Problems related to the position of judge of the category of civil servant Rpublic of Kazakhstan

In accordance with Article 75 of the Constitution of the Republic of Kazakhstan [1] and Article 3 of the Constitutional Law "On the Judicial System and Status of Judges of the Republic of Kazakhstan" the judiciary consists of the Supreme Court of the Republic and local courts, which is a system of state bodies with specific functions and tasks whose implementation depends on the appropriate legal status of judges and their professional competence. [2]

Part 1 of Article 23 of the Constitutional Law "On the Judicial System and Status of Judges of the Republic of Kazakhstan" states that the legal status of judges is determined by the Constitution of the Republic of Kazakhstan, this Constitutional Law and other laws.

This formulation raises a number of controversial issues, in particular regarding the fitness of office of a judge to the category of civil servant. This question is to some extent due to the fact that the earlier acting Presidential Decree having the force of law "On State Service" dated December 26, 1995 [3] judges were classified as civil servants while the current legislative act regulating direct questions of public service to those judges not determine (n. 2 p. 3 art. 3). There are different points of view on the possibility or impossibility, appropriateness or lack thereof assignment of judges to the category of civil servants and legal implications of this [4]. The relevance of the study of the legal status of judges, as civil servants, due to the fact that currently there is an intensive review of many of the pre-existing notions about the nature of public service, its subjects, organizational, legal and practical implementation of the design. The significance of the problem under discussion, primarily associated with the need to determine the proper regulation of the industry concerning the legal status of judges.

Institute of Civil Service includes legal rules that establish: the formation of public-service relationship; public offices, which occupy employees, carried out on behalf of the state (and also on behalf of local authorities) its function; principles

of service; the legal status of civil servant; Military Service; termination of public-official authority [5]. Similar to the regulation and the legal status of judges. Current legislation stipulates that the judge is a person appointed or elected in accordance with the law as a judge working in the appropriate court and to fulfill their obligations in a professional manner. Chairman of the judges are permanent judges of the Supreme Court, provincial and equivalent courts, district and equivalent courts; chairmen of the boards of the Supreme Court, provincial and equivalent courts.

Given that the judiciary is one of the branches of government, the judge is its carrier and has one of the state functions.

The legal status of judges, as well as any public servant, primarily due to its public and legal nature. Both activities are regulated by specific legislation defining the basic elements of all of these institutions.
The concept of service in Kazakhstan's legislation is not yet reached. Appeal to linguistics does not clarify the situation. The dictionary defines the term "serve": how to do something, for someone of something, doing someone's will, orders, work in favor of something [6].

In jurisprudence to study this issue in theoretical terms refer primarily scientists administrative considering, as a whole, as a service such socially meaningful activities that expresses a direct relationship with a specific person, it aims to use and with his knowledge [7]. The most profound questions about the concept of public service studied VM Manokhina. It displays the following definition: public service is a professional activity of certain contingent of people - employees - on the organization of the execution and implementation of the powers of state, public and other social structures [8]. The author reasonably believes that the concept, the main features, objectives and functions of public service can be defined, only revealing the relationship and interdependence of public service tasks, functions and forms of state [9, p.5]. This finding is consistent with another definition of public service, by which is meant labor activities carried

out in a professional manner civil servants in order to perform the tasks and functions of the state [10, p. 123].

The specific nature of the relationship developing between the state and the judges (these relations can be called a public-service), lies in the fact that the state not only gives the judge the right to act on his behalf, but also establishes the possibility to apply specific, statutory measures of state coercion. Based on the foregoing, it can be determined that the judicial service is carried out on behalf of the state court activity for the implementation of the judiciary in reviewing and resolving cases and disputes of law and fact. The court, speaking on behalf of the State implements the will and interests of the state, as reflected in the legislation. In exercising its power of justice, in order to implement the tasks assigned to them under Part 2 of Article 1 of the Constitutional Law "On the Judicial System and Status of Judges of the Republic of Kazakhstan", the court applies the statutory enforcement action against violators of the law, as well as restore the violated rights . Article 4 of the Law "On State Service" provided that, in exceptional cases, the Constitution of the Republic, constitutional laws and other legislative acts of the Republic of Kazakhstan for civil servants can be defined different legal status. This rule allows, in our view, be considered Constitutional Law "On the Judicial System and Status of Judges of the Republic of Kazakhstan" as an independent source of law governing, in particular, the legal status of judges as civil servants and judicial activities as a kind of public service.

Analysis of the Law of the Republic of Kazakhstan "On Public Service" and the Constitutional Law "On the Judicial System and Status of Judges of the Republic of Kazakhstan" allows us to conclude that the legal status of judges and their work in all cases covered by the term "civil servant" and "public service" in its broadest sense. It seems that the judges in its status (its main constituent elements of "ideology") can not be different from the civil servants, as in terms of their legal status (rights, duties, responsibilities, scope of authority, the order is entered into, termination of service relations and etc.) are essentially equal to its contents, with some exceptions caused by the fact that the judges there are special

laws and regulations that define the specifics of their legal status and competence. Judicial activities, as well as everything related to the public service, as a rule, include within the scope of administrative law. However, the failure of such a conclusion, first of all, confirmed by analysis of the fundamental differences subject to regulation under consideration branches of law. On the subject of legal regulation as a fundamental criterion of differentiation of administrative and labor law refers not only to scientists - "Labours" [11], but also "Administrativists" [12]. Based on the conventional view in the theory of administrative law are the subject of recent public relations arising on the executive and administrative activities of public authorities [7, p.5]. Regulation of labor relations is the same namespace labor law.

It should be noted that direct absolute administrative and legal approach to the service relationship is less common. Authors often make judgments about the various options the compilation of administrative and labor law. However, many representatives of the science of administrative law insist on the formation of a special branch of the law - the law of the service, but the question of the field of law remains an open question, but the idea emerges service law [13]. For example, VM Manohin, speaking about the event in the process of performance management among its members several types of relations defines the following: firstly, between the person performing official duties (employees), and the other person (subject to impact), which are official; secondly, between the employees and other stakeholders at the place of his life - with accounting, human resources and other structures carried over labor, is - the employment relationship [14]. In this case, the scientist believes that in an effort to include all service relations in the sphere of labor relations only a contradiction of the Constitution and that such proposals are aimed, ultimately, the elimination of administrative law as an industry [15]. Some authors, not agreeing with this position, believe that this interpretation is seen in an attempt to dismember the social relations that are the subject of legal regulation in the nucleus and associated relationships similar to the allocation in the labor law and labor relations in the direct social organization of labor and its derivatives

relations. However, the labor law includes the object of his control and those and others, while the VM Manohin tries to distribute them to different areas of the law that can hardly be considered justified [16]. We believe that in determining the industry sector relations on the labor judges can not be assumed as an absolute administrative law and labor approach. The distinction between the regulation of relations in the service between labor and administrative law are subject to employee participation internal or external relations.

So, at one time AE Pasherstnik consider the entire public service as an institution of labor law, noting the need for a complicated actual composition, additional conditions for the emergence or final consolidation of labor relations of public service [17]. However, he believed that public servants as subjects of administrative law are the only administrative relations with the external environment. The same position and began to adhere to other authors, specializing in labor law.

In general, the approach based on the delimitation of spheres of legal regulation of the service relationship with the division into internal and external undoubtedly plays a positive role in determining the industry classification of legal rules governing social relations in the public service. Here, you can agree with some authors that employee participation in internal and external relations to some extent dependent on the amount of power to his position [11, p.24]. Indeed, if we consider the work of an employee with extensive administrative powers, it was mostly their implementation will occur in external relations, through the provision of administrative influence on the external actors. Employees, the amount of regulatory powers which are not so significant, mainly act as a subject-house service relationship. However, experts in the field of administrative law accentuate the work of civil servants only as expressing the will of the state and its representative bodies. However, considering the rights and obligations of civil servants in general as a basis for their administrative legal status and stating changes in legislation, different authors have different opinions spot institute of public service in the legal system. So, A.P.Alehin,

A.A.Karmolitsky and Yu.M.Kozlov emphasize decisive influence administrative and legal regulation in relation to "the public service, which manifests itself in any possible occurrence of reasons for action norms other industries" [18]. Following the logic of these authors, the relationship regarding the implementation of judicial powers also need to consider the administrative and legal relations. However, it appears that the rights and duties of judges are not only part of their general legal, administrative and legal status, but also to determine their position in the field of labor law, and thus make their labour status. This follows from the argument that the judge's relationship with the government on the implementation of the labor (service) activities can not be fully controlled only by administrative law.

It should be recognized fair view SA Ivanova, considers it necessary to carry out the difference between the tasks and functions of the state and employed to meet these challenges and carry out these functions. Renowned scientist believes that "service to the state - is inherently labor activities carried out on the basis of employment where the employee is a civil servant and employer public body" [19]. It seems that expressed S.A.Ivanov judgment can no conventions extrapolated to the scope of a judge, where the figure of the employer is the state, with their employers' vesting powers of various government agencies and officials (President of the Republic of Kazakhstan, the Supreme Judicial Council, the Court jury in a disciplinary matter, and others.).

We can not agree with the judgment VM Manokhina that the subject of labor law is only limited relations with the workers [7, p.10]. Another N. Alexandrov, who has spearheaded the definition of a circle of relations regulated by the industry, pointed out that one of the types of socialist labor relations are worker-service relationship [20]. At the present stage of science labor law opinion on the inclusion relations with employees in the employment relationship is predominant. This conclusion can confirm the absence of labor legislation in Kazakhstan division of workers to workers and employees and employee understanding of the word just a physical person who is employed by the employer and directly performing work under an employment contract. Considering the

above issues related to the judicial work of the public service, we noted that the problem primarily arises from the need to determine the correct regulation of the industry, the definition of industry classification rules governing the judge.

In our view, express our solidarity with the existing opinion that the difference in the nature of work of these categories of workers can only be a basis for differentiation of rules governing their employment and related to labor relations within the boundaries of labor law, but do not release these standards beyond [21].

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