
КОНСТИТУЦИОННОЕ И МЕЖДУНАРОДНОЕ ПРАВО

КОНСТИТУЦИЯЛЫҚ ЖӘНЕ ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ

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Development and establishment of the legal status of individuals and citizens in the constitutional doctrine of the Republic of Kazakhstan

This article analyzes the current legislation of the Republic of Kazakhstan and international legislation related to the establishment and development of the legal status of a person and citizen in the constitutional doctrine of Kazakhstan. Also addresses the issue of the limits of restrictions on the rights and freedoms of man and citizen, who is one of the most difficult, as the legal restrictions substantially affect the degree of freedom and the security of the individual in society and the state. Reflected the natural law concepts of rights and freedoms of individuals who have found their expression in a comprehensive Constitution of Kazakhstan.

Key words: Constitutional doctrine, right of the citizens, Constitution of the Republic of Kazakhstan, The Law "On Advocacy", round table, Institute of privacy, The principle of equality.

Constitutional doctrine of Kazakhstan confirmed the position about the natural origin of individual rights and in clause 12 paragraph 2 proclaimed that human rights and freedoms belonged to everyone from the birth, are recognized as absolute and inalienable.

One of the novelties of contemporary constitution is the establishment that the human rights and freedoms determine the content and application of laws and other regulations. It means that at the publication of the laws of the Republic of Kazakhstan, the state must come from the constitutional rights and freedoms of the person, the interests of human being and citizen. This clause of the constitution for the first time really brings to life of Kazakhstani society the principles of constitutionalism, in particular the principle of priority of the person to the state [1].

At the same time exercise of rights and freedoms of human being and citizen has a restrictive framework, which can be expressed as follows:

- 1) it must not infringe on the rights and freedoms of other persons;
- 2) it must not infringe on the constitutional order;
- 3) it must not infringe on public morality.

Completely new theory lies in confirmation the legal status of the personality of the Republic of Kazakhstan. At the core of Kazakhstani concept of constitutional rights and freedoms guaranteed by the Constitution of 1995, there are universal values to which civilized society went for a long time. Many of the provisions of the Universal Declaration of Human Rights adopted by UN General Assembly from December 10, 1948 [2], reflected in the contemporary Constitution.

It should be noted that the natural legal conception of rights and freedoms found its comprehensive expression at the Constitutions of the Republic of Kazakhstan. According to this concept the human being is the source of his natural rights and freedoms which are recognized as absolute and inalienable, in accordance with Clause 12 of the Constitution of the Republic of Kazakhstan of 1995 [3]. It is important to bear in mind that human rights and freedoms regardless of civil belonging are recognized by the state Kazakhstan, are guaranteed and protected by it. At the same time, human rights and freedoms are not identical with the rights of citizen, although they are interrelated, but not completely identical. The rights and freedoms of human being and citizen are fundamental category of the Constitution of the Republic of Kazakhstan, called to

confirm a person as the highest value of Kazakhstani society. Ensuring civil rights and freedoms is one of the forming principles of Kazakhstani constitutionalism.

The Constitution of 1995 first established as a subject of constitutional rights and freedoms not a citizen, that is, a person officially belonging to the given State and, accordingly, which is under its patronage, but every person irrespective of his civil belonging. Recognition by the Constitution of the Republic of Kazakhstan the rights means recognition the constitutional doctrine of Kazakhstan the natural rights bearing inalienable character. Human rights are basic, they are inherent to all human beings from the birth, regardless of whether they are citizens of the state in which they live, or not, and the rights of citizens include those rights that are assigned to a person only by virtue of his belonging to the state (citizenship).

Thus, in contemporary law there are distinguished two concepts: "human rights" and "civil rights." Under the first, initially emerged, the rights and freedoms inherent in all people, regardless of their citizenship, deriving from natural law are referred to. Under the second — the rights and freedoms provided by the positive law of the state to its citizens are referred to.

The term «human rights» is used always in international law, and the term «civil rights» — is used in the constitutional and other domestic law. The term «human rights» also is used in the constitutional law of the Republic of Kazakhstan, as it provides the rights and freedoms not only for its citizens but also to a large extent for non-citizens who are in the territory of the state. Human rights emanating from the natural, suprapstate law do not preclude their positive clearance in the constitutional and other legislative materials, in this way some contradiction of these two groups of rights and freedoms which have different origins is smoothed out.

Section II of the Constitution of 1995 is devoted to the confirmation of the legal status of the human being and the citizen. If the Constitution of 1993, the first section was devoted to the basics of the legal status of the citizen of the Republic of Kazakhstan, consisting of seven chapters, the Constitution of 1995 without division into chapters allocated to these purposes thirty clauses.

Institute of citizenship has undergone significant changes. It should be noted that the essence of citizenship is characterized by its basic principles and general principles confirmed at the Constitution of the Republic of Kazakhstan and the Law «On Citizenship of the Republic of Kazakhstan» dated from December 20, 1991 with amendments and additions from October 3, 1995 [4].

In our opinion, the most valuable in the establishment of citizenship of the Republic of Kazakhstan is new conceptual content of this institution — above all, the embodiment of universal values, the recognition of the human being and the state equal in rights provided with their mutual responsibility. These basic principles made up a system of principles of citizenship of the Republic of Kazakhstan [5, p. 60, 61].

The most important principle of the citizenship of the Republic of Kazakhstan is the recognition of mutual responsibilities of the citizen and the state as confirmed at clause 1 of the Law «On Citizenship of the Republic of Kazakhstan»: «The Republic of Kazakhstan, through its agencies and officials is responsible to the citizens of the Republic of Kazakhstan, as the citizen of the Republic of Kazakhstan is responsible to the Republic of Kazakhstan».

One of the essential principles of citizenship, first constitutionally confirmed in 1995, is the principle of unity and equality of citizenship. The unity of citizenship manifested in the fact that every person in the Republic of Kazakhstan has the right to citizenship. And all the citizens of the Republic of Kazakhstan, regardless of where they live, have equal rights and equal responsibilities. The principle of equality is manifested in the fact that all the citizens are equal before the law regardless of the basis of the acquisition of citizenship, origin, property status, race and ethnical identity, etc.

The principle of equality of citizens is comprehensive in its content. One of the important principles of citizenship, confirmed in the Constitution of 1995, is the principle of monocitizenship: belonging to the citizenship of another state is not recognized for the citizen of the Republic of Kazakhstan. Problems of dual citizenship, resulting from the adoption of the Law «On Citizenship of the Republic of Kazakhstan» in 1991, were one of the reasons for the complications in the relations with a number of states. The existence of citizens with dual citizenship creates difficulties both for the state and a concrete person. The practice of citizenship legislation in most countries is aimed at reducing those with dual citizenship.

One of well-known scientists and specialists in citizenship N.V.Vitruk considers that when the person has dual citizenship it can damage the sovereignty of the state, considered such person in accordance with national legislation a citizen [6, p. 4].

First of all, there the fundamental principle of the state is violated — such as a full jurisdiction of the state power over its citizens. On the other hand, there are some difficulties arisen from the side of the citizen

in usage of his rights. All these compel the state to take measures to eliminate the causes of dual citizenship. According to p. 3 of clause 10 of the Constitution of the Republic of Kazakhstan «for a citizen of the Republic of Kazakhstan the citizenship of another state is not recognized». The Constitution, securing such a position excluded the possibility of dual citizenship [5, p. 62, 63].

It should be noted that for the first time in the constitutional concept of rights and freedoms of the Republic of Kazakhstan it was laid down the doctrine of freedom. And the doctrine of constitutionalism in Kazakhstan is based on a doctrine of freedom, trying to find a reasonable balance between freedom and social freedom, freedom and government regulation. The idea of freedom first carried the idea of human freedom from state interference. Further, in its conceptual development the freedom became regarded as «participation in the creation of such a society in which everyone acts like its natural part. As if the human being — is a social creature by nature, should be included in political society, the true freedom — it is not just personal freedom or freedom from society: it is the realization of the noblest qualities of the person, and voluntary submission to laws that he helps to create. Therefore, freedom is not limited to the liberal procedural restrictions it implies the existence of objective criteria of good and justice. Freedom is interpreted as a means of personal self-development. Freedom in the context of civil rights — it's not just freedom from arbitrary of power, but freedom of forming public predestination of the human being — the freedom to become a worthy citizen, with a worthy life in harmonious and equitable state [7; 84].

For many years, a clear picture was crystallized on the content of freedom and its relationship with the state. Document confirmation of these notions of freedom found itself in the Declaration of Independence of the United States in 1776, the Universal Declaration of Human Rights, adopted by the UN in 1948, French Declaration of Human Rights and Citizen Rights in 1978.

These greatest documents in their importance laid the foundation of modern civilization; they have the meaning and purpose of a legal, constitutional state.

The Constitution of the Republic of Kazakhstan reflected not only the right to life, but stemming from it the right to recognition as a person before the law. The right of everyone to protect their rights and freedoms by all noncontradictory to law means including necessary defense Constitutionally confirmed. Clause 2 of the International Pact on Civil and Political Rights of 1966 indicates the need for legal protection for any persons seeking such protection [8]. Paragraphs 2 and 3, Clause 13 of the Constitution implement the above mentioned clause of the International Pact on Civil and Political Rights in the constitutional law of the republic.

Thus, paragraph 2 of clause 13 of the Constitution gives everyone the right to judicial protection of their rights and freedoms. Decisions and actions (or inaction) of state bodies, local authorities, public associations and officials may also be appealed in court. Everyone is entitled in accordance with international treaties of the Republic of Kazakhstan to international bodies for the protection of human rights and freedoms, if all available domestic remedies or legal defense are exhausted. Paragraph 3 of clause 13 guarantees the right to qualified legal assistance.

The Law «On Advocacy» from December 5, 1997 [9] as the main problem lays for advocateship the facilitating of the implementation of the guaranteed by the government and by the Constitution of the Republic of Kazakhstan human right to judicial protection of their rights, freedoms and qualified legal assistance. Clause 6 of the Law «On Advocacy» provides the cases of legal assistance free of charge, and the trustees, upon request, are exempt from payment and legal assistance is provided by lawyers at the expense of firm of attorneys or bar association.

One of the most important principles of constitutionalism is the equality. Kazakhstan doctrine of constitutionalism constitutes the principle in the cl. 14 of the Constitution. The Constitution of the Republic of Kazakhstan states: «All are equal before the law and the court». In the current Constitution in this way reflected cl. 7 of the Universal Declaration of Human Rights, which stated that «all are equal before the law and are entitled without any discrimination to equal protection under the law». Equality before the law means the same legal position of citizens (and aliens) before the law, i.e. match the full range of rights and obligations of all human beings. The content of equality implies the absence of illegitimate privileges and the prohibition of discrimination on any grounds.

Paragraph 2 of cl. 14 establishes the constitutional protection of individuals from discrimination on grounds of origin, social, property status, sex, race, nationality, religion, views, place of residence, etc.

The Constitution of the legal state provides the legal, i.e. formal, equality between human beings. Sense of formal equality is to provide equal start opportunities to everybody, the realization of which depends on the talent, intelligence and resourcefulness of each person. The law can not be without risk of destruction of

human freedom to regulate these human qualities, the attempt to bring them to the «average» size inevitably leads to inhibition of the social activity of people, loss of energy of the strongest personalities and socially useful persons. The equality of persons before the court is equally important. It does not matter the legal status of the person — all i.e. everyone, both citizens and noncitizens, as well as foreigners are brought before the court in equal status, receiving the same protection of their legitimate rights and bearing the same measure of responsibility.

Constitutionalism complicates the adoption and implementation of government decisions, not as the end in itself, but in order for people to live freely, or at least be free from government tyranny. The constitution that meets the requirements of constitutionalism, is different from the simple basic laws determined the state structure in that it tries to ensure the freedom. The right to freedom is nothing like freedom itself, i.e. ability to perform any lawful acts. In this rule there is inherent limitation of the right to freedom of other people, especially officials with the possibility of using coercion to people.

Fundamental human right — it is his inalienable and natural right of everyone to life, as confirmed in clause 15 of the Constitution of the Republic of Kazakhstan. In order to comply with European standards the changes were made in this clause on May 21, 2007. From now on, the death penalty established by thy law as an exceptional measure of punishment in the following cases [10]:

- for terrorist crimes, connected with the loss of life;
- the most gravest crimes committed in wartime.

The Constitution of the Republic of Kazakhstan in clause 16 confirms the right to personal freedom for the first time in contemporary constitutional practice in Kazakhstan. Personal freedom of human being — is his inalienable and absolute right arising by virtue of the natural nature of human being himself. Personal freedom is a unit of human rights, which form an indissoluble unity that is the foundation of virtually all the legal status of the person, because without such right there meaning of any other rights and freedoms are lost. In a lawful state human freedom is equal to all nature and protected by the state and by legal means and forms. Restriction of the constitutional right to human freedom shall be allowed only in cases prescribed by the law, and only with court approval, providing arrested person right to appeal.

It should be noted that the issue of restrictions on rights and freedoms was the subject of «round table», conducted by the Nizhny Novgorod Law Institute of the Interior Ministry of the Russian Federation jointly with the magazine «State and Law» in December 1997 [11]. The speakers at this roundtable suggest that under the restrictions of fundamental rights in the proper constitutional and legal sense, refers to constitution permitted and established constitutional law exceptions to the constitutional status of human being and citizen.

The Constitution of the Republic of Kazakhstan of 1995, securing the inviolability of human dignity (clause 17), went much further, securing privacy, personal and family secrets, protection of honor and dignity (clause 18). For the first time at the level of the constitution the privacy rights are confirmed, constitutionalism establishment is not possible without the civil society, where the basics is the sovereignty of the individual, meaning the integrity of his «habitat».

Institute of privacy includes a great variety of guarantees that are contained in various clauses of the constitution. The right to personal and family privacy, to defense of the honor and dignity are constituted. Neither of whom can be demanded the information concerning the origin or business activity of relatives, intimate relationships, sources of financial condition of the family, etc. If honor and good name are humiliated or insulted, he may demand through the trial the punishment or compensation for moral damage, provided that by the Criminal Code. If the defamatory and rights disparage information published in press, the court may order the same print organ to publish a confutation of this information.

Everyone has the right to secrecy of correspondence, telephone conversations, postal, telegraph and other messages. Therefore it is prohibited opening and inspection of letters and other postal items, interception of telephone conversations. The Criminal Code classifies the violation of the secrecy of correspondence, telephone conversations and telegraphic communications of citizens as a crime. Search, seizure, arrest of correspondence and its seizure of postal and telegraph offices may only be on grounds and procedures established by the Code of Criminal Procedure. Strictly regulated by the law the order wiretapping.

Furthermore, the Constitution under cl. 19 gives everyone the right to determine and indicate or not indicate his national, party and religious affiliation.

A completely different concept than in the previous constitutional law laid the basics of confirmation of social-economic rights in the modern Constitution of the Republic of Kazakhstan. If the unit of social-

economic rights earlier was as some granted by the state causing some sense of dependence on the state by its citizens, but their modern interpretation aims at the personal initiative and encourages more entrepreneurship. Therefore, the existing points of view of scholars such as Cass R. Sunstein that the constitutional provision in post-communist countries is not only useless but harmful, in our opinion, are incorrect. Thus, Sunstein writes: «Many positive rights are not consistent with the common desire to root out of the citizens... a sense of dependence on the state and its desire to support and encourage private initiative ... If the individual positive rights are taken into consideration by the citizens as the inalienable rights conferred by the state, it can have negative impact on the personal initiative and enterprise [12].

I. Michailovskaya also considers that giving the social-economic rights the status of constitutional rights leads to some negative consequences:

- 1) not only preserve but also strengthen paternalistic attitudes of citizens;
- 2) preservation of Soviet behavior patterns;
- 3) occurrence of difficulties in replacing the egalitarian distribution of goods of special targeted assistance to vulnerable people [13].

We suppose that in the conditions to the transition to the market economy and forming the market economy as one of the functions of the state is a social function. Moreover, in cl. 1 of the Constitution it is stated that Kazakhstan — is a welfare state. Therefore, the necessity for legal protection of citizens is one of the challenges in solving problems of human rights in well equipped democratic country. It is quite important that the search for ways to achieve a balance between the interests of the individual and society — is one of the main directions of development of Kazakhstani statehood.

The Constitution of 1995 at the confirmation of social-economic rights, there is a balance that does not, on the one hand, develop a dependency and equalization in the distribution of social goods, and the other — a certain degree of care shall be done for a person with the purpose of ensuring the necessary conditions for maintaining his dignity.

Thus, according to cl. 24 there not a right to work is declared, but the right to freedom of labor, which is a constitutional novelty. The first constitution of independent Kazakhstan continued to secure the right to work, and it corresponded with the obligation to work. The right to freedom of labor also includes the freedom of every person to dispose of their abilities to work, choose the type of activity and profession. Free choice of occupation and profession is solely voluntary will of everyone to exercise their right to work in various forms of employment under the employment agreement or contract, the organization of any type of property, passing the state and military service, do business without a legal entity or as member of the partnership, a member of the production cooperative or farm, as well as within the civil law contracts (the author's agreement, contract, contract assignments, etc.).

And in this case, the implementation of the constitutional right for freedom of labor conditions contributes to the full development of personality and is an implementation of cl. 23 of the Universal Declaration of Human Rights and cl. 6 of the Pact on Economic, Social and Cultural Rights, which confirms the right of everyone to the opportunity to earn a living by work which he freely chooses or to which he freely agrees.

At the same time, these constitutional provisions encourage entrepreneurship, ensuring that in paragraph 4 of cl. 26 right of everyone to freedom of entrepreneurial activity, and free use of his property for any lawful business activity.

Somewhat different the right of the citizens of the Republic of Kazakhstan on social protection by guaranteeing minimum wages and pensions, Social Security age, sickness, disability, widowhood, and other legal grounds (clause 28), as well as the right to receive free only guaranteed level of medical care established by law (p. 2, cl. 29) are recognized.

Voluntary social insurance, creation of additional forms of social security and charity are encouraged.

If the earlier the constitution guaranteed free medical care, but now there is only the amount of guaranteed health care. Constitution of 1993 guaranteed free secondary, secondary professional and higher education in state educational institutions (cl. 24) [14]. The current Constitution only guarantees free secondary education and higher education on a competitive basis to private educational institutions (cl. 29, 30).

Complex of social-economic rights is presented in the constitution in quite harmonious form, where the health visitor role of the state in relation to society is limited to socially vulnerable layers of population, expansion of the sphere of state control is very low.

Complex of political rights confirmed in the constitution, has not undergone any changes.

Constitutional recognition of responsibilities undergone some changes. The Constitution of the Republic of Kazakhstan of 1993 were charged duties only to citizens of the Republic of Kazakhstan (clauses 29–31). Now, the duty to observe the Constitution and laws of the Republic of Kazakhstan, to respect the rights, freedoms, honor and dignity of others, as well as the duty to respect state symbols of the republic and to pay the legally established taxes, fees and other mandatory payments are imputed to all residents of Kazakhstan (clauses 34, 35.) These charges are attributable to citizens and foreigners and stateless persons residing at the territory of the republic.

As for the responsibilities of citizens of the Republic of Kazakhstan, they except the defense the republic and the duty of military service obligations enriched with the care for the preservation of historical and cultural heritage and protection of monuments of history and culture, preservation nature and natural resources (cl. 37, 38).

Imputation of the first two responsibilities only to citizens of the Republic of Kazakhstan is not in doubt and dispute. Indeed, it would be illogical to require foreign nationals or stateless persons to perform military service or to protect the Republic of Kazakhstan from encroachment by other states. The same can be said about such duties as the duty of care to preserve the historical heritage and protect monuments of history and culture. Historical and cultural heritage, handed down to us from our ancestors, historical and cultural monuments of our country — who but the citizens of Kazakhstan have to take care of their preservation?!

Certain proposals are called by one of the duties, which lies just to the citizens of the Republic of Kazakhstan. It is the duty to preserve nature and to preserve natural resources (clause 38). Why do conservation and respect for natural resources as a duty imposed only on citizens of the Republic of Kazakhstan? According to p. 1 of cl. 31 of the Constitution of the Republic of Kazakhstan the state seeks to protect the environment, conducive to human life and human health. Notice that the human, not a citizen, that is, the state, creating favorable conditions does not make distinctions on individual citizens and aliens. They are created for all people, as we infer from the wording of p. 1 of cl. 31 of the Constitution of the Republic of Kazakhstan. It turns out that the state creates favorable to life and health conditions for all people, but to preserve nature and protect the natural wealth should only citizens of the Republic of Kazakhstan. It seems that the legislator is not well articulated this clause, fixing this responsibility only for the citizens of the Republic of Kazakhstan. For comparison, there may be cl. 58 of the Constitution of the Russian Federation, which states: "**Each** (emphasis added — A.S.) is obliged to preserve nature and the environment, to take care of natural resources" [15].

In general, by securing the rights and freedoms of human being and citizen, the Constitution of the Republic of Kazakhstan unequivocally states that the limitation of rights and freedoms of citizens for political reasons are not allowed in any form. In no cases shall not be restricted the rights to the nationality (clause 10), the right to defend and protect its citizens (clause 11), the right to judicial protection and to qualified legal assistance (clause 13), the right to equality before the law and the court (clause 14), the right to life (clause 15), the right to personal freedom (p. 1, clause 16), the right to physical integrity (clause 17), the right to use their native language and culture, to free choice of language of communication, upbringing, education and creative expression (clause 19), the right to freedom of conscience (clause 22), right to private property (p. 2, clause 26).

In general, the question of the limits of limits of rights and freedoms of human and citizen is among the most difficult, as the legal restrictions on the merits affect the degree of freedom and security for the person in society and the state [16, p. 162–167].

Among the new foundations of limitation the rights and freedoms of human and citizen of Constitution of 1995 puts the health and morals (p.1, cl. 39).

The Republic of Kazakhstan is a multinational state, and, of course, maintaining social stability is one of the main tasks of the state. It was appropriate constitutional provision unconstitutional recognition of any action that could violate international consent (p. 2, cl. 39).

In general, it should be noted that a new approach to human rights and freedoms laid down in the last Constitution the Republic of Kazakhstan, based on the recognition general humanitarian values, including the idea of human rights, its legal protection, autonomy of personality, the existence of areas free of state intervention, from the arbitrariness of officials.

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Қазақстан Республикасының конституциялық доктринасындағы адам және азаматтардың құқықтық мәртебесінің қалыптасуы мен дамуы

Мақалада Қазақстан Республикасының қолданыстағы заңнамасындағы және конституциялық доктринасында адамдар мен азаматтардың заңға сүйенген мәртебесінің қалыптасуына қатысты халықаралық құқықтық актілер талданды. Сонымен қатар адамдар мен азаматтардың құқықтары мен бостандықтарын шектеу туралы сұрақтар және табиғи заңға сүйенген тұжырымдары қаралды.

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Становление и развитие правового статуса человека и гражданина в конституционной доктрине Республики Казахстан

В статье дан анализ действующего законодательства Республики Казахстан и международных правовых актов, связанных со становлением и развитием правового статуса человека и гражданина в конституционной доктрине РК. Также рассмотрен вопрос который является одним из самых трудных, о пределах ограничения прав и свобод человека и гражданина, так как законодательные ограничения, по существу, влияют на степень свободы и безопасности человека в обществе и государстве. Отражены естественные правовые концепции прав и свобод человека и гражданина, нашедшие всеобъемлющее выражение в Конституции Республики Казахстан.