

Basics of the legislative process in the Republic of Kazakhstan
Yagmussova A.¹, Baymakhanova D.² (Republic of Kazakhstan)
Основы законодательного процесса в Республике Казахстан
Ягмусова А. Ф.¹, Баймаханова Д. М.² (Республика Казахстан)

¹Ягмуссова Акерке Файзуллакызы / Yagmussova Akerke - бакалавр юридических наук;

²Баймаханова Дина Муратовна / Baymakhanova Dina - доктор юридических наук, профессор,
 кафедра теории и истории государства и права, конституционного и административного права,
 юридический факультет,
 Казахский Национальный Университет им. Аль-Фараби,
 г. Алматы, Республика Казахстан

Abstract: *this research paper is devoted to consideration of the basics of the legislative process in the Republic of Kazakhstan. This topic is of immediate interest in our country for as more as for 20 years, since Kazakhstan being a young state needs primarily a strong legislative power that adopts comprehensive and reasonable laws. The legislative process's spectrum of subjects, its stages and lawmaking principles are analyzed in this paper. The necessity of using both legal and linguistic analysis methods in the process of interpretation is revealed and reasoned. The term "legislative function" is presented in the paper in comparison with such terms as "legislative process", "legislative drafting" and "lawmaking". Opinions of Kazakhstan scientists and lawyers on lawmaking and legislative function are presented. Based on the research conducted the author tried to define the main challenges of modern legislative drafting.*

Аннотация: *в данной статье рассмотрены основы законодательного процесса в Республике Казахстан. Тема актуальна в нашей стране уже более 20 лет, так как молодому независимому государству, которым является Казахстан, в первую очередь нужна сильная законодательная власть, принимающая полноценные и обоснованные законы. В работе проанализированы круг субъектов законодательного процесса, его стадии и принципы законотворчества. Выявлена и обоснована необходимость совместного использования методов юридического и лингвистического анализа в процессе толкования. Термин «законодательная функция» представлен в статье в сравнении с такими терминами «законодательный процесс», «законотворчество», «правотворчество». Приведены мнения казахстанских ученых и юристов о законотворчестве и законодательной функции. На основе проведенного исследования автором предпринята попытка раскрыть основные насущные проблемы современного законотворчества.*

Keywords: *legislative process, lawmaking, stages of legislative drafting, principles of legislative drafting, Constitution of the Republic of Kazakhstan, Parliament, President, lawmaking, legislative intent, legality, democracy.*

Ключевые слова: *законодательный процесс, законотворчество, стадии законотворчества, принципы законотворчества, Конституция Республики Казахстан, Парламент, Президент, правотворчество, законодательная инициатива, законность, демократизм.*

Legislative drafting – a complex and time-consuming process, which should result in a new law as intended by the author. The main link in the legislative drafting is adoption of a bill by the legislative body. The terms of reference for adoption of statutory laws and regulations is defined by the Constitution and other laws. Thus, in compliance with the Constitution of the Republic of Kazakhstan dated 30.08.1995, the main legislative body of the Republic of Kazakhstan is the Parliament of the Republic of Kazakhstan. The majority of Kazakhstani scientists emphasize the priority of the legislative function of the Parliament of the Republic of Kazakhstan. For example, B.A. Bekjanov thinks that “legislative function is a primary and central function of any parliament whatever. This function is based on an idea that parliament’s purpose is to adopt laws and other regulations thereby providing stability and welfare of a society and state. This provision is directly stated in Art. 49 of the Constitution of the Republic of Kazakhstan” [1].

M.T. Baymakhanov notes: “Legislative drafting – is somewhat a “calling card” of modern parliament, and all other activities of parliaments are derivative of this main activity and are intended to support and highlight it, create the most favorable conditions and prerequisites for it. It must be confessed that no other body is able to replace parliament for exercising the legislative drafting function, since by its character and nature as applicable to procedures, forms and methods of resolution of different issues no other body is so perfectly disposed to carry out the mentioned activity as parliament” [2].

Before considering the legislative function of the Parliament of RoK, we found it necessary to pay attention to the fact that when characterizing this function various terms are used such as “legislative function”, “legislative process”, “lawmaking”, “legislative drafting” etc. The widest notion in this series is “lawmaking”. In our opinion, lawmaking is a process of creation of law in general, rather than particular laws, and therefore the

notion “lawmaking” possesses a wider content than “legislative drafting”. Thus, we think it necessary to delineate these two notions. Although, this is not a principally important, we think that such a state of affairs can lead to misunderstanding of some concepts. For instance, V.K. Babaev defines legislative drafting as a “procedure of official approval of a regulatory document with law-making body” and emphasizes “stages of legislative intent, discussion of bill, its adoption and publishing” [3]. Since he uses the term “regulatory act”, rather than “legislative act” and “law-making body” rather than “legislative body”, it is unclear what he is taking about: legislative drafting or lawmaking.

The notion “legislative drafting process” sometimes is identified with the notion “legislative process”. They seem to be slightly different in meaning, rather they are intercrossing notions. In our opinion, “legislative process” includes all official stages of elaboration and publishing of a law stated in the Constitution, i.e. process of elaboration, discussion, adoption and coming into effect, while “legislative drafting process” stresses on a creative part of this process. The majority of Kazakhstani scientists adhere to this interpretation of legislative process. According to G.S. Sapargaliev, “legislative process of the Parliament of RoK – a process of elaboration, discussion, adoption and coming into effect of a law, that is compliant with the Constitution realized by the Parliament with involvement of subjects empowered with legislative functions by the Parliament” [4]. A. Tagaev deems that “legislative process as a strictly regulated activity is a generality of certain procedural actions (stages of legislative process) by special authorized subjects, aimed at creation of supreme legal force – the law” [5].

Indeed, the differential characteristics of the legislative process, set forth in the Constitution of RoK include specific subjects. They are mentioned in part 1, Art. 61, Constitution of RoK: the right of legislative intent is possessed by the President of RoK, parliamentarians sitting in chambers of the Parliament and the Government; specific objects – draft of legislative act, legislative act; specific of the activity itself: this a strictly regulated by the Constitution process of elaboration, discussion, adoption and coming into effect of a legislative act; specific of place for carrying out of a given activity: shall be carried out exclusively in the Parliament of RoK; specific result of activity: a legislative act adopted and taken effect. The right of legislative intent shall be exercised exclusively in the Mazhilis of the Parliament, though; different subjects execute such intent in different ways: 1) the President of the Republic – as a special message; 2) Government – as a resolution; 3) parliamentarians of both chambers of the Parliament – as a presentation.

In order to have more embossed picture of law making in the Republic of Kazakhstan let us consider it in comparison with the law making process in the Russian Federation. The first stage of law adoption or making amendments thereto is a proposal for their creation, in other words, intent. The legislative intent is a right to proposal to issue a law and to introduction of a bill to legislative body. Doing so, the legislative body is obliged to study both the proposal and bill. The Parliament “as proposed by the President of the Republic of Kazakhstan shall make amendments and additions to the Constitution; adopt constitutional laws, make amendments and additions thereto” [6, art.53, p.1]. Likewise, “the right of legislative intent is possessed by parliamentarians of the Parliament of the Republic of Kazakhstan, and by the Government of the Republic” [6, Art.61, p.1]. According to the Constitution of the Russian Federation the right of legislative intent is possessed by the President Constitution of the Russian Federation, Federation Council, members of the Federation Council, parliamentarians of the State Duma, Government of the Russian Federation, and legislative (representative) body of federation subjects. Such right is also possessed by the Constitutional Court of the Russian Federation, Supreme Court of the Russian Federation and Supreme Arbitral Court of the Russian Federation within their terms of reference [7, Art. 104].

This is followed by a decision of the competent body, i.e. Mazhilis of the Parliament on necessity to issue a law, inclusion of the relevant proposal in the bills scheduled, and development of the official bill. It is the lower house of the Parliament that has exclusive jurisdiction "to acceptance for consideration and consideration of bills" [6, Art. 56, p.1], and wording of laws. After passing this stage (wording of law) and approval it with the Mazhilis by the vote (more than half of the total number of parliamentarians), the bill goes to the Senate of the Parliament. The parliamentarians of the Senate shall within sixty days consider the bill. Then vote shall be conducted: if the Senate votes "for" by the majority of votes, the bill becomes a law; otherwise, the Senate returns the bill to the Mazhilis for reconsideration, while communicating their comments. The Mazhilis shall review the bill, make amendments, and send to the Senate. A bill declined for the second time cannot be re-introduced during the same session. In the case of confirmation of the bill, the law within ten days shall be sent to the President for signature.

The next stage is checking for compliance with the Constitutional law of the Republic of Kazakhstan. The Constitutional Council “shall consider laws, adopted by the Parliament, for their compliance with the Constitution of the Republic before signing by the President” [8, Art.72, p. 1.2]. The Constitutional Council shall take its decision not later than one month from the date of bill introduction. In case of approval of the law by the Constitutional Council, the law will be sent to the final stage – signing by the President. The President shall take the final decision within 12 days. If the law is signed, it will be published. If the law is not signed for any reasons, it will be sent back for consideration to the lower chamber of the Parliament, Mazhilis, and it will pass the same stages of elaboration. If there is no response after expiration of the term given for signing the law by

the President, the law will automatically be deemed to be adopted. In Russia, the final stage of adoption of the law is broadly similar to ours. In accordance with the Constitution of the Russian Federation, federal laws shall be adopted by the State Duma, at the same time they have to get approval of the Federation Council. A law is deemed to be approved, if it was not considered by the upper chamber after bringing to it within fourteen days. The process of adoption of a law is ended with its signing by the President of the Russian Federation. The final date of adoption of a law is deemed to be its publication. Official publication of the law is essential. According to the Constitution of the Republic of Kazakhstan, publication of laws is mandatory. It means that unpublished laws shall not be applied. So, for comparison, according to the Constitution of the Russian Federation “any regulatory legal acts, affecting the rights, freedoms and duties of individual and citizen, may not be applied if they are not officially published for general information” [7, Art.15].

A special role in adoption of laws is given to the President. Apart from the fact that the President has initiated the majority of bills and puts the final "point" in the process of adopting the law, the President has a number of additional powers. “Parliament may delegate to the President the right to adopt acts on the powers of the Parliament. In other words, the President, in the case of the transfer of the legislative powers to him, may pass acts which will be called laws” [9]. Also, in accordance with the Constitution of the Republic of Kazakhstan, the President has the right to determine priority bills for the Government and to reduce significantly the terms of their consideration. Citizens of the Republic of Kazakhstan shall also be directly involved in making some of the laws through a referendum.

For example, on 7 October 2015, the Kazakhstan Mazhilis members approved on the second reading the bill "On Informatization", according to reporter of Novosti-Kazakhstan agency. The purpose of the bill is to ensure the further development of informatization of Kazakhstan society by legal implementation of an effective system of its organization, which will meet modern international standards. At the plenary session, parliamentarians also approved on the second reading the accompanying bill "On amendments and additions to some legislative acts on the issues of informatization". The bill stipulates making amendments and additions to 6 codes and 19 laws; to the Civil Code with respect to equating of electronic transactions to other forms; to the Code of Administrative Offences, administrative liability for violations in the field of informatization; for the purpose of information security amendments in the law "On Telecommunications" are proposed aimed at resolving issues of transferring subscriber numbers, interaction of telecommunication operators and operators of a centralized database with state authorities [10].

As an example we can also refer to acceptance by the parliamentarians of Mazhilis of the Parliament of Kazakhstan at the plenary session amendments to the bill "On State Service of the Republic of Kazakhstan" proposed by the President of Kazakhstan, Nursultan Nazarbayev. On 22 October, the RoK Parliament adopted a new law “On State Service of the RoK”. On 26 October, this law was submitted to signing by the President of RoK. The head of the state supported the bill, though expressed his disagreement with some articles, he made objections to the retirement age of political civil servants. Amendments to the bill proposed by the President of RoK were approved by the Mazhilis parliamentarians unanimously [11].

According to the above legislative drafting process in the Republic of Kazakhstan we can make the following conclusions: the legislative intent is possessed by the first President of the Republic of Kazakhstan, as well as by the Parliament members and the Government members. Bill and formulation of a law shall be developed and adopted at the initial stage by the Mazhilis of the Parliament. The Mazhilis and the Senate of the Parliament, the Constitutional Council and the President of the Republic of Kazakhstan actively participate in processing and adopting laws. The final stage of adopting a law is its signing by the President of the Republic of Kazakhstan. From this we can conclude that adopting the law does not violate the status of Kazakhstan as a legal and democratic state. From comparison of the legislative drafting processes in Kazakhstan and Russia we can conclude that there is no big difference, due to the close cooperation and a single policy for many years, until 1991.

Summing up all the above, it is necessary to identify a number of urgent problems of modern legal drafting. First, it is necessary to change the current practice of legal drafting at the stage of preparation of a draft law/bill. Here there is a possibility to develop a draft by the team of scientists-professionals, which would replace the departmental procedure for preparation of draft laws. A serious problem is unjustified legislative activity. Many laws are amended and added in a few months or even weeks after their adoption. The reason for that is in understated demands to adopted bills. As a result of their application, there are found many "holes" that have to be "darn" immediately.

Second, it is quality of the law itself. Only scientifically based regulation can be arrayed in formal and legal forms, and it should be fixed constitutionally. Of big importance is the problem of conceptual certainty of legislation. To achieve brevity and precision of the legal language, it is very important to use the correct legal terminology. It is necessary to create a uniform glossary of legislation terms.

Naturally, the above list of challenges of the legal drafting process is not exhaustive. It is necessary to conduct a deep scientific study of these issues, and on its basis to develop practical measures to improve the legal drafting process. Law, even if it embodies the vital interests, will not run automatically. For its

implementation it is necessary to make a special mechanism, which takes effect at the organizational stage. Only this way the state can influence the mechanism of the state and society in general, in order to establish relations, prescribed by the law.

References

1. *Bekjanov B. A.* Parliamentarism in Kazakhstan: modern state and development prospects: Synopsis of Thesis. Ph.D. - Almaty, 2010. Page.11.
2. *Baymakhanov M. T.* Revisiting the political and legal nature of parliament as a supreme body of state authority // Theoretical and constitutional and legal aspects of Parliamentarism in the Republic of Kazakhstan: Materials of international research/practice conference. – Almaty: KazNU named after al-Farabi, 2006. 17 November. Page. 17.
3. Theory of state and law: Study book / under supervision of V.K. Babaev. – M.: Jurist, 2001. Pages.330-331.
4. *Sapargaliev G. S.* Parliament law in the Republic of Kazakhstan. – Astana, 2009. Page.101.
5. *Tagaev A.* Stages of legislative process // Prevention of criminal. 2010. № 4-5. Page 29.
6. Constitution of the Republic of Kazakhstan, A. 2015.
7. Constitution of the Russian Federation.
8. Comments on the Constitution of the Republic of Kazakhstan, A. 2015.
9. *Abdukarimova Z. T.* “Law making activity of the Parliament of the Republic of Kazakhstan and raising its effectiveness”, Bishkek, 2001.
10. ИА Новости-Казахстан: [Электронный ресурс]: URL: <http://newskaz.ru/politics/20151007/9837411.html/> (дата обращения 07.10.2015).
11. Международное Информационное Агентство KAZINFORM: [Электронный ресурс]: URL: <http://www.inform.kz/rus/article/2840469>. (дата обращения 18.11.2015).