой вариант разрешения острой и сложной проблемы уголовной ответственности за терроризм и экстремизм, считает автор, — в совершенствовании уголовного законодательства по ответственности за терроризм и экстремизм. Эффективность уголовного законодательства, отмечено в статье, во многом будет зависеть от качества соответствующих правовых норм, соблюдения юридической техники в формулировке оснований уголовной ответственности в соответствии с размерами, видами наказаний.

Ключевые слова: терроризм, экстремизм, законодательство, уголовно-правовые нормы, национальная безопасность.

Глобализация трансформировала терроризм в международный терроризм. Криминализация, распространение коррупции, обычной и организованной преступности, нередко смыкающейся с терроризмом, — оборотная сторона и составная часть процессов глобализации [1; 87].

Вопросы, связанные с поддержанием стабильности и безопасности, в сегодняшнем динамично развивающемся мире приобретают особую актуальность. Наряду с традиционными военными угрозами все большую опасность для человечества представляют так называемые новые или нетрадиционные угрозы и вызовы, такие как международный терроризм и экстремизм. С этими угрозами сегодня в той или иной степени сталкивается практически каждое государство. По своей опасности они порой превосходят традиционные военные угрозы. Выгодное геополитическое расположение, наличие больших запасов минерального сырья в странах Центрально-Азиатского региона, выход последних на передовую линию объявленной мировым сообществом войны против международного терроризма привели к тому, что Центральная Азия в формирующейся новой структуре международных отношений приобретает все большее значение. Вместе с тем кризисные явления, имеющие место в социально-экономической жизни большинства центрально-азиатских государств, их близость к основным очагам нестабильности обусловливают появление различного рода рисков и вызовов, несущих с собой угрозу безопасности [2; 207].

Республика Казахстан находится в эпицентре угроз, которые представляют наибольшую опасность, и нуждается в соответствующей правовой оценке ключевых положений по борьбе с терроризмом и экстремизмом, а именно: как им противостоять, какие средства наиболее эффективны для борьбы с ними? Необходимо, на наш взгляд, в проект Уголовного кодекса Республики Казахстан внести существенные новации и ужесточение санкций статей, касающихся тех сфер, которые так или иначе могут быть использованы в террористических и экстремистских целях.

Рассмотрим концептуальные уголовно-правовые нормы, выработанные мировым сообществом, которые основное внимание уделяют вопросам совершенствования норм, предусматривающих уголовную ответственность за террористические действия, которые необходимо применить и в Республике Казахстан, так как они доказали свою эффективность в противодействии терроризму и экстремизму.

В этой связи наиболее интересны подходы к уголовно-правовому регулированию борьбы с терроризмом в традиционных капиталистических (рыночных) правовых системах таких государств, как США, Франция, Италия, Таиланд. Российское национальное уголовное законодательство на пути к выработке адекватных законодательных мер по противодействию терроризму и иным террористическим преступлениям.

Подходы законодателей зарубежных государств к регулированию вопросов борьбы с терроризмом различны. Это зависит не только от эскалации террористических деяний, но и от исторических условий формирования государства и его правовой системы, правовых традиций. Имеются особые

условия формирования антитеррористических уголовно-правовых норм в законодательстве государств с федеративным или унитарным устройством. Универсальных уголовно-правовых норм против терроризма и его проявлений за рубежом также не найдено. Изучение зарубежного опыта по этому вопросу может оказаться полезным для совершенствования собственного законодательства.

Законодателями США осуществляется активная работа по совершенствованию уголовно–правовых норм противодействия терроризму. Действующее федеральное законодательство США предусматривает уголовную ответственность за отдельные проявления террористической преступности.

В апреле 1996 г. в США был принят Закон «О борьбе с терроризмом и применении смертной казни». Он существенно ужесточил и расширил действия уголовного федерального законодательства США. В разделе VII (терроризм) ст. 702 в главу 113B раздела 18 Свода законов США вносится ст. 2332в. В этой статье к актам терроризма были отнесены «убийство, похищение, нанесение увечья, нападение, повлекшее за собой тяжелые телесные повреждения, или нападение с применением опасного оружия в отношении любого лица в пределах США; создание существенного риска нанесения серьезных повреждений любому другому лицу путем разрушения и нанесения ущерба любому строению, транспортному средству либо другому недвижимому или личному имуществу в пределах США, а также штата и сговор совершить такого рода деяния» в том случае, если эти деяния «рассчитаны на оказание давления или нанесение ущерба действиям правительства путем угроз и шантажа либо путем принуждения или рассчитаны на осуществление мер возмездия, направленных против действий правительства».

Совершение преступлений, направленных против правительства и относящихся поэтому к преступлениям по федеральному уголовному праву, законодатель США выделяет в качестве признака, квалифицирующего любое преступление как террористическое. Приведено более 30 преступлений, признаваемых таковыми и влекущих за собой более жестокое наказание.

Следует особо отметить, что законодатели западных демократий, понимая масштабы террористических угроз, порой сознательно идут на определенные ограничения прав и свобод граждан и постулатов демократической законности, например, в США создаются новые карательные структуры, усиливается направленность и ужесточаются наказания за терроризм, широко привлекается военная мощь государства («Закон «Об усилении борьбы с терроризмом и эффективности высшей меры наказания»).

Глава 113b УК США определяет перечень террористических действий, таких как использование оружия массового поражения (ст. 2332a), определяет акты терроризма, выходящие за пределы национальных границ (ст. 2332b), финансовые операции (ст. 2332d), подрывы мест общественного назначения, государственных учреждений, общественной транспортной системы и инфраструктуры (ст. 2332f), использование ракетных систем по уничтожению самолетов (ст. 2332g), использование радиологических рассеивающих устройств (ст. 2332h), покрывательство и оказание убежища террористам (ст. 2339), оказание материальной поддержки террористам (ст. 2339A), оказание материальной поддержки либо ресурсами определенным иностранным террористическим организациям (ст. 2339b), финансирование терроризма (ст. 2339C), военная подготовка иностранными террористическими организациями.

Обращает на себя внимание жесткость наказаний за терроризм и террористические преступления. Уголовный кодекс США предусматривает несколько видов наказаний за совершенное террористическое деяние, в зависимости от наступивших последствий. Так, статья 2332 (уголовные наказания) Уголовного кодекса США выделяет 3 типа последствий и соответствующего наказания к ним — убийство, покушение на убийство и причинение тяжкого вреда здоровью гражданину США:

– тяжкое убийство (подпункт 1 п. «a» ст. 2332) — наказание — штраф, смертная казнь либо заключение (на определенный срок либо пожизненное), либо и то и другое;

– умышленное убийство (подпункт 2 п. «a» ст. 2332) — наказание — штраф либо заключение сроком на более 10 лет, либо и то и другое;

– непредумышленное убийство (подпункт 3 п. «a» ст. 2332) — наказание — штраф либо заключение сроком не более 3 лет, либо и то и другое.

Пункт «b» ст. 2332 определяет меру наказания за покушение либо заговор с целью убийства:

1) покушение на убийство, квалифицированное как тяжкое, карается штрафом либо сроком тюремного заключения не более 20 лет (подпункт 1 п. «a» ст. 2332);

2) заговор двух и более лиц с целью покушения на убийство, квалифицированного как тяжкое, карается штрафом либо заключением (на определенный срок либо пожизненный), либо и то и другое.

Пункт «С» ст. 2332 определяет меру наказания за причинения серьезного вреда здоровью:

1) намерение причинить серьезный вред здоровью (подпункт 1 п. «С» ст. 2332);

2) причинение серьезного вреда здоровью карается штрафом либо тюремным заключением сроком не более 10 лет, либо и то и другое.

Таким образом, наказание за любые террористические действия, имеющие последствия, указанные в ст. 2332, назначаются в соответствии с данной статьей.

На наш взгляд, более удачные уголовно-правовые нормы по противодействию терроризму принимают законодатели Западной Европы.

Отдельно необходимо отметить, что уголовная ответственность за создание преступных объединений с целью совершения террористического акта, наступает непосредственно после выявления преступного сообщества, даже если его члены еще не приступили к осуществлению задуманной ими акции. Все это позволяет правоприменительным органам эффективно реагировать уже на ранней стадии организованной террористической преступной деятельности.

Под террористическими актами, согласно ст. 421–1 УК Франции, понимаются совершенные отдельным лицом или преступным сообществом, созданным, чтобы серьезно нарушить общественный порядок путем запугивания или террора, умышленные посягательства на жизнь, на неприкосновенность человека, похищение или незаконное удержание человека в закрытом помещении, угон летательного аппарата, судна или любого другого транспортного средства, хищения, вымогательства.

Также к террористическим отнесены преступные деяния в сфере информатики; незаконный доступ ко всей или части системы автоматизированной обработки данных; уничтожение или изменение обманным путем содержащихся в указанной системе данных; участие в группе, созданной с целью подготовки для совершения одного или нескольких конкретных действий из перечисленных деяний. Помимо этих действий к террористическим актам действующий Уголовный кодекс Франции относит:

– изготовление и хранение смертоносных или взрывчатых средств и устройств;

– производство, продажу, импорт или экспорт взрывчатых веществ;

– приобретение, хранение, транспортировку или незаконное ношение взрывчатых веществ или устройств, изготовленных с использованием этих веществ;

– хранение, ношение и транспортировку оружия и боеприпасов;

– разработку, изготовление, хранение, складирование, приобретение и передачу биологического оружия или оружия, в основе которого лежат токсины;

– использование химического оружия и запрещенных химических средств.

Статьями 421–2 и 421–4 УК Франции введено понятие экологического терроризма и уголовной ответственности за него.

В УК Франции четко прописаны рамки преступного финансирования терроризма. Статья 421–2–3 гласит: «Тот факт, что лицо не в состоянии объяснить происхождение средств, соответствующих его образу жизни, находясь при этом в отношениях с лицом или лицами, занимающимися одним или несколькими видами деятельности, предусмотренными в статьях с 421–1 по 421–2–2, наказывается семью годами лишения свободы и штрафом в 100000 евро».

В Италии уголовно–правовые нормы, направленные на борьбу с терроризмом, содержатся в Уголовном кодексе страны (ст. 270 bis.), а также в Законе № 15 от 1980 г. Эти нормативные акты не содержат четкого определения терроризма, в них говорится об объединениях, цель которых — совершение террористических актов и разрушение демократического порядка. Наказание — тюремное заключение на срок до 15 лет всякого, кто поощряет, создает, организует или руководит объединением, пропагандирует таковое, совершает насильственные действия, чтобы нарушить демократический правопорядок.

Примером умелого использования зарубежного опыта и определенной трансформации социалистических норм права в рыночные может служить Китайская Народная Республика. В главе 2 «Преступления против общественной безопасности», диспозициях ст. ст. 114–115, УК КНР отнесены, по сути, 10 составов преступлений, которые могут применяться в качестве способов осуществления террористических актов: поджог, затопление, взрыв, применение отравляющих веществ либо свершение иных опасных действий, направленных на разрушение заводов, портов, рек, водных источников, складских и жилых помещений, лесных и сельскохозяйственных угодий, пляжей, пастбищ, ос-

новных трубопроводов, общественных сооружений или иного государственного или частного имущества, причинивших вред общественной безопасности, но не повлекших за собой серьезных последствий, наказываются лишением свободы на срок от 3 до 10 лет. Статья 115 УК КНР за те же действия, что описаны в ст. 114 УК КНР, но повлекшие за собой человеческие жертвы, тяжелые увечья или смерть, либо причинившие серьезный ущерб государственному или частному имуществу, влекут за собой лишение свободы на срок свыше 10 лет, бессрочное лишение свободы или смертную казнь. Установлена и уголовная ответственность за покушение. Часть 2 ст. 115 за неудачную попытку совершения такого преступления предусматривает наказание от 3 до 7 лет лишения свободы, и при смягчающих обстоятельствах — лишение свободы до 3 лет или краткосрочный арест.

КНР, начиная с 80–х годов прошлого века, последовательно ратифицировала договоры, направленные на борьбу с незаконным захватом воздушных судов (Гаагская конвенция 1970 г.), с действиями, нарушающими безопасность гражданской авиации (Монреальская конвенция 1971 г.), и рядом других. Поэтому в действующем УК КНР нашли свое отражение и соответствующие уголовно-правовые запреты конвенционного характера. Так, в ст. 121 захват и удержание воздушного транспортного средства с применением угроз, насилия или иных способов наказываются лишением свободы на срок свыше 10 лет или бессрочным лишением свободы, а те же деяния, приведшие к человеческим жертвам или к серьезному повреждению воздушного транспортного средства, караются смертной казнью. Аналогично и с захватом иных средств передвижения.

Захват и удержание морского, речного судна или автомобиля с применением угроз насилия или иных способов наказываются лишением свободы до 10 лет, те же деяния, повлекшие за собой серьезные последствия, — на срок свыше 10 лет или бессрочным лишением свободы.

В Китае, как и в России, основные террористические проявления связаны с сепаратизмом. В Китае острие государственной политики в борьбе с этим злом направлено против уйгурских сепаратистов, выступающих за создание независимого государства «Восточный Туркестан» на территории Синьцзян-Уйгурского автономного района КНР. Сепаратисты создали лагеря боевиков, склады боеприпасов и оружия; с 1990 г. ими совершено более 200 терактов, где пострадали свыше 600 человек.

В связи с этой угрозой в УК КНР в главе «Преступления против государственной безопасности» предусмотрен ряд статей, направленных на противодействие причинам террористической деятельности: «причинение вреда территориальной целостности и безопасности КНР» (ст. 102 УК); «организация, планирование и совершение практических действий, направленных на раскол государства, нарушение государственного единства, осуществленные зачинщиками или лицами, совершившими тяжкие преступления» (ст. 103 УК). При этом ст. 136 УК КНР допускает за совершение преступлений, перечисленных в этой главе, в случае «причинения особо серьезного вреда государству и народу и при особо отягчающих обстоятельствах», применение смертной казни.

Серьезное внимание уделено борьбе с незаконным оборотом оружия. В ст.ст. 125–130 УК КНР за эти преступления предусмотрены жесткие санкции, а незаконное производство, торговля, перевозка, пересылка по почте, хранение стрелкового оружия, боеприпасов, взрывчатых веществ (ст. 125) караются смертной казнью. Часть 2 ст. 127 «открытое хищение (или кража) стрелкового оружия, боеприпасов, взрывчатых веществ, принадлежащих государственным органам, военнослужащим и полиции, наказывается лишением свободы на срок свыше 10 лет, бессрочным лишением свободы или смертной казнью».

Существенная особенность Уголовного кодекса Таиланда при наказании за террористические действия — возрастные границы уголовной ответственности. Ответственность за совершение преступления предусмотрена с 7 лет, но ребенок с 7 до 14 лет не подвергается наказанию, к нему применяются так называемые воспитательные меры воздействия. При необходимости выносится предупреждение также и родителям или опекуну ребенка. К подросткам в возрасте от 14 до 17 лет по усмотрению суда применяются либо воспитательные меры, либо уголовное наказание. Однако в последнем случае оно должно быть меньше в 2 раза по сравнению с тем, что указано в санкции статьи за конкретное преступление. Молодые люди в возрасте от 17 до 20 лет подвергаются только наказанию, но уменьшенному на 1/3 или на 1/2 (ст. ст. 72–79).

В действующем УК Таиланда и других уголовно–правовых актах отсутствует понятие терроризма и террористического преступления. Вместе с тем раздел VI «Преступления, относящиеся к общественной безопасности» дает перечень из 22 составов, которые можно отнести к способам терроризма. Так, статья 218 гласит: любой, кто поджигает:

(1) здание, лодку или плавучий дом, где проживают люди;

(2) здание, лодку или плавучий дом, используемый для хранения или производства товаров;

(3) место для развлечений или собраний;

(4) здание, которое является собственностью государства, общественным местом или местом для отправления религиозных обрядов;

(5) железнодорожную станцию, аэропорт, общественную парковку или лодочный причал;

(6) пароход или моторную лодку водоизмещением пять тонн или больше, самолет или поезд, используемый для общественных перевозок, должен быть приговорен к смертной казни, пожизненному тюремному заключению или тюремному заключению на срок от пяти до двадцати лет.

Статья 221. Любой, кто становится виновником взрыва, который может нанести вред другому человеку или собственности, принадлежащей другому человеку, должен быть приговорен к тюремному заключению на срок не более семи лет и к штрафу в размере не более четырнадцати тысяч бат.

Статья 222. Любой, кто становится виновником взрыва, чтобы нанести вред одному из объектов, указанных в ст. 218, должен быть наказан по этим статьям.

Статья 224. Если совершение преступлений, предусмотренных ст.ст. 217, 218, 220, 221 или 222, влечет за собой смерть человека, виновный должен быть приговорен к смертной казни или к пожизненному тюремному заключению.

Если совершение указанных в параграфе 1 настоящей статьи преступлений причиняет значительный физический вред другому человеку, виновный должен быть приговорен к смертной казни, пожизненному тюремному заключению или тюремному заключению от десяти до двадцати лет.

Статья 232. Любой, кто каким бы то ни было образом приводит одно из перечисленных ниже транспортных средств в такое состояние, при котором они могут представлять опасность для человека: морское транспортное средство, самолет, поезд или трамвай; автомобиль, используемый для общественных перевозок; пароход или моторную лодку водоизмещением пять тонн и более, используемую для общественных перевозок, — должен быть приговорен к тюремному заключению на срок от шести месяцев до семи лет и к штрафу в размере от одной тысячи до четырнадцати тысяч бат.

Статья 237. Любой, кто добавляет отравляющее вещество или любое другое вещество, которое может нанести вред здоровью, в пишу, воду в любом колодце, пруду или резервуаре, и эти пища или вода становятся доступными для общественного потребления, должен быть приговорен к тюремному заключению на срок от шести месяцев до десяти лет и к штрафу в размере от одной тысячи до двадцати тысяч бат.

Так же как в Китае и России сепаратизм является основой для большинства террористических проявлений и в Таиланде. Поэтому в главе II «Преступления против внутренней безопасности Королевства» ст. 113 гласит: любой, кто совершает акт насилия или угрожает совершить акт насилия с целью свергнуть или изменить Конституцию; свергнуть законодательную власть, исполнительную власть или судебную власть, предусмотренные Конституцией, или сделать эту власть недействительной; или разделить Королевство или захватить власть в любой части Королевства, совершает мятеж и должен быть приговорен к смертной казни или пожизненному тюремному заключению.

Такое построение уголовного законодательства способствует успешной правоприменительной деятельности по подавлению на ранней стадии террористических проявлений — жестоко и в рамках закона. При этом налицо и деполитизация уголовно-правовых норм [3].

Российский Уголовный кодекс, в частности ст. 205 «Терроризм», предусматривает уголовную ответственность за террористические и приравненные к ним иные действия в виде лишения свободы на срок от пяти до десяти лет.

Те же деяния, совершенные:

а) группой лиц по предварительному сговору;

б) неоднократно;

в) с применением огнестрельного оружия, — наказываются лишением свободы на срок от восьми до пятнадцати лет.

Деяния, если они совершены организованной группой либо повлекли по неосторожности смерть человека или иные тяжкие последствия, наказываются лишением свободы на срок от десяти до двадцати лет.

Примечательно, что в УК РФ к уголовной ответственности за террористические и приравненные к ним иные действия привлекаются лица, достигшие 14 лет [4].

Для Республики Казахстан, как страны, имеющей тесные контакты практически по всем отраслям с Российской Федерацией, будет полезным внедрить разработанные ими новации и уголовно–

правовые нормы, которые будут закреплены в законодательных актах в сфере национальной безопасности.

Это поправки к УК РФ и КоАП РФ, к действующим законам «О связи», «О противодействии легализации и отмыванию доходов, полученных преступным путем», «О национальной платежной системе», «О ФСБ», «О противодействии терроризму» и др.

Сотрудники ФСБ, по замыслу авторов пакета, получат право на личный досмотр граждан, их вещей и транспортных средств. До сих пор это было прерогативой сотрудников МВД. По ряду статей ужесточаются наказания, вплоть до пожизненного срока.

Пожизненный срок полагается за: прохождение обучения в целях осуществления террористической деятельности (ст. 205.3 УК РФ), организацию террористического сообщества и участие в нем (ст. 205.4 УК РФ), организацию деятельности террористической организации и участие в деятельности такой организации (ст. 205.5 УК РФ), создание вооруженного формирования (ст. 208 ч. 1 УК РФ), угон транспортного средства, повлекший смерть человека (ст. 211 ч. 3).

В статью 205.1 УК РФ «Содействие террористической деятельности» добавляется пункт 4 — организация финансирования терроризма, которая также карается лишением свободы от 15 до 20 лет или пожизненным заключением.

Если цель преступления — пропаганда, оправдание и поддержка терроризма, то это теперь будет считаться отягчающим обстоятельством. Помимо этого, предлагается наказывать как за терроризм за посягательство на жизнь общественного деятеля (ст. 277 УК), насильственный захват власти и ее удержание (ст. 278 УК), вооруженный мятеж (ст. 279 УК). А среди критериев террористической деятельности появляется «дестабилизация деятельности органов власти».

Антитеррористическим пакетом законопроектов также определяется ряд деяний, опасных с точки зрения терроризма.

По статьям Уголовного кодекса «Террористический акт» (ст. 205), «Содействие террористической деятельности» (ст. 205. 1), «Захват заложника» (ст. 206), «Угон судна воздушного или водного транспорта либо железнодорожного подвижного состава» (ст. 211), «Посягательство на жизнь государственного или общественного деятеля» (ст. 277), «Насильственный захват власти или насильственное удержание власти» (ст. 278), «Вооруженный мятеж» (ст. 279) и «Нападение на лиц или учреждения, которые пользуются международной защитой» (ст. 360) наказание не может быть избрано ниже низшего предела или заменено на более мягкое. Помимо этого, по данным статьям исключаются условное наказание — освобождение от уголовной ответственности по истечении сроков давности совершения преступления, а также отсрочка наказания.

Отдельный блок поправок посвящен противодействию отмыванию доходов и контролю над денежными операциями и информацией в телекоммуникационных сетях.

У хостинг-провайдеров, владельцев сайтов и других лиц, круг которых определит правительство, появится новая обязанность — хранить в течение полугода данные о приеме, передаче, доставке, обработке различной электронной информации.

Требовать ее будут вправе силовые органы в рамках оперативно-розыскной деятельности. Это правило будет также распространяться на иностранные ресурсы, которые предоставляют информационные услуги на территории России.

Неперсонифицированные платежные средства, такие как «Яндекс–кошелек» или предоплаченные пластиковые карты, предлагается подвести под сокращение объемов анонимных перечислений. Перечисления через границу (трансграничные) фактически будут запрещены (до сих пор этот запрет был зафиксирован лишь в отношении банковских и почтовых переводов). А внутри страны на них будут введены более жесткие лимиты — 15 тыс. рублей вместо 40 тыс. рублей в месяц, при этом не более 1 тыс. рублей в течение рабочего дня [5].

Таким образом, предложенные уголовно-правовые нормы и санкции статей в части ужесточения уголовного наказания за терроризм и экстремизм придадут дополнительный импульс борьбе с данным недугом в мировом сообществе, однако анализ экономических факторов формирования террористических движений позволяет сформулировать некоторые практические рекомендации для нашей страны. На наш взгляд, бороться с терроризмом и экстремизмом нужно путем увеличения издержек этого выбора — делать невыгодным переход от образа жизни обычного гражданина к образу жизни террориста. Примечательно, что в США, ЕС и других развитых странах популярна точка зрения, согласно которой наиболее эффективный путь борьбы с терроризмом и экстремизмом — предоставлять

потенциальным или даже реальным террористам привлекательные возможности для законопослушной жизни.

Существуют мероприятия, направленные на повышение скрытых издержек (издержек упущенных возможностей) участия в терроризме и экстремизме:

– реинтеграция террористов в общество: создание у них ощущения принадлежности не только к «соратникам по оружию», но и к обществу в целом (например, путем вовлечения их в публичные дебаты), позволит им, как минимум, усомниться в непреложности избранного пути;

– поощрение раскаивающихся: смягчение наказаний либо даже полное освобождение от них, поддержка экс-террористов на начальных этапах мирной жизни;

– предоставление оппозиционерам ценимых в обществе возможностей в обмен на отказ от террористической деятельности (например, приглашение идеологов террора в ведущие университеты).

Однозначно, что, во-первых, эффективная борьба с терроризмом и экстремизмом принципиально не может вестись силами одного государства — она должна регулироваться на уровне современной мир-системы в целом. Во-вторых, даже на национальном уровне главным инструментом регулирования уровня терроризма и экстремизма в долгосрочном периоде является не деятельность правоохранительных органов, а социальная политика, регулирующая взаимоотношения различных этнических и конфессиональных групп, и внешнеполитическая стратегия правительства (в частности, степень «дружбы – вражды» с США и со странами ислама). В-третьих, на развитие терроризма и экстремизма влияют не только и не столько собственно антитеррористические мероприятия МВД и органов национальной безопасности, сколько общее движение к режиму «правления права», создающему благоприятные возможности для легальной самореализации граждан, отвращая их от участия в террористической деятельности. В-четвертых, необходимо не только применять силовые меры против членов террористических организаций, но и добиваться максимально «громкого» освещения их достижений в СМИ, чтобы оказать превентивное воздействие на потенциальных террористов.

Список литературы

1 *Адилходжаева С.М.* Повышение управляемости глобализационными процессами и ускорение борьбы с международным терроризмом и наркобизнесом // Евразийская интеграция: экономика, право, политика. — 2008. — № 4. — С. 86–90.

2 *Султанов Б.К.* Казахстан в современном мире: реалии и перспективы. — Алматы: КИСИ при Президенте Республики Казахстан, 2008. — 348 с.

3 Сравнительно-правовой анализ зарубежного законодательства о противодействии терроризму. Научный доклад «Центра изучения новых вызовов и угроз национальной безопасности РФ» Приморского института государственного и муниципального управления. — [ЭР]. Режим доступа: http://www.milpol.ru

4 *Наумова А.В.* Постатейный комментарий к Уголовному кодексу РФ от 13.06.1996 г. № 63–ФЗ. — [ЭР]. Режим доступа: http://www.globalteka.ru

5 *Гриценко О., Мошкин М.* Еще жестче. В Госдуму внесен пакет антитеррористических законопроектов. — [ЭР]. Режим доступа: http://www.vz.ru

Д.Б.Байсағатова

Терроризм және экстремизмге қарсы қимыл саласындағы Қазақстан Республикасының қылмыстық заңнамасын одан әрі жетілдіру бойынша шаралар кешені

Мақалада қазіргі кездегі өзекті мәселе — терроризм және лаңкестікке қарсы күрес қарастырылды. Автор Қазақстан Республикасы Қылмыстық кодексінің нормаларын құқықтық талдау негізінде терроризм және экстремизмнің қоғамдық қауіпінің деңгейін түсіну үшін бірқатар маңызды түзетулер ұсынды. Терроризм және экстремизм үшін қылмыстық жауаптылықтың қатерлі және күрделі мәселесін шешудің шешуші нұсқасы терроризм және экстремизм үшін тиісті жауаптылық пен қылмыстық заңнаманы жетілдіру болып табылады. Қылмыстық заңнаманың тиімділігі тиісті құқықтық нормалардың сапасы мен қылмыстық жауаптылық негіздері және жазалау мөлшері мен түрлерінің тұжырымдамасында заңды техникалардың сақталуына байланысты болады.

D.B.Baiysagatova

A package of measures to further develop the criminal law of the Republic of Kazakhstan in the field of combating terrorism and extremism

In article the questions connected with actual problem of our time — the fight against terrorism and extremism. Based on the legal analysis of the norms of the Criminal Code of the Republic of Kazakhstan about terrorism author offers a complex of significant amendments that are important for understanding the degree of social danger of terrorism and extremism. A key way to resolve the vexed and scabrous problems of criminal responsibility for terrorism and extremism is to improve the criminal law with a corresponding responsibility for terrorism and extremism. The effectiveness of the criminal law will largely depend on the quality of norms and in compliance with the legal technique in the formulation of the bases of criminal responsibility and sizes, types of punishments.

References

1 Adilkhodzhayeva S.M. *Eurasian integration: economics, law, politics*, 2008, 4, p. 86–90.

2 Sultanov B.K. *Kazakhstan in modern world: realities and prospects*, Almaty: KISI under the President of the Republic of Kazakhstan, 2008, 348 p.

3 *Relatively legal analysis of international law against terrorism*, http://www.milpol.ru

4 Naumova A.V. *Commentaries to the Criminal Code of the Russian Federation from 13.06.1996. № 63-FC*, http://www.globalteka.ru

5 Gritctenko O., Moshkin M. *Even tougher. A package of anti-terrorism law proejects was introduced for consideration of the State Duma*, http://www.vz.ru

МЕРЕЙТОЙ ИЕЛЕРІ
НАШИ ЮБИЛЯРЫ

Белгілі құқықтанушы-заңгер, ұлағатты ұстаз және көрнекті ғалым Төлеш Ерденұлы Қаудыровтың бейнесінен бір үзік сыр

Төлеш Ерденұлы Қаудыров 1955 жылы 25 қаңтарда Солтүстік Қазақстан облысы Петропавл қаласында дүниеге келді. 1972 жылы Петропавл қаласының орта мектебін үздік аяқтады. Сол жылы С.М.Киров атындағы Қазақ мемлекеттік университетінің заң факультетіне түсіп, 1977 жылы үздік дипломмен бітірді. Жоғары оқу орнын бітіргеннен кейін С.М.Киров атындағы Қазақ мемлекеттік университетінің заң факультетінің азаматтық құқық кафедрасына оқытушы ретінде қалдырылды.

1977–1990 жж. аралығында ол С.М.Киров атындағы ҚазМУ-дың ассистенті, аға оқытушысы, доценті, заң факультеті деканының орынбасары лауазымдарын атқарды. «Азаматтық құқық», «Шаруашылық құқық» оқу курстары бойынша дәрістер оқыды. Қоғамдық жұмыстарды оқытушылық және ғылыми жұмыстармен сәтті үйлестіре білді.

1987 жылы ақпанда Томск мемлекеттік университетінде (Ресей) КСРО-ғы танымал ғалым-цивилист Ю.Г.Басиннің ғылыми жетекшілігімен заң ғылымының кандидаты ғылыми дәрежесін іздену бойынша «Гражданско-правовые оператив-ные санкции в хозяйственных обязательствах» тақырыбында ғылыми жұмысын сәтті қорғады.

Қазақстан Республикасы Тәуелсіздігін алғаннан кейін Т.Е.Қаудыров Қазақстан Республикасы Президентінің Әкімшілігіне жұмысқа кабылданды. 1990–1992 жж. аралығында ҚР Президентінің Әкімшілігінің алғашқы құрамында Мемлекеттік-құқықтық бөлімде кеңесші, аға референт лауазымдарында қызмет атқарды. Осы жылдар аралығында еліміз үшін маңызды әрі жауапты міндетті — Қазақстан Республикасының алғашқы заңдарын шаруашылық саласы бойынша сараптау бойынша жұмыстарды орындады. Сол жылдары жас мемлекет өзінің егемендігін жүзеге асыру үшін қажетті мемлекеттік биліктің және басқарудың жаңа органдарын қалыптастырды. 1992 жылы ҚР Президентімен кездесуден кейін Т.Е. Қаудыров Қазақстанның Патенттік жүйесін құруға жолданады. Ол 1992–2002 жж. патенттер және лицензиялар, сонымен қатар тауарлық белгілерді және тауар шығарылған жердің атауын тіркеу аясында мемлекеттік басқарудың орталық органы – Қазақстан Республикасының Патенттік ведомствосын құрып, аталмыш органды он жыл бойы басқарып шықты. Т.Е.Қаудыров ҚР-ның «Патент» Заңы, «Тауар таңбалары, қызмет көрсету таңбалары және тауар шығарылған жерлердің атаулары туралы» ҚР-ның Заңы, «Интегралды микросхемалар топологияларын құқықтық қорғау туралы» Заңы, ҚР-ның «Ғылым туралы» Заңы, сонымен қоса интеллектуалдық меншіктің жекелеген объектілері бойынша көптеген заңға бағынышты актілердің жобаларын құрастырушылардың бірі болып табылады. Онымен құрылған еліміздің патенттік жүйесі Тәуелсіз Мемлекеттер Достастығында (ТМД) ең үздік аталып, қазірдің өзінде де сәтті қызмет етуде. Т.Е.Қаудыров Қазақстанның Дүниежүзілік Сауда Ұйымына мүшелікке өтуіне қажет деп саналатын маңызды халықаралық конвенцияларға қосылуына өз үлесін қосқан.

1992–1993 жж. Қазақстан Республикасының 1993 жылы 28 қаңтарында қабылданған алғашқы Конституциясын әзірлеуге қатысып, «Қазақстан Республикасының экономикалық дамуы» бөліміне жауапты болды. Осы еңбегі үшін Қазақстан Республикасы Құрмет грамотасымен марапатталған.

1993–1995 жж. Т.Е.Қаудыров ТМД-ның он елінің жұмыс тобының ресми өкіл-мүшесі ретінде Еуразиялық патент конвенциясын қабылдауға қатысты. 1995 жылдың қараша айында ҚР Президенті Еуразиялық патент конвенциясын бекітті. 1995 жылы қатысушы-елдердің өкілдерімен Еуразиялық патент конвенциясының Әкімшілік кеңесінің бірінші төрағасы болып екі жылдық мерзімге сайланды.

1993–1994 жж. Т.Е.Қаудыров ТМД елдерінің Үлгі Азаматтық кодексінің жобасын (Лейден қаласы, Голландия) және ҚР-ның Азаматтық кодексінің (Жалпы бөлімі) жобасын әзірлеуге қатысты. Осы құжаттардың ТМД елдерінің Парламентаралық Ассамблеясы және ҚР Парлементінде қабылдануына үлесін қосты. Т.Е.Қаудыров ТМД-ның танымал ғалымдарының қатарында «Интеллектуалдық меншік» бөлімін әзірлеуге жауапты болды.

1997–1999 жж. ҚР-ның Азаматтық кодексінің (Ерекше бөлімі) жобасын әзірлеу бойынша жұмыс тобына қатысып, жеке-дара V бөлімді («Интеллектуалдық меншік құқығы») жазды. 1999 жылы Т.Е.Қаудыров екінші рет қабылданған ҚР-ның «Патент» Заңы, «Селекциялық жетістіктер туралы» Заңы, екінші «Тауарлық белгілер туралы» Заңы, «Интегралды микросхемалар топологияларын құқықтық қорғау туралы» Заңының жобаларын әзірлеу бойынша жұмыс тобын басқарды.

2002 жылы Қазақстан Республикасының 2003 жылы 5 сәуірде қабылданған Кеден кодексінің «Кеден органдарымен интеллектуалдық меншік объектілеріне құқықты қорғау» атты 10-бөліміне ұсыныстар енгізу бойынша талқылауға қатысты. 2005 жылы Қазақ көлік және коммуникация академиясының «Трансқазақстан темір жол магистралінің техника-экономикалық негіздемесін әзірлеу» бойынша жобасына құқықтық кеңесші ретінде қатысса, ал 2006 жылы азаматтық заңнаманы жетілдіру бойынша Қазақстан Республикасы Үкіметінің ведомствоаралық комиссиясының мүшесі болды.

Жоғарыда аталып өткен тәжірибелік, оқытушылық және заңшығармашылық қызметтерін қоса атқара жүріп, Т.Е. Қаудыров ғылыми жұмыспен де белсенді айналысты. 2002 жылы маусым айында «Гражданско-правовая охрана объектов промышленной собственности в Республике Казахстан» тақырыбында докторлық диссертациясын сәтті қорғады.

Бүгінгі күні Т.Е. Қаудыровтың 100-ге жуық ғылыми жұмыстары жарыққа шыққан, соның ішінде жеке авторлықта «Гражданско-правовая охрана объектов промышленной собственности в Республике Казахстан» атты монографиясы (2001) жарыққа шықты, «Основы патентного права и патентовведения в Республике Казахстан» (2003) атты оқу құралының жауапты редакторы, «Гражданское право Республики Казахстан» (III-бөлім) (2004) атты оқулықтың X бөлімінің («Право интеллектуальной собственности»), Гражданский кодекс Республики Казахстан (Особенная часть); Комментарий (постатейный) (2006), «Право интеллектуальной собственности» бөлімінің авторы.

Ғылымға және құқық шығармашылыққа қосқан үлесі Төлеш Ерденұлының әр жылдары алған лайықты марапаттауларымен расталады: Қазақстан Республикасының Құрмет грамотасы; «Қазақстан Республикасының тәуелсіздігіне 10 жыл», «Қазақстан Республикасының Конституциясына 20 жыл» медальдары; В.И.Блинников атындағы Еуразиялық патент ұйымының «Өнертапқыштық және патент қызметін дамытуда қосқан зор үлесі үшін» алтын медалі.

Т.Е.Қаудыров қоғамдық жұмыстарға да белсенді араласады. Әр жылдары халықаралық деңгейде ЕврАзЭҚ-ның интеллектуалдық меншік сұрақтары бойынша сарапшы; ҚР Сауда-өнеркәсіп палатасында Халықаралық төрелік соттың төрешісі; Қырғыз Республикасында Жүсіп Баласағын атындағы Қырғыз ұлттық университетіндегі заң ғылымдарының докторы ғылыми атағын беру бойынша Диссертациялық кеңестің мүшесі болды. 2007 жылы қазан айында Париж қаласында инвестициялық дау бойынша Халықаралық трибуналдың жұмысына Қазақстан Республикасы Үкіметінің жағында сарапшы ретінде қатысты.

Республикалық деңгейде Т.Е.Қаудыров Қазақстан Республикасы Президентінің жанындағы Рақымшылық бойынша комиссия мүшесі; Қазақстан Республикасы Президентінің жанындағы Құқықтық саясат бойынша кеңес мүшесі; Қазақстан Қазақстан Республикасы Жоғары Сот кеңесінің жанындағы Біліктілік комиссиясының мүшесі; Қазақстан Республикасы Әділет министрлігінің Интеллектуалдық меншік мәселелері бойынша ведомствоаралық комиссиясының мүшесі; Қазақстан Республикасы Жоғарғы Сот жанындағы Ғылыми-консультациялық кеңесінің мүшесі; Астана Халықаралық төрелік сот төрағасының орынбасары; Қазақстанның төрелік және аралық соттарының төрешісі; Қазақстан Республикасының Кәсіпкерлік кодексін әзірлеу бойынша жұмыс тобының төрағасы ретінде танымал ғалым.

Бүгін Т.Е.Қаудыровтың ғылыми мектебі қалыптасты деуге болады. Ғалымның жетекшілігімен азаматтық құқық саласы бойынша оннан астам кандидаттық диссертациялар мен PhD докторлық

диссертациялары қорғалды. Сондай-ақ көптеген докторлық және кандидаттық диссертациялардың ресми оппоненті ретінде ғылыми көзқарастарын, пікірлерін білдіру арқылы, Қазақстанда заң ғылымының дамуына өзіндік қомақты үлесін қосып келеді.

Барлық қызмет саласының түрлерінде Т.Е.Қаудыров өзінің жауапкершілігімен, креативті ойшылдығымен және ұсынылған жұмысқа ғылыми шығармашылық көзқарасымен ерекшеленеді.

Төлеш Ерденұлы Қаудыров — ұлттық цивилистика ғылымының, соның ішінде интеллектуалдық меншік құқығының дамуына елеулі үлес қосқан тұғыры биік, ірі тұлға. Олай дейтін себебіміз, ғалымның ғылыми жетістіктері елінің игілігіне жарады. Ізденімпаз ғалым үнемі тынбай жұмыс істеуде. Ізденіп еңбек ету, өзінің бойындағы бар білімі мен адамгершілік қасиетін ұрпақ игілігіне жарату – ғалымның өмірде мақсат тұтқан негізі ұстанымы.

Профессор Төлеш Ерденұлы Қаудыров ғылыми ортада да, мемлекеттік билік өкілдерінің арасында да зор құрметке ие адам. Өмірін заң ғылымы мен біліміне, еліміздің дамуына арнаған азаматтың әрбір еңбегі, ғылыми жетістігі келер ұрпаққа үлгі болары сөзсіз.

Болмасаң да ұқсап бақ,
Бір ғалымды көрсеңіз.
Ондай болмақ қайда деп,
Айтпа ғылым сүйсеңіз.
Сізге ғылым кім берер,
Жанбай жатып сөнсеңіз?
Дүние де өзі, мал да өзі,
Ғылымға көңіл берсеңіз, —

деп, ұлы Абай айтқандай, ұлағатты Ұстаз және Ғалым — Төлеш Ерденұлының өмірлік жолы жастарды кәсібилікке, парасаттылық пен мәдениеттілікке тәрбиелеуге бағыттайды.

Қадірлі Төлеш Ерденұлы, Сізді мерейтойыңызбен құттықтай отырып, зор денсаулық, қажымас қайрат, шығармашылық табыстар тілейміз, ғұмырыңыз ұзақ, шығармашылығыңыз мәңгілік болсын!

Ізгі ниетпен, академик Е.А.Бөкетов атындағы
Қарағанды мемлекеттік университетінің
заң факультетінің ұжымы

АВТОРЛАР ТУРАЛЫ МӘЛІМЕТТЕР
СВЕДЕНИЯ ОБ АВТОРАХ

Abzalbekova M.T. — Master of law, Senior lecturer at the department of criminology and criminal proceedings, Ye.A.Buketov Karaganda State University.

Akhmetova, N.S. — Candidate of jurisprudence, Professor the theory and history of state and law, Ye.A.Buketov Karaganda State University.

Amandykova, S.K. — Doctor of Law sciences, Professor, Head of department of theory and history of state and law, constitutional law, L.N.Gumilyov Eurasian National University, Astana.

Amanzholova, B.A. — Candidate of jurisprudence Associate professor of department of the criminal law and criminology, Ye.A.Buketov Karaganda State University.

Arenova, L.K. — Candidate of jurisprudence, Associate professor of department of the criminal procedure and criminalistics chair, Ye.A.Buketov Karaganda State University.

Assetova, G.B. — Master in Juridical sciences, Senior teacher of department of the civil and labor law, Ye.A.Buketov Karaganda State University.

Baiysagatova, D.B. — PhD the doctoral candidate, Academy of Financial Police, Astana.

Baykenzhina, Sh.T. — Master in Juridical Sciences, Specialist lawyer, department of legal affairs and internal audit, Ye.A.Buketov Karaganda State University.

Baiymanova, A.A. — Undergraduate, Ye.A.Buketov Karaganda State University.

Beisembayeva, G.M. — Candidate of economic sciences, Associate professor, Head of department «Management», S.Toraiygyrov Pavlodar State University.

Beiyshenaliyev, Z.Sh. — Candidate of pedagogical sciences, Associate professor, Director of the College of Law Kyrgyz State Law Academy under the Government of the Kyrgyz Republic, Bishkek.

Birmanova, A.I. — Master in Juridical sciences, Senior teacher of department of theory and history of state and law, Ye.A.Buketov Karaganda State University.

Bozhkarauly, A. — Candidate of jurisprudence, Department chair of the constitutional and international law, Ye.A.Buketov Karaganda State University.

Dadashov, R.F. — Undergraduate, Ye.A.Buketov Karaganda State University.

Zhakupov, B.A. — Candidate of jurisprudence, Associate professor of criminal procedure chair of B.Beiysenov Karaganda Academy of MIA Republic of Kazakhstan.

Zhamiyeva, R.M. — Candidate of jurisprudence, Associate professor, Department chair of the criminal procedure and criminalistics chair, Ye.A.Buketov Karaganda State University.

Iliyeva, I. — Institute for the State and the Law, Bulgarian Academy of Sciences, professor, doctor PhD, Bulgaria.

Il'yassova, G.A. — Candidate of jurisprudence, Associate professor, Ye.A.Buketov Karaganda State University.

Iskakova, I.Ye. — PhD the doctoral candidate, Ye.A.Buketov Karaganda State University.

Kakimova, M.Sh. — Candidate of jurisprudence, Associate professor, Head of department of theory and history of state and law, Ye.A.Buketov Karaganda State University.

Kaliyeva, G.K. — PhD the doctoral candidate, Kazakh Humanitarian law University, Astana.

Kazantseva, O.L. — Candidate of jurisprudence, Associate professor of the constitutional and international law of law department of the Altaiy State University, Russian Federation.

Kizdarbekova, A.S. — Candidate of jurisprudence, Associate professor, Head of department of the civil and labor law, Ye.A.Buketov Karaganda State University.

Kozhakhmetov, G.Z. — Dean of Faculty of Law, Doctor of jurisprudence, Professor, Ye.A.Buketov Karaganda State University.

Kubeyev, Ye.K. — Rector Doctor of Law Sciences, Professor, Ye.A.Buketov Karaganda State University.

Kumysbekova, Zh.T. — Candidate of jurisprudence, Associate professor, Caspian University, Almaty.

Kussainov, D.Sh. — PhD the doctoral candidate, B.Beiysenov Karaganda Academy of MIA Republic of Kazakhstan.

Mamedov, R.Yu. — Doctor of PhD of Academy of police of the Ministry of Internal Affairs of the Azerbayizhan Republic, Baku.

Mausymbayeva, A.A. — Undergraduate, Ye.A.Buketov Karaganda State University.

Mussina, A.Zh. — Candidate of economic sciences, Associate professor, Head of department «Finance and accounting», S.Toraigyrov Pavlodar State University.

Prudnikova, M.Yu. — Master in Juridical sciences, Senior teacher of department of the civil and labor law, Ye.A.Buketov Karaganda State University.

Rakimbayev, E.N. — Doctor of Law sciences, professor, Kyrgyz State Law Academy under the Government of the Kyrgyz Republic, Bishkek.

Sartova, R.B. — Candidate of economic sciences, Associate professor of the department of «Management», S.Toraiygyrov Pavlodar State University.

Sultanbekova, G.B. — Senior lecturer at the department of criminology and criminal proceedings, Ye.A.Buketov Karaganda State University.