
КОНСТИТУЦИЈАЛЫҚ ЖӘНЕ ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ КОНСТИТУЦИОННОЕ И МЕЖДУНАРОДНОЕ ПРАВО CONSTITUTIONAL AND INTERNATIONAL LAW

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Problems of legality strengthening in the sphere of motherhood protection

Analyzing a current state of protection of motherhood in the Republic of Kazakhstan and having investigated the legislation of some foreign countries in the field of protection of motherhood, authors came to opinion on need of updating of the existing normative and legal acts regulating protection of motherhood. Besides, in the article problems of strengthening of legality in the sphere of protection of motherhood are considered. Ideas and suggestions for improvement of the legislation and law-enforcement practice in the sphere of providing the corresponding material benefits are expressed by authors, namely authors suggest to reconsider assignment of an award «Altyn alka» (Gold alka) and sequence of provision of housing for large families. In addition, the article deals with the problems of strengthening the rule of law in the field of maternity protection. The authors declare their ideas and proposals for improving the legislation and law enforcement practices in the field of ensuring mutually acceptable financial well-being. The legislation of the Republic of Kazakhstan of August 24, 2009, № 858 states that the process of adopting a law in the country is important for ensuring the guaranteed and unconditional fulfillment of the constitutional duties of all state and individuals, citizens and organizations.

Keywords: Constitution, family, motherhood, rights and freedoms of a child, social guarantees.

Introduction

The great French writer Victor Hugo in the XIX century wisely noticed that a family was a crystal of society. As we know, the family is a small group based on marriage or consanguinity. The life in a community, mutual aid, moral and legal responsibility unites all the members of a family [1; 715]. That is, family as social institute was always the main cell of society having the right for protection from the state and society.

In each society, care of mother was care of a child, and each new child in a family is a pleasure for a family and the state as a birth of a child provides the demographic growth. The President of Kazakhstan Nursultan Nazarbayev noted the importance of the matter in his annual Message to the citizens of Kazakhstan and set the task to increase population by 10 percent till 2020 [2]. The special role of a family is that it carries out social function that provides continuous replacement of some members of society with others. The future of each nation and humanity, in general, potentially depends on younger generation, therefore ensuring the rights of a family and children; their legal protection is an indisputable problem of the state.

The Family Code of the Republic of Kazakhstan defines in details that a family is a circle of people, connected by property and personal non-property rights and duties following from marriage (matrimony), relationship, property, adoption or other forms of acceptance of children on education and urged to promote strengthening and development of the family relations [3].

It is unconditional that many legal mechanisms carry out the protection of their interests. For example, for stimulation the birth rate the state guarantees a number of grants to citizens having children. The Law of the Republic of Kazakhstan «About the welfare payments to citizens having children» [4] installs uniform system of welfare payments to the citizens having children in connection with their birth and education

which provides the material support of motherhood guaranteed by the state, paternity and the childhood. In our opinion, interests of mother and child coincide, and to consider them separately is not always reasonably and pertinently.

Therefore, protection of motherhood is one of priority problems of the state. It should be noted that in the Message to the citizens «Strategy «Kazakhstan-2050»: the new political policy of state» the President Nursultan Nazarbayev especially noted, «I declare that the protection of motherhood and the childhood is the most important component of social policy at a new stage». Further he emphasized, «for the state, as well as for me personally, motherhood is a special care».

However, today's realities show that in the legislation there are conflict norms where constitutional rights both of mothers and a child are violated. Namely, one can find in the norm of the Republic of Kazakhstan regulating the state awards, and in the law of the Republic of Kazakhstan «About the Housing Relations».

In our opinion, for comparison of existing rules, the research of legal bases for protection of interests of mother and child is actual in daily activity of both a legislator and scientists-lawyers. Only the constitutional principle will allow to create effective institute for protection of motherhood and a child, and to provide its realization fully.

The Constitution of the Republic of Kazakhstan adopted in August 30, 1995 on a Republican Referendum is the fundamental state and legal act of our republic which guarantees the rights and freedoms of the person and the citizen.

The Universal Declaration of Human Rights (adopted during the third session of the United Nations General Assembly by the resolution 217 A (III) in December 10, 1948) fixed in point 2 of Article 25 that the motherhood and infancy have the right for special care and the help [5].

The Concept of Legal Policy of the Republic of Kazakhstan approved by the Decree of the President of the Republic of Kazakhstan in August 24, 2009, No. 858 defines the main directions of development of legal system of the country for the period from 2010 till 2020. As it is noted in the Concept, in the course of the further statement of the principles of the constitutional state in the country it is important to achieve, on the one hand, the greatest possible guarantees implementation of constitutional rights and freedoms of the person and the citizen, and on another hand unconditional and exhaustive performance of the constitutional duties by all government bodies, officials, citizens and the organizations.

Besides this, document reflects the need for further realization of legal ideas and principles of the Constitution of the Republic of Kazakhstan which have to be embodied in legislative, organizational and other measures of the state. Therefore, in the course of improvement of the legislation, and during law-enforcement activity it is necessary to follow steadily the principles of rule of the Constitution, and to provide compliance of standards of acts of subordinate level to acts of the higher.

Ensuring the rights and freedoms of the person and citizen is the important condition guaranteeing equal rights and freedoms as it is demanded by the constitutional principle [6] which is also a protection basis for motherhood and the childhood in the Republic of Kazakhstan.

Problem definition

The problem of our research is comparison of the normative legal acts adjusting mechanisms of realization of protection of the rights of mother and child in the domestic legislation. In particular, precepts of law governing relations in the field of granting state awards and in the sphere of the housing relations in Republic of Kazakhstan are considered there. The subparagraph 2 of Art. 12 of the Constitution of the Republic of Kazakhstan says that: «the rights and freedoms of the person belong to everyone from the birth, admit absolute and inalienable and define the contents and application of laws and other regulations».

It should be noted that the legislator provides the certain norms allowing the pregnant woman to protect the rights and interests of her unborn baby till the child's birth.

The received results assume development of the recommendations capable to promote effective formation of system of the right and realization of the rights, freedoms and legitimate interests of mother and child as, the problem of collisions in the right always generated sharp disputes, and permission of the matters becomes more and more actual.

The objective of the research is ensuring the unity and consistency of the normative legal acts concerning the rights and interests of mother and child.

The main part

At present the protection of motherhood and the child gains social and legal, economic and political character. In essence, all pursued large-scale state policy directed on strengthening of a family of protection of motherhood and the childhood promotes formation of the healthy nation and strengthening of family values in society. Each state is interested in formation of the full-fledged and healthy personality bringing benefit to society. Today we need more effective state policy on strengthening of a family, protection of motherhood and the childhood, worthy providing in old age [7].

As we know, according to the Constitution of the Republic the only source of the government is the people of Kazakhstan. According to Article 1 of the Constitution of Republic of Kazakhstan, «The Republic of Kazakhstan approves itself as the democratic, independent, constitutional and social state supreme of which values are the person, his life, rights and freedoms». Following from sense of the constitutional article, that the country assumes obligations to soften a social inequality by creation of conditions for worthy life to the citizens [8].

The Republic of Kazakhstan assumed a duty to recognize and guarantee the rights and freedoms of the person, to protect them from any illegal intervention or restriction.

Recognition by the state of the rights and freedoms of the person means their duty to approve these values in fundamental legal acts. As we know, when developing the Constitution of the Republic of Kazakhstan by the legislator, provisions of the Universal declaration of human rights were incorporated. Therefore, according to the Constitution exercising the rights and freedoms, an individual has the right to protect them.

Recognizing the legal values of the person accepted by the international community, the Republic of Kazakhstan at the same time guarantees their implementation, and the guarantor of their observance is the President of the Republic of Kazakhstan.

Assuming the above-mentioned values, the state installs legal mechanisms of their implementation (realization). The legislative and others adopted by laws according to the Constitution, and directed on realization of its provisions concern to them.

Thus, guarantees of observance of the rights and freedoms of the person are the essential signs of the constitutional state emphasizing value of the rights and freedoms of the person as the supreme value [9; 213].

The item 2 of Article 12 of the Constitution fixed that the rights and freedoms of the person belong to everyone from the birth, admit absolute and inalienable and define the contents and application of laws and other regulations. However, these provisions found the reflection in the Universal declaration of human rights where «All people are born free and equal in the advantage and the rights ...» [10].

In our opinion, here it is pertinently to emphasize that the above-mentioned subparagraph of article of the Constitution defines the principle of inalienability of human rights.

In addition, inalienability of the rights and freedoms of the person means that no one including the state can deprive people of the established rights, freedoms, except the cases provided by the Constitution, and laws [11] adopted on its basis.

Thus, having analyzed a current state of protection of the rights of mothers who have many children, we came to opinion on need in more detail to consider the legislation in this area. As we realize, the constitution is the most important standard and legal criterion of interpretation and application of all legal facts and commission of legal actions. Unfortunately, it is possible to note that the legislator allowed violations regarding compliance of the constitutional legality.

As we mentioned above, the norms governing state awards and the housing relations of the Republic of Kazakhstan contradict the basic principles of the Constitution.

In our opinion, it is necessary to consider the above norms separately. Therefore, for example, Article 28 of the law «About the State Awards of the Republic of Kazakhstan» tells the following: «the suspension bracket «Altyn alka» awards the mothers who gave birth and raised seven and more children. Rewarding with a suspension bracket «Altyn alka» is made on reaching the seventh child of age of one year and in the presence of other living children of this mother».

We consider, it is wrong to state that one should do rewarding on reaching the seventh child of age of one year and in the presence other of living children of this mother. In our opinion, the legislator incorrectly created this context, as in the context, defining the contents, the legislator establishes the fact of mother who gave the birth to children by the word «given birth». The legislator in this case accurately confirms the event of the birth of all children, thereby lays down «condition» — their existence in live at the time of assignment of the state award.

Following from sense of this norm, that the developers of the law deprived both the newborn and his given birth mother, the social benefits, which the Constitution of the Republic of Kazakhstan guarantees to everyone.

The following circumstance draw our attention, the essence of that article of the law deprives the family of the social benefits, guaranteed by the state, until the newborn does not reach age of one year. Thereby the legislator deprives them the social benefits in advance. According to the current legislation, social support can be carried out in the most various forms, namely, living space, privileges for payment of maintenance costs of the dwelling together with family members, and also special welfare payment for payment of utilities (at a rate of 6,40 MSI — monthly settlement indicator) [12].

It is necessary to pay special attention to dependence of the previous six children from the seventh newborn child. Moreover, this circumstance, essentially limits the rights of other members of a large family. It is possible to give the following case as an example. That is the appeal of the citizen of «N» to Department of Committee of work, social protection and migration of Astana city. So citizen «N» writes, «My mother gave birth and brought up 7 children, but the eldest of children who was born in 1979, died in 2005. That time she was married, having given birth to two children. Therefore, the latest child in our family was born in 1989. Why did they award my Mother with «Kumis alka» («Silver alka»)? Why not with «Altyn alka» («Gold alka»)? In addition, even it corresponds to laws of Kazakhstan, whether it is correct to grant my Mother with lower award» [13]. This misunderstanding, in our opinion, creates psychological uncertainty for the given birth mother, and she becomes «hostage» of the incorrect formulation of a provision of the law.

In our opinion, the above collision of norms don't give the chance to reach the social benefits of mother who gave birth to seven and more children, thereby this circumstance in the period of instability of economy gains special relevance. Moreover, taking into account the inflation it noticeably reduces a standard of living of such people, as this category of society is socially vulnerable.

At the same time, misunderstanding of the approach concerning the third paragraph of Article 28 of the Law «About the State Awards in the Republic of Kazakhstan» is caused, where, in our opinion, the legislator, incorrectly defined categories of children who are considered for receiving the state award. According to the content of this norm those children are:

- adopted by mother in the order established by the law;
- the dead or missing people at protection of interests of the Republic of Kazakhstan or at execution of other official duties;
- the dead at natural disasters or when performing a civic duty on rescue of human life and material values, in fight against crime and protection of a public order;
- the dead owing to wound, mutilations or diseases got under the specified circumstances or owing to a labor mutilation or occupational disease.

Bewilderment of the above-stated category of children is caused, as in our opinion, the legislator at their classification did not consider other circumstances of lethal outcome. For example, death of a child owing to falling in a well, a manhole, etc. and in other cases. Proceeding from the contents and meaning of the text of the law follows that the listed cases of death of the child are not included into the specified list of the legislator. Moreover, it, in turn, generates uncertainty in society that demands detailed study of this provision of the law, i.e. in our opinion the legislator has to consider all cases of a lethal outcome. Diseases, the specified circumstances received at or owing to a labor mutilation, or occupational disease.

However, we in parallel should analyze a question on provision of housing for large families that demand the scientific analysis.

According to the Law «About the housing relations of the Republic of Kazakhstan», No. 94 adopted on April 16, 1997, the legislator gave the classification of socially vulnerable people. In addition, in our opinion this classified hierarchy does not take into account those people described in Article 36 of the Law «About the State Awards of the Republic of Kazakhstan». This article, states that, «The mothers having many children awarded by a suspension bracket «Altyn alka» or who received earlier a rank «Mother-Hero» are provided with living space on the established norms first of all». Moreover, in the above-mentioned law, in Article 68 the legislator carries to socially vulnerable segments of the population of the following groups of people:

- 1) disabled people and participants of the Great Patriotic War;
 - a. persons equated to disabled people and participants of the Great Patriotic War;
- 2) disabled people of 1 and 2 groups;
- 3) families having or which are bringing up disabled children;

4) persons suffering from heavy forms of some chronic diseases listed in the list of diseases approved by the Government of the Republic of Kazakhstan;

5) pensioners on age;

6) the orphan children and children without parental support who didn't reach twenty nine, lost parents till being adult.

At an appeal of such persons for military service the age lasts for the term of passing of conscription military service;

7) oralman (Kazakh people who lived in foreign countries and have returned to Kazakhstan);

8) persons who lost the dwelling as a result of ecological disasters, emergency situations of natural and technogenic character;

9) large families;

10) families of persons, the lost (dead) at execution of the state or public duties, military service, by preparation or implementation of flight in a space, at rescue of human life, at protection of a law and order;

11) incomplete families.

It would be desirable to emphasize that the Law «About the State Awards of RK» was adopted in December 12, 1995, whereas, the law «About the Housing Relations» — in April 16, 1997.

Certainly, the above-mentioned laws protect interests of large families, however the legislator didn't consider «the principle of first priority» at provision of housing to large families determining segments of the population by their social vulnerability, and also didn't take into account other circumstances of death of children.

Perhaps the legislator at acceptance of the above-mentioned norms considered an economic situation of that time when decrease in the income of the population and the state took place.

As in 1994 the Gross Internal Product (GDP) per capita made a little more than seven hundred dollars [14], and by January 1, 2012 it grew more than by 12 times and exceeded 12 thousand US dollars. The forecast of the government, expected to reach such level only by 2015 [15].

In our opinion, to stimulate the growth of the population it is necessary to support large families financially. The state has to provide them with social guarantees so that they did not appear in the worst situation. Moreover, the budgetary expenses, on large families should not have burdened some character for the state treasury.

Thus, the system measures providing as supremacy of legality in the country and stability of legal system and forward development of the national right within the existing Constitution are necessary. The integrated approach to legal policy will allow modernizing all standard and legal base in the context of the general strategy of development of the state. Including for forming of qualitatively new model of public, administration on the principles of productivity, transparency and the accountability providing protection of the rights and freedoms of citizens, interests of society and state.

Implementation of provisions of the Concept of legal policy will allow realizing the main ideas and the principles of the Constitution of the republic in the context of the next stage of construction in Kazakhstan of the constitutional state.

Efficiency of implementation of the legal Concept and respectively stability of the national right, effectiveness of legal regulation depend on constructive interaction of all branches of the government, quality of the decisions made by authorities and responsibility of officials.

Complex development of the Kazakhstan legislation will promote further strengthening of the mode of legality, observance of constitutional rights and freedoms of the person and citizen, ensuring sustainable social and economic development of the country, strengthening of the Kazakhstan statehood [6].

Therefore, the provision of subparagraph 2 of Article 12 of the Constitution of RK affirming the rights and freedoms of the person is fundamental during the developing and adoption of the laws and other regulations establishing conditions and a procedure of these rights and freedoms [11]. Moreover, the provision on inalienability of fundamental human rights is not absolute and can be limited to the law as Article 39 of the Constitution of the Republic of Kazakhstan provides it.

Conclusions

In our opinion, it is necessary to consider in detail at the legislative level the conceptual directions of legal policy of the Republic of Kazakhstan in the sphere of the rights and freedoms of the citizen. Namely, creation by the state of appropriate legal and other conditions and guarantees, the most favorable for family life should provide the protection of a family and motherhood. It is represented that in the country it is required from us not only acceptance of economic measures, i.e. the social component directed on material

support of motherhood, but also ensuring increase of the original status of motherhood in society has always to be considered.

From that how social policy of the state will fully reflect moods and needs of mothers, the success of further development of such society depends.

In our opinion, creation of the healthy moral atmosphere in large families in the country requires association of efforts of government institutions and institutes of civil society for search of new forms and methods of family policy.

Thus, provisions of the Constitution have to become the major postulate and a keynote of the contents of all normative legal acts in the Republic of Kazakhstan.

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Ана мен баланы қорғау саласындағы заңдылықты нығайту мәселелері

Қазақстан Республикасындағы ананы қорғаудың қазіргі жай-күйін және ананы қорғау саласындағы кейбір шет елдердің заңнамасын зерттей отырып, авторлар ананы қорғауды реттейтін қолданыстағы нормативтік-құқықтық актілерді түзету қажеттілігі туралы пікірге келді. Сонымен қатар мақалада

ананы қорғау саласындағы заңдылықты нығайту мәселелері қаралды. Авторлар тиісті материалдық игіліктерді қамтамасыз ету саласындағы заңнама мен құқық қолдану практикасын жетілдіру бойынша идеялар мен ұсыныстарды айтты, атап айтқанда, «Алтын алқа» алқасын берудің талаптары мен критерийлердің және көпбалалы отбасылар үшін тұрғын үй беру кезектілігін қайта қарауды ұсынды. Сондай-ақ мәселе аумақтардағы қорғау әйелдердің құқықтарын бұзу мәселелерін қарастырды. Авторлар өзара қаржылық қолайлылықты қамтамасыз ету саласында заңнаманы және құқық қолдану тәжірибесін жетілдіру бойынша өздерінің идеялары мен ұсыныстарын білдіруде. Қазақстан Республикасының 2009 жылғы 24 тамыздағы № 858 Заңымен елде заң қабылдау үрдісі бүкіл мемлекеттің, азаматтардың және ұйымдардың конституциялық міндеттерінің кепілді және сөзсіз орындалуын қамтамасыз ету үшін маңызды.

Кілт сөздер: Конституция, отбасы, ана болу, баланың құқықтары мен бостандықтары, әлеуметтік кепілдіктер.

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Проблемы укрепления законности в сфере защиты материнства

Анализируя современное состояние защиты материнства в Республике Казахстан и исследовав законодательство некоторых зарубежных стран в области защиты материнства, авторы пришли к мнению о необходимости корректировки действующих нормативно-правовых актов, регламентирующих защиту материнства. Кроме того, в статье рассмотрены проблемы укрепления законности в сфере защиты материнства. Авторами высказаны идеи и предложения по совершенствованию законодательства и правоприменительной практики в сфере обеспечения соответствующих материальных благ, а именно пересмотреть критерии и требования присвоения подвески «Алтын алқа» и очередность предоставления жилья для многодетных семей, а также в области обеспечения взаимоприемлемого финансового благополучия. Законодательство Республики Казахстан от 24 августа 2009 г. № 858 гласит, что процесс принятия закона в стране важен для обеспечения гарантированного и безусловного выполнения конституционных обязанностей всего государства и отдельных лиц, граждан и организаций.

Ключевые слова: Конституция, семья, материнство, права и свободы ребенка, социальные гарантии.

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