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**ON THE ISSUE OF THE COMPETENCE OF ADMINISTRATIVE COURTS IN THE
REPUBLIC OF KAZAKHSTAN, THE MAIN DIFFERENCES FROM CIVIL PROCEDURE**

Abstract. The article deals with the issues of the competence of administrative courts in the Republic of Kazakhstan and in foreign countries. The main attention is paid of the peculiarities of the conduct of administrative proceedings in the Republic of Kazakhstan.

The scientific novelty lies in the study of the basic principles of the administrative courts' organization. The author is of the opinion that every person has the right. His case should be observed by the independent and impartial court.

In the article, based on the comparative research method, a brief overview of the competence of administrative courts in the Republic of Kazakhstan and other countries. The main differences between the administrative process and civil proceedings were also identified.

The author thinks that the institute of administrative procedures is of particular relevance, especially the analysis of the principles that still remain little explored in the administrative-legal doctrine.

Thus, the issue of the competence of administrative courts is due to the sum of the specialized principles as a condition for ensuring citizens' access to justice.

Keywords: administrative justice; administrative proceedings; administrative judge; legality; public rights; interests of citizen; officials; administrative case.

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**ҚАЗАҚСТАН РЕСПУБЛИКАСЫНДАҒЫ ӘКІМШІЛІК СОТТАРДЫҢ ҚҰЗЫРЕТІЛІГІ
ТУРАЛЫ МӘСЕЛЕГЕ ҚАТЫСТЫ,
АЗАМАТТЫҚ ПРОЦЕСТЕН НЕГІЗГІ АЙЫРМАШЫЛЫҚТАРЫ**

Аннотация. Мақалада Қазақстан Республикасындағы және шет елдердегі әкімшілік соттардың құзыреті мәселелері қарастырылады. Негізгі назар Қазақстан Республикасында әкімшілік сот ісін жүргізудің ерекшеліктерін анықтауға аударылады.

Ғылыми жаңалық – әкімшілік соттар мен әкімшілік сот ісін ұйымдастырудың негізгі принциптерін зерттеу. Автор әрбір азамат, егер оның заңды құқықтары бұзылған жағдайда, тәуелсіз және бейтарап соттың ақылға қонымды мерзімде істі әділ және жария талқылауға құқығы бар деген қорытындыға келді.

Мақалада зерттеудің салыстырмалы әдісі негізінде Қазақстан Республикасындағы, жақын және алыс шет елдердегі әкімшілік соттардың құзыретіне қысқаша шолу жасалды. Сондай-ақ, әкімшілік процестің азаматтық сот ісін жүргізуден негізгі айырмашылықтары анықталды. Автордың пікірінше, Әкімшілік процедуралар институты, әсіресе әкімшілік-құқықтық доктринада әлі де аз зерттелген принциптерді талдау ерекше өзекті болып табылады.

Осылайша, әкімшілік соттардың құзыреті туралы мәселе азаматтардың сот төрелігіне қол жеткізуін



қамтамасыз ететін шарт ретінде әкімшілік сот ісін жүргізу қағидаттарын сапалы қамтамасыз етумен тығыз байланысты.

Түйінді сөздер: әкімшілік әділет; әкімшілік сот ісін жүргізу; әкімшілік судья; заңдылық; қоғамдық құқықтар; азаматтардың мүдделері; лауазымды тұлға; әкімшілік іс.

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К ВОПРОСУ О КОМПЕТЕНЦИИ АДМИНИСТРАТИВНЫХ СУДОВ В РЕСПУБЛИКЕ КАЗАХСТАН, ОСНОВНЫЕ ОТЛИЧИЯ ОТ ГРАЖДАНСКОГО ПРОЦЕССА

Аннотация. В статье рассматриваются вопросы компетенции административных судов в Республике Казахстан и в зарубежных странах. Основное внимание уделяется выявлению особенностей проведения административного судопроизводства в Республике Казахстан.

Научная новизна заключается в изучении основных начал организации административных судов и административного судопроизводства. Автором сделан вывод о том, что каждый гражданин, в случае если нарушены его законные права имеет право на справедливое и публичное разбирательство дела в разумный срок независимым и беспристрастным судом.

На основе сравнительного метода исследования был проведен краткий обзор компетенции административных судов в Республике Казахстан, и в странах ближнего и дальнего зарубежья. Также были выявлены основные различия административного процесса от гражданского судопроизводства.

По мнению автора, особую актуальность представляет институт административных процедур, особенно анализ принципов, которые в административно-правовой доктрине до сих пор остаются малоисследованными.

Таким образом, вопрос о компетенции административных судов тесно связан с качественным обеспечением принципов административного судопроизводства как условия, обеспечивающего доступ граждан к правосудию.

Ключевые слова: административная юстиция; административное судопроизводство; административный судья; законность; публичные права; интересы граждан; должностное лицо; административное дело.

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Introduction. It should be noted that the competence of the administrative courts is of fundamental importance in ensuring the quality of justice in public law. The effective functioning of administrative courts and administrative proceedings is an important step in the implementation of the provisions of the Constitution of the Republic of Kazakhstan guaranteeing citizens the right to judicial protection.

The administrative justice promotes to the realization of the most important principles reflected in the Constitutional Law «On the Judicial system and the status of Judges of the Republic of Kazakhstan» on December 25, 2000 №132¹.

Independent courts strengthen the authority of the State, which has proclaimed the rights and freedoms of a citizen as the highest value.

Also noteworthy that recently the position of administrative courts have been widely discussed by domestic scientists and practicing lawyers.

The analysis of the legislation shows that administrative proceedings differ from other types of legal proceedings. That it deals with administrative cases where one of the sides is necessarily a public administration body or another public body.

In this regard, the administrative courts created on the basis of the new Administrative procedural and process-related code of the

¹ О судебной системе и статусе судей: Конституционный закон Республики Казахстан от 25 дек. 2000 г. №132 [Электронный ресурс] – Режим доступа: <https://adilet.zan.kz/rus/docs/Z000000132> (дата обращения: 25.07.2023).



Republic of Kazakhstan (here and after – APC) organically fit into the ongoing judicial and legal reform, one of the goals of which is to further specialize the courts of the administration of justice in the Republic of Kazakhstan.

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

Results and discussion. The administrative courts' competence is not only theoretical, but also has an important practical character. The success of the ongoing judicial and legal reform and the effectiveness of the mechanism for protecting the rights and freedoms of citizens from administrative arbitrariness of officials largely depend on how clearly the legal foundations of the activities of administrative courts are formulated.

B.K. Nurgazinov notes that the need for administrative proceedings to acquire an independent procedural form is due to a number of reasons, one of which is formally unequal position of participants (parties) in the administrative process. In this regard, the APC has adopted an entirely new principle of administrative procedure, which provides for the equalization of positions of the parties, the so-called active role of the court [1].

A.N. Prizhennikova notes, the creation of special administrative courts for the consideration of public law disputes corresponds to expand the legal guarantees of the individuals of administrative and jurisdictional management [2, p. 436].

In accordance with the APC of the Republic of Kazakhstan, 5 categories of cases are considered in the order of administrative proceedings: 1) cases of challenging the actions (inaction) of administrative bodies; 2) cases of challenging decisions, conclusions; 3) cases of challenging the actions (inaction) of bailiffs;

4) cases; 5) cases on challenging the actions (omissions)².

Until July 1-st, 2021, the above categories of cases were considered in civil proceedings in accordance with the civil procedural code of the Republic of Kazakhstan in special claim proceedings.

Thus, according to article 16 of the administrative procedural code of the Republic of Kazakhstan, administrative courts have the right to:

1. Without limiting itself to explanations, statements, petitions of participants of administrative process, arguments, evidence and other materials submitted by them of administrative case, full and objective investigation of all factual circumstances, Important for the proper resolution of an administrative case.

2. The judge has the right to give his preliminary legal opinion on the legal grounds relating to the factual and (or) legal sides of the administrative case.

3. The court, on its own initiative or at the reasoned request of the participants in the administrative process, collects additional materials and evidence, as well as carries out other actions aimed at solving the tasks of administrative proceedings³.

From the above, we can note that the legislator has expanded the rights and competencies of the judge in administrative cases. The competence of this judge has been expanded for the purpose of a fair resolution of an administrative case.

Next, we will consider the opinions of the scientist A.A. Amangeldy regarding the correctness of including administrative procedures and administrative court proceedings in the Administrative procedural and process-related code of the Republic of Kazakhstan.

The scientist notes that the administrative procedure is a repeated administrative procedure for considering hundreds of applications and complaints in administrative bodies, officials, as individuals or legal entities [3, p. 29]

According to A.A. Amangeldy, the consolidation of administrative procedures and administrative proceedings into one codified

² Административный процедурно-процессуальный кодекс Республики Казахстан: от 29 июня 2020 г. №350-VI [Электронный ресурс] – Режим доступа: <https://adilet.zan.kz/rus/docs/K2000000350/history> (дата обращения: 25.07.2023).

³ The same source.



act was a bold decision. The scientist cites the opinion of V.M. Redcous, who also notes the courage of the Kazakh legislator. According to the scholar, the combination of such seemingly rather diverse legal phenomena as administrative procedures and administrative proceedings in one codified act, shows that the current level of law-making and legislative technology allows you to realize the intended, although many scholars and practitioners probably recognize this, at least, debatable, and as a maximum, not very successful [4].

Thus, we see that there are no unified approaches among scientists.

Some scientists believe that it is necessary to separate administrative procedures into a separate codified act. Others believe that their connection is necessary.

Let's consider an attempt to include consideration of cases arising from administrative and legal relations in civil legislation.

We can see that an attempt was made to fully include the consideration of cases that arise from administrative and legal relations in civil proceedings.

In our opinion, this position was insufficiently justified for the following reasons.

Firstly, the special subject composition of administrative and legal relations was not taken into account. Participants in these legal relations are a body, an official who has a prerogative and public authority. Thus, there is no equality between the parties.

In the civil process, disputes that arise between equal subjects are considered. For example, in some foreign countries, administrative justice authorities have an active position when considering a dispute. This is done in order to make up and equalize the possibilities of a citizen and a public authority in resolving a case.

It should be noted that the institutions of administrative procedures and administrative proceedings were developed on the basis of the legal experience of regulation in Germany [5, p. 137].

For example, the administrative courts of Germany consider three types of applications: challenging administrative decisions, requirements for the issuance of an act, requirements for establishing the fact of the issuance of an act. Claims of the first type

indicate defects in the form or content of the act. The second type of claim is a request from an interested person to make a decision, according to which the governing body is obliged to issue an act in which the plaintiff is interested. In lawsuits of the third type, the question of recognizing the existence or absence of a legal relationship or the cancellation of an act is raised in administrative courts [6].

At the same time, the presence of its own jurisdiction, – Yu. Depp, – is not the decisive moment. It seems more important when administrative courts check decisions of public administration bodies. These bodies, which have the authority to allow or prohibit citizens to perform any actions, that is, to restrict citizens in their fundamental rights, are obliged to be guided in their work by the law [7, p. 50].

Take a look the Swiss experience. Judicial control by the courts is guaranteed by article 29 of the Swiss Constitution. Thus, many administrative acts can be challenged in an administrative court directly or indirectly by applying to higher supervisory authorities [8].

The subject of an administrative dispute can be any legal act, individual or normative, since a general reservation applies in France. The exceptions are acts of the Government that are of a political nature or are aimed at safeguarding the defence and security of the State, as well as acts of a disciplinary nature adopted in schools and penal institutions.

K.S. Davis believes that the courts have become the main legislators in the United States. Today, the courts play a dominant role in the United States. The administrative procedure is actually the result of the legal practice of lawyers defending the interests of individuals dissatisfied with the actions of administrative institutions in the United States. The complaints of these persons were considered by the courts. The courts usually sided with the victims if a fair procedure was not followed [9].

Thus, Jost Guzmán notes that the legal principles enshrined in the law are not as specific as in ordinary law, but they still affect, even indirectly, the legal effects of other legal norms in their application [10, p. 237].

According to B. Schwarz, many US states have their own administrative procedures and legal laws. They are guided by federal legislation



and the State Administrative Procedure Act. Because it has been prepared and updated by state commissioners for the unification of legislation [11].

This law was the first attempt by the legislature in common law countries to establish the most important, fundamental provisions governing the administrative procedure [12, p. 16].

For example, N.G. Salishcheva notes that the role of the court appears to be different (judge) in a dispute between a citizen and the state.

In administrative proceedings, a judge cannot be an arbitrator by analogy with the consideration of a civil case. The judge's task is to take into account the real inequality in the legal positions of the parties in the sphere of public power, observing the principles of competitiveness and openness of the process.

J. Depp also names other distinctive features characteristic of the consideration of most public law discussions:

1. The administrative judge has the right to independently investigate the circumstances of the case. However, he is not bound by the statements and evidence of the parties. Being independent, he is entitled.

2. It has an expanded duty to provide clarification to the parties. However, the judge is more helpful to the parties in formulating their statements.

3. In the administrative process, there is a potentially wider range of participants in the judicial process. The judge has the right to involve third parties whose interests may be affected.

4. The main reason for bringing an action before a court is, as a rule, to challenge an administrative decision in a higher instance. Thus, the administrative judge decides not only on the original administrative act but also on the conclusion of the second instance case which rejected the complaint [7, Pp. 55-56].

Thus, a judge in the process of considering a complaint (claim) must be independent, rely on the principle of legality, but at the same time not abuse his discretion.

According to APC, the administrative judge only verifies that the fundamental rules of discretion involved have been violated. On the

other hand, based on the circumstances of the case, the judge may require the body to take a new decision: for example, the issuance of an administrative act within a specified period of time, or, if such an act has already been issued and the judge has found it to be unlawful – eliminating its negative consequences. Upon application, the court may also rule that the administrative act was unlawful.

A positive aspect in the activity of administrative courts is the possibility of checking the applicable legal norms their constitutionality. Thus, if a contradiction is revealed, the court has the right to apply to the Constitutional court with a submission on the recognition of its constitutionality.

At the same time, there are certain differences between administrative and civil proceedings.

Administrative judge decides matters relating to public law, whereas in civil proceedings the parties to the dispute are legal entities, natural persons.

According to APC, an administrative court judge is not an administrative body and therefore cannot make a final decision on the merits of the dispute and issue the required administrative act himself. Only if the case was ripe for a decision could the judge make it, replacing the actual issuance of the administrative act. In monitoring the legality of an administrative act, however, the judge may disregard the legal opinion of the administrative authority if it is not in agreement with his own – even if several administrative authorities are involved in the case, and if they have already decided⁴.

N.L. Khamaneva and N.G. Salishcheva in the work «Judicial power» note that the special procedure of administrative proceedings should reflect the following features of a public legal dispute:

- a citizen's access to justice should be simplified by establishing special procedural deadlines for applying to the court, also by the procedure of preparing the case for consideration and the consideration of the case itself;
- a citizen should be assisted in drafting an appeal (administrative claim or complaint) to the court;
- the «Investigative» role of the court (as

⁴ Административный процедурно-процессуальный кодекс Республики Казахстан: от 29 июня 2020 г. №350-VI [Электронный ресурс] – Режим доступа: <https://adilet.zan.kz/rus/docs/K2000000350/history> (дата обращения: 25.07.2023).



opposed to civil proceedings), taking into account the demand for the necessary evidence and documents that are inaccessible to a citizen, the implementation of other measures by the court on its own initiative;

- the duty of proof should be assigned to the body of administration, which compensates for the inequality in the position of subjects of public law;

- the burden of proof should be placed on the administration, which compensates for the unequal treatment of subjects of public law;

- ensuring a fair settlement of the public-legal (administrative) dispute. Also, the prompt execution of the court decision [13].

In this aspect, the main purpose of administrative courts is to monitor such provision. Judicial control of public administration, concerns legality, conformity with the law of administrative acts or of lack of due activity. It can be entrusted to ordinary courts of law, which has been natural for Anglo-Saxon countries for centuries, or to special courts of law, which are set up only for that purpose, administrative courts, this being a regular practice in the continental Europe since the 19th century [14, p. 95].

In countries with well-established legal traditions, the State did not intervene in the economy, and disputes between market actors were settled by independent courts. Investors should also have confidence in the courts, which should protect their interests from possible bureaucracy.

It should be possible to rely on these courts to rule on the merits, regardless of any influence, and only in accordance with the law. If the country does not have such guarantees of law and judicial process, investors will not take risks related to investments or will not be able to increase investments... Independent courts and, in particular, administrative courts, adjudicating only on the basis of the law, are a country's positive advantage in international competition.

In addition, if state and judicial decisions do not meet the requirements of reliability, this is an obstacle to the development of their own national enterprises. It doesn't contribute to positive economic and social development. That is why, in international relations, administrative courts

are an «are an indicator with good government» («good government»). They create trust and reliability [15, p. 128].

Since the most important criterion for determining a particular form of legal proceedings is the legal nature of the case. It should be attributed to administrative proceedings: the participation of a body (official) endowed with powerful administrative and legal powers is a defining sign that these legal relations are of a public-legal nature, which makes it possible to distinguish administrative and legal disputes from civil and other relations [16, p. 191].

It should be noted that these category of cases is carried out according to the rules of civil procedure by the Civil procedure code of the Republic of Kazakhstan (further – CPC RK)⁵.

However, this procedure differs significantly from the suit procedure, despite the fact that it is called special. The peculiarity of this type of proceeding is that the parties are unequal between themselves (One of the parties is a public authority, which has the power). Furthermore, the consideration of such cases in civil proceedings, based, inter alia, on the principles of adversarial and equal rights of the parties, does not allow, in many cases, persons who have submitted a complaint or application to the court, Properly protect their rights and legitimate interests.

Effective protection of the rights and freedoms of citizens is not possible without a clear definition of jurisdiction between courts of general and special jurisdiction. This distinction is relevant, as the current legislation does not consistently determine jurisdiction. In that connection, the same dispute could be considered by both a court of general jurisdiction and a specialized court. This provision is predicated on the fact that jurisdiction is determined by the rules of various legislative acts – civil and administrative. The rules of these legislative acts with regard to the determination of jurisdiction and the procedural regulation of the consideration of cases of jurisdiction overlap and also conflict.

The famous Korean scientist D.H. Kim notes that it is not uncommon in Korea: «In an administrative case, it becomes known that the grounds for such responsibility are challenged

⁵ Гражданский процессуальный кодекс Республики Казахстан: от 31 окт. 2015 г. №377-V ЗРК [Электронный ресурс] – Режим доступа: <https://adilet.zan.kz/rus/docs/K1500000377/history> (дата обращения: 25.07.2023).



in civil proceedings... In these circumstances, it is not uncommon for administrative cases to be suspended by administrative courts in connection with the consideration of a civil case in special proceedings» [17].

Thus, we propose to transfer certain categories of cases of special production of the APC to the agro-industrial complex.

First of all, it is Chapter 30 of the CPC, which regulates the procedure for challenging the legality of normative legal acts.

According to article 298, paragraph 1, of the Code of Civil Procedure: «A citizen or a legal entity subject to a normative legal act which considers that a normative legal act adopted and published in the manner prescribed by law violates their rights and legitimate interests, guaranteed by the Constitution and laws of the Republic of Kazakhstan, have the right to apply to the court for recognition of this normative legal act contrary to the law completely or in a separate part»⁶.

The dispute that arises is undoubtedly of a public law nature, since the legality of normative legal acts that violate the rights, freedoms and legitimate interests of natural and legal persons is being challenged. Here the party – respondent is a state body or its official who has the right to issue normative legal acts.

The authors of the commentary to the CPC, while describing the cases under consideration under special actions (even before the transfer of some proceedings to the administrative courts), also noted the public-legal nature of the disputes and referred to the German experience, where public law disputes are dealt with by separate administrative courts under a special administrative procedure code. In fact, the consideration of a case of public law disputes by ordinary courts in civil proceedings takes place only in exceptional cases and for historical reasons.

There is no substantial justification for this, since the state undoubtedly infringes on the interests of a citizen. For a citizen, a civil trial, in which he himself must state the grounds for his claims and bring evidence himself according to the principle of adversarial proceedings, is much less profitable than an administrative

process in which a court or an administrative body is, in principle, obliged to investigate the circumstances of the case.

Conclusion. It may be concluded from the above that administrative proceedings deal with procedural procedures for the consideration and resolution of administrative cases. Administrative proceedings are an institution that facilitates the implementation of administrative justice in courts.

We believe that some other proceedings considered as special proceedings in civil procedure law are of a public law nature and should therefore be subject to regulation by APC. These proceedings: declaring a citizen missing and declaring a citizen dead; involuntary committal of a person with a mental, behavioural disorder (disease), including related to the use of psychoactive substances, to the hospital of the organization, providing medical assistance in the field of mental health; on applications for recognition of an organization carrying out extremism or terrorist activity in the territory of the Republic of Kazakhstan and (or) another state, extremist or terrorist, including the establishment of changes in its name, as well as the recognition of information materials imported, issued, manufactured and (or) distributed in the territory of the Republic of Kazakhstan, extremist or terrorist; on declarations of recognition of the Internet Casinos, products of foreign mass media, distributed in the territory of the Republic of Kazakhstan, containing information contrary to the laws of the Republic of Kazakhstan, illegal; on sending a citizen to compulsory treatment for tuberculosis, etc.

The proposed amendments and additions will provide an additional guarantee of protection of the rights, freedoms and legitimate interests of individuals and legal entities enshrined in the Constitution and laws of the Republic of Kazakhstan. From the above ideas and ways of their implementation on issues of competence of administrative courts, we believe that the norms in the APC of Kazakhstan correspond to the best foreign models of administrative justice.

This principle is protecting citizens from possible pressure from public authorities.

The purpose of such a provision is, of course,

⁶ Административный процедурно-процессуальный кодекс Республики Казахстан: от 29 июня 2020 г. №350-VI [Электронный ресурс] – Режим доступа: <https://adilet.zan.kz/rus/docs/K2000000035> (дата обращения: 10.04.2023).



to maintain a certain balance of interests. This approach is consistent with world practice and based on the positive experience of administrative proceedings in foreign countries.

It is also an additional guarantee of protection

of the rights, freedoms and legitimate interests of natural and legal persons enshrined in the Constitution and laws of the Republic of Kazakhstan.

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