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**HUMAN RIGHT TO A FAIR TRIAL UNDER INTERNATIONAL LAW AND
NATIONAL LAW OF THE REPUBLIC OF KAZAKHSTAN**

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Abstract. Human as an individual has the inviolable rights proclaimed in international conventions, declarations, constitutions and laws of states. Human rights cannot be bought or inherited, they are “inalienable” and no one has the right to violate them. As stated in The International Bill of Human Rights, including Universal Declaration of Human Rights of 1948, International Covenant on Economic, Social and Cultural Rights of 1966 and International Covenant on Civil and Political Rights of 1966 and other international legal acts, these rights are inherent to every human being, regardless of race, color, sex, language, religion, political or other opinion, nationality, property status, status of birth. One of the significant human rights listed in these international legal documents is a human right to a fair trial. The role of human right to a fair trial is particularly important in the relationship between citizen and state, since every democratic state is required, according to international obligations, to meet the basic needs of people and respect human rights in courts within its jurisdiction. This article aims at determining and describing the term of the “Human right to a fair trial” under international law and national law of the Republic of Kazakhstan, outlining the main activity of the United Nations system in the sphere of providing human right to a fair trial. Moreover, analysis of observing human rights in court proceedings in the Republic of Kazakhstan and Macedonia has been carried out in the present article.

Түйін сөздер: адам құқығы, бейтарап әділеттілік, қорғануға құқық, Халықаралық құжаттар, теңдік қағидасы, әділ сот ісін жүргізуге құқық, сөз бостандығы, сотталушының құқықтар, БҰҰ Адам құқықтары жөніндегі Комитеті.

Аннотация. Адам жеке тұлға ретінде халықаралық конвенциялармен, декларациялармен, конституциялармен және мемлекеттердің заңдарымен қорғалатын қол сұғылмайтын құқықтарға ие. Адам құқықтарын сатып алуға немесе мұра арқылы иеленуге болмайды, ол адамның ажырамас құқығы және оларды бұзуға ешкімнің құқығы жоқ. Адам құқықтары жөніндегі Халықаралық Биль, 1948 жылғы Адам құқықтарының жалпыға бірдей

Декларациясы, 1966 жылғы Азаматтық және саяси құқықтар туралы халықаралық пакті мен 1966 жылғы Экономикалық, әлеуметтік және мәдени құқықтар туралы халықаралық пакті және басқа да халықаралық-құқықтық актілерде көрсетілгендей, құқықтар әрбір адамға оның нәсіліне, түсіне, жынысына, тіліне, дініне, саяси немесе өзге де наным-сеніміне, ұлтына, мүліктік жағдайына, мәртебесін қарамастан тән. Осы халықаралық-құқықтық құжаттарда аталған маңызды құқықтардың бірі ретінде – әділ сот ісін талқылауға құқық болып есептеледі. Әділ сот ісін талқылаудағы адам құқығының рөлі азамат пен мемлекет арасындағы қатынастарда ерекше маңызды, өйткені әрбір демократиялық болып танылған мемлекет халықаралық міндеттемелерге сәйкес, адамдардың негізгі қажеттіліктерін қанағаттандыруға және өзінің юрисдикциясына кіретін соттарда адам құқықтарын құрметтеуге міндетті. Бұл мақалада халықаралық құқық пен Қазақстан Республикасының ұлттық заңнамасына сәйкес «Адамның әділ сот талқылауына құқығы» ұғымының анықтамасы мен сипаттамасы, адамның әділ сот талқылауына құқығын қамтамасыз ету аясындағы БҰҰ жүйесінің негізгі қызмет бағыттары талқыланды. Сонымен қатар, аталған мақалада Қазақстан Республикасындағы және Македониядағы сот процестерінде адам құқықтарының сақталуына талдау жүргізілді.

Ключевые слова: права человека, беспристрастное правосудие, право на защиту, международные документы, принцип равенства, право на справедливое судебное разбирательство, свобода слова, права обвиняемого, Комитет по правам человека ООН.

Аннотация. Человек как личность обладает неприкосновенными правами, провозглашенными в международных конвенциях, декларациях, конституциях и законах государств. Права человека нельзя купить или унаследовать, они “неотъемлемы” и никто не имеет права их нарушать. Как указано в Международном Билле о правах человека, включая Всеобщую Декларацию прав человека 1948 года, Международный пакт об экономических, социальных и культурных правах 1966 года и Международный пакт о гражданских и политических правах 1966 года и в других международно-правовых актах, эти права присущи каждому человеку, независимо от расы, цвета кожи, пола, языка, религии, политических или иных убеждений, национальности, имущественного положения, статуса рождения. Одним из важных прав человека, перечисленных в этих международно-правовых документах, является право человека на справедливое судебное разбирательство. Роль права человека на справедливое судебное разбирательство особенно важно в отношениях между гражданином и государством, поскольку каждое демократическое государство обязано, согласно международным обязательствам, удовлетворять основные потребности людей и уважать права человека в судах, находящихся под его юрисдикцией. В данной статье определено и описано понятие «Право человека на справедливое судебное разбирательство» в соответствии с международным правом и национальным законодательством Республики Казахстан; выявлены основные направления деятельности в системе ООН в сфере соблюдения прав человека на справедливое судебное разбирательство. Кроме того, в настоящей статье проведен анализ соблюдения прав человека в судебных процессах в Республике Казахстан и Македонии.

The United Nations and its specialized agencies play a major role in shaping human rights standards. It is within the framework of this organization that states have developed and adopted all the most important international agreements in the field of human rights. The functions and powers of the UN in the field of human rights are extremely diverse. In addition to the development and adoption of international agreements, human rights research is conducted, and advisory and technical assistance is provided to individual countries. In some cases, monitoring functions are also performed to ensure that states comply with their obligations under the UN Charter and international agreements. Along with the work of the UN, the functioning of Convention bodies established on the basis of a number of universal international human rights agreements adopted after the creation of the UN is becoming increasingly important for the protection of human rights and freedoms at the international level.

In the system of International legal acts created under the auspices of the United Nations, the new UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) [1], reflect the need to modernize approaches to the treatment of prisoners, while maintaining the traditional humanitarian values enshrined in international human rights standards. In the preamble to the international legal act is considered "repeatedly expressed desire of the United Nations for the humanization of criminal justice and protection of human rights" draws attention to "the importance of human rights in daily activities for the administration of criminal justice and crime prevention". The Mandela rules are intended to "take into account the latest scientific developments and best practices in the field of penal institutions in order to ensure a safe and human environment for prisoners". This document contains a comprehensive set of guarantees for the protection of the rights of individuals, those who are subject to detention or imprisonment. The content of these documents serves as the basis for establishing any prison regime. In short, they provide that all prisoners and detainees should enjoy the right to respect for their human dignity with regard to the conditions of their detention.

Basically defendant's rights should be provided in accordance with the part 1 of Article 14 of the International Covenant on Civil and Political Rights of 1966 (ICCPR) begins with the words: "*All persons shall be equal before the courts and tribunals. Everyone has the right in the consideration of any criminal charge against him, or in the determination of his rights and obligations in any civil process for a fair and public hearing by a competent, independent and impartial court established by law*" [2]. The right to a fair trial can be attributed not only to basic human rights, but also to be defined as a set of basic standards for the organization of legal proceedings in a democratic state of law. The right to a fair trial implies the need to ensure a whole group of other fundamental legal possibilities of a person, in particular, such as competitiveness and equality parties to the process, the right to defense and qualified legal assistance, the right to defend / represent oneself in person, the right to an independent and competent court, acting on the basis of the law, etc.

In a fair trial, everyone can count on an objective and impartial investigation and trial in a fair, open (with the exception of those specifically defined in international law) and contentious dispute between the parties, taking place in the most optimal forms and deadlines established by law. The basic standards of a fair criminal process are listed in Article 14 of the ICCPR 1966. The right to a hearing by a competent, independent and impartial tribunal established by law obviously implies that a competent tribunal established by law means a justice body staffed with established by applicable law by qualified, honest, incorruptible servants of law. This standard implies a prohibition of permission. Judges must abide the rules on jurisdiction established by procedural laws. The impartiality and independence of the court is a complex concept implying organizational, material and legal freedom of judges. When making decisions on the merits of cases judges must be independent from the parties, state authorities and public institutions. Of course, judges should be guided by law and obey his requirements.

According to Principle 2 of the Basic Principles on the Independence of the Judiciary 1985, "*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason* [3]."

Also in the Principle 1 of the Basic Principles on the Independence of the Judiciary 1985, "*The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary* [4]."

Obviously, the degree of independence of judges is determined by a combination of a number of factors directly related to the selection process such as:

- the appointment of judges;
- assessment of the results of their activities;
- conditions for career growth;
- the grounds and procedure for bringing to disciplinary (official) responsibility;

- remuneration of their work, organization of the labor process;
- social and material support of both the judges themselves and the technical staff of the courts.

International law pays close attention to this issue and formulates the main criteria for assessing the degree of independence of the courts when considering specific cases in national legal systems.

The justice of the criminal process is impossible without equality of arms and adversarial. This principle is guaranteed by the above norm of the Article 14 of the ICCPR 1966. Obviously, its observance takes place only if there is a reasonable balance between the powers of the prosecution and the defense. The equality of the parties should be present not only in the judicial stages of the process, but also during the preliminary investigation. In this regard, the legal status of a defense lawyer in criminal proceedings guarantees independence and inviolability, the ability of everyone to freely use the help of a trusted lawyer. These elements are very important and fundamental for fair justice.

The principle of justice on the basis of equality before the law and the court is enshrined in Article 21 of the Code of Criminal Procedure of the Republic of Kazakhstan 2014. In accordance with this rule, justice is administered in principles of equality of all before the law and the court. During criminal proceedings, no one may be subjected to any discrimination on the grounds of origin, social, official and property status, gender, race, nationality, language, religion, beliefs, place of residence and other circumstances. The independence of a judge is ensured by the provisions of Article 22 of the Code of Criminal Procedure of the Republic of Kazakhstan 2014 which states that: *“A judge in the administration of justice shall be independent and subject only to the Constitution of the Republic of Kazakhstan and the law”* [5]. Any interference in the activities of the court in the administration of justice is unacceptable and entails liability under the law. Judges are not accountable in specific cases. A detailed analysis of the situation in the field of ensuring this principle is described later in the next part of this section. Guarantees of the right to protection, ensuring the competitiveness and equality of parties to criminal process - integral elements of a fair criminal process. The Romano-German legal family, to which the legislation of Kazakhstan relates, is characterized by the organization of a judicial system with a traditionally strong state charge, drawing its capabilities from an equally powerful investigative police apparatus. In this regard, it is very important to overcome the consequences. Repressive criminal procedure past and equalize the balance of powers between the prosecution and the defense. Unfortunately, until now, criminal justice continues to be of an unreasonably harsh inquisitional nature and "extradite" an extremely low number of acquittals.

During our personal experience of attending court proceedings there was a situation where defendant's rights had been violated. We were witnessing a very complicated case. This criminal case is related to the citizen of the Republic of Kazakhstan, Articles 366.2, 366.3.4 of Criminal Code of the Republic of Kazakhstan 2014. In the course of that criminal case, we had been informed with the following information: the defendant was charged with "bribing" and was detained for 11 months in an isolation ward. Having visited this court session repeatedly, as an observer, we were convinced that in practice the legislation of the Republic of Kazakhstan, the constitutional rights of people and citizens are not complied with international standards of human rights. According to that case, the defendant states that since the moment of detention, his rights had been violated at the highest level, and not only in physical, but also in moral pressure. Although the defendant publicized the case at trial, the judge tried to ignore those inadmissible facts. At the second hearing, at the time of the commentary by the defendant, the state prosecutor and the judge objected to duplication of his remarks and restricted freedom of expression. As a result, the judge had expelled the defendant from the courtroom because the defendant was emotional. It was noticed that the court did not provide conditions that could improve the condition of the defendant. The duration of the case was extremely long for the defendant, and many difficulties and objections had not been taken into account by the judge and prosecutor, moreover, they objected all claims. When defendant said that he would complain on the judge for violation of his rights, the judge

immediately began to satisfy his requests. But not completely. In accordance with this case a conclusion can be made that the defendant's freedom of speech was violated. The freedom of speech rises out of the basic human natural right - a right of freedom. That means that without freedom there are neither free persons, nor the freedom of the society.

When being a part of a team sent to Macedonia for a research internship, we had a great opportunity to make researches on Macedonian domestic law, Macedonian judicial system and court proceedings. We analyzed the most fundamental principles as right to a fair trial, equality of arms and the freedom of speech in Macedonian courts. There is an Article 16 of the Macedonian Constitution 1991 guaranteeing the freedom of a human. Besides, the freedom of personal conviction, conscience, thought and public expression of thought is guaranteed as well as the freedom of speech, public address, public information and the establishment of institutions for public information [6].

The right to a fair trial is explicitly guaranteed in Article 5 in Macedonian Criminal Procedure Code 2010 together with the principle of "equality of arms" as its integral part. In this regard, in accordance with the provision of Article 5 of the Code, "*A person accused of a crime is entitled to a fair and public hearing by an independent and impartial court, in an adversarial procedure, in which one may challenge the accusations and can propose and present evidence in his defense*" [7]. Hence, we can undoubtedly conclude that the principle of 'equality of arms' is guaranteed. But the practice is not always in correspondence with the letter of the law. There is a question whether there is a real equality in the current criminal justice system that is not yet abandoned the attitude of "obedience" between the police and prosecutors, on one hand, and the prosecution and the court, on the other. According to the Criminal Procedure Code, the defense has the same rights as the prosecution, with exception of those who belong to the prosecutor as a public authority. The previous legislative was very much in favor of the prosecutions, and gave so little opportunities to defense to prepare its arguments that lead to the impression that the defense has no chance in preparing a "winning case". The first "inequality" that was problematic in the previous legislation was in the unequal human and professional resources of defense vs. prosecution, when the prosecution had the entire state mechanism (criminal experts, police, forensic experts, etc.) and defense was put alone. The legislator made an effort to correct the issue, but the new provisions are not an appropriate solution. According to the new Criminal Procedure Code 2010 the defense has the right to hire private detectives, technical experts to complete the evidence procedure in favor of the defense [8]. And all of this stands nicely on paper but the practice might be otherwise. Justice is expensive. The question is whether each defendant can afford such an expensive defense, which necessarily implies other costs other than the hiring of a defense lawyer or the right to 'all-inclusive' defense is reserved only for those who financially can afford it. And what about those who cannot afford a lawyer and the state has provided them an ex officio lawyer? The provisions for hiring a technical expert or a private detective are dead letter for them. Hence, that 'equal' access to justice depends on how much the defendant can financially afford to be represented.

Also such situations took place in the practice of our national courts. For example, due to the fact that each accused (defendant) has the right to invite a paid defender of his choice, as well as access to a free defender on behalf of the state, in case if he cannot pay money to a paid defender. However, when entering the court, it turned out that there is a big difference between a paid defender and a free lawyer. For example, the defender working on a free basis, does not show much activity in a court session. The defender must prove the innocence of the accused (defendant). However, this is not a procedural obligation, but a moral obligation [9]. But in the case, if the defendant is not acquitted then defender will not be subjected to any penalties. This leads to the conclusion that defenders, especially free lawyers, can work by showing negligence to the fate of their defendant.

For instance, Human Rights Committee had replied to Kazakhstan's report that concerned about the lack of measures to ensure the independence of the judicial system, both in law and in practice. The Committee also stated: "the state party should take all necessary measures to ensure,

both in law and in practice, the independence of the judicial system and to guarantee the competence, independence of judges. It should [10], in particular:

(a) eliminate all forms of unlawful interference in the judiciary by the Executive branch and effectively investigate such allegations;

(b) take measures to ensure that judicial discipline is monitored by an independent body, clarify the grounds for bringing judges to disciplinary responsibility, including their removal from office, and ensure that due process of law is followed in disciplinary proceedings and that disciplinary sanctions imposed are independently reviewed by the courts;

(c) provide sufficient guarantees to ensure the independence of lawyers in practice, refrain from any actions that may constitute harassment or harassment of lawyers, or unlawful interference with their work, and hold accountable those responsible for such actions.

It should be noted that earlier, according to the report of the working group on the Universal periodic review, some of the international recommendations in this area were supported by the Republic of Kazakhstan. Thus, according to this report, our country agreed to "take measures to further strengthen the impartiality and independence of the judiciary by implementing existing judicial procedures and by promptly and thoroughly investigating any reports or complaints made in connection with corruption in national courts". We hope that further positive progress in this direction will continue in the course of the judicial and legal reform.

In Kazakhstan, International legal standards have entered the system of legislation and practice of institutions and bodies that carry out punishments relatively recently. In connection with the proclamation by the Constitution of the Republic of Kazakhstan [11] of the priority of generally recognized principles and norms of international law in relation to national legislation (Article 4, part 3), these principles and norms are directly embodied in the laws adopted in Kazakhstan. The criminal enforcement legislation of the Republic of Kazakhstan (Article 1, part 3 of the Criminal Code of the Republic of Kazakhstan) takes into account international acts related to the execution of punishments and treatment of convicts. If there is a conflict between the criminal executive legislation of the Republic of Kazakhstan and International treaties ratified by it, the latter shall apply.

The Republic of Kazakhstan has undertaken to consistently implement in the legislation and practice of the execution of punishments the provisions relating to the provision of human and civil rights and freedoms. Therefore, we believe that some recommendations on how to improve the protection of the rights and legitimate interests of those sentenced to imprisonment in Kazakhstan will be offered.

State as a subject of International law has to take certain measures to provide its citizen's rights by obeying all forms of defense according to International documents but not only by domestic legal acts. The protection of human rights requires serious steps. Because each rash decision can be led to peoples suffer. If state facilitates to the court's decision to make it rightly then people will have much more opportunity to get a fair defense and equality before the court. Because right to fair trial and equality of the parties are the main requirements which must be affected in court proceedings. If it works, each party will be afforded a reasonable opportunity to present its case under conditions that do not place him at a disadvantage vis-a-vis his opponent or opponents. The principle of equality of arms is considered to be an inherent element of the principle of fair procedure. These rights are absolute and can't be limited on any legal base. Its essence is fair and public hearing by an independent and impartial court with guaranteeing of all the minimum rights of the defendant. Also such rights are specified in each state's legislation in order to be realized. The purpose of this article was to show that this right is not only essential but it is also a milestone to fair procedures. Therefore, the courts must be careful when applying the law and to have in mind that justice must not only be done: it must also be seen to be done.

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