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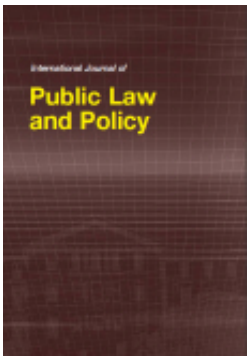

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Analyses of the principles of legality and justice in administrative proceedings of the Republic of Kazakhstan

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Abstract: The relevance of the study is due to the existing dogmatism in legal science, which concerns the basic principles of law, and also affects the effectiveness of the legal application of these principles in practice. Based on this, the purpose of the work is to study the role of the principles of legality and justice in the practice of administrative proceedings of the Republic of Kazakhstan. During the implementation of the study, the significance, and role of legal principles in administrative justice in the Republic of Kazakhstan was investigated. After analysing the model of the transition of the countries of the former USSR to the system of administrative justice and the specifics of its implementation in Kazakhstan, it was concluded that the principles of legality and justice are legally fixed in the Administrative Procedure Code of the Republic of Kazakhstan.

Keywords: legal principles; socio-economic well-being; administrative procedures; Supreme Court; legal environment.

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1 Introduction

Nowadays, the categories of legality and justice remain fundamental for the general theory of law. Their significance within the framework of the mechanism for ensuring the socio-economic well-being of society emphasises the need to study it and find ways to strengthen it in modern society. In jurisprudence, the understanding of the category 'legality' has often changed due to changes in the political and legal situation in different historical periods. One of the most significant and relevant approaches is the separation of law and legal act, as well as the allocation of the category of 'non-legal act'. At the moment, dogmatism still prevails in legal science, including in relation to the concepts of legality and justice. Changing views on legality, as well as on legal science in general, can be associated with various legal concepts. Modern legal science considers legality in terms of three main manifestations: as a principle of law, as a method of activity, and as a regime or state. It is important to consider legality in all three aspects, since it is a complex and multifaceted phenomenon of the political and legal life of society and the state. It reflects the level of legal behaviour of all subjects of law, the degree of perfection of law enforcement and legislative practice of state bodies, and also puts forward

fundamental requirements for them and their activities. The problem of the role of the subjective research view on the category of legality remains open. A significant number of solid works devoted to this category only emphasises its importance as a social and legal aspect of social relations.

So, legal principles are of great importance in the process of applying the norms of laws, despite the fact that their legal nature has not yet been fully disclosed, there is no clear line between legal norms and the legal principles set forth in the legislation. Daci (2010) correctly points out the difficulty of defining legal principles due to the fact that they, in some cases, are considered as specific legal norms, in other cases – as general legal prescriptions, in third circumstances they are presented as standards, but on the basis of which legal norms are based. The need to develop a precise definition is to ensure consistency and correspondence between scientific doctrine, the practice of legislation and its application in the system of legal regulation of public relations (Skorobogatov and Krasnov, 2020).

We agree with the opinion agree with the opinion of some researchers that the principles of law, on the one hand, are general guidelines developed by legal science and indirectly determine the direction and content of legal regulation. On the other hand, legal principles act as legal prescriptions, the application of which contributes to the realisation of the goals and objectives of modern justice (Shupickaya, 2020). Huysmans (2015) emphasises that the legal principles established in legislation do not contain such specific information as customary legal norms. However, they significantly affect, albeit indirectly, the legal meaning of other legal norms in the process of their application. The legal principles reflected in the legislation should include such as the principle of legality, justice, legitimacy, equality, legal trust, good faith, which are especially relevant in the sphere of relations between the state, its institutions and the person and citizen.

So, in the post-Soviet space, from the moment the republics of the former USSR gained independence, the process of building democratic states began, the highest values of which at the constitutional level were declared to be a person, his rights, and freedoms. In this process, a significant role began to be assigned to building relations between the state and the individual, resolving disputes and conflicts between citizens and their associations related to actions (inaction) and decisions of public authorities. The period of formation and development of administrative justice begins, the essence of which is the decision-making system of administrative institutions, councils, commissions and specialised courts (Miglionico and Maiani, 2020).

The importance of administrative justice is precisely expressed in the following statement: the majority of citizens have the rights defined by these bodies, to a greater extent than by the courts of general jurisdiction (Sossin, 2008).

In this process, an important role is given to scientific doctrine and legislative consolidation of the application of legal principles in administrative proceedings, which will be discussed in this article.

2 Methods

The purpose of this article is to analyse the meaning and role of legal principles in the system of administrative justice in Kazakhstan, especially the principles of legality and justice. Thus, these principles protect peoples constitutional rights. The article also draws attention to the experience of the Baltic countries (Estonia, Latvia, and Lithuania), which

were among the first in the post-Soviet space that began the transition to an administrative justice system. The paper examines the level of systemic links between some principles, including traditional values. The relationship between the principle of legality and justice is revealed, answers are being sought about which principle should be preferred in specific circumstances, why the principle of justice is necessary, despite the presence of the principle of legality.

To achieve a comprehensive analysis of the principles of legality and justice in the system of administrative justice, the research works of Kazakhstani and foreign scientists, specialists in the field of theory and philosophy of law, application of law and administrative law were studied. Using system analysis, comparative analysis, theoretical and legal forecasting, a methodological basis for the study was developed, which made it possible to draw certain conclusions in this article. Particular attention was paid to the work of foreign lawyers who studied the problems of applying legal principles and conducted research in the field of administrative justice.

The article also pays attention to the textual presentation of the content of legal principles in administrative proceedings, how fully and voluminously their essence is disclosed in the articles of the law. Measures are proposed to improve the legislation in terms of the legal technique of presenting legal norms relating to legal principles. Despite the fact that the article is devoted to the legal foundations for applying the principles of legality and justice in the administrative proceedings of the Republic of Kazakhstan, the authors also dwell on the experience of the Baltic countries in the formation of a system for protecting the rights and freedoms of citizens from misconduct by public authorities. In addition, the article shows the possibility of applying the principles of justice and legality by analogy with the practice of the Supreme Court of the Republic of Kazakhstan in civil cases.

The formal-legal method was used to carry out a more detailed analysis of legal acts. Thus, the norms regulated by the Administrative Procedure Law of Latvia, the Administrative Procedure Code of the Republic of Estonia, the Law on Administrative Proceedings of the Republic of Lithuania, as well as the Administrative Procedure Code of the Republic of Kazakhstan were studied. The method of comparative legal analysis made it possible to compare the legal acts of foreign countries with Kazakhstan, to identify similarities and differences, and to analyse the effectiveness of these norms in law enforcement practice.

In turn, the deduction method provided an opportunity to reveal the activities of the principles of justice and legality in Kazakhstan based on the identified features of the legislative norms. The method of induction, which was based on the information received about the law enforcement practice of Kazakhstan, taking into account its inherent features and principles, made it possible to characterise the activities of the principles of legality and justice. The method of logical analysis was used to reveal in detail the fundamental principles of law, to identify their role and significance in the functioning of administrative proceedings in Kazakhstan. The functional analysis method was useful for considering the development of the above principles in Kazakhstan.

3 Discussion

The first in the process of transition to administrative justice were the Baltic States (Estonia, Latvia, and Lithuania), which quickly began to abandon the priority of state

interests over personal interests, and administrative law began to update universal values (Načisčionis and Urmonas, 2021). Article 2 of the Administrative Procedure Law of Latvia states that the actions of the executive power related to certain public legal relations between the state and a person must be subject to the control of an independent, objective and competent judicial authority. The principle of legality in resolving administrative cases is not considered in the traditional sense, since traditional administrative law tends to pay attention not so much to good administrative decisions as to judicial control of illegal decisions. In accordance with this, the understanding of legality is associated with the legal status of participants in an administrative case, in which the regime for exercising and protecting the rights and legitimate interests of individuals meets the standards of proper execution and compliance with legal norms by public authorities. A similar norm is established in the Code of Administrative Procedure of the Republic of Estonia, in which Article 2 determines the task of administrative proceedings to protect the rights of persons from illegal activities in the exercise of executive power. Administrative legal proceedings in Estonia are based on the principles of legality and fairness, which guarantee the protection of the rights and interests of citizens and organisations in the process of resolving administrative disputes. The principle of legality means that the resolution of administrative disputes is carried out on the basis of existing laws and regulations, the courts must apply laws and rules consistently and predictably.

In the Republic of Lithuania, in accordance with Article 15 of the Law on Proceedings in Administrative Cases, the court has the authority to determine the legality of legal acts adopted by public administration entities, and the legality and validity of their actions. The court may also consider the question of the legality and validity of the refusal of these subjects to perform actions within their competence, or to delay their implementation. The principle of fairness in the legislation of the Republic of Lithuania implies that every person who is obliged to make decisions in an administrative matter must act within the framework of a judicial procedure. It should consider the issue before it with an open mind and give each side the opportunity to adequately present its position. The decision must be taken with a sense of responsibility by the tribunal, which is bound to administer justice. The right to a fair trial is based on the fact that it does not contain detailed requirements and prohibitions, but requires specification in accordance with objective conditions. In practice, the courts exercise this right through instructions in the process in order to ensure that the actions of the parties are consistent with the course of the process and determine the timing of the consideration of a particular case.

Administrative justice in the Republic of Kazakhstan

In previous studies, it was noted that the issues of organising administrative justice in the Republic of Kazakhstan were extremely relevant. The main purpose of its creation was to establish a clear legal framework for control over the actions of state bodies. Administrative justice was supposed to guarantee additional protection of human and civil rights, as well as increase the investment attractiveness of Kazakhstan (Sarpekov et al., 2021). However, real administrative justice in Kazakhstan was established only in 2020, since the measures taken by the drafters of the bill since 2010 were aimed at trying to combine in one law the two conflicting powers of the administrative court: the consideration of cases of administrative offences and the resolution of public law disputes, as well as ensuring protection of the rights of persons from illegal actions of

competent officials and bodies. Later, realising the inconsistency of this approach, the initiators of the creation of administrative justice began developing a new draft law in 2015, and work on it was completed on June 29, 2020 with the adoption by the Parliament of the Republic of Kazakhstan of the Administrative Procedure Code (APC RK).

This regulatory legal act, which entered into force on July 1, 2021, became the starting point for the full functioning of the system of administrative procedures and administrative proceedings in the Republic of Kazakhstan. The main task of these systems was to provide a set of measures to achieve a balance between private and public interests in public law relations, primarily through the protection of human rights and freedoms from possible arbitrariness of the executive branch. The achievement of the goals and objectives of administrative procedures and administrative proceedings is realised through the correct application of specific material and procedural norms, as well as through the application of legal principles. The legislator, securing the right to use legal principles by individuals and legal entities and the authority of the court, other competent bodies to apply legal principles in resolving cases, did not limit their number to the principles specified in the APC RK. The APC of the RK establishes the principles of administrative procedures and administrative proceedings, such as the principles of legality, fairness, protection of rights, freedoms and legitimate interests; the principle of proportionality, the prohibition of abuse of formal requirements; presumption of reliability, the active role of the court; reasonable time for proceedings. Unlike civil procedural and criminal procedural legislation, new principles have been introduced in the APC of the RK, the application of which should ensure an increase in the effectiveness of the legal regulation of relevant relations.

The establishment of new legal principles does not mean that systemic links have been developed between some principles, including traditional ones (Sager and Tebbe, 2019). For example, the principle of justice is singled out and stands apart from the principle of legality. What is their relationship, and which principle should be preferred in specific circumstances? If the principle of legality implies strict adherence to legal prescriptions, then the principle of justice, its concept, is not an empty shell, but a category with deep content. Justice encompasses not only formal equality (equal treatment of similar cases), but also substantive equality based on the equal dignity of each person, which requires giving each person his ‘due’, which is his right to claim (Wright, 2000). The famous Indian judge Krishna Iyer emphasised that justice is a comprehensive fact of secular law, where the spiritual dimension enlivens legislation and litigation to turn justice into a vital idea. It has many shades and forms, diverse manifestations and outlines.

However, the content of justice is not precisely defined in any legislative act, including in the legislation on administrative proceedings in Kazakhstan. The adherence of the subject of the application of law to the principle of justice is described in the APC of the RK, on the one hand, as ensuring equal opportunities and conditions for the participants in an administrative case to exercise the right to a comprehensive and complete study of the circumstances of the case. On the other hand, the principle of justice is considered as a criterion for resolving relevant issues by the court. In general, while recognising the correctness of this approach of the legislator to the content of the principle of justice, at the same time it is believed that the essence of the principle is not fully disclosed. The rule on the application of the principle of justice is accompanied by the need to follow the criteria of reasonableness, objectivity and impartiality, which

themselves require disclosure of their content due to the evaluative nature of these concepts. Moreover, the principle of justice is expressed more in the procedural aspect, and, as it is evident, the norms of substantive law applied by the court in an administrative case are reflected in the multiple system of normative legal acts, in which there is no mention of the principle of justice at all. And this situation takes place, despite the fact that the essence of administrative procedures and administrative proceedings lies ultimately in the legal and fair decision of the administrative case on the merits, and not in the formal observance of the procedural requirement of the principle of justice.

In this regard, the gap due to the lack of the principle of justice in the texts of the system of substantive rules governing public law relations could be filled in the APC with the establishment of a more precise requirement that not only a judge, but any other entity representing public authority in an administrative case and applying the norms of substantive law, was guided by the principle of justice. Establishing the relationship between the principle of justice and the principle of legality, as mentioned above, also requires closer attention. Clause 2, Article 5 of the APC, revealing the tasks of administrative proceedings, prescribes the need for a fair, impartial and timely resolution of administrative cases, while omitting as a task the requirement, firstly, for the legal resolution of cases.

The importance of establishing the relationship between legality and justice is often manifested in such circumstances when it comes to a possible choice between the principle of legality and justice, given that the content of the principle of legality is disclosed in the APC and implies the duty of the judge to strictly comply with the requirements of the Constitution and laws, and the content of the principle of justice is set out abstractly and based on other evaluative concepts. Of course, the harmony of law and justice is summarised, the law in its essence must be fair. Ultimately, the protection and fair treatment of citizens is the essence of what the law in a democratic state should strive for Poillot (2021). In this regard, the law in every possible way focuses on the fact that a judge or other subject of the application of law should obey only the law, he should not have a subjective attitude to certain events or persons. However, life always turns out to be more complicated than the requirements that are established in the system of legal relations. In this regard, to some extent, the authors agree that the presence of a gap, contradiction or other defects in the law can create a threat to fair justice if, without critical reflection, possible conflicting requirements of the law are followed and the principle of justice is not used in conjunction with other similar values.

Emphasising the judge's attention to the need to follow the principle of justice in resolving an administrative case, disclosure of the content of this principle in the law, if possible, would be a significant achievement in the system of legal regulation of public law relations, since even in the traditional legal system there are unique ways to resolve conflicts and disputes, reconciling common concepts of law with specific requirements of individual justice (Samandarov, 2023). The need to use legal principles in administrative proceedings when applying substantive norms is objectively conditioned. Foreign researchers rightly point out why the law deviates from direct meaning and refers to legal principles, analogies, and precedents instead of clear legal rules, and why metaphors are used instead of direct meaning and truth. As absurd as this approach is, the textual approach seems to prioritise the ordinary meaning of the language used in the text over other manifestations of the author's intent. Judges are often told that the interpretation of laws only requires determining the direct meaning of the words adopted. What is the

point of putting words in a law, contract, treaty, or testament if those words are not to be regarded as binding? (Kaptein and Velden, 2018).

Answering this question, it is noted that it is enough to refer to the system of legislation of any state in the field of public law relations affecting human rights and freedoms, and see that it cannot contain, and, as a rule, does not contain legal norms that would be aimed at solving all special cases with all their variations. Of course, any system of law by default assumes certain general principles of interconnection that establish relationships between areas of activity that are subject to regulatory regimes (Pojanowski, 2019). From this point of view, it is believed that each legal system of the countries of the continental system should be consistent, complete, and closed in the sense of regulating all the supposed types of social relations. Here, the principle of completeness and closeness means that the legal system already includes legal regulation for each supposed case that may arise from the set of all social relations. However, as Cobbe (2019), jurisprudence constantly demonstrates an insoluble conflict between the desire to legislate in the form of clear, specific, consistent and rational rules and the inability to do so. The legislator tries to enact clear guidelines and principles in laws, because he considers it unfair to impose obligations where there are no clear rules or where it is difficult to bring behaviour in line with the requirements of the law.

However, clear and specific rules often aim to resolve individual cases without providing for the resolution of disputes and conflicts in other circumstances. Therefore, they quickly lose their regulatory effect, acquiring the character of a system of casuistic norms. Moreover, it is impossible for the human mind to foresee all or even most of the circumstances that a rule may encounter in life. The system of social relations is incredibly complex, since each person operates in a network of interaction with a huge number of objects, people, and institutions in constantly changing combinations and permutations. As new circumstances arise, the occurrence of which the legislator did not anticipate, he often begins to make changes to the adopted regulatory legal acts, but human experience is too complex to allow him to foresee all life circumstances without exception. As a result, the legislator's attempt to do this through endless amendments to laws leads to them becoming too complex, cumbersome and contradictory in the course of a continuous process of modifications of laws and by-laws (Olson, 2022).

In this regard, it seems more rational not to use a method based on attempts to resolve all individual cases and reflect this in an array of regulatory legal acts, but the way of applying, in necessary cases, legal principles aimed at making lawful and fair decisions. The function of the law is precisely to resolve the conflict of opposing rights and interests by applying, in the absence of any specific provision of the law, other rules of law that resolve similar social relations and conflicts (Potter, 1994). In more complex cases, it is necessary to apply the general principles and provisions of law, thereby finding a way out of a difficult situation and solving the problem, since the use of analogous reasoning is dictated by the nature of the law, which requires the application of rules to specific facts using various techniques and methods for implementing legal prescriptions.

In general, paragraph 2 of article 6 of the APC is consistent with the doctrine of the possibility and necessity of applying the general principles of law that have been developed by science. This paragraph also indicates that the principles of administrative procedures set out in Chapter 2 are not exhaustive and should not prevent the application of other principles of law. At the same time, the use of only the word 'administrative procedures' in the norm, without linking it to administrative proceedings, can, if interpreted literally, lead the system of legal regulation to contradictory results. On the

one hand, administrative bodies, when making decisions regarding legal entities and individuals, may, following the letter of the law, apply other principles of law not specified in the APC, and such permission is not granted to the courts, based on a literal interpretation of the norm.

Another aspect related to the principle of legality concerns the obligation of the court to apply to the Constitutional Council of the Republic of Kazakhstan with a request to recognise the unconstitutionality of a law or other regulatory act that is subject to application if the court concludes that this act violates the rights and freedoms of a person and citizen, enshrined in the Constitution. However, the obligation of such a court appeal to the Constitutional Council of the Republic of Kazakhstan, even if the court is convinced that a law or act is unconstitutional, contradicts the principle of independence of the judiciary and the principle of direct action of constitutional norms. Instead, the court should have the right to appeal to the Constitutional Council of the Republic of Kazakhstan if it has doubts about the constitutionality of a law or regulation. If the judge is sure of the unconstitutionality of the act, he should have the right to apply the relevant norms of the Constitution, which has direct effect on the territory of the Republic, without applying to the Constitutional Council of the Republic of Kazakhstan.

The application of the principle of justice in administrative justice is hampered in the future by the fact that this practice was not widespread even in the system of courts of general jurisdiction in Kazakhstan. It is believed that some experience of the Supreme Court of the Republic of Kazakhstan, which occasionally applied the principle of justice, will be a kind of guideline for using this approach by analogy in resolving administrative cases. In general, little case law has shown that the court can reconcile and adjust conflicting interests or claims in such a way as to ensure their fair balance. As a result, these conflicts are resolved by giving legal effect to one or more just interests, which thus become a legal right or simply a 'right' (McManaman, 1956). Thus, in the legal literature, an example is described when the civil collegium of the Supreme Court of the Republic of Kazakhstan saw legal justifications in the property claims of a citizen, despite the fact that such normative prescriptions were not exactly contained in the legal system of the Republic, but were set out in an abstract form in the legal principles and foundations. national legislation. Applying the principle of justice, a Supreme Court decision was made, on the basis of which the family of the participant in the Afghan war returned to her flat, despite the fact that the citizen did not fully comply with the requirements for compliance with certain procedures for obtaining housing at a reduced price (Nollkaemper et al., 2020).

In judicial practice, the decision of the civil collegium of the Supreme Court is also noteworthy for reference in this regard, where it granted the petition of the side of the court case based on the application of the principle of justice and the fundamental meanings of national legislation. The content of the decision is that due to the fault of medical workers, expressed in an unprofessional surgical operation, the applicant's wife died. The husband of the deceased demanded in the court of first and second instances to recover 5 million tenge from the city hospital for the moral damage caused. The court of first instance satisfied the plaintiff's complaint only partially, establishing a penalty of 1 million tenge from the defendant, while the appellate instance reduced this amount to 100,000 tenge. The Supreme Court, granting the petition in full, as emphasised by Masterman and Murray (2022) that constitutional principles aimed at justice and legality and affirming life, human rights and freedoms as the highest values of the state and society, are the fundamental basis for the administration of justice. The Court of Appeal

did not take into account the fact that the defendant, by his unprofessional actions, ended the life of a person, making an irreparable and heavy loss for his loved ones.

4 Conclusions

The adoption of the Administrative Procedure Code marked the transition of the Republic of Kazakhstan to an administrative justice system aimed at ensuring the rights and freedoms of citizens, protecting their interests from illegal actions and decisions of public authorities. However, the adoption of a normative legal act in itself does not mean that the goals and objectives of administrative justice will be fully implemented. Much will depend on the effectiveness of the application of the system of normative legal acts by the judiciary in resolving disputes and conflicts between the state administration and citizens. In this aspect, a large role is given to the legal principles set forth in the law.

The ability of the court to find a balance between the principle of justice and the principle of legality depends on many factors, primarily on the legislative disclosure of the meaning of the principle of justice. When defining the concept of justice, one should proceed from the fact that it was understood by many well-known thinkers as a true free virtue, which has compassion as its source, it is from justice that all other virtues practically and theoretically derive.

In applying the law, the judiciary must adhere to the principle of justice, which requires an individual approach that takes into account the specific circumstances and personal characteristics of each person. However, the law cannot cover all individual factors that may be significant for a fair legal assessment of specific legal relations. From this perspective, legality, and justice may be in conflict with each other. Therefore, the administrative court must resolve this contradiction based on the formula, according to which the only possible solution in a particular case must be the most optimal, reasonable and humane, and recognised as fair within the framework of the law. The law enforcement practice of courts of general jurisdiction in Kazakhstan has experience in such use of the principle of justice, which allows, by analogy, to implement it in the system of administrative justice.

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