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The role and legal status of the court in modern Kazakh criminal proceedings

Abstract. This article describes the role and legal status of the court in criminal proceedings. Special attention is paid to the development of the judicial system in modern Kazakhstan and the status of the formation of the court to protect the rights and freedoms of citizens on behalf of the state. On the basis of the study analyzed some regulations on the judicial system of the Republic of Kazakhstan.
Keywords: country, law, court, criminal process, status.

The current period of reform of the judiciary is extremely exciting. For the first time in the history of constitutional development in Kazakhstan in Article 4 of the Constitution, to the law applicable in the Republic of Kazakhstan assigned regulatory decisions of the Supreme Court. This has caused an increased interest of scientists and practitioners to clarify the nature and character of regulations the highest judicial body of the country. Legal scholar S. Udartsev argues that the Constitution attempted to out- line the scope of the existing rights in Kazakhstan. This attempt is positive as a departure from the rights information in ordinary consciousness only to the regulations of the legislative and executive authorities, the official expansion for the partial subjects of law-making, it is important for legal practice, especially in today's dynamic period. First recommendation, guideline for the courts decisions of the plenum of the Supreme Court summaries of judicial practice began for the 1995 Constitution officially recognized form of normative legal acts. In its opinion, the Supreme Court there was «new activities – law-making and law regulating. An important law-making function of the courts is associated with the real right of choice of law rules, regulations governing certain relations, especially in the case of conflict» [1, 181].

Judicial interpretation becomes law-right correction value. Based on the analysis of a number of decisions taken by the researcher concludes that often in the decisions of the Supreme Court contain provisions allowing its conflict of law rules or by providing the courts, based on, for example, constitutional provisions and the provisions of the current law, to decide on the applicability of certain provisions of the law. The Supreme Court and the entire judicial system become more active factor in the evolution of a dynamic society. Doctor of law E. Abdrasulov also believes that clarification of the law given by the Supreme Court of the Republic of Kazakhstan in the regulatory decisions is, first, the interpretation, and secondly, they are official. In the present conditions of the principle of direct action of constitutional norms, scientists believe, it is possible and necessary normative interpretation of the Constitution by the Supreme Court for more effective implementation of the above principle. Moreover, according to E. Abdrasulov, despite the statements of individual researchers that «in the course of interpretation cannot create new regulations or make the existing law any

additions and changes», judicial and regulatory casual interpretation provides indications sources law, as in the results of interpretive activities contained specifying rules received during the inference of a general and abstract initial rules set out by the legislator [2, 22].

Some scientists have put forward the idea that the regulatory decisions of the Supreme Court are not a normative legal act and they are supposedly «secondary» in relation to them. It is proved by the fact that, under Article 81 of the Constitution, the Supreme Court «gives explanations on issues of judicial practice», as well as reference to the Law of the Republic of Kazakhstan «On normative legal acts», which regulatory decisions of the Supreme Court are not included in the hierarchical content of the first paragraph of Article 4 of the Constitution that «the law applicable in the Republic of Kazakhstan. Analyzing the content of the first paragraph of Article 4 of the Constitution that «the current law in the Republic of Kazakhstan are norms of the Constitution, relevant laws, other regulations, international treaties and other obligations of the republic, as well as regulatory resolutions of the Constitutional Council and the Supreme Court of the republic», Mr. Sapargaliyev and Mr. Suleimenov believe that this norm of the Constitution according to the sources of existing law is divided into: 1) the provi- sions of the Constitution; 2) normative legal acts; 3) regulatory resolutions of the Constitutional Council and the Supreme Court. Analyzing the above, it can be concluded that the regulatory decisions of the Supreme Court are not included in the second group and therefore are not normative acts [3, 26].

In the author's view, the logical, semantic and philological analysis allows you to select from three to two main groups of sources of the law in force, listed in the Constitution: 1) the provisions of the Constitution; 2) corresponding to them other normative legal acts, including regulatory decisions of the Supreme Court. Eating mentioned constitutional norm with regard to the regulatory provisions of the Constitutional Council and the Supreme Court of the Union «and» is not separation and connection, and does not differentiate the sources of the law in force in the regulations and non-regulatory decisions of the Constitutional Council and the Supreme Court, but merely establishes a list of them. The official interpretation of paragraph 1 of Article 4 of the Constitution, this Constitutional Council on 28 October 1996, stated that the existing law of the Republic of Kazakhstan is considered as a system of norms contained in accepted eligible subjects in the established order normative legal acts: the Constitution and the corresponding laws of the republic, decrees of the President , resolutions of the Parliament, its Chambers and the Government of the Republic, other regulatory legal acts, international treaties ratified by the Republic of Kazakhstan, the normative decisions of the Constitutional Council and the Supreme Court of the Republic. It emphasized that «all of these legal acts (emphasis added) are included in the current law.

The decision of the Constitutional Council on 6 March 1997 stressed that as a standard is considered «a Supreme Court ruling, which contains explanations courts on the application of legislation (its norms) and formulated certain rules of behavior of subjects in the field of justice». Such a regulatory decision, which is binding on all courts of the Republic, issued on the application in the jurisprudence of the legislation,including the provisions of the Constitution of Kazakhstan. The formulation of the concept of «existing law» in paragraph 1 of Article 4 of the Constitution and the official interpretation of the rules by the Constitutional Council did not give any reason for the separation mentioned in it normative legal acts on the regulatory and non-regulatory. Article 81 of the Constitution defines the scope of the Supreme Court, not the character and legal nature of its regulatory decisions. The content side of the regulatory decisions of the Supreme Court is defined by its name «regulatory» and becoming a part of the law in force, i.e., Article 4 of the Constitution. Arguments authors of the publication, based on the question: «Why is the Constitution of the Republic of Kazakhstan of the Supreme Court Act calls» the statutory ordinance «rather than» normative legal act?, And the subsequent conclusions that the regulatory decisions of the Supreme Court are «acts

having regulatory properties (and not normative legal acts), and only formally required in cases» were not based on the Constitution, the interpretation of its rules by the Constitutional Council and the law [4 30].

The use of the legal definition of «decree», especially with the definition of «normative» should not cause doubts in the property of the normative act, as well as not being questioned on the basis of normative decisions of the Constitutional Council, the Government resolutions, decisions of the Parliament and its Chambers. The authors of publications recognize and question the regulatory resolutions of the Constitutional Council as soon as by the grounds that Article 4 of the Constitution, they (along with the regulatory decisions of the Supreme Court) referred to statutory regulations, not a normative legal act. For the first time formulated the constitutional terminology «existing law» and the inclusion of regulatory decisions of the Supreme Court it is recognition as a source of law in Kazakhstan, the so-called case law based on judicial practice. In contrast to the classical case law when lower courts make decisions, referring to similar specific case before the others (usually higher) court Kazakh existing law includes a «generalized», «synthetic» case law, i.e. jurisprudence is not a particular case and a particular category of cases throughout the country, are not approved for use individual judge, and the highest judicial body – the Plenary of the Supreme Court. In this respect the Constitution of Kazakhstan ahead of the Constitution of the Russian Federation and other CIS countries. Thus, under article 126 of the Russian Constitution, the Supreme Court gives a «clarification on the issues of judicial practice». As you know, before the adoption of the new Constitution of Kazakhstan, the Supreme Court in accordance with the law also gave the «guiding opinions» to the courts on the application of the national law, arising during the examination of certain cases. The constitutions of the Soviet period and the Constitution of the Republic of Kazakhstan in 1993 acts of the Supreme Court do not represent, and their legal constitutional characteristics absent. The current Constitution is not by chance avoids the term «explanation» when describing the legal content and the form of the legal act of the judiciary and introduces an entirely new definition of acts of the Supreme Court 'regulatory decisions. «This requires that the quality of Kazakhstani scientists new research space of regulatory decisions of the Supreme Court in the existing law» [5, 443].

For lawyers there is no need to explain what a huge and substantial legal difference between «clarifications on judicial practice» and «the regulatory decisions of the Supreme Court». Although the factual basis for the adoption of these acts is the same – a generalization of judicial practice, the nature and content of the final legal document changed significantly. This is evidenced by Article 4 of the Law «On normative legal acts», according to which the regulatory decisions of the Supreme Court and the Constitutional Council is fixed hierarchy of normative legal acts. Note that the fixation 'is a hierarchy «does not mean finding outside the regulations, as the authors of publication, but merely indicates a particular legal effect of regulatory decisions of the Supreme Court and the Constitutional Council. It is determined by the fact that for the Constitutional Council are binding norms of the Constitution, and to the Supreme Court – the norms of the Constitution and laws (Paragraph 1 of Article 77 of the Constitution). In addition, the decision of the Constitutional Council on 13 December 2001 is definitely that «from the right to give an authoritative interpretation of the Constitution should be the legal validity of the decisions of the Constitutional Council, which is equal to the legal force of the norms that have become the subject of his interpretation». The rules of constitutional law, the Constitutional Council concludes, are used in union with the provisions of the relevant resolutions of the Constitutional Council, which paragraph 1 of Art. 4 of the Constitution recognized the source of the law in the Republic of Kazakhstan. The norms of the legislation, which became the subject of consideration by the plenary of the Supreme Court, the author's opinion should be applied in unity with the provisions of the relevant regulatory decisions of the Supreme Court. The decisions of the Constitutional Council states that since

paragraph 1 of article 4 of the Constitution assigns the regulatory decisions of the Supreme Court of the Republic of Kazakhstan to the existing law, and paragraph 2 of the same article establishes the supremacy of the Constitution and the direct effect of its norms, the Supreme Court has the right, pursuant to Articles 17 and 22 of the Constitutional Law «On the Judicial System and Status of Judges in the Republic of Kazakhstan», issue regulatory decisions on the application of the Constitution, constitutional, ordinary laws and other regulations in the judicial practice. Thus, if the Constitutional Council has the right to interpret the provisions of the Constitution in its «pure form», irrespective of their use or non-use, the Supreme Court summarizes the practice of courts of constitutional norms and gives explanations. They can be given to the interpretation of the legislation (judicial interpretation), may contain provisions relating to the settlement of conflicts between the provisions of the Constitution and the laws, regulations, legislation or other regulations, as well as the features of the application determined by the courts of legislation [6, 25].

Regulatory decisions of the Supreme Court must exactly conform to the Constitution and the laws do not contradict it, since according to Article 77 of the Constitution, a judge in the administration of justice shall be independent and subject only to the Constitution and the law. The inclusion of the Supreme Court of the bodies officially determine the content of existing law, objectively determines its role not only as the highest court in individual cases, but also as a body to form a sample resolution of court cases have information and intellectual center of the judicial system, and in case the need for regulatory corrective Enforcement courts in the event of a conflict or ambiguity and the direction of the judicial practice, based on the spirit and principles of law.

During the adoption of regulatory decisions, the Supreme Court, on the basis of a systematic analysis and comparison of the norms of the Constitution and the law fills some «gaps of law», explains the practical application of laws in accordance with their substance and the basic principles. A feature of the judiciary is that it applies to all cases and disputes in this regard; the judge must resolve the dispute, even in the absence of the rule of law. Thus, under Article 6 of the CPC, in the absence of the law governing legal disputes, the court shall apply the law regulating similar relations, and in the absence of such rules shall decide the dispute based on the general principles and meaning of the legislation. Consequently, the judicial practice on a legal basis fills the gaps of law. The Supreme Court, summarizing such jurisprudence gives explanations governing the new relationship and fill in the blanks of the legislation.

The adopted regulatory decisions of the Supreme Court focused on the consistent implementation of the constitutional principles of a democratic state whose highest values are an individual, his rights and freedoms. In December 2002 the Supreme Court, based on the constitutional norm on the right to protection, stressed that the implementation of proceedings on the principles of priority protection of the rights, freedoms and civil rights, integrity, respect for honor and dignity, the presumption of innocence, competitiveness, equality of all before law and the courts is inextricably linked to the constitutional right of everyone to obtain qualified legal aid lawyer (defender). In accordance with the Supreme Court for the first time in the normative document secured the rule that the right to defense should be implemented with the participation of professional lawyers or other persons admitted as an advocate – spouse (wife), close relatives or legal representatives of the suspect, accused, representatives of trade unions and other public associations, only on condition that their legal knowledge and the ability to provide real client qualified legal assistance.

This position was criticized authors of the publication, since, in their view, this is a new rule of law, and, in addition, define the word «able to provide qualified legal assistance», in turn, require clarification by whom and by what criteria regulatory decision expressly states that the organs inquiry, investigation and the courts (answer to the question: who? required to clarify this issue (including the defined criteria) and if the person elected by the suspect, accused, convicted as an advocate, not able to provide

qualified legal assistance, to discuss the issue of bringing to the case of a professional lawyer [7].

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Some problems of mediation in criminal proceedings the Republic of Kazakhstan

Abstract. In this article, the author studies the issues about mediation development in criminal science of Kazakhstan. Entering the "mediation" term generates a lot of controversy in the scientific community in Kazakhstan that gives possibility to study the experience of this institution by other states. It was observed by author that in practice, the inquirer and investigator refer to mediation passively, and they practically don`t use the opportunities which have been provided by legislation, although according to the procedure this institution aims to reduce the load for law enforcement.

Keywords: mediation, crime, punishment, law, criminal cases, injured person, reconciliation.

Introduction

For the present time, we can more often hear from the foreign and domestic theorists of the criminal law sciences, employees of law and order, public representatives about so-called "crisis of punishment." Many scientists of the developed western countries talk about the necessity of transition from the strategy of "war on crime" to the strategy of "harm reduction", from "retributive justice" to the

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