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THE LAWMAKING FORMS: THEORETICAL AND PRACTICAL ISSUES

Article is devoted to studying the forms of lawmaking and their features in Kazakhstan and abroad. As a rule, in world practice lawmaking can be implemented in three forms: the specialized authorized legislature, the people of the republic on a referendum and a certain person with the delegated powers. Adoption of laws by legislature is the usual, daily used lawmaking form. It is the most widespread, the most important and the lawmaking form providing high degree of responsibility of its participants. Realization of lawmaking by specialized authorized public authority (parliament) it is possible to consider as a fundamental basis of lawmaking, the others – as auxiliary institutes. The second form of lawmaking is national lawmakings. It is very seldom used in legislative practice. The most important aspect, feature of this form is the adoption of acts on the basis of direct will of the people, that is by a referendum. In spite of the fact that the adoption of laws by a referendum very seldom meets the countries of the world, national lawmaking is very important and significant. It is reflection of democratic nature of the state. Other form of lawmaking – creation of laws other not legislative subject within the delegated powers. Feature of this form of lawmaking: the related legislative activity is carried out by the subjects which do not have legislative powers, therefore, legislative activity on the basis of the delegated powers does not belong to an appropriate subject in a type of its direct duties.

The purpose of scientific research – to define the main forms of lawmaking used in world practice, the analysis of their importance, features and conditions of regulation by their comparison. The scientific importance of work is that article considers along with the established lawmaking form – lawmakings of Parliament, features of lawmaking in the conditions of the delegated powers, conditions of its emergence and practice of realization, value and the importance of national lawmaking, the reason of its rare application.

Key words: lawmaking, national lawmaking, adoption of law on the basis of delegation of powers, the bill, the legislation, legal regulation, national powers, a referendum, democracy.

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Заң шығарушылық нысандары: теориялық және тәжірибелік мәселелері

Мақала заң шығару нысандарын зерттеуге арналған, олардың ерекшеліктері Қазақстанда және шетелде қолданылады. Заң шығарушы органның заң шығаруы ең көп тараған, ең маңызды нысан болып табылады және оның мүшелеріне қатысты жоғары жауапкершілікті қалыптастырады. Заң шығарудың екінші түрі – танымал заң шығару. Әлемдік тәжірибеде республикалық референдумда заңдарды қабылдау өте сирек кездесетініне қарамастан, кез келген мемлекеттің демократиялық сипатының көрінісі болып табылады. Екіншісі, заң шығарудың ерекше нысаны – заң шығарушы емес, заң шығарушы билікке ие болатын басқа да субъектілер. Заң шығарудың осы формасының ерекшелігі заң шығару өкілеттігі жоқ заңды тұлғалардың заңнамалық қызметті

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жүзеге асыруы болып табылады, яғни өкілеттігін кеңейту негізінде заңнамалық қызмет оның тікелей жауапкершілігіне байланысты тиісті тақырыпқа жатпайды. Ғылыми зерттеулердің мақсаты заң шығарудың негізгі нысандарын анықтау, олардың құндылықтарын талдау, ерекшеліктер мен реттеудің жай-күйін анықтау болып табылады. Жұмыстың ғылыми маңызы: мақалада заң шығарудың әдеттегі формасы, Парламент, заңнамалық өкілеттіктерді беру, оның пайда болу шарттары мен жүзеге асыру практикасы, халықтың заң шығармашылығының сипаты мен маңызы, оның сирек қолданылу себептері қарастырылған. Практикалық маңыздылығы: мақаланың мазмұнында келтірілген мәліметтер, заң шығарушы практикада, заң шығару нысандарын зерттеуде пайдаланылуы мүмкін.

Зерттеу әдістері: талдау, салыстыру, статистикалық, философиялық, шегерім, индукция. Зерттеу нәтижесінде референдумда қабылданған заңдар конституциялық құқықтық қатынастар жүйесіндегі халықтың орнын ескере отырып, басым құқықтық күшке ие болуы тиіс деп негізделген. «Нормативтік құқықтық актілер туралы» заң заң актілерінің иерархиясында, заң нормалары мен референдумда қабылданған өзге де актілердің нормаларына қайшы келген жағдайда, халықтың тікелей ерік-жігерімен қабылданған заң нормаларының басымдықты ережесін реттейді. Зерттеудің маңыздылығы: мақалада заң шығарушы билік өкілдерінің, құқықтық реформаның заң шығарушы жүйесінде қабылданған заңның орны негізінде заң шығарудың ерекшеліктерін анықтайды. Жұмыстың практикалық маңызы: зерттеу нәтижелерін заң шығару тәжірибесінде қолдануға болады.

Түйін сөздер: заң шығару, заң шығару өкілеттігі, құқықтық реттеу, халықтық өкілдігі, референдум, демократия.

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Формы законотворчества: теоретические и практические проблемы

Статья посвящена изучению форм законотворчества, их особенностей, используемых в Казахстане и за рубежом. Законотворчество законодательного органа является самой распространенной, наиболее важной формой законотворчества и создающей для ее участников более высокую степень ответственности. Второй формой законотворчества является народное законотворчество. Несмотря на то, что в мировой практике принятие законов на республиканском референдуме встречается очень редко, это проявление демократического характера любого государства. Другая, необычная форма законотворчества – принятие законов не законодателем, а иным субъектом, наделенным законодательным полномочием. Особенностью данной формы законотворчества является осуществление законодательной деятельности субъектами, не обладающими специальными законотворческими полномочиями, то есть на основе наделения полномочиями законотворческая деятельность не может принадлежать соответствующему субъекту в силу его непосредственной обязанности. Целью научного исследования является определение основных форм законотворчества, анализ их значения, особенностей и состояния регулирования. Научная значимость работы: в статье рассматривается наряду с обычной формой законотворчества – Парламента, особенности законотворчества при делегировании законодательных полномочий, условия его возникновения и практика реализации, сущность и значение народного законотворчества, причины его редкого применения. Практическая значимость: данные, выводы, изложенные в содержании статьи, могут быть использованы в законотворческой практике, в исследовании форм законотворчества.

Методы исследования: анализ, сравнение, статистическая, философская, дедукция, индукция. В результате исследования было обосновано, что законы, принятые на референдуме, должны иметь приоритетную юридическую силу с учетом места населения в системе конституционно-правовых отношений. В законе «О правовых актах» следует регламентировать место акта народного законотворчества в иерархии правовых актов, приоритетное положение норм закона, принятых посредством прямого волеизъявления населения в случае противоречия между нормами закона и нормами иных актов, принятых на референдуме. Ценность исследования: в статье определены особенности законотворчества на основе делегирования законодательных полномочий, место закона, принятого на референдуме, в системе правотворчества. Практическая значимость результатов работы: выводы исследования можно использовать в правотворческой практике.

Ключевые слова: законотворчество, делегирования законодательных полномочий, правовое регулирование, народное представительство, референдум, демократия.

Introduction

In any state adhering to a civilized way of development besides lawmaking questions of adoption of regulations in general, lawful registration of various processes in society are important. Ensuring various legal reforms by necessary legal base undertaken in the state, execution of tasks of any state programs demand law-making, including the main – lawmaking. As, in any developed state the law makes a basis of a legal system of this state, also in laws freedoms and the interests of citizens as members of democratic society are established, legal, human, personal qualities develop. Respectively, the fact that finding of increase in degree, stable development of the law and activities for its creation in the center of attention of science at a present stage of social development is objectively reasonable phenomenon.

As domestic and foreign practice shows, in a realization form lawmaking is various. In spite of the fact that in any state lawmaking belongs to legislature, the Parliament is not the only form. From world practice of lawmaking we see several forms of realization of such activity. These forms differ among themselves according to subjective contents (direct participants), on process of creation of legal statuses, in the ways and methods of their generalization in the uniform normative legal act and also according to the main procedures used at their acceptance. Differences of forms of lawmaking can be noticed on actions of participants, on ways of execution of the functions by them. Procedures for providing validity to legal acts show these differences and give the chance to study them and to analyse.

Theoretical-methodological bases of the article

Acquaintance with the Kazakhstan and foreign practicians shows three main forms of lawmaking:

1. Legislative activity of public authority of the power. Adoption of laws public authority is daily used main form of lawmaking. Here it is about activities for creation of acts within execution of the functional duties by the special representative by public authority.

In this form of lawmaking the adoption of laws carries out specialized authorized body – the state legislative authority (Parliament of the Republic of Kazakhstan). Besides, other subjects also participate in this form of lawmaking in formation of a legislative system (the President, the Government).

The corresponding form of the legislation means performance by the staff of specialized authorized body of all necessary actions for creation of an effective complex of acts. They define, make precepts of law for a legal statement and reflection and form their text contents, uniting them in a uniform complex and also perform formal procedures for official adoption of the legal act and allocate it with validity. Adoption of laws by authorized public authority (parliament) is the most widespread, the most important and the lawmaking form assuming the highest degree of responsibility of participants. The regulating possibilities of formation by parliament of the legislation of the republic are generally connected with professionalism and personal qualities of the legislators and other persons participating in process of creation of the law. It is possible to note that now among personal qualities of legislators there are legal culture and professional consciousness play an important role. As the quality and efficiency of the acts adopted by the legislator are defined by the level of legal culture and professional consciousness of the legislator. (Ibrayeva, 2017: 78)

On condition of high level of training of the subjects participating in lawmaking process, law-making activity of Parliament is the most effective form of lawmaking. Respectively, purposeful and correctly organized activity of the experts who perfectly mastered rules of the legislative equipment allows to achieve successfully the lawmaking objectives, fully, specifically and systemically to show elements of legislative rules in provisions of regulations. In other words, provides the regulating effectiveness of corresponding acts. Only in the course of the lawmaking realized in such form legislators have an effective opportunity of realization of the professional and creative potential. (Deppe, 2008)

Discussion

As we already noted, in Kazakhstan specialized public authorized body on realization of lawmaking is the Parliament of RK. As it is approved in Article 49 of the existing Constitution of Kazakhstan the Parliament of RK is the supreme representative body of the Republic which is carrying out legislature. As we can notice, the Constitution of the Republic assigned legislature to Parliament. The legislature of Parliament of RK means set of its powers on adoption of laws. According to the Constitution adopted in 1995, the Parliament of the Republic is not the supreme body of the government as in Soviet

period, also as well as is not the only legislature which is carrying out legislative activity as it was established in the Constitution of 1993, it it is simple «the supreme representative body which is carrying out legislature». Non-recognition of Parliament not only as the supreme body of the government, but also not the only legislature in the Constitution of 1995 is not casually. The reason of deprivation of Parliament of function of the only body which is engaged in legislative activity is the new form of lawmaking approved in the Constitution of 1995, that is lawmaking of the President of Kazakhstan on the basis of delegation of powers. (Dave, 2007)

The adoption of laws Parliament is a daily form of lawmaking. This public authority, directly and indirectly created by the people, represents the people of the Republic, means integrity of all people, is the main manifestation of democratic character of the state, that is is recognized as the main form of realization of the power citizens. Therefore, the Parliament is considered as the representative of interests and will of the people, that is all citizens of the state. In this regard the main activity of Parliament of RK is recognition, studying and reflection in laws of freedoms, the interests of indigenous people, providing a direct, continuous communication of the people with the state through the deputies. The similar nature of Parliament defines a basis of activity of its members – representatives of the people. For deputies the most important – care of satisfaction of interests of citizens by expression of will of all population. (Bigeldy, 1996)

Realization of lawmaking by specialized authorized body of the government is a fundamental form of lawmaking, other forms are considered as auxiliary institutes and in practice meet seldom. (Davis, 2002)

2. In world practice it is possible to meet realization of lawmaking not by legislature, and other person. In that case, the following form of lawmaking is the adoption of laws on the basis of delegation of legislative powers. This form of lawmaking admits quality of special institute of legal regulation. Following essence: lawmaking is implemented by the subjects which do not have special legislative powers on the basis of the law or an order of authorized body of the government. Therefore, feature of lawmaking on the basis of delegation of powers is that legislative activity does not belong to appropriate authority owing to its direct duties. In the Big Soviet encyclopedia the institute of delegation of the law-making right is determined as the edition by the Government of the regulations having validity by representation of Parliament. (Prokhorov, 1972: 56) Thus, in this form of law-making the right of adoption of law is given to the public authority or a certain person who does not have the right for adoption of laws owing to the corresponding competence.

If to speak about the one who is specifically allocated with legislative powers the main subject having legislative powers is the Government (a naprmiyer, in Italy, Spain, France, etc.). As for the Republic of Kazakhstan, the legislative institute on the basis of delegation of powers at the constitutional level was for the first time introduced by the Constitution of 1995. According to edition of the Constitution before the constitutional reform on March 10, 2017 the Parliament of the Republic at a joint meeting of Chambers two thirds of voices of the total number of deputies of each of Chambers at the initiative of the President has the right to delegate to it legislative powers for the term which is not exceeding 1 years. (Constitution, 1995: Article 53 Paragraph 3) Therefore, the Constitution of 1995 fixed a possibility of delegation of legislative powers in Kazakhstan not to the Government, and the President of the Republic. (Kanter, 1993)

As a rule, in foreign countries with the regulated legislation on the basis of delegation of powers the circle of the questions which are a subject of lawmaking of the delegated person (Government), a form of the act of the Government published by the relevant institute, rules which need to be taken in attention at implementation of powers are specified in the act of delegation of powers the concrete term of use by the Government of the delegated powers (that is legislative powers). Classification of the above-stated standard of the Constitution of RK of 1995 operating till 10.03.2017, the analysis of the legislation of that time regulating the status of the President and the Government show regimentation in these acts only of an order and the term of delegation by Parliament of the Republic of legislative powers to the President, respectively a side of the questions which are a subject of lawmaking of the President was not defined in the legislation of the republic. Uncertainty in the constitutional legislation of border of the relations presented on the legislation of the President indicated a possibility of the adoption of laws on any public relations considered in Paragraph 3 of Article 61 of the Constitution including borders of the relations regulated by the constitutional law.

The President of Kazakhstan in the order of delegation of powers had the delegated powers twice: in December, 1993 after self-dissolution of the Supreme Council on the 12th convocation and in March, 1995 on the basis of the decision of the

Constitutional Court of RK on recognition of powers of deputies of the Supreme Council unconstitutional. As it is possible to notice, the case of early stay of powers of two convocations of Parliament was caused by delegation of legislative powers to the President and these two cases took place before adoption of the Constitution of 1995. Therefore, in spite of the fact that the legislation form on the basis of delegation of powers in Kazakhstan at the constitutional level was for the first time regulated by the Constitution of 1995, it was not put into practice after adoption of the Constitution. According to the changes and additions made on March 10, 2017 in the Constitution of the Republic the President does not carry out legislative activity. That is, the institute of delegation of legislative powers was excluded by the law on modification and additions in the Constitution of RK on March 10, 2017. (Law, 2017) Thus, today in the Republic of Kazakhstan it is possible to allocate the following forms of implementation of lawmaking:

1. Legislation of Parliament of the Republic of Kazakhstan;
2. The legislation of the people of Kazakhstan by a referendum.

In general, the analysis of practice of the legislation on the basis of delegation of powers showed the following: – it is possible to tell that when functioning of the installed lawmaking mechanism – legislature, the legislation plays a supporting additional role and this legislature it is designed to supplement legislative activity of legislature in case of its inability adequately effectively and in due time to govern a certain complex of the public relations. (Nafziger, 1995)

Though institute of delegation of powers in present time in some countries are recognized as necessary institute and takes the place, in a number of the countries delegation of legislative powers to other person is not considered necessary. To take, for example, China. In China it is caused by feature of legal regulation. More precisely, in this state it is widespread and not the adoption of laws, and bylaws is widely used. In this regard in the legal system of China the number of laws are not enough. The complexity of legislative process is one more reason for that. The scientist V.V. Sevalnev in article of 2014 noted: «Despite high requirement of society for the law «About Counteractions of Corruption and to Bribery», this bill many years agreed in committees and groups, the question of adoption of the relevant document still is under consideration» (Sevalnev, 2017: 91) One more feature of adoption of laws in China: a possibility of making decision on refusal in adoption of any law. The scientist Troshchinsky P.V. notes that in spite of the fact that in China drafts of the Civil code and the Administrative code were discussed by experts several times, the corresponding projects did not reach acceptance process (Troshchinsky, 2017: 158-159)

If in China the procedure of adoption of law in parliament is very long and difficult process that forms a basis of acceptance of a set of bylaws, then in some other countries the long period of lawmaking became the reason of emergence of institute of delegation of legislative powers. Due to the long-term process of adoption of law in Parliament it is difficult to notice all changes happening in society and quickly legally to react to them.

If to prove, leaning on historical situations, during certain periods of social development in life of a number of the countries in the private sphere stagnation, instability took place, besides, on regularity of development public life became complicated, process of its development went violently, in connection with acceleration of public processes the role of the state amplified, in lawmaking of Parliament new problems appeared. In particular, from Parliament rapid response to changeable circumstances was required. However, despite possession of necessary opportunities for adoption of qualitative laws, in connection with the arisen problems the Parliament was not capable to adopt concrete, priority laws quickly. If to speak about one more way of lawmaking – national lawmaking, the adoption of laws by a referendum on the nature is unsuitable for the operational solution of problems. In such cases, lawmaking on the basis of delegation of powers is the only mechanism allowing to adopt quickly the law necessary for society, the state. In addition to the aforesaid, the regulated order of lawmaking interferes with expeditious adoption of the priority law. In particular, according to the developed regularity change, addition of the current legislation perhaps not with other acts, but only the law. In case of need other law is required to publish changes of the current law. Need of modification and additions in any laws leads to excessive increase in work of Parliament. In turn, in connection with the decision private, sometimes formal questions, it takes away a lot of time from Parliament. In this regard, owing to increase in amount of works, the Parliament does not have enough time for deep discussion, the analysis of the major bills. It is possible to tell that this fact served as the cause of institute of delegation of legislative powers in a number of foreign countries. So, we will consider the main conditions of emergence of institute of

delegation of legislative powers, first, as we noted, excessive increase in work of legislature. As a rule, in such situation the Parliament can charge the solution of some questions on the agenda, that is legislative regulation, to the Government (in some countries to the President). (Kotov, 2013: 457) Secondly, consideration of legislative regulation of some public relations by Parliament as private questions. In spite of the fact that regulation of such relations requires the law, these issues can be resolved by executive power. Thirdly, need of expeditious regulation of any public relations. It caused by the long procedure of discussion, adoption of the bill in Parliament. Fourthly, need of timely regulation of the public relations. Adoption of laws is timely, neither early, nor late, the most important, gives the chance to the legislative base of the state to go along with development of society and also defines quality of laws. As last and current practice of social development shows, the quality of laws is defined not only their legal qualities, but also that, how in due time they are accepted. Fifthly, there can be other situations. In some countries, despite legal not regimentation of delegation of legislative powers, in practice cases of adoption of acts by persons meet, on the status not of representatives to adopt laws. For example, in the neighboring Russian Federation despite not regimentation in the constitutional legislation of a question about delegations of legislative powers, it is possible to notice cases when the Parliament of the Russian Federation charged to the Government or the President regulation of any appropriate questions by adoption of laws. As for our state, we cannot tell that a lack of time at legislature to be engaged in direct lawmaking owing to increase in amount of works or impossibility of expeditious regulation in Parliament in case of need of expeditious regulation of certain relations, promoted fixing of institute of delegation of legislative powers in the Constitution of 1995. The analysis of historical events in the political system before adoption of the Constitution of 1995 showed that implementation of lawmaking by the President was connected with absence at that time in the system of the government of specialized authorized body for execution of legislative activity – legislature. (Grajzl, 2009)

In world practice of adoption of acts on the basis of delegation of powers it is possible to meet cases when the number of the acts adopted by this form of lawmaking much more exceeded the number of the acts adopted by specialized authorized body – Parliament. For example, V.E. Chirkin wrote in the work that in Great Britain in a year no more than 100 laws whereas on the basis of delegation of powers in a year about 2 thousand acts are accepted are adopted (Chirkin, 2012: 142)

In practice of application of the relevant institute it is possible to meet cases when the government (in Kazakhstan the President) on the basis of the delegated powers successfully resolved the issues which arose in life of the state. For example, in Kazakhstan the President of the Republic in connection with self-dissolution of the Supreme Council on its delegation adopted 54 valid decrees (according to the Law «About Temporary Delegation to the President of the Republic of Kazakhstan and Heads of Local Administrations of Additional Powers»). Valid these decrees resolved important issues of the political system, an economic refoma, social protection of the population, strengthening of legality and a legal order, external political and foreign economic activity. (Mukhamedzhanov, 1995) As N.A. Nazarbayev told personally: «In the absence of Parliament it was necessary to fill shortcomings of the sphere of legal regulation, to adopt a package of economic laws espceially important for formation of market economy by means of valid decrees. Therefore continuous functioning of an economic complex of the country was ensured by necessary legislative bases. (Nazarbayev, 1996) Thus, practice of application of the relevant institute showed that it not only provides uninterrupted operation of lawmaking, but also continuously provides public administration and social development by legal base.

3. National law-making is very seldom used lawmaking form. It is about adoption of acts on the basis of direct will of the people, that is by a referendum. If in the previous forms of lawmaking by subjects there were a legislature of the government and the person given legislative powers (the President, the Government), then a subject of adoption of law by a referendum are the people. In spite of the fact that this form of lawmaking in the countries of the world meets seldom, adoption of laws by the people very important and significantly. It is expression of democratic character of the state.

The referendum is one of the most influential and indicative forms of democracy. It provides the direct decision with the people of certain questions of the state life, determination of freedom of the population and legislative registration. According to introduction of the law of the Russian Federation of June 28, 2004 «About a referendum of the Russian Federation» the referendum the highest is direct expression of the power of the people, way of implementation of its sovereignty. (Federal

constitutional act) According to Article 3 of the Constitution of the Republic of Kazakhstan the only source of the government are the people. The people carry out the power directly or through the representatives. The referendum is recognized as the only main way of direct implementation of the government by the people.

In fact the referendum is a national vote of the citizens having the right for participation in a referendum concerning the state value. Treat the similar questions (the state value) which are brought up for a popular vote also adoption of laws.

Studying and the analysis of institute of a referendum showed that it was recognized as national vote not at once. The history of formation and development of a referendum, as well as any other phenomenon showed that in at one time it was considered as national poll, was determined as the appeal to the case of voters for the purpose of acceptance of the final decision by certain questions later. The provision on regulation of the relevant institute in the Constitution of the USSR of 1936 became the reason of definition of the bill of a referendum not as national vote, and as national poll. In particular, in this Constitution the referendum was established as national poll.

At a stage of the development the referendum as we noted, was determined as the address to the people by certain questions. In particular, in due time professor A.A. Mishin specified in the legal encyclopedic reference book a referendum as «the appeal to the case of voters for the purpose of acceptance of the final decision on the constitutional, legislative questions or other internal political and foreign policy affairs». (Sukharev, 1984: 320) In its definition of a referendum not as decision-making on appropriate questions but only as the address to the people «is not present the speech about vote, adoption of the concrete decision by the relevant institute», D.M. Baymakhanova (Baymakhanova, 1998: 64) says.

In the Constitution of Kazakhstan of 1978 removal at national discussion of the most important public questions of the state life and also removal at a national voting (referendum) was regulated. The corresponding definition of a referendum caused misunderstanding from society concerning its character. In this regard we consider it necessary to stop on the following opinion of the outstanding erudite lawyer G.S. Sapargaliyev: «ambiguity of nature of a referendum became result of conventional attitude to its importance as important issues of the state life were resolved not by the people, but the Communist Party. Result of the referendum held in 1991 on preservation of the USSR, the proof of ambiguity of its character. That is, in spite of the fact that most of citizens voted for preservation of the Union, the result of this referendum did not receive obligatory validity». (Sapargaliyev, 2009: 307-308)

In the history of independent Kazakhstan two laws on a referendum were adopted. In the decree of the President of Kazakhstan of March 25, 1995, the valid Constitutional law, «About a republican referendum», the referendum was determined as national vote by drafts of laws and decisions on the most important questions of the state life of the Republic of Kazakhstan. (Decree, Art.1) The second law on a referendum adopted the same year (02.11.1995) added a concept of a referendum. In particular, according to the relevant law a referendum as in definition of the law of March 25, also solutions of rather most important questions of the state life, the most important is not only vote according to drafts of laws, it is national vote according to drafts of decisions for the most important questions of the Constitution of the Republic of Kazakhstan, the constitutional laws, laws and the state life. (Constitutional Law, Art. 1) Participation of the only source of the government – the people in legislative activity of the Republic by adoption of the Constitution of RK, the constitutional laws and laws is enshrined in the specified republican legislation only theoretically. In the history of independent Kazakhstan the referendum was held only two times and it is obvious that without adoption of the Constitution of 1995 it would not treat lawmaking. Thus, adoption of laws by a referendum in the history of the Republic of Kazakhstan still is not applied. This democratic institute was not used also in Soviet period.

The people are a special subject of lawmaking. In the Russian Federation the people are considered as the legislator having universal powers. Feature of national lawmaking in this state: here the people have the right to adopt the acts regulating any sphere of the public relations and in Russia some acts can be adopted only by holding a referendum. Adoption of the new Constitution of the Russian Federation and the law on modification of it can become an example. Adoption of these acts is not allowed in the durgy way. Therefore, in Russia the referendum in appropriate questions happens a binding character. If to speak about our state, at us legal regulation of a referendum stands on its optional hind legs. The optional referendum is a referendum which can be held on a certain question or to solve without its carrying out. As a rule, holding such referendum

depends on desire of the person authorized to appoint it.

As we noted above, the following feature of lawmaking by a referendum of Russia: the people have the right to adopt the acts regulating any spheres of the public relations. According to the current legislation of Kazakhstan a lawmaking subject by a referendum can be the Constitution of the Republic, the constitutional laws and laws (the consolidated laws and simple laws), laws on modification and additions. In the Law of RK «About a Republican Referendum» the circle intolerable on a referendum is defined. According to the corresponding praivl the following questions cannot be a referendum subject.

1) which can cause violation of constitutional rights and freedoms of the person and citizen;

2) changes of the status of the Republic of Kazakhstan as independent state, unitarity and territorial integrity of the Republic, form of its board and also fundamental principles of activity of the Republic underlain by the Founder of independent Kazakhstan, the First President of the Republic of Kazakhstan – Elbasa, and his status;

3) administrative-territorial device and borders of the Republic;

4) justice, defense, national security and protection of public order;

5) budgetary and tax policy;

6) amnesties and pardons;

7) appointments and elections to a position, dismissal of persons relating to maintaining the President, Chambers of Parliament and Government of the Republic;

8) implementation of the obligations following from international treaties of the Republic. (Constitutional Law, Art. 3)

Results

The result of the related activity of the people as direct subject of lawmaking does not need any confirmation by acts of the President of the Republic of Kazakhstan or the public governmental bodies and also are binding in all territory of the Republic. The laws adopted on a referendum anyway have validity, respectively act on all territory of the republic.

As we noted above, the people of the Republic are the only source of the government. The role of the people in the system of constitutional legal relations means need of existence of priority validity for the laws adopted on a referendum, that is need of priority of result of national lawmaking – the law in a legislative system. According to the law «About a Republican Referendum» (the 2nd Paragraph 35 of article) «Discrepancies between the decision made by a referendum, and the Constitution, the constitutional laws, laws and other regulations of the Republic are eliminated by reduction of the Constitution, the constitutional laws, laws and other regulations in compliance with the decision accepted by a referendum». As we see, this norm shows priority of the law adopted by the held referendum in all legal system. However, the analysis of the following legislation of the republic shows the probability of non receipt of priority of the law adopted by direct will of the people in a legislative system. In particular, in spite of the fact that the law «About a Republican Referendum» set rule of the law (act) adopted on a referendum (Article 35, Paragraph 2), is enshrined in Article 12 of the law «About Legal Acts» that in the presence of contradictions in standards of regulations of different level standards of the act of higher level work, and in the presence of contradictions in standards of regulations of one level the standards of the act which later are put into operation work. Respectively, this norm allows to draw a conclusion that the level of the act adopted by national lawmaking can be low. Besides, it is normal of the above-stated law, defining a stage of normative legal acts (Article 10), the role of the law adopted on a referendum in the corresponding stage is not defined. Thus, in the law «About Legal Acts» it is necessary to settle a role of the act of national lawmaking at a stage of normative legal acts and also priority position of the legislative rules accepted by direct will of the people in case of contradictions between the legislative rules and standards of other acts accepted on a referendum. (Cummings, 2004: 688)

According to the Constitution of the Republic of Kazakhstan of 1995 the right to make decisions on holding a referendum belongs to the Republic President. In the previous Constitution of 1993 the similar right was granted to the Supreme Council and after the Supreme Council to the President. As we noticed, today the legislature is incompetent to prinmat decisions on holding a referendum. The parliament has the right only for manifestation of an initiative to destination of a referendum. Scientists V.A. Kim and G.V. Kim prove the relevant decision of a question so: «… in that case announcement of referendum will not be overlapping. If division of the right for decision-making according to holding a referendum into two parts as it is fixed in the constitutional norm of 1993, that is existence of a parallel mechanism continued further, it could lead to crisis of the power, such referendum would turn

into the instrument of split of the people from a form of the direct power». (Kim, 1998: 69)

Further, concerning an issue of change of the laws adopted on a referendum, in Kazakhstan special rules, a special order concerning change, addition of the laws adopted in such form are not established. Therefore, the laws adopted on a referendum can be changed by other forms of lawmaking (Parliament). Foreign practice showed that the appropriate question in all countries is regulated differently. In the neighboring Russian state in Paragraph 4 of Article 83 of the above-stated Law of June 28, 2004 «About a referendum of the Russian Federation» it is fixed that the decision made on a referendum can be cancelled or changed precisely by decision-making on a new referendum if in the decision other order is not specified. As we see, this situation claims that the law adopted in the form of national lawmaking can change or be repealed only in the corresponding form, that is by means of the relevant law adopted on a referendum.

In science it is considered that such order of change of the laws adopted on a referendum, has the difficulties. In particular, such order very much complicates improvement of the laws adopted on a referendum and causes danger of emergence of insuperable contradictions (for example if the law adopted on a referendum contradicts the new law). (Chukhvichev, 2012: 103)

Such high role of the laws adopted by the people on a referendum in Russia shows the following special results of national lawmaking: the laws adopted during direct will of the people are fundamental for other normative legal acts (and for laws). Therefore, the laws adopted on the Russian public referendum are designed to form a basis, base for the whole system of a zakonoadelstvo, including for the laws adopted in the parliamentary way.

In the Kazakhstan legislative practice an example of national lawmaking by direct will of the people is the existing Constitution of the Republic. At the moment it is the only act adopted on a republican referendum by direct will of the people.

Showed studying of the law «About a Republican Referendum» that in the republic process of national lawmaking is regulated generally and superficially and as we spoke, has very rare practical application, that is today national lawmaking is limited to adoption of the existing Constitution. The incomplete and inexact regimentation of this form of lawmaking can be noticed on the following signs: the special procedures realized during national lawmaking completely are not defined, not clearly and unclear who and as will create the bill submitted for discussion who and as will make changes to the relevant bill what special procedures need to be performed for pronouncement of the bill at a referendum. (Hanfling, 2006)

In general, this form of lawmaking has as well shortcomings. In particular, in case of adoption of laws by holding a referendum its participants (people) have no real opportunity to participate in preparation of the bill. Citizens (people) have no competence to define contents of future law, to influence an essence and a form of the provisions stated in it. They only agree or do not agree with the ready text of the bill made by other subject. Besides, on a referendum its participants have to vote for the whole bill. That is, citizens cannot vote for a certain part of the bill submitted for a referendum which they want which is pleasant to them. In turn, in case the legislator, that is the citizen voting on a referendum, agrees not with the whole bill, and only with its certain part, such order of adoption of law forces it to choose one or the other actions: votes for adoption of the whole bill, approving along with the pleasant provisions of the bill and not pleasant provisions, or despite existence in the bill which were pleasant to it and the being equitable its interests of provisions, but owing to presence at the bill of not pleasant provisions, does not approve it. Therefore, in that case the citizen acts against the will, that is votes against the project, despite existence in it of the provisions which were pleasant, being equitable to its interests. It not only lowers degree of objectivity of a referendum, but also raises doubts in a possibility of use of this referendum as the instrument of expression of will of the people. (Harrington, 2005)

Conclusion

Studying of the law considering the organization and an order of holding a referendum showed that it specifically does not regulate carrying out or not carrying out national discussion on the bill submitted for discussion of a referendum. Therefore before submitting bills for a referendum, it is necessary to fix carrying out national discussion specifically. Incomplete and inexact regulation of the law on a referendum gives the grounds to draw a conclusion that participating citizens of a referendum will have no opportunity to make changes to the bill which is brought up for national vote, to offer new, edition of the bill.

Practical importance: the materials, conclusions presented in contents of article can be used when training in the sphere of constitutional right,

institute of lawmaking, when studying legislative practice, lawmaking forms. Research methods: analysis, comparison, statistical, philosophical methods, deduction, induction. As a result, taking into account a role of the people in the system of constitutional legal relations, this research proved need of the introduction in priority validity of the laws adopted on a referendum, that is need of priority of the law, which is result of national lawmaking in a legislative system, defines the role of acts of national lawmaking at a stage of normative legal acts in the law «About Legal Acts», need of regulation of a priority position of the legal norms accepted by voluntary will of the people in case of contradictions between the legal standards and standards of other acts accepted on a referendum. Research value: article defines feature of institute of lawmaking on the basis of the delegated powers, a role of the law adopted on a referendum in the system of lawmaking. Practical importance of results of work: conclusions of a research can be used in law-making practice. (Qandilov, 2013)

The above-mentioned does not give the grounds to criticize and doubt the importance of institute of a referendum in general as a way of expression by the people of the will. The referendum is necessary for the population as the only way of direct statement of the will, without connecting it with views and opinions of the representatives. However, as we noted, now in the conditions of emergence and regulation of this mechanism in the country the referendum is necessary for expression of views on in advance certain, created question. Further improvement, development of this constitutional and legal institute in the future can create opportunities for formation by rather important form of will of the people in the course of lawmaking. In the developed, advanced case the referendum not only will fill up legal base of the republic, but also will become the reason of increase in activity of certain public authorities (faces), will help growth of legal consciousness of citizens. As on a referendum are implemented the following social function of public authority: public control of activity of public authorities. Because on a referendum the bills offered on a popular vote by the subjects who showed an initiative in announcement of referendum are given appreciation. In addition, by a referendum participation of citizens in affairs of the state will increase, influence and impact on all spheres of life will amplify.

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