Мемлекет пен діннің арақатынасындағы тірі байланыстар зайырлы және рухани құндылықтардың арақатынасы негізінде орнатылады.

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THE MAIN PRINCIPLES OF ADMINISTRATIVE PROCEEDINGS OF THE REPUBLIC OF KAZAKHSTAN

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It should be noted that the President of the Republic of Kazakhstan Kassym-Jomart Tokayev declared 2021 the Year of the 30th anniversary of Independence. The Republic of Kazakhstan has become a prosperous, developing country, well-known in the international arena over the years of Independence.

At the same time, it should be noted that the essence and main purpose of administrative proceedings are disclosed and specified in the principles, fundamental, guiding principles that define its purpose as a set of norms governing the organization and activities of judicial bodies authorized to administer administrative justice [1].

On July the 1-st, 2021, the new Administrative Procedural and process related Code of the Republic of Kazakhstan (*hereinafter referred to as the APPRC*) entered into force. The APPRC of the Republic of Kazakhstan is aimed at regulating public-legal relations arising between an administrative body and a person in respect of whom the public functions of this administrative body established by law are implemented.

There is a certain consensus in the foreign scientific literature regarding the key role of the principles of administrative proceedings in general and administrative procedures in particular. According to K.-P. Sommerman, «... the development of its own legal principles is crucial for the formation of administrative law as an independent subject» [2].

Recognizing these factors, K.-P. Sommerman, within the framework of the analysis of the European experience, identified the following system of principles:

1. The principles of the rule of law and the rule of law are declared as a kind of primary basis, all other principles are proclaimed as derivatives and/or modified from the named fundamental dyad.

2. «Formal (procedural, structural) principles» characterize the ways and means by which administrative bodies should perform the functions assigned to them:

2.1. The principle of legality.

2.2. Legal guarantee and protection of trust.

2.3. The principle of equality and protection of arbitrariness.

2.4. Excessive prohibitions and restrictions (including the principle of proportionality).

2.5. «Due process of law».

2.6. Responsibility of administrative bodies and officials [2, p. 65].

Like E. Schmidt-Eissmann notes that administrative procedures and standards (criteria) that should be applied to the executive body when making a decision (including protection against discrimination, principles of proportionality and integrity, protection of trust) are the two most important tools of administrative regulation [3].

Materials and methods. In the course of the study, general scientific theoretical methods were applied. The method of cognition of scientific and theoretical materials was the main one for all the work. When considering and analyzing the basic principles of administrative procedures, the method of literature analysis was used; generalization method – when highlighting the basic principles; logical method – when analyzing problematic issues.

Results and discussions. It should be noted that in most European countries the institute of administrative justice is represented by administrative proceedings and administrative courts or specialized administrative structures within the framework of general courts. For example, in Austria, Germany, Bulgaria, the Netherlands. Administrative courts have also been established in the countries of the former USSR: Lithuania, Latvia, Estonia, Armenia, Azerbaijan.

L.T. Zhanuzakova notes that this approach was adopted as a basis in our country on the development of administrative procedural law, which was defined in the Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020 as one of the important directions of the development of national law in general [4].

This document pointed out the need for the adoption of an Administrative Procedural Code, a clear identification of the subject of regulation of administrative procedural legislation, the principles of administrative proceedings, the creation of an institute of administrative justice that resolves disputes about law arising from public relations between the state and a citizen (organization). L.T. Zhanuzakova believes that administrative proceedings should become a full-fledged form of justice, along with criminal and civil proceedings [4].

We share this position because it is relevant and acceptable for the legal system of modern Kazakhstan.

Among the functions of the principles of administrative proceedings, we highlight the following:

1) often preceding the adoption of certain laws, anticipating the formation of procedures, the principles are designed to «prepare» the rule of law for their appearance and «hurry up» the legislator;

2) ensuring a certain universality of legislation on administrative procedures; at the same time, it should be remembered that the principles of administrative procedures may go beyond the scope of a specific law, they immanently seek to cover as much as possible of public relations;

3) assistance in establishing a balance between legal and non-legal principles of procedures;

4) balancing public and private interests, including the protection of non-governmental persons from possible abuses by management entities, as well as protecting public administration from the dishonesty of citizens and organizations;

5) finally, the purpose of the principles is to ensure the reality, concrete regularity of administrative procedures through «fine-tuning of law», analogy of law and law, as well as acting as a means of assessing related legal phenomena, especially discretionary administrative acts [5, p. 123].

According to R.A. Podoprigora the key innovations of the Institute of administrative procedures are:

- new principles of such procedures: fairness, proportionality, protection of the right to trust, prohibition of abuse of formal requirements, presumption of reliability, administrative discretion;

- the concept of an administrative body [6].

Such authority may be not only the public authority, local government, and public legal person, or other organization that has the authority to issue an administrative act, an administrative actions (inaction) [6].

R.A. Podoprigora notes that with the preparation and adoption of new regulations and amendments to existing entities norm-setting activities should take into account the General principles of administrative law [6].

We agree with R.A. Podoprigor's opinion that all existing administrative legal norms cannot contradict the fundamental and guiding ideas of administrative law in their content, they must strictly comply with them, develop them and disclose their meaning and content in relation to all regulated public relations without exception [7, p. 89].

We share the position of R.A. Podoprigora that in each specific situation, in the absence of principles of administrative law, they will still be perceived and implemented in accordance with the personal discretion and understanding of each subject of law, and not in accordance with the general guiding and fundamental ideas of administrative law, its goals and objectives [7, p. 89].

We agree with R.A. Podoprigor's opinion that the basic principles of administrative law, such as the rule of law, the exclusive competence of the law, the principle of proportionality and legal certainty, must necessarily be taken into account, recognized and applied as independent sources of administrative law, also in the law-making and law-realization activities of subjects of administrative law when they interpret administrative-legal norms [7, p. 89].

It should be noted that the institution of administrative procedures and judicial proceedings for the legislator and the doctrine still remain largely unexplored and obscure problem. We will try to briefly identify groups of the most important subordinate guiding principles, the influence of which is decisive for the principles of administrative proceedings.

Among the functions of the principles of administrative procedures, we will highlight the following:

- often preceding the adoption of certain laws, anticipating the formation of procedures, the principles are designed to «prepare» the rule of law for their appearance and «hurry up» the legislator;

- ensuring a certain universality of legislation on administrative procedures; at the same time, it should be remembered that the principles of administrative procedures may go beyond the scope of a specific law, they immanently seek to cover as much as possible of public relations. And this aspiration is understandable and even fair, since we are not talking about the principles of a particular law, a phenomenon that more or less fully covers the entire system of administrative procedures of various species;

3) assistance in establishing a balance between legal and non-legal principles of procedures;

4) balancing public and private interests, including the protection of non-governmental persons from possible abuses by management entities, as well as protecting public administration from the dishonesty of citizens and organizations;

5) finally, the purpose of the principles is to ensure the reality, the specific regularity of administrative procedures through the «fine-tuning of law», the analogy of law and law, as well as acting as a means of assessing related legal phenomena, especially discretionary administrative acts [5, p. 123].

Among the basic general legal principles that have the most important impact on administrative procedures, we propose to include:

- the principle of legality;

- the principle of justice (reasonableness, good faith);

- the principle of proportionality (proportionality) [5].

It should be noted that the principle of legality has formal and substantive, procedural and material dimensions. In the event of a dispute about his civil rights and obligations or when any charges are brought against him, he has the right to a fair and public hearing of the case within a

reasonable time by an independent and impartial court established by law. In this case, the court decision is announced publicly, but the press and the public may not be allowed to attend court sessions during the entire process or part of it for reasons of morality, public order or national security in a democratic society, as well as when the interests of minors require it or to protect the privacy of the parties, or to the extent that, in the opinion of the court, it is strictly necessary – in special circumstances when publicity would violate the interests of justice.

Let's consider the principle of proportionality, known to almost all modern legal systems, by its origin is associated with such philosophical categories as «harmony», «measure», «golden mean». In a general sense, it expresses the requirement of equivalence in relationships, equality of mutual grants and receipts, as well as a balance of interests. Having passed a long evolutionary path of development, in modern public law, the principle of proportionality functions primarily as a criterion for determining the limits of the exercise of state powers and permissible restrictions on human rights.

For example, in the administrative law of Prussia in the XIX century, courts began to apply to the principle of proportionality on the basis of the All-Prussian Land Code of 1794 in order to limit the discretion of the police and other public administration bodies when they applied coercive measures [5, p. 123].

According to A.B. Zelentsov, O.A. Yastrebov, in order to determine the composition of the principles of judicial administrative law, they must be distinguished:

- from the principles and ideas implemented and developed at the doctrinal level: the principles of law are legally fixed and legally binding;
- from the usual norms of judicial administrative law: the principles are of fundamental importance, abstract content, universal coverage and are determined more by objective factors of law-making than by the will and discretion of the legislator [1].

A.B. Zelentsov highlights the following features of the principles of administrative proceedings:

- principles are not some eternal, unchangeable and abstract ideas, but legal categories corresponding to the socio-economic, moral, political conditions of the development of society and reflecting the prevailing ideas about what administrative justice should be;
- the principles embody a kind of concrete historical ideal of justice, which the state can afford and which it is able to provide;
- the principles are the most general, fundamental legal provisions;
- the principles are in the nature of categorical, unconditional imperative requirements that must be obeyed not only by citizens and organizations, but also by courts, as well as other public authorities;
- it is necessary to determine the basic principles of the organization of judicial bodies exercising jurisdiction over administrative disputes, the main characteristic features of the judicial administrative process;
- the principles should apply at all stages of the judicial administrative process;
- compliance with the principles is guaranteed by the current legislation [1, p. 137].

It should be noted that the APPRC is a legislative act regulating the procedure for implementing administrative procedures, as well as regulating the procedure for resolving disputes arising from public legal relations.

It follows from this that the legislative act provides for the resolution of disputes arising between state bodies, administrative bodies, officials, as well as citizens and legal entities.

The purpose of the adoption of the Code is the development of constitutional values in management activities, the implementation and protection of public rights and legitimate interests of citizens arising in relations with the state, officials. The Code includes a number of exhaustive principles on the basis of which administrative cases will be resolved.

According to A.A. Sabitova, the APPRC should become a single legislative act containing the norms of administrative law systematized in a certain way and regulating not only the procedure for considering administrative cases, but also the procedure for citizens to appeal against the actions of officials in administrative and judicial bodies [8, p. 36].

For example, most German lawyers believe that article 1 of the Basic Law of Germany legitimized the most important principle of the German state, namely the recognition of human freedom and individuality as the highest value. In fact, this is the consolidation at the constitutional level of the provision that the state serves a person. It is this attitude that underlies the entire judicial practice of Germany, predetermining its development of the principle of proportionality [9, p. 203].

The creation of APPRC will contribute to a more effective resolution of complaints and «administrative claims» of citizens and their associations against the actions of public administration bodies and their officials. Thus, to a certain extent, the task of protecting the rights, freedoms and legitimate interests of a citizen will be solved.

Let us consider in more detail the principle of proportionality in administrative procedures. So, the principle of proportionality is the principle that determines the legality of an action in terms of maintaining a balance between the goal and the means used.

Thus, according to article 10 of the Code, it is provided that when exercising administrative discretion, an administrative body, an official ensure a fair balance of interests of the participant in the administrative procedure and the company. At the same time, an administrative act, an administrative action (inaction) must be proportionate, that is, be suitable, necessary and proportional.

In the following cases, administrative acts, administrative action (inaction) are considered appropriate, necessary and proportionate if:

- administrative acts are acceptable to achieve the goal established by the laws of the Republic of Kazakhstan;

- administrative acts, administrative action (inaction), are considered necessary if they limit the rights, freedoms and legitimate interests of the participant in the administrative procedure to the least extent;

- administrative acts, administrative action (inaction) are considered proportional if the public benefit obtained as a result of restrictions on the rights, freedoms and legitimate interests of the participant in the administrative procedure is greater than the harm caused by these restrictions [6].

We adhere to the opinion of A.B. Zelentsov that the principles of administrative proceedings can be expressed in two forms:

- the text form is a direct formulation and consolidation of the principle in normative legal acts that have the greatest legal force – in the Constitution, international legal acts, Laws. These principles are the basic norms underlying the legislation on judicial power and procedural legislation. They are the basis for all other rules governing the procedure for conducting administrative proceedings;

- semantic form – the derivation of the content of the principle from legal norms and institutions [1, p. 126].

According to A.B. Zelentsov, the importance of the principles of administrative proceedings for the organization and implementation of administrative justice lies in the fact that they:

- determine the essence, purpose and form of administrative justice, its procedural and organizational principles;

- are designed to guarantee the observance of the rights and legitimate interests of citizens and organizations and their effective protection in the field of administrative proceedings;

- serve as the basis of administrative procedural legislation and determine the essence, structure and qualitative features of judicial administrative law;

- are the most important guarantees for the realization of the goals of administrative justice, create the basic conditions for their achievement;

- oblige the court to be guided not only by specific administrative and procedural norms, but also by general principles of procedural law;

- contribute to the correct interpretation of all norms of judicial administrative law;

- act as a guarantor of the lawful, fair and reasonable administration of administrative justice [1].

Yu. N. Starilov notes that «The principles of administrative proceedings are subjective concepts. They are formulated by a person (legislator), based on specific legal experience and legal culture in the country, and are based on the basic provisions of the legal system, taking into account the achieved level of development of sectoral administrative legislation. At the same time, the principles reflect objective connections arising in the system of managerial, administrative and legal relations» [10].

More generally, it refers to the requirement in administrative law that a person must know the case being made against him or her and be given an opportunity to answer it before the person or agency that will make the decision. Beyond that, however, the content of the principle is often difficult to determine in particular circumstances, and what fairness requires has altered over time and continues to evolve [11, p. 49].

According to A.B. Zelentsov, the principles of administrative proceedings are classified according to their legal significance on:

- General legal, common both for the legal system as a whole and for all types of legal proceedings. These principles are implemented in administrative proceedings: directly and indirectly, manifested in sectoral and intersectoral principles. The directly applicable ones include, for example: the principle of legality, the rule of law, respect for human and civil rights and freedoms, equality of all before the law and the courts. Indirectly, in administrative proceedings, for example, such general legal principles as the principle of democracy and justice apply.

These principles are manifested in judicial and administrative proceedings on such fundamental grounds as competition, equality of the parties, transparency, the principle of completeness, comprehensiveness and impartiality of judicial proceedings;

- interdisciplinary, inherent in several related branches of law (the principle of the administration of justice only by the court, the independence of courts and the independence of judges, the national language of judicial proceedings);

- special sectoral principles that are peculiar only to judicial administrative law as a branch (for example, the principle of competition and equality of the parties) [1, p. 130].

Also, it should be noted that according to the content and object of legal regulation, the principles of administrative proceedings are divided into:

- judicial, or organizational, principles that establish fundamental requirements for the organization of judicial bodies authorized to administer administrative justice and the status of judges (principles of judicial system);

- judicial, or functional, principles defining the basic requirements for the procedure of administrative proceedings and ensuring the implementation of the main functions of the court in the process of direct consideration and resolution of administrative cases [1, p. 130].

Thus, the following conclusions can be drawn:

1) Many principles of administrative proceedings have constitutional and legal «roots».

2) The principles of Administrative Proceedings are designed to guarantee the observance of the rights and legitimate interests of citizens and organizations and their effective protection in the field of administrative proceedings.

3) The principles of administrative proceedings oblige the court to be guided not only by specific administrative and procedural norms, but also by general principles of procedural law.

4) The principles of administrative justice are the fundamental legal requirements for the construction of administrative justice bodies and the procedure for its implementation, designed to ensure the fulfillment of its tasks and to guarantee the recognition, observance and protection of subjective public rights and legitimate interests of citizens and organizations by making lawful, reasonable and fair judicial decisions on administrative cases.

5) Along with other principles applied in administrative proceedings, the principle of proportionality has a certain inner core that does not have specific historical and cultural dependencies, which in any case allows us to consider it as a kind of natural-legal barrier against arbitrary restriction of constitutional rights and freedoms of citizens, based on the positivist idea of law.

6) The principles of administrative legal proceedings should play an important role in the application of the norms of the APPC, since these principles cover almost all spheres of public legal relations and are aimed at regulating public relations arising between an administrative body and a person in respect of whom the public functions of this administrative body established by law are carried out.

Thus, in the event of a dispute about his civil rights and obligations, each participant in the administrative procedure has the right to appeal an administrative act, an administrative action (inaction) not related to the adoption of an administrative act, in an administrative (pre-trial) order.

It should be noted that the adoption of the APPRC marked the transition of the Republic of Kazakhstan to the system of administrative justice aimed at ensuring the rights and freedoms of citizens, protecting their interests from illegal actions and decisions of public authorities. At the same time, the adoption of a regulatory legal act by itself does not mean that the goals and objectives of administrative justice will be fully implemented. Much will depend on the effectiveness of the judicial authorities' application of the system of regulatory legal acts in resolving disputes and conflicts between the state administration and citizens. In this aspect, a large role will be given to the legal principles set out in the law.

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СУДЬЯЛАРДЫҢ ҚҰҚЫҚТЫҚ МӘРТЕБЕСІ ЖӘНЕ ҚАЗІРГІ КЕЗЕҢДЕГІ СУДЬЯЛАРДЫҢ КӘСІБИ ЖӘНЕ АДАМГЕРШІЛІК ҚАСИЕТТЕРІНЕ ҚОЙЫЛАТЫН ТАЛАПТАР

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Мемлекет және құқық теориясы мен тарихы, конституциялық құқық кафедрасының докторанты

Жалпы сот билігінің негізі мен судьялардың мәртебесінің құқықтық негіздері еліміздің ата заңы – Конституциядан басталады. Яғни 7 бөлімі Соттар және сот төрелігі деп аталады [1].

Келесі нормативтік акті болып «Қазақстан Республикасының сот жүйесі мен судьяларының мәртебесі туралы» Қазақстан Республикасының 2000 жылғы 25 желтоқсандағы N 132 Конституциялық заңы [2] болып табылады.

Республика заңнамасына сәйкес судья дегеніміз – судья лауазымына заңда белгіленген тәртіппен тағайындалған немесе сайланған, тиісті сотта жұмыс істейтін және өз өкілеттігін кәсіби негізде орындайтын адам болып табылады. Судьялар ҚР Жоғарғы Сотының, облыстық және оларға теңестірілген (бұдан әрі - облыстық), аудандық және оларға теңестірілген (бұдан әрі - аудандық) соттардың төрағалары және тұрақты судьялары; Жоғарғы Сот, облыстық соттар алқаларының төрағалары болып табылады. Судья болып Конституциялық заңның 23-бабында көрсетілгендей «Қазақстан Республикасының Конституциясында және осы Конституциялық заңда белгіленген тәртіппен сот төрелігін іске асыру жөніндегі өкілеттіктер берілген, өз міндеттерін тұрақты негізде орындайтын және сот билігін жүргізуші болатын мемлекеттің лауазымды адамы болып табылады». Сондықтан заң судья лауазымына үміткер адамдарға да, судьялардың өздеріне де басқа кәсіп түрлеріне тән емес ерекше талаптарды белгілейді.

Жалпы судья болу үшін келесідей талаптар қойылады:

Бірінші талап, кандидаттың 30 жасқа толуы. Келесі талап, жоғары заң білімінің болуы, мінсіз беделінің болуы. Үшінші талап, біліктілік емтиханын тапсыруы. Төртінші талап кандидаттың медициналық куәландырудан өтуі.

Судья болып алғаш рет жұмысқа орналасып жатқан үміткерлерге негізгі жұмыс орнынан қол үзіп, сотта ақы төленетін тағылымдамадан ойдағыдай өткен және тағылымдама қорытындысы бойынша соттың жалпы отырысының оң қорытындысын алған және "Қазақстан Республикасының Жоғары Сот Кеңесі туралы" Қазақстан Республикасының