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

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Some aspects of constitutional fixation of the principles of electoral law in the Republic of Kazakhstan and foreign countries

In the scientific article the theoretical and legal aspects and the constitutional and legal basis of the principles of electoral law of the Republic of Kazakhstan and foreign countries based on the analysis of the current constitutional and legal legislation of the Republic of Kazakhstan and foreign countries, legal literature in the field of electoral law and process, international documents are discussed. Much attention is paid to the study of the provisions of the Constitution of the Republic of Kazakhstan and the constitutions of foreign countries, the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan», enshrining the fundamental principles of electoral law. The analysis of international and legal norms on the principles of electoral law is given, the opinions of legal scholars are examined, and topical issues of constitutional reflection of the principles of electoral law are highlighted. The author considers the regulation of some election principles, touched upon some of the problems of restriction of suffrage. The need for further improvement of constitutional and electoral legislation was established, proposals for the introduction of amendments and additions to the constitutional and legal legislation of the Republic of Kazakhstan in the sphere of regulating the basic principles of electoral law and the process were formulated. In the article the foreign experience of constitutional and regulation of the basic principles of electoral law is discussed. The main directions for improving the constitutional and legal regulation of the principles of electoral law are: enshrining universal principles of electoral law in constitutional legislation on elections; systematization of principles of electoral law.

Keywords: the Constitution of the Republic of Kazakhstan, the constitution of foreign countries, the Constitutional Law of the Republic of Kazakhstan «On elections in the Republic of Kazakhstan», the principles of electoral law.

Introduction

Elections are a legalized form of direct people's will and, consequently, are the most important manifestation of democracy at the state, regional and municipal levels. Through elections, citizens have an impact on the state and municipal authorities and thereby exercise their right to participate in the management of state and local affairs.

The 1995 Constitution of the Republic of Kazakhstan proclaimed that the only source of power in the country is its people [1], exercising its power both directly and delegating it to state bodies. Article 3 of the Basic Law of Kazakhstan gives a capacious description of elections as an institution of democracy, defining them, along with the referendum, as a direct expression of the power of the people.

The constitutional significance of the elections is the most vivid, concentrated expression in the principles of functioning of the institutions of political democracy. At the legal level, these principles are revealed and manifest their importance as principles of electoral law.

Methods and materials

The methodological basis for the study of the topic of a scientific article is a set of methods of scientific cognition, both general scientific and private scientific: dialectical method, logical, empirical, historical, comparative legal, system-structural, as well as special legal methods of interpretation of rules of law.

Results

The principles of electoral law, expressing the essence of the democratic constitutional system of the country, are fixed primarily at the constitutional level. Their main purpose is to ensure that the election results correspond to the real will of the voters.

Let us turn to the provisions of the Constitution of the Republic of Kazakhstan, the Constitutional Law of the Republic of Kazakhstan «On elections in the Republic of Kazakhstan» of September 28, 1995 [2], the norms of international law, as well as the scientific views expressed on this topic.

Principles of electoral law were developed by centuries — old world experience in the development of democratic institutions and were embodied in the most important international legal documents [3; 45]. Article 21 of the Universal Declaration of Human Rights of 1948 stipulates the right of everyone to participate in the management of state affairs, both directly and through their elected representatives [4]. As a mandatory principle of electing representatives, the Declaration indicates freedom of choice. It also enshrines the principle that the authority of the government (that is, representatives elected by the people) should be based on the will of the people. The will of the people, in turn, is exercised in elections, which should be free, periodic, and not falsified, with universal equal suffrage [4].

The International Covenant on Civil and Political Rights of 1966 connects the right to participate in the management of public affairs directly or through their elected representatives with the presence of citizenship. With regard to elections, the right to elect and be elected is established in compliance with requirements similar to those established by the Universal Declaration of Human Rights (Article 25) [5]. So, Article 25 of the Covenant guarantees that a citizen must have, without any discrimination, referred to in Article 2 of the Covenant, and without unreasonable restrictions, the right and the opportunity to: a) to take part in the conduct of public affairs, both directly and through freely elected representatives; b) to vote and be elected in genuine periodic elections held on the basis of universal and equal suffrage by secret ballot and ensure the free will of voters; (c) to be allowed in own country under general conditions of equality to the public service [5].

To increase the level of guarantees of electoral rights, states may assume additional international obligations at the regional level. Thus, the Inter-Parliamentary Assembly of the States Parties to the Commonwealth of Independent States (IPA CIS) in 2011 developed Recommendations for improving the legislation of the States parties to the IPA CIS in accordance with international electoral standards [6]. According to this document, states undertake obligations in improving the legislation of the IPA CIS member states on elections to national parliaments to take into account legal, historical and other features of the development of the IPA CIS member states, to follow basic international electoral standards, which include the following: universal suffrage, equal suffrage, direct suffrage, secret ballot, periodic and compulsory elections, open and transparent elections, free elections, genuine elections, fair elections [6].

As can be seen from the content of the Recommendations, international standards are identical to the principles of the elections adopted in the Republic of Kazakhstan. Thus, the Constitutional Law of the Republic of Kazakhstan «On Elections in the Republic of Kazakhstan» [2] fixes the following principles for conducting elections in the Republic of Kazakhstan: universal, equal, direct suffrage; secret ballot; free will; freedom of election and voluntary participation in elections; openness, publicity and independence in the activities of election commissions (Articles 2, 3, 20). This identity is due to the importance of the principles for ensuring the electoral rights of citizens and the regulation of the electoral process.

To reveal the constitutional purpose of elections and the principles of electoral law, it is necessary to turn to the principles and foundations of the constitutional system, enshrined in the Basic Law of Kazakhstan.

Article 3 of the Constitution of the Republic of Kazakhstan contains the following provisions:

- the people of the Republic of Kazakhstan as the only source of power in the country;
- the possibility of exercising the power of the people, both directly and through public authorities;
- free elections as one of the main forms of direct expression of the power of the people.

The 1995 Constitution of the Republic of Kazakhstan [1] does not contain a detailed procedure for the preparation and conduct of elections or a separate section devoted to this procedure.

Article 33 part 2 of the Constitution of the Republic of Kazakhstan establishes: citizens of the Republic have the right to elect and be elected to state bodies and bodies of local self-government, as well as to participate in a republican referendum. Article 33, part 3 of the Constitution specifies: do not have the right to elect and be elected, to participate in the republican referendum citizens, recognized by the court as incapable, as well as those held in places of deprivation of liberty by a court sentence. Article 41 part 1 of the Kazakhstan Constitution states that the President of the Republic of Kazakhstan shall be elected in accordance with the constitutional law by adult citizens of the Republic on the basis of universal, equal and direct suffrage by secret ballot for a term of five years. Article 51, part 1 of the Constitution of Kazakhstan provides that ninety-eight deputies of the Mazhilis are elected on the basis of universal, equal and direct suffrage by secret ballot. In accordance with the provisions of Article 51 part 2 of the Kazakhstan Constitution, the election of deputies of the Senate is carried out on the basis of indirect suffrage by secret ballot. According to the provisions of Article 86 part 2 of the Basic law of the Republic of Kazakhstan maslikhats are elected by the population on the basis of universal, equal, direct suffrage by secret ballot for a term of five years.

Consideration of these rights in relation to the elections should be in the legal sense in conjunction with Articles 12 and 39 of the Constitution of the Republic of Kazakhstan. Thus, in accordance with part 5 of Article 12 of the Kazakh Basic Law, realization of the rights and freedoms of a person and citizen must not violate the rights and freedoms of other persons, encroach on the constitutional order and public morality. Part 1 of Article 39 of the Constitution establishes grounds for restricting the rights and freedoms of a person and citizen, which include the need to protect the foundations of the constitutional system, the protection of public order, the protection of human rights and freedoms, health and morality of the population.

The basic principles of holding elections in Kazakhstan also include their openness and publicity. These principles, arising from the provisions of Articles 4, 18 and 20 of the Constitution of the Kazakhstan, are enshrined in Article 20 «Organization of the activities of election commissions and the appeal of their actions. Publicity in the activities of election commissions» of the Kazakhstan Constitutional Law «On Elections in the Republic of Kazakhstan» [2]. In accordance with the principle of publicity of Article 20 of this Constitutional law, it is established that the activities of election commissions are carried out on the basis of collegiality, publicity and openness.

The provisions of Article 20 of this law also provide for the right of candidates, proxies, observers, representatives of the media, if they have an official certificate and the editorial office to attend election commission meetings, to receive information related to the election campaign (part 7 of the Constitutional law on elections). With regard to election commissions, there is also the obligation to create the conditions for free familiarization of all persons with their decisions, which are posted in public telecommunications networks, and in cases provided for by this law, subject to other publication (part 6, Article 20 of the law).

The basic foundations, the most important principles and norms of the electoral law are enshrined in the constitutions of the country. For example, the Portuguese Constitution provides: the people exercise political power through universal, equal, direct, secret and periodically held voting and in other forms provided for by the Constitution (part 1 of Article 10); the right to vote is exercised by everyone personally, and its exercise is a civic duty (Article 49) [7]. Article 48 of the Italian Constitution states that all citizens who have reached the age of majority are voters — men and women; voting is personal and equal, free and secret [8].

Among the most important and internationally recognized principles of electoral law, the observance of which makes it possible to recognize elections as democratic and their results as legitimate, are the following: universality, freedom of participation, equality, the direct and indirect nature of elections, and secret voting.

Article 116 of the Portuguese Constitution fixes the following list of general principles of suffrage:

1. Direct suffrage with secret and periodically conducted voting is a general rule for electing officials of elected bodies of state power, autonomous regions and local authorities.
2. The compilation of voter lists is mandatory officially, permanent and unified for all elections, with universal and direct suffrage.
3. Election campaigns are based on the following principles: (a) freedom of propaganda; (b) equality of opportunity and equal treatment of all candidates; (c) the impartiality of public institutions in relation to various candidates; (d) monitoring campaign expenditure.
4. Citizens are obliged to cooperate with the election administration in the forms prescribed by law [7].

However, most constitutions contain the most general provisions on electoral law and specific instructions on how to elect the relevant elected bodies — Parliament, President, and others, and everything else is governed by other constitutional laws and other legal acts. So, Article 3 of the French Constitution proclaims: «In accordance with the provisions of the Constitution, elections may be direct or indirect. They are always universal, equal and secret. In accordance with the conditions determined by law, all adult French citizens of both sexes enjoying civil and political rights are voters» [9].

In some countries, for example, in Great Britain and the United States, constitutions may not enshrine general democratic principles of electoral law, although in practice they are implemented.

In constitutions, the characteristics of the principles of electoral law usually refer not to subjective electoral law, but to the elections themselves or to voting. For example, Article 61 of the Belgian Constitution indicates: «Members of the House of Representatives are elected directly by citizens who have reached the age of 18 and do not fall under any of the exceptional cases provided by law. Each voter has only one vote» [10]. Part 1 of Article 38 of the Basic Law for the Federal Republic of Germany states: «The deputies of the German Bundestag are elected by universal, direct, free, equal and secret elections» [11]. According to part 1 of Article 68 of the Spanish Constitution: the Congress (the lower house of parliament) consists of at least 300 and no more than 400 deputies elected by universal, free, equal, direct and secret ballot under the conditions established by law [12].

The laws governing the electoral process, the principles of subjective suffrage receive specification and the necessary guarantees.

Discussion

To reveal the essence of the principles of electoral law as regulators of electoral relations in legal science there are various approaches to their classification. So, in the literature it is noted that «the principles of electoral law reflect the basic principles that are the foundation of the legal regulation of electoral relations» [13; 45]; other authors define the principles of subjective suffrage as those conditions for its recognition and implementation, the observance of which during elections makes these elections a valid people's vote. The violation of these principles undermines the legitimacy of elections, and, consequently, of elected bodies of power and self-government. Among the principles of subjective suffrage, they include universality, freedom, equality, directness (in some cases combined with certain indirectness), and secret ballot [14; 366].

In the Kazakh legal literature concept and varieties of principles of suffrage are also discussed. According to Professor Aitkhozhin the principles of electoral law are fundamental, guiding principles, ideas, requirements and conditions, without which any elections cannot be recognized as legitimate [3; 45].

Professor E.B. Mukhamedzhanov believes that the principles of electoral law are the initial principles enshrined in the legal norms, expressing the essence of the electoral system and ensuring the electoral process [15; 241].

According to the point of view of E.B. Mukhamedzhanov there are two groups of principles of suffrage: a) the principles determining the conditions of the electoral legal personality of citizens; b) the principles governing the qualitative features of the organization of the elections. The first group includes the principles of: universal suffrage; equal suffrage; direct and indirect suffrage; secret ballot. Principles of second group comprise:

- the participation of voters (the public) in taking the initiative to call elections, their preparation and conduct;
- state character of elections (conducted by the state);
- free campaigning (both for and against candidates);
- the principle of election financing (for example, mixed, elections are financed both by the state and not from state funds);
- openness, publicity, freedom of election;
- public control over the course of elections, and summing up their results [15; 242].

The basic principles of electoral law, in the opinion of this author, are the principles that make up the first group, since they form the fundamental principles, on which all electoral legislation is based. The second group of principles is related to the electoral process [15; 242].

K.K. Aytkhozhin also identifies several types of principles of electoral law. Firstly, the fundamental principle of the electoral law arising from the foundations of the constitutional system of the Republic of Kazakhstan is the principle of freedom of elections [3; 45]. Secondly, a separate group of the Constitutional Law on Elections includes the principles of citizen participation in elections, according to the norms of

Article 3 (universal, equal and direct suffrage by secret ballot, voluntary participation of a citizen in elections, free will). Thirdly, obligation and periodicity of elections [3; 46]. Fourthly, among the principles of suffrage can be distinguished group of principles that provide voters with the opportunity for real choice and control over the observance of the legality of elections: publicity of elections, alternative elections [3; 54].

As for the classification of the principles of electoral law, it seems to us that the most correct approach is that which provides as a criterion for the classification of their intended purpose in the mechanism of legal regulation of electoral relations. So, the first group of principles consists of the principles of organization and conduct of elections (mandatory, periodicity, freedom, alternative elections, the admissibility of various electoral systems, the independence of bodies ensuring the organization and conduct of elections); the second group of principles includes the principles of citizen participation in elections (universal, equal, direct suffrage, voluntary implementation of subjective electoral rights on the basis of personal and secret voting) [13; 53, 54].

Thus, the study of legislation and scientific literature allows us to conclude that the principles of electoral law can be viewed both as generally accepted principles and norms of international law, and as principles for conducting elections or principles of subjective suffrage. This indicates that the guarantee of the electoral rights of citizens in the light of the provisions of Part 1 of Article 12 of the Constitution of the Republic of Kazakhstan is disclosed through the normative consolidation of the principles of electoral law.

Elections are held in order to elect deputies, members of an elected body of local self-government, elected officials. The general rule for participation in elections as a voter or candidate is the inclusion in the legislation the requirement that this person has the citizenship of the country.

One of the features of the organization of the municipal electoral process in the context of international electoral standards is to have the opportunity to participate in municipal elections for citizens of foreign states. In the European space, participation in the municipal elections of foreign citizens is becoming a trend, as the European Convention on the Participation of Foreigners in Public Life at the Local Level, adopted in Strasbourg by the Council of Europe on February 5, 1992, provides for the possibility of the participation of foreigners in municipal elections.

In the Russian Federation, the participation of foreigners in municipal elections is possible subject to the following two requirements: firstly, they must reside permanently in the territory of the respective municipality; secondly, an international treaty must be concluded between the Russian Federation and the state of citizenship of these persons. At the same time, it should be borne in mind that it is still a general rule in foreign electoral systems that citizens of this particular country participate in elections.

All constitutions of foreign countries and member states of the Commonwealth of Independent States establish active and passive electoral rights of citizens. This applies to elections in the supreme representative and the local authorities.

In foreign electoral law, the usual age for obtaining an active electoral right is 18 years old.

The world practice of legal regulation of citizens' electoral rights allows their restriction. For example, part 3 of Article 48 of the Italian Constitution says that «the right to vote cannot be limited except by virtue of civil incapacity, a final criminal sentence and in cases of misbehavior specified in the law» [8]. Paragraph 3 of Article 51 of the Constitution of Greece states: «The law cannot restrict the right to elect, except in the case when the minimum age is not reached or there is no legal capacity or as a result of a non-repealing criminal punishment for certain types of crimes» [16]. The constitution of Bulgaria also establishes the provisions under which «every citizen above the age of 18, with the exception of those placed under judicial interdiction or serving a prison sentence, shall be free to elect state and local authorities and vote in referendums» (paragraph 1 of Article 42) [17]. Article 49 part 1 of the Constitution of the Portuguese Republic establishes: all citizens over eighteen years of age are eligible to vote, with the exception of persons whose civil incapacity is recognized by the law of a general nature [7].

In accordance with Article 4 of the Electoral Code of the Republic of Belarus of February 11, 2000 «the election of the President of the Republic of Belarus, deputies of the House of Representatives, deputies of local Councils of Deputies and the referendum are universal: citizens of the Republic of Belarus who have reached the age of 18 have the right to vote and participate in a referendum. In the elections, the referendum does not include citizens, recognized by the court as incapable, persons contained by court sentence in prisons. Persons in respect of whom, in accordance with the procedure established by the criminal procedure legislation, a preventive measure chosen — detention, do not participate in the voting» [18].

Article 33, Part 3 of the Basic Law of the Russian Federation states: do not have the right to elect and be elected citizens, recognized by the court as incapable, as well as those held in places of detention by a

court sentence [19]. In the theory of constitutional law of the Russian Federation the problem related to the deprivation of electoral rights of certain categories of citizens is discussed. The authors note that Article 32 of the Constitution of the Russian Federation specially stipulates the possibility of depriving citizens of electoral rights. Specifically, it is about deprivation of the electoral rights of two categories of citizens: those recognized as legally incapable in accordance with the procedure established by law, as well as those sentenced to imprisonment by a court sentence and being in places where the sentence is served.

Both active and passive suffrage is exercised by citizens voluntarily. In this case, the principle of the freedom of choice is realized. This principle has various forms of expression. On the one hand, the constitutional legislation of foreign countries recognizes freedom to participate in elections, and on another hand, a mandatory vote on participation in elections can be established. There is a mandatory participation vote in almost 30 countries (Austria, Australia, Argentina, Belgium, Greece, Italy, Luxembourg, Latin American countries, etc.). In states with a mandatory vote, the obligatory participation of citizens in elections is established.

For example, Article 48 of the Italian Constitution states that voting is personal and equal, free and secret; its implementation is a civic duty. Article 62 of the Belgian Constitution states: «Voting is compulsory and secret». In accordance with Article 15 of the Constitution of Chile «in the elections, voting is personal, equal and secret. In addition, it is mandatory for citizens».

Consequently, in some foreign countries, voting is considered as a duty of citizens. It should be noted that freedom of election, as well as the political apathy of voters, give rise to absenteeism, that is, the mass non-participation of voters in elections. With all the uselessness of this form of protest, it increases political instability in society, weakens and distorts the state's connection with the people.

In foreign countries, in order to increase the very low rate of participation in elections, the legislator has simplified voting rules. The most common form of voting is by mail.

In Denmark, Portugal, Germany, Ireland, Great Britain, Sweden, voters who are outside their place of residence vote by mail. Here's how such a vote is carried out in Portugal: the voter, 5–10 days before election day, informs the chairman of the municipal chamber about moving to another district with the provision of a relevant travel document or a certificate from a higher chief. The chairman of the municipal chamber issues a ballot paper and two envelopes: blue — for the bulletin and white — for the blue envelope and electoral card, with the indication on the envelope «vote by mail». The white envelope is sent by post to the polling station with information about the voter and a mandatory confirmation of receipt of the envelope. Currently, up to one third of voters vote by mail and there is a tendency to increase the proportion of such a voting mechanism [15; 247].

Conclusions

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

The legal nature of the principles of the electoral law as a whole is fundamentally dependent, are derived from the constitutional and legal understanding of the essence of the electoral process as the highest form of democracy and implementation of the national sovereignty, its tasks and functions.

The multifunctional nature of elections is manifested primarily in the election of a certain path of development of society and the state, in the formation of the political unity of society, that is, the role of elections cannot be reduced only to the act of empowering certain individuals as a result of their election.

The process of improving the electoral legislation and the relevant law enforcement practice actualize the task of the constitutional formulation of the system of principles of the electoral law of the Republic of Kazakhstan. In the Constitution of the Republic of Kazakhstan the followings should be enshrined: universal principles of electoral law (universal, equal, direct elections, by secret ballot), the observance of which gives the elections a truly free and democratic character; the age at which a citizen of the Republic of Kazakhstan has an active electoral right.

The basis of the legal regulation of electoral relations is formed by the principles of electoral law, which cannot be reduced only to the legal basis for the participation of Kazakhstani citizens in various types of

elections. In modern conditions, the principles of electoral law, based on their intended purpose in the mechanism of legal regulation of electoral relations, can be classified into two groups — principles of organization and conduct of elections and principles of citizen participation in elections. The first group of principles consists of such principles as mandatory, periodicity, freedom, alternative elections, the admissibility of various electoral systems and the independence of the bodies ensuring the organization and conduct of elections. The second group includes the principles of universal, equal, direct suffrage, as well as voluntary participation in elections, based on personal and secret voting. For a more clear definition of the system of principles of electoral law, it is necessary, in our opinion, to supplement Article 3 of the Kazakhstan Constitutional Law «On Elections in the Republic of Kazakhstan» with corresponding norms.

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Ф.А. Ержанова

Қазақстан Республикасы және шет елдерде сайлау құқығы қағидаттарының конституциялық бекітілуінің кейбір аспектілері

Мақалада Қазақстан Республикасының және шет елдердің қолданыстағы конституциялық-құқықтық заңнамасын, сайлау құқығы мен процесі саласындағы заң әдебиеттерін, халықаралық құжаттарды талдау негізінде Қазақстан Республикасы мен шет елдердің сайлау құқығы қағидаттарының