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**About the question of the direct
action of the norms of the
Constitution of the Republic of
Kazakhstan**

The relevance of the research question of the direct action of the Basic Law is connected with the fact that it is a legal act which should be guided by the requirements of all the organs of the state, organizations, public associations and citizens. At the same time the principle of direct action is formally declared and it is not regulated in a procedural terms nor in the Constitution of the Republic of Kazakhstan nor in the current legislation. This suggests the need to develop the concept of direct action of the Constitution of the Republic of Kazakhstan, which would be adequate to the needs of the present stage of the constitutional and legal development of society and the state and fully meet their needs. This concept would become an integral part of the theory of the implementation of the Constitution, which could cover the entire social mechanism of its action in society and state.

Key words: Constitution, the Basic Law, the principle, direct action, rights, freedoms, responsibilities, citizens, legal state, state organs.

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**Қазақстан Республикасы
Конституциясы нормаларының
тікелей әрекеті туралы
мәселесіне**

Негізгі заңның тікелей әрекеті мәселесін зерттеудің өзектілігі, оның нормативтік құқықтық акті, барлық мемлекеттік органдар, ұйымдар, қоғамдық бірлестіктер және азаматтар жетекшілікке алуы керек ереже болып табылатындығымен байланысты. Мұнымен қатар тікелей әрекет қағидасы формалды түрде анықталған және процесуалдық мағынада Қазақстан Республикасының Конституциясының өзінде де, қазіргі заңдарда да реттелмеген. Мұнан қоғам мен мемлекеттің конституциялық-құқықтық дамуының қазіргі сатысының сұраныстарына және оның қажеттілігіне толық сәйкес келе алатын Қазақстан Республикасы Конституциясының тікелей әрекеті тұжырымдамасын дайындау қажеттілігі туралы шешімге келуге болады. Аталған тұжырымдама оның мемлекет пен қоғамдағы әрекеті бүкіл әлеуметтік тетіктерін қамти алатын Конституцияны іске асыру теориясының құрамдас бөлігі болар еді.

Түйін сөздер: Конституция, Негізгі заң, қағида, тікелей әрекеті, құқық, бостандықтар, міндеттер, азаматтар, құқықтық мемлекет, мемлекет органдары.

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**К вопросу о прямом действии
норм Конституции Республики
Казахстан**

Актуальность исследования вопросов прямого действия Основного Закона связана с тем, что он является нормативным правовым актом, предписаниями которого должны руководствоваться все органы государства, организации, общественные объединения и граждане. В тоже время принцип прямого действия провозглашен формально и не отрегулирован в процессуальном отношении ни в самой Конституции Республики Казахстан, ни в текущем законодательстве. Из этого следует вывод о необходимости разработки концепции прямого действия Конституции Республики Казахстан, которая была бы адекватна запросам современного этапа конституционно-правового развития общества и государства и в полной мере отвечала его потребностям. Указанная концепция стала бы составной частью теории реализации Конституции, которая могла бы охватывать весь социальный механизм ее действия в обществе и государстве.

Ключевые слова: Конституция, Основной закон, принцип, прямое действие, права, свободы, обязанности, граждане, правовое государство, органы государства.

**ABOUT THE QUESTION
OF THE DIRECT ACTION
OF THE NORMS OF
THE CONSTITUTION
OF THE REPUBLIC OF
KAZAKHSTAN**

The relevance of the research question of the direct action of the Basic Law is connected with the fact that it is a legal act which should be guided by the requirements of all the organs of the state, organizations, public associations and citizens. Through direct action the Constitution as the Basic Law determines the whole system of legal regulation of social relations in the state. At the same time the question of the direct action of the Constitution of the Republic of Kazakhstan is rather new to the internal legal science and practice. For the first time this fundamental principle was formulated in the Constitution of the Republic of Kazakhstan, 1993 in paragraph 7 of its section «Fundamentals of the Constitutional System»: «The Constitution of the Republic of Kazakhstan has the supreme legal power and its norms have direct effect. Laws and other acts contrary to the provisions of the Constitution have no legal effect». [1] In the Soviet Constitutions the principle of direct action of the Constitution is not proclaimed, but nevertheless, it has been regarded as a legal act, «which acts directly, immediately, without knowing in this respect, no restrictions» [2, p.49]. According to the Russian scientist A. Vengerov, such a feature of the Soviet Constitution as standardization, allowed the judicial authorities in the past to apply its provisions directly, directly to the solution of specific cases, despite the fact that in the Constitution of the USSR of 1936 it wasn't told about it.

«Certain judges according to the scientist, exhausted with hopelessness, legal impasse, unable to find other ways for protection the rights of citizens, decided to refer to articles of the Constitution. But how rarely it happened». Analyzing the practice of enforcement of the standards of the Constitution by judicial authorities of the USSR for over 30 years, he found only a few cases of direct action of the Constitution of the USSR [3, page 52]. This principle was completely shared in the theory of all socialist countries. In the legal science of that time it was emphasized on the importance and necessity of wider use in practice of the principle of direct action of national constitutions. In the conditions of formation of legal state in our country it is necessary to abandon the common Soviet tradition of non-use of constitutional norms in the resolving specific cases. In the Constitution of the Republic of Kazakhstan of 1995 it is stated that it «has ... direct action on the entire territory of the Republic»

(parag. 2 of Art. 4), supplemented by the provision that «the rights and freedoms of the person and citizen define the content and application of laws and other normative legal acts» (clause 2, article 12. The principle of direct action of the Constitution means that:

– citizens, other natural persons legally being on the territory of Kazakhstan, can directly exercise their rights and freedoms, to protect them in the event of a violation, guided by the principles and norms of the Basic law;

– state authorities, primarily the courts and executive authorities are obliged to apply the provisions of the Constitution to resolve specific cases, to use its norms for publication of normative legal acts and the consideration of applications of citizens and their associations.

In this regard, there may be doubt about the direct (immediate) actions of any and all provisions of the Constitution, because it contains goals, standards, principles. Their direct action and regulatory power are manifested in the establishment of general directions of development of fundamental social relations, under which the whole law system of the Republic of Kazakhstan should be based on, including the mechanism of legal regulation. This circumstance gives the Constitution of the Republic of Kazakhstan the legal base of the current legislation.

G.S. Sapargaliyev notes that the direct effect of provisions of the Constitution means that the state bodies can (should) apply directly its provisions in the following cases if:

1) there is no special legal act regulating the matters to be considered by a public body;

2) although there is a special legal act, but it is contrary to the Constitution;

3) the constitutional provision does not contain any instruction to a possibility (necessity) of its application through the adoption of a normative legal act that defines the rights, freedoms and duties of a person and citizen;

4) the provision of the Constitution does not require additional regulation [4, p. 46].

It should be noted that the direct effect of constitutional norms is inherent in all methods of the law enforcement process. However, in all cases it is carried out exclusively within the constitutional legal relations.

We believe that the principle of direct action of the Constitution in the Basic law of the Republic of Kazakhstan is formally proclaimed and is not adjusted in procedural process neither in itself nor in the current legislation. Therefore, the rights of the citizens are often regulated by contradictory, unsta-

ble regulations, which often leads to corruption and arbitrariness of the officials. The absence of a mechanism of direct action of constitutional norms in law enforcement practice indicates under estimation (if not ignores) the supremacy of the Constitution.

Nihilism in regard to the constitutions, common in the field of state administration is the result of the unbelief of society to the direct effect of the Basic law, which reinforces the alienation of citizens from the state, practically without referring to the Constitution as the guarantor and the real means of protection of their fundamental rights and freedoms. N. A. Matuzov among the common reasons marked nihilism according to the Constitution of the Russian Federation noted the lack of (minimum) of its legitimacy and social base, making it difficult to secure the stability of peace and harmony. « Legally to live according to the Constitution are all obliged. A significant portion of the population has a conflict between the internal and external persuasion need to comply with the Basic law» [5, p. 8]. This duality posed by the disparity between the declared principles and real implementation them in life is also the characteristic of the Constitution of the Republic of Kazakhstan.

The Supreme Court of the Republic of Kazakhstan has repeatedly made official explanations to courts on the issues of direct implementation of the provisions of the Constitution [6]. Under the article 78 of the Constitution of the Republic of Kazakhstan, the courts shall not apply the laws and other regulatory legal acts limiting the rights and freedoms of a person and citizen guaranteed by the Constitution. If the court finds that a law or other regulatory legal act infringes them, it is obliged to suspend the proceedings and address the Constitutional Council of the Republic of Kazakhstan with a proposal to declare that law is unconstitutional. The courts of general jurisdiction may not take into account the law that contradicts, in their opinion, the Constitution and make decisions based directly on the constitutional norm. But in this case it would be not about the law but about the obligation of the court to address the Constitutional Council with a request to review the constitutionality of this law, that would be consistent with the logic of the Article 78 of the Constitution when considering the application of its norms.

In the Resolution of Plenum of the Supreme Court of the Republic of Kazakhstan of 14.05.1998 «On some issues of implementation of the legislation of the judiciary in the Republic of Kazakhstan» states: «In accordance with the requirements of paragraph 4 of Article 4 of the Constitution the courts

are not entitled to use the unpublished legal acts concerning the rights, freedoms and responsibilities of citizens and to justify their decisions. Therefore during the proceedings the court is obliged to check the fact of publication of the normative legal act to be applied.

The courts of original jurisdiction, appellate and supervisory courts to fulfill the requirements of the Article 78 of the Constitution apply for submission to the Constitutional Council of the Republic of Kazakhstan on the recognition as unconstitutional the law or other normative legal act which infringes the rights and freedoms of a person and citizen guaranteed by the Constitution at any stage of the proceedings» [7].

However, the analysis of the practice of realization the powers of the Constitutional Council of the Republic of Kazakhstan shows that the courts rarely resort to this instance. This fact is related, in our opinion, not so much with the excellent condition of the texts of normative legal acts of different levels, but with a certain passivity of the judiciary on this fundamental issue.

In order to ensure the proper role of the Constitution in the life of society and every citizen, the legislator must ensure a clear reflection of the provisions of the Constitution in the norms of laws and regulations, enhance the ratio of direct action of the norms of the Constitution by requiring the judiciary to refer to the substantive part of their decisions be-

sides the special standards that directly regulating the considered by court the legal relationship to the legal norms of the Basic law.

We believe that the recognition of the Constitution as an act of direct action is crucial and confirms, in particular, the fact that Kazakhstan is actually making practical steps towards the real recognition of the rights and freedoms as the supreme value of the state. At the same time, the research of some legal aspects of the principle of direct action of the Constitution is not sufficient for the full and complete understanding of the mechanism of its implementation as a whole and the determination of its social effectiveness. In the study of this mechanism it is important to use the potential of law in general and other sciences – history, political science, sociology and social psychology.

Thus, the principle of direct action of the Constitution of the Republic of Kazakhstan as a powerful practical tool of legal effect on all aspects of life of society and state is essential for the establishment of a legal state. This fact suggests the need to develop the concept of direct action of the Constitution of the Republic of Kazakhstan which would be adequate to the needs of the present stage of constitutional and legal development of the society and the state and fully meet its needs. This concept would become an integral part of the implementation of the theory of the Constitution which could cover the entire social mechanism of its action in the society and the state.

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