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

UDC 340.136

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**Institute of delegated legislation in foreign countries
and the Republic of Kazakhstan**

This article discusses what is included in the concept of the Institute delegate legislation in foreign countries and the Republic of Kazakhstan, as it coexists with other state institutions. Controversial points of view and approaches to the problem of delegated legislation were analyzed. The advantages and disadvantages of the Institute delegate legislation were defined, ways to delegate legislation powers of parliament to the government, that were in constitutional practice were assessed. Main features, bases, conditions, the subjective scope, time and types of realization of delegate legislation mechanism were underlined for the sustainability management system of public affairs in difficult situations.

Keywords: Constitution, law, legislation, delegate legislation, powers, president, parliament, government, institute, functions, executive power, separation of powers.

In recent years more and more countries introduce and use the institution of delegated legislation in their constitutional practice. At the end of the twentieth century many countries adopted new Constitutions, which established a new system and introduced new institutions, including provisions on delegated legislation. In the constitutions of Croatia, Moldova, Kazakhstan and Romania this institution was introduced for the first time. In the countries, where institution of delegated legislation is used for a long time, with every year the number of acts adopted by delegated legislation increases (for example The Great Britan, Canada, Australia). The wide use of this institution attracts our attention, because we want to know what is the reason of it. Every year conferences dedicated to the institution of delegated legislation show us the high interest in this topic of many statesmen and scientists.

With the increasing complexity of social life the parliament can not, for various reasons (the complexity of the problem, different approach, etc.) quickly and timely resolve new social relations. Parliament passes the decision to other entities of power, most often to the government. Parliament sends its power through delegated legislation. But not in every constitution has provisions which allows and regulates delegated legislation.

So now we can see more information about delegated legislation in juridical literature. Expressed different points: whether it is necessary to use in the activity of the state, or it just creates a lot of problems? The growth of government rule-making causes concern among many scientist. It is due to the fact that the delegation of legislative powers to the executive branch will bring the usurpation of power of Parliament. Scientists researches show that the institution of delegated legislation is closely related to such democratic institutions as the separation of powers and parliamentary [1; 236]. Their concerns scientists is explained by the fact that the use of delegated legislation leads to a new despotism of executive power.

Foreign literature has a large number of different viewpoints and approaches to the problem of delegated legislation. Thus, some authors see delegated legislation as imbalance between the legislative branch and the executive branch.

If we talk about the negative attitude of some authors, it should tell you about the positive side of the problem. There are many arguments in favor of delegated legislation. An example of the beneficial influence of delegated legislation on the US economy and society can serve as a massive delegation of legislative power from Congress to the executive branch in the days of Franklin Roosevelt (in 1930, the Great Depression), as well as with the presidency of R. Nixon (the 1970s) and 1980s years of Ronald Reagan.

There is a third point of view on the problem of delegated legislation. It lies in the control of possible negative consequences of such a policy by a court or other actions.

In this connection it is necessary to determine exactly what includes the concept of institution of delegated legislation and how it exists with other state institutions.

Delegated legislation — it is a system of legislative acts adopted by the various public authorities on the basis of the powers transferred to them by Parliament or other representative bodies [2; 584].

This term is interpreted in different countries in different ways, and the question of the admissibility of the delegation of legislative powers in the constitutions decided not amount.

There are different ways of defining the concept of delegated legislation. Some sources indicate that this activity, others define it as a set of acts (delegated legislation — it is acts of executive authorities issued on behalf of Parliament and having the force of law) [1; 235]. It is a dual understanding derives from the term «legislation». It seems that this two viewpoints have the right to exist.

Delegated legislation is not a new institution of constitutional law. It existed in the seventeenth and nineteenth centuries, but the widespread use of the institute began in the twentieth century. In Russia before the revolution, scientific papers on this subject been absent, as well as in the Soviet period, with the exception of treatment in some cases, to the issue of delegation of legislative powers in foreign countries. For example V.M. Gessen, V.V. Ivanovsky, N.M. Korkunov, N.I. Lazarevskii considered the issue of a clear definition of the various acts of state bodies, as well as the consideration of individual cases of delegation of legislative powers in Europe.

During the Soviet period institution of delegated legislation discussed by S.L. Zivs, I.D. Levin, A.A. Mishina et al., but everywhere for this expressed a negative attitude.

Currently, the issue of delegated legislation is seen more often. Various sources of literature on constitutional law of foreign countries contain a summary of the application of this institute in individual countries. The first attempt to make a comparative analysis of the conditions of the Institute delegated legislation was undertaken by V.S. Troitskiy and L.A. Morozova in the newspaper «Delegated lawmaking».

In foreign countries to this issue came up only in terms of describing the highlights of the institution. Work dedicated to delegated legislation for the most part only in the countries with the Anglo-Saxon model law — Great Britain, Australia, New Zealand, USA and India. But in the early 1960s of the twentieth century in Norway T.Ospal defended his doctoral dissertation, which became an important work on the issue of delegated legislation in Scandinavia. The conclusions to which he came accepted throughout the Nordic legal science.

One of the main reasons for the emergence and development of delegated legislation is a more rapid adoption of the legal act than a parliamentary lawmaking. In cases where an urgent need to develop the law, an act of delegated legislation can be used without waiting for the next session of Parliament, and the end of the full procedure of parliamentary lawmaking.

Institute of Analysis of delegated legislation is incomplete without determination of advantages and disadvantages of delegation legislation.

Delegated legislation has the following advantages:

- exceptional flexibility, which facilitates changes in the current legislation;
- saving parliamentary time (Parliament approves the concept of a legal regulation on an issue and leaves all the work to executive authority. They develop the specific content of law);
- delegated legislations norms differ concreteness and do not require extra time to interpret due to the small percentage of ambiguous provisions;
- legislative powers delegated to experts in the appropriate field, possess a high level of professionalism and knowledge of local conditions.

It is also necessary to note disadvantages of the Institute of delegated legislation:

- legislative powers are transferred to individuals who do not carry the political responsibility to the voters;
- expansion of powers of the administrative authorities and the strengthening of the bureaucratic structures carries an especially strong negative character.

Based on the constitutional practice of delegating legislative powers of Parliament to the Government can be accomplished in two ways: direct and indirect.

With the direct delegation of legislative powers to the Parliament shall issue an act on the basis of which the Government is entitled to delegated legislation, indicating a specific organ, for how long and on what issues receives such a right.

In the case of extremely conditions is needed another procedure of delegation of authority from the legislative branch to the executive, which provides the ability to quickly reaction to the situation. This mechanism is indirect delegation, which is more suitable name of «exceptional» delegation.

It should be noted are the characteristic features of indirect delegation of a limited number of issues for which the government has the right to make regulations having the force of law, and mandatory subsequent approval by the parliaments of the appropriate acts of delegated legislation.

Indirect delegating legislative powers to parliament a law drawn up in very general terms, and apply it without the appropriate standard-setting activities of the executive bodies is impossible. This practice does not usually have a legislative regulation of this process, with the exception of France.

Any delegation of legislative authority expects the initiative of Parliament or the government. Despite the fact that the Constitution of Italy, Germany and Spain require parliamentary initiative to transfer its legislative powers, the question is what makes the parliament? It authorizes the transfer of part of the legislative authority (in the case of the government's proposals, as in France) or initiates this process by itself. The problem is to whom will come earlier awareness of the need of delegated legislation. However, this problem becomes a certain importance in France. Article 38 of the Constitution directly secured government initiative. If in Italy, Spain and Germany, the Parliament itself can initiate the process for delegation of legislative powers to sanction or government for its proposal. In France it is only one way — the authorization request of the Government of the transfer of part of the legislative authority.

In any case, the scope of powers not related request from the Government, that is delegating conditions are entirely dependent on the discretion of Parliament.

If you look into the history of the formation of the statehood of the Republic Kazakhstan, then we had a period of delegated legislation.

The problem of delegated legislation in the following years is widely studied in the works of M.Zh. Basharova, L.T. Zhanuznakova, L.A. Morozova, G.S. Sapargaliyev, T.S. Safarov, E.N. Sustavova, V.S. Trotsky and et al.

The following basic features of the delegation:

- delegation of powers is permitted only in cases expressly provided by the Constitution and laws of the State;
- acts of delegation suggest the presence of established at the constitutional level or a in a legal way scheme of separation of powers, the distribution and the division of powers between the public authorities of different levels and types;
- delegation of primary powers assigned to state bodies by the Constitution and the law, is carried out to the extent possible and permitted redistribution of power where it can be effective for the implementation of state goals;
- delegation of authority — is an act that has conventionally basis, that is can be interpreted as a kind of public-law agreement concluded for a definite period and generating mutual rights and obligations of the parties;
- subject of the agreement on delegating may be the individual authority or a combination of powers Authority;
- delegator, who transferred authority is responsible to delegate;
- legal situation which has arisen in connection with the delegation of powers in the field of public law, should be fully controlled by the delegate as the primary carrier of legitimated authority [3; 154–157].

With regard to the functioning of this institution in the independent Kazakhstan, its appearance is due to the difficulties of the transition period, which entered the country immediately after the declaration of independence of 16 December 1991.

Legal literature criticizes paragraph 51 of the Regulations of the Parliament as contrary to paragraph 4 of Article 53 of the Constitution. It notes that the delegated powers are not only for ordinary laws but also for constitutional laws. However, by taking an ordinary law they can't delegate the adoption of a constitutional law, which has greater legal force [4; 231].

In our opinion, it is impossible to say unequivocally that the law on the delegation must necessarily be constitutional.

Firstly, the list of constitutional laws is limited and expressly provided for by the constitution (except the constitutional law of the President).

Secondly, if we agree with this approach, it put into question the outputting not only the theoretical possibility of issuing President of the acts on the basis of the provisions of acting constitution and presidential decrees having the force of Constitutional Law, published in 1995–1996.

The third is in the Constitution and Rules of Procedure of the Parliament of the concept of «law» is used in various articles as in the broadest sense (including ordinary and constitutional laws. For example, paragraph 3 of Article 61 of the Constitution, which establishes the range of issues that Parliament decides to explicitly uses the concept in a broad sense. Paragraph 3 of the number of such issues include the basis for the organization and activities of state bodies. The status of the supreme bodies of state power are regulated by constitutional laws.

Fourthly Law on delegating legislative powers to the President shall require a two-thirds vote of the total membership of each House of Parliament at a joint session of the Senate and the Majilis. That is the procedure for the adoption of the law (at least in the voting stage) coincides with the adoption of the constitutional law procedure. Therefore, the legal nature of on delegating the law differs from the usual, current laws.

Perhaps it would be wise to one of the subjects of empowered listed in paragraph 1 of Article 72 of the Constitution, to appeal to the Constitutional Council with a petition for an official interpretation of paragraph 4 of Article 53 of the Constitution. In this form, or by taking a conventional constitutional law, Parliament must be taken decision on delegating legislative powers to the President?

At the same time, we can agree with the fact that the President can not be delegated the authority to make changes and additions to the Constitution [5, 264].

In fact the Parliament can not independently consider the matter without the president's initiative. Only in the case of rejection of the legislative body of the head of state Offer submitted to a national referendum changes and additions to the Constitution, Parliament has the right to a majority of not less than four-fifths of the total membership of each chamber to adopt such a law. But this right is the supreme representative body is secondary industrial character of its original initiative, introduced by the President. Therefore, it can not be delegated.

The Constitution does not contain any restrictions on the substantive scope of delegation. Parliament may delegate to the President the right to make laws on any matter, the regulation of which comes in the form of laws established by paragraph 3 of Article 61 of the Constitution.

However, believe that the definition of substantive restrictions on the scope of delegating all the same should impermeably. for example it questions the republican budget approval and report on its implementation. This is a traditional prerogative of the parliament, which allows him to control the revenues and expenditures of the state to protect the interests of the people, when approving the national budget, thereby fulfilling its role as the supreme representative body. View of the right president actually means its transfer into the hands of the executive branch, as head of state, formally entering her system, according to their powers and influence tends to the executive branch.

Subparagraph 4 of Article 53 of the constitution states that the parliament at a joint session of the Chambers' by two thirds of the total number of deputies of each of Chambers by the President has the right to delegate legislative authority for a period not exceeding one year.

Indeed initiative of delegation and the term of its consideration in the Parliament, as well as the delegation of the term comes from the president, but no more. Parliament may reject the initiative. Parliamentis not obliged to transfer the head of state the right to make laws for the whole range of issues is requested and initiated exactly on their life. He can reduce the time and a list of questions.

Parliament also decides not simple, and a qualified majority. Therefore, even if more than half of the deputies would vote positively, but does not reach the two-thirds in each chamber, the decision on the delegation will not be accepted. Therefore, in any case, the final word rests with the Parliament.

The laws issued by the President in the delegation order, are equal in their legal effect to the laws passed by Parliament and do not need the approval of the latter.

Constitutional Council identifies two situations in peacetime implementation mechanism of delegated legislation (claims 3, Article 53 of the Constitution) and in time of war (PP4 p2.st45 and Article 53 of the Constitution). «A state of war directly affect the organization of the government, the legal system of the country, affecting various legal relations».

In peacetime, the delegation of legislative powers by the Parliament Head of State may at the joint session of the Parliament Chambers the two thirds of the total number of deputies of each of Chambers by the President of the Republic for a period of up to one year.

At the same time the military legal fact the transfer of legislative power to the president is the adoption by Parliament at a joint session of the Chambers decision to declare a state of war. In this period, the legislative powers of the President in time of war may exceed one year- ads until the cessation of hostilities, but not earlier than their actual termination.

Common to the two types of institution of delegated legislation is that the President in the exercise of legislative powers between the right to issue laws that regulate the most important public relations, established by item 3 Article 61 of the Constitution and constitutional laws [6; 1].

From the above, we have concluded that the institute delegated legislation justified by the need to ensure the sustainability of public affairs complex control systems in complex situations (protracted parliamentary crisis between the political parties, the state of war, etc.) through the implementation of the president of the legislative authority for a specific period of time. This once again confirms that institute of presidency aims to cement the state, ie, provide primarily stability of ruling mechanism.

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Шет елдердегі және Қазақстан Республикасындағы табысталған заңнама институты

Мақалада табысталған заңнама институтының шет елдерде және Қазақстан Республикасындағы түсінігі, оның мемлекеттің басқа да институттарымен арақатынасы қарастырылды. Табысталған заңнама мәселелеріне қатысты бірқатар ерекше көзқарастар талданған. Табысталған заңнама институтының артықшылықтары мен кемшіліктері анықталды, қалыптасқан конституциялық тәжірибеге, парламенттің үкіметке табысталған заңнама өкілеттіліктерін беру тәсілдеріне баға берілді. Табысталған заңнаманың мемлекет үшін күрделі жағдайларда мемлекеттік істерді басқару жүйесінің тұрақтылығын қамтамасыз етудегі сипаттары, негіздері, шарттары, пәндік аясы, мерзімі мен жүзеге асыру механизмдері жан-жақты зерттелді.

Кілт сөздер: Конституция, заңнама, табысталған заңнама, өкілеттілік, президент, парламент, үкімет, институт, қызмет, атқарушы билік, биліктің бөлінуі.

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Институт делегированного законодательства в зарубежных странах и Республике Казахстан

В статье раскрыто понятие института делегированного законодательства в зарубежных странах и Республике Казахстан, показана взаимосвязь данного института с другими институтами государства. Проанализированы неоднозначные точки зрения и подходы к проблеме делегированного законодательства. Определены преимущества и недостатки института делегированного законодательства, дана оценка сложившимся в конституционной практике способам делегирования законодательных полномочий Парламентом Правительству. Выделены основные черты, основания, условия, предметная сфера, срок и виды реализации механизма делегированного законодательства для обеспечения устойчивости системы управления государственными делами в сложных для страны ситуациях.

Ключевые слова: Конституция, закон, законодательство, делегированное законодательство, полномочия, Президент, Парламент, Правительство, институт, функции, исполнительная власть, разделение властей.

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