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Development of the system of sources of Kazakh law

The aim of the study is to analyze the sources of law of the Republic of Kazakhstan as an independent systemic phenomenon, formulate conclusions and proposals for improving the source base and practice of lawmaking and law enforcement. On the basis of the method of comparative legal analysis, the development of the system of sources of law in general, sources of law of other countries and the Republic of Kazakhstan is investigated. Based on the method of historical research, the role and significance of historical sources in the development of the modern system of sources of law are revealed. The method of system analysis was used to study the definitions of sources of law existing in the theory of law. The author's vision on the correlation between the source and form of law is formulated. The properties and functions of sources of law are determined by the factors for the legal system, on the basis of which lawmaking and law enforcement activities are built. The methods of classification of sources of law are analyzed, the possibilities of using various grounds for the classification of sources of law are considered in order to systematize them and determine their potential in the process of law enforcement. The possibility of introducing the concept of «auxiliary» sources of law into the domestic theory of law, as it exists in the theory and practice of international law, has been investigated. The possibilities and basic patterns of integration of modern Romano-Germanic and Anglo-Saxon legal systems are considered. The conclusion about the existence of the tendency of «westernization» of the system of Kazakhstani law is formulated; the use of judicial precedent as a source of law in the context of a «special legal regime» on the territory of the MFC «Astana».

Keywords: legal system, system of law, source of law, form of law, judicial precedent, general principles of law, legal act, resolution of the Constitutional Council, legal doctrine, legal convergence, auxiliary sources of law, analogy of law, analogy of law.

Introduction

The question of the sources of law is decisive in the classification of legal systems. It is the nature of the sources of law used in the regulation of public relations that makes it possible to identify the legal system and the state's belonging to one or another legal system. In the context of globalization, the mutual influence of all elements of social relations, including in the sphere of legal regulation, is increasing; there is an interplay of legal systems. In the development of the legal system of any state, the determining factor is the system of sources of law. The system of sources of law is characterized by the fact that, being, at first glance, a purely theoretical instrument, in fact, they play a decisive role in the functioning of the entire legal system. It is no coincidence that in all program documents of our country, the issues of improving sectoral legislation are always given due attention. The characteristic of all legal systems existing in the world is inevitably associated with the study of the issue of the system of its sources, their classification and legal nature. In other

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words, the system of sources of law adopted in the state has a direct impact on the practice and quality of lawmaking and law enforcement activities.

Today, the construction of the system of law of the Republic of Kazakhstan is based on the principles of the Romano-Germanic legal family: the rule of law, the law is the main source of Kazakhstan law, etc. The adoption of the law «On Legal Acts» main directions of development of the Kazakhstan legal system. A significant novelty of the current law is the classification of the laws of the Republic of Kazakhstan, the classification and definition of the concepts of bylaws at various levels, the concept of «hierarchy of legal acts» is introduced. The concept and conditions for the use of analogy of laws and analogy of law are introduced. All this made it possible to significantly improve the system of sources of Kazakhstani law.

However, the legal system of our state is not forever an established set of legal acts. She is in constant development and improvement. The proof of this is the introduction of a special legal regime in the financial sphere on the territory of the MFC «Astana». The term «special legal regime» means that along with the current law of the Republic of Kazakhstan, the principles and precedents of English common law will be applied in this territory. The «Concept of the legal policy of the Republic of Kazakhstan for the period from 2010 to 2020» for the Kazakh legal system is set to become competitive on a par with other legal systems in order to ensure the convenience of law enforcement and protection of the rights of all participants in legal relations. The adoption of the laws «On Legal Acts», «On the MFC» Astana «also dictate the need for further research on the nature of sources of law and their role in the development and functioning of the legal system. All these circumstances determined the choice of the topic of this article.

Methods and materials

The study used traditional methods of cognition — dialectical and historical, methods of analysis and synthesis. The study of the theoretical foundations of the system of sources of law is based on the methods of comparative legal analysis, the historical method, the methods of formal and dialectical logic. The study of the functions and properties of sources of law is based on the methods of systemic and structural analysis. The classification of sources of law is based on the methods of structural and system analysis. To characterize the legal nature of various sources of law, a formal legal method was used.

In the course of the study, the current legislation of the Republic of Kazakhstan, specific legal norms governing public relations in various spheres of the economy, social and cultural sphere were analyzed. Studied theoretical and legal concepts, categories and definitions formulated by the science of theory of law and other branch legal sciences, and used in the process of lawmaking and law enforcement; the main provisions of the theory of natural law as a theoretical foundation for the development of the legal system.

Results

The author analyzes the definitions of sources of law existing in the theory of law, formulates his own vision on the relationship between the source and form of law. The methods of classification of sources of law are analyzed, the possibilities of using various grounds for the classification of sources of law are considered in order to systematize them and determine their potential in the process of law enforcement. The possibility of introducing the concept of «auxiliary» sources of law into the domestic theory of law, as it exists in the theory and practice of international law, has been investigated. The possibilities and main patterns of integration of modern Romano-Germanic and Anglo-Saxon legal systems are considered, the emerging tendency of «westernization» of the system of Kazakhstani law is analyzed; the use of a judicial precedent as a source of law in the context of a «special legal regime» on the territory of the MFC «Astana».

A feature of modern legal development is the mutual penetration of the principles of law and sources, characteristic of different legal systems. In modern conditions in the countries of the Romano-Germanic legal system, there is a tendency to increase the role of judicial practice. The decisions of the country's highest court (constitutional or supreme) are used as the basis for decisions of the lower courts. Despite the fact that judges in the countries of the Romano-Germanic system are not bound by the decisions of higher courts, there is a tendency towards an increase in the role of their decisions. At the same time, the legal nature of the normative decisions of the Supreme Courts (Constitutional Council) is considered in two ways. From a formal legal point of view, in the Romano-Germanic legal system, they are normative legal acts, from the point of view of Anglo-American law, they can be considered as a judicial precedent, clothed in the form of a normative legal act.

Discussion

Sources of law play a crucial determining role in the characteristics of the legal system of each state. Since the law of each state, due to certain reasons and characteristics, is a constituent element of a broader legal phenomenon — the legal system — the sources of law characteristic of a particular legal system inevitably affect the legal system of a separate state. The importance of sources of law is so great for identifying not only the legal system, but also for the system of law of a separate state, that it is the subject of constant research and study throughout the entire existence of law in human society. Sources of law are traditionally understood as specific special forms in which legal norms are clothed. The legal system of each state is characterized by its own special range of sources of law. Each state, performing one of its most important functions — the legal regulation of social relations, uses a certain set of methods and means, in which law-making activities play a central role as a method, and legal acts as the main means. The legal acts that appear as a result of law-making activities, in their totality, form the main link in the system of state law. In accordance with Article 1 of the Law on Legal Acts, they are subdivided into «normative and non-normative, legislative acts and by-laws». The study of the legal nature of normative acts should be linked to their place and role in the legal system of a given state. Showing the importance of such a phenomenon as the system of law, scientists note the need for such characteristics as «proper organization and internal consistency» [1; 167], «objectivity, unity of legal norms and the ability to isolate» [2; 231]. But the rule of law and legal act are not the only elements of the legal system. Traditionally, scientists refer to the structural elements of the legal system as the rule of law, branch of law, sub-branch of law, institution of law, sub-institute of law [2; 232]. In our opinion, in this logical sequence, such an important element as a normative legal act is missing. If we put the rule of law at the basis of the system of law, then it will be logically justified to place a normative legal act as the next link in the system, the primary and basic element of which is the rule of law. Sources of law play a crucial determining role in the characteristics of the legal system of each state. Since the law of each state, due to certain reasons and characteristics, is a constituent element of a broader legal phenomenon — the legal system — the sources of law characteristic of a particular legal system inevitably affect the legal system of a separate state. The importance of sources of law is so great for identifying not only the legal system, but also for the system of law of a separate state, that it is the subject of constant research and study throughout the entire existence of law in human society. Sources of law are traditionally understood as specific special forms in which legal norms are clothed. The legal system of each state is characterized by its own special range of sources of law. Each state, performing one of its most important functions — the legal regulation of social relations, uses a certain set of methods and means, in which law-making activities play a central role as a method, and legal acts as the main means. The legal acts that appear as a result of law-making activities, in their totality, form the main link in the system of state law. In accordance with Article 1 of the Law on Legal Acts, they are subdivided into «normative and non-normative, legislative acts and by-laws». The study of the legal nature of normative acts should be linked to their place and role in the legal system of a given state. Showing the importance of such a phenomenon as the system of law, scientists note the need for such characteristics as «proper organization and internal consistency» [1; 167], «objectivity, unity of legal norms and the ability to isolate» [2; 231]. But the rule of law and legal act are not the only elements of the legal system. Traditionally, scientists refer to the structural elements of the legal system as the rule of law, branch of law, sub-branch of law, institution of law, sub-institute of law [2; 232]. In our opinion, in this logical sequence, such an important element as a normative legal act is missing. If we put the rule of law at the basis of the system of law, then it will be logically justified to place a normative legal act as the next link in the system, the primary and basic element of which is the rule of law.

When characterizing the relationship between the concepts of «system of law» and «legal system» in the legal literature, it is usually noted that the system of law «is a phenomenon of an objective nature» [2; 231], that the system of law is determined by the existing social structure of society and the state, and, that the legislator cannot arbitrarily change the existing historical type of law. Here, let us disagree with this statement. If we talk about the system of law of a particular state, then it is precisely thanks to the activity of the legislator who personifies the state that the historical types of law in a given state change, the entire system of social relations existing in it changes. If we agree with the opinion of MN Marchenko that «the system of law is understood as its purely internal structure, then the quality of subjectivity should be attributed to the system of law, since the internal structure of law depends on the will of the legislator». In turn, the legal system is an integral element of a broader, collective category — the legal system. The legal system is a set of internally coordinated and interconnected legal means with the help of which the state exerts a norma-

tive influence on social relations [2; 232]. In this regard, we assume that such and the historical path of its formation» [3; 756]. As you can see, in this example, the definition is based on the common sources of law. In other words, the main difference between legal systems lies in the nature of the sources of law. The form, list and hierarchy of legal sources (forms) of law are traditionally regarded as the main difference between the common law family and the Romano-Germanic family. In particular, for the Romano-Germanic legal system, the law acts in the form of norms that have legislative expression, while for the Anglo-Saxon, the quality of the legal system is objective.

A fundamentally different, in our opinion, definition of the legal system (family) is given by the Legal Encyclopedia. In it, the legal system is understood as «a more or less broad set of national systems of law, which are united by a commonality of sources of law, basic concepts, structure of law, the main source of law — a judicial precedent.

R. David uses a similar approach for grouping legal systems. He notes that the differences between legal systems of different countries become less noticeable if we start from «not from the content of specific rules, but from the more permanent elements used to create, interpret and evaluate the rules. The norms themselves can be infinitely diverse, but the methods of their development, systematization, interpretation show the presence of some common characteristics» [4; 20]. So, we come to the conclusion that the source or form of law is one of the main criteria in the classification of legal systems.

The following types of sources of law are known to various states: legal custom; judicial precedent; legal doctrine; normative contracts; religious norms; principles of law; arbitrage practice; normative legal acts. Sometimes the principles and norms of international law and treaties between states are called as an independent source of law. Legal custom is considered historically the first source of law, since customs arose before positive law, and the first laws were customs sanctioned by the state. Thus, a legal custom is a custom recognized or accepted by the state. In other words, a custom takes on a legal character after it is approved and recognized by the state. At the same time, this custom also receives protection from the state. Tlepina Sh.V. notes that «customary law becomes a system of generally binding social norms, which are protected by the state and provide for the legal regulation of social relations» [5; 43]. Akhmetova N.S. notes that in the pre-revolutionary Kazakh society, customary law remained the most important source of law [6; 3]. In this case, the term «source of law» can be viewed in an objective, broad sense, understanding by it the entire set of legal norms at this stage of historical development. At the same time, the author notes that «Kazakh customary law consists of the following sources: adat, the practice of the court of biys, the position of the congress of biys» [7; 18]. And here you can notice the difference in the meanings of the term «source». In the latter case, these will be the forms of customary law of the Kazakh society, i.e. specific legal regulations containing rules of conduct.

Not all customs become legal, but only those that meet the interests of the state. Legal customs have not lost their regulatory significance in modern conditions. So, in paragraph 10 of Article 2 of the Law of the Republic of Kazakhstan «On Arbitration», a definition of business customs is given: «rules of conduct that have developed and are widely used in the field of civil law contracts that do not contradict the applicable law, regardless of whether they are recorded in any document « [8]. There is a similar definition in article 5 of the Civil Code of the Republic of Kazakhstan, a definition of business customs is given [9]. The custom is widely used in parliamentary practice and in the state legal sphere, for example, the procedure for forming a government in Great Britain, many legal institutions of royal power, the procedure for holding parliamentary sessions, etc. Legal customs are actively used in international relations. Customs are recognized by states in trade practice, sea and other transportation. The traditions of community life are common in the modern states of Africa, Latin America, Japan and China. This is especially true of family, hereditary and land relations.

The problem of objective and subjective in law can also be considered when clarifying the relationship between the source of law and the form of law. In the theory of law, two concepts are used — the form of law and the source of law. Most scholars identify the concept of the source of law and its form. However, in recent years, the position is gaining more and more recognition according to which the concepts of the form of law and the source of law, although closely related, do not coincide. Therefore, they must be distinguished. The form of law shows how the law is organized, how its content is expressed outside. The form of law is understood as the official consolidation of the content of the rule of law in order to give specific phenomena official legal force, the quality of universality as state and power orders, hierarchy. The concept of a source of law is a system of factors that predetermine the content of law and the forms of its expression. To be a source of law means to serve as a factor in law formation, to have the ability to normative regulation,

to provide material for new legal norms. The source of law is that from which it is created, arises. Consequently, sources of law serve as criteria for legal formation, legal establishment. Therefore, the sources of law may be not the forms of external expression of law, but those social factors and phenomena of reality that form the basis of the process of the emergence of legal norms, from which the state draws new norms of law. In the 60s of the XX century. in the Soviet legal literature there was a dispute over the use of the terms «form» and «source» of law. It was suggested to use the concept of «form of law» instead of «source of law» [10; 34]. However, this position did not receive support in science, and instead it was proposed to clarify the term «source of law» and call it «a legally formal source of law» [11; 36]. At the same time, it was proposed to highlight the sources of law: 1) in the material sense; 2) in the ideal sense; 3) in a legal or formal sense. The sources of law in the material sense are understood as the material conditions of the life of society or the way of life of people, that is, the totality of historical, economic, political, geographic, climatic, moral factors that characterize the social and spiritual world of a particular nation and its material life. The source of law in the ideal sense presupposes those philosophical ideas that formed the basis of this legal system [3; 404]. It is these factors that represent the objective side of law.

As you can see, the question of the relationship between the concepts of «source of law» and «form of law» for many years has remained one of the most controversial.

Some scholars, claiming the non-identity of the categories under consideration, understand the sources of law as the force that creates legal prescriptions, and under the forms of law, the external and internal expression of law assert their non-identity. For example, T.V. Kashanina. understands the sources of law as the will of law-making subjects. Accordingly, the sources of law can be «the will of humanity (human rights, principles of law); will of the people (referendum norms); the will of the state (legislative norms); will of the team (corporate norms); will of citizens, organizations (contractual norms). The form of law is a reservoir where legal norms are located. At the same time, in the historical context, ten forms of law are distinguished, namely: legal custom, religious texts, legal precedent, business habit, legal awareness, normative act, legal doctrine, judicial practice, moral views, contract» [12; 35].

At the same time, many researchers consider the concepts of «form of law» and «source of law» as synonyms. In particular, Baytin M.I. proceeds from the fact that the form (source) of law is «certain ways (methods, means) of expressing the state will of society. The form shows what are the external manifestations of law, in what form it exists and functions in real life. With the help of the form, the state will is given an accessible and generally binding character, the official communication of this will to the performers. Through the form, the law, as it were, gets a «start in life», acquires legal force» [13; 67]. Indeed, is it possible to imagine the existence of a formless law or a form of law without content. The content of the law is clothed in a certain form, becomes its legal shell.

When considering the problem of correlation of sources and forms of law, we proceed from the fact that this issue cannot be solved one-sidedly, straightforwardly. The analysis shows that «in some respects the form and source of law can coincide with each other and be considered identical, while in other respects they can differ significantly from each other and cannot be considered identical.» The form and source of law are identical categories when it comes to secondary, so-called formal legal sources of law. «This emphasizes that, among other things, the identity of the form and the source of law, where the form indicates how, how the legal (normative) content is organized and expressed outwardly, and the source indicates what are those legal and other sources, factors, predetermining the considered form of law and its content» [2; 57].

We share the point of view of S.V. Miroshnik, who proposes to consider the concept of «source (form) of law» in several aspects:

In the material sense of the word, the sources of law include the material conditions of society, which give rise to the need for legal regulation of social relations, the need to reach a compromise between the opposite interests of various subjects.

In the ideal sense of the word, the source of law should be recognized as the legal consciousness of the legislator, who believes that this group of social relations should be regulated by the relevant legal regulations. In many respects, the timeliness of the adoption of this or that regulatory legal act depends on the will of the competent state body.

Finally, the source of law in the formal sense of the word is various forms of external expression of the rules of behavior of participants in social relations. These include: legal customs, normative legal acts, judicial (administrative) precedents, regulatory agreements, religious texts, legal doctrine [14; 36].

Not all of the named sources of law are related to Kazakhstani law. Since the Republic of Kazakhstan is a secular state, religious norms cannot be applied to regulate public relations. We consider scientific doctrine as an informal source of law that can influence the position of law-making and law enforcement agencies.

The source of law in a formal, or legal, sense means different ways of external expression of the rule of law. Formal sources are carriers of information about the rules, models of behavior of subjects of law. Recently, a source of law has been highlighted in the political sense, by which the state is understood as a source of positive law. As the authors of this proposal believe, it is the intellectual and volitional activity of the bearers of state power that is the link between the sources of law in the material sense and documentary sources. V.V. Lazarev sources of law calls the factors «feeding the emergence and action of law» [1; 143]. He refers to them the law-making activities of the state, the material conditions of society. In a historical sense, the concept of «source of law» is used when characterizing historical monuments of law, when they want to show the roots and origins of modern law in force in the state [15].

Currently, the term «source of law» most often refers to legal sources, or sources in the legal sense. In the literature, the following definitions of legal sources are given — these are the official forms of expression and consolidation of the rules of law in force in this state [2; 133]. Alekseev S.S. under the sources of law understands «coming from the state of the official documentary forms or methods of expression and consolidation of the rules of law, giving them a generally binding legal value» [10; 76].

The study of forms of law involves the allocation of a number of methodological premises. First, one should not forget the relationship between the form of law as a legal category and the form of law as a philosophical category. In the latter case, relying on the general philosophical understanding of the form of law, the following definition of the form of law as a philosophical category can be formulated: the form of law is a way of organizing and interacting elements and processes of the legal system between themselves and the surrounding world.

Secondly, the form of law is always characterized by a certain social essence and content.

Third, the form of law and the content of law are paired legal categories, since it is impossible to break the form and content of law, interpenetrating and complementing each other. Hegel paid attention to this: «the content is not formless, but the form at the same time is contained in the content itself, and is something external to it» [16; 122].

Fourth, when studying the form of law, one should remember that this is a dynamically developing legal phenomenon. Changes in politics, economy, social sphere are adequately reflected in legal norms, and, consequently, in the forms of law. This process can be carried out by filling the old form with new content or by the emergence of a new form. For example, the activities of the Constitutional Council of the Republic of Kazakhstan, the highest courts have led to the emergence of a new form of law. Case law began to actively develop in Kazakhstan.

The form of law should be distinguished from the form of a normative legal act. The form of law should be understood as various types of sources of law in the objective sense. These species have been analyzed above. The form of a regulatory legal act is various ways of expressing legal signatures. The form of a normative legal act is always determined by its content and legal force. The existence of differences between the form of law and the form of a legal act is indicated by Article 22 of the Law on Legal Acts, which prescribes in the requisites of a normative legal act an indication of the form of the act: law, government decree, minister order, maslikhat decree, etc. Clause 1 of Article 62 of the Constitution established, that the form of legislative acts of Parliament is laws. Baymakhanov M.T. uses the concept «form of normative legal regulation» [17; 253].

So, at different stages of the life of law in a given state, starting from the development of legal ideology, the formation of a legal system, the emergence of a law-making idea and ending with the application of the current legal act to a specific social relationship, the relationship between the concepts of «source of law» and «form of law» also changes. At the stage of the development of legal ideology, the formation of the system of law, in other words, at the stage of legal formation, objective factors prevail (material conditions of society, philosophical ideas, legal ideology, historical conditions for the development of law and the state). All these factors in general are the sources of law. At the stage of lawmaking, all of the above sources of law form the basis for investing legal ideas in specific legal forms, i.e. normative legal acts.

In the classification of sources of law, they often use such a method as their division into main and auxiliary. The main sources include those that directly regulate social relations. This means that the law enforcement body, making a decision, justifies it with a specific legal norm from a specific legal act. For the countries of the Romano-Germanic legal system, to which the Republic of Kazakhstan also belongs, these

are acts related to the so-called statutory law — laws, by-laws, adopted in strict accordance with the established law-making procedure. That is, all participants in legal relations will reconcile their actions with the requirements that are fixed in specific regulations. Auxiliary sources of law are used in the case when the law enforcement officer finds it difficult to choose a suitable legal norm or there is no corresponding legal act in the legislation, that is, there is a gap in law when this legal relationship has not yet been regulated by a legal norm. And here the so-called «general principles of law» play an important role.

The principles of law are the sources of law in almost all legal systems. In the Romano-Germanic legal system, it is allowed to substantiate a court decision in case of gaps in law by general legal principles. As already noted, the Civil Code of the Republic of Kazakhstan established that when applying the analogy of law, it is necessary to rely on the principles of rationality, fairness and good faith. In the scientific literature, various definitions of the concept of the principles of law are given. Nevertheless, one can agree that the principles of law are fundamental ideas enshrined in official sources of law or recognized in legal practice and reflecting the patterns of development of social relations. Legal axioms are often used as the principles of law, for example: «You cannot bring a claim twice in the same case»; «The resolution of a dispute between two persons must not harm a third party»; «Let the other side be heard»; «The court must be fair». General principles of law are applied in international law (paragraph c) of Article 38 of the Statute of the ICU). The principles of law have direct regulatory significance. This applies primarily to the principles enshrined in the Constitution of the Republic of Kazakhstan. In the literature, it is customary to distinguish principles: general legal, intersectoral and sectoral [18; 7]. General legal principles include those that are inherent in all branches of law without exception: legality, equality before the law, justice, humanism. They are enshrined, for example, in the Constitution of the Republic of Kazakhstan, in the Criminal Code of the Republic of Kazakhstan. Industry principles reflect the specifics of a particular branch of law. For example, in family law, the principle of equality of women and men in family relations, the principle of regulating marriage and family relations only by the state operates; in environmental law — the principles of a reasonable combination of economic and environmental interests, rational use of resources; in the sphere of labor law — the principles of freedom of labor, labor protection and health of workers, guaranteed labor rights of workers, etc. It should be noted that, despite the stability of the principles and a large degree of their abstraction, they do not remain unchanged at all times and eras. They change their content and significance, although their mobility is much less than the rule of law.

In the legal literature, it is usually indicated that the interpretations of the higher courts serve as the basis for a new understanding and application of certain rules of law. However, in contrast to case law in the civil law system, such interpretations serve as a secondary source of law. Interpretations of the highest courts seem to deepen and detail the law. Moreover, the judicial practice of the highest courts develops legal provisions that have normative content and act as generally binding regulators of public relations. They summarize the experience of applying specific legal norms and give the necessary certainty to their content. As a result, the decisions of the highest judicial bodies serve as a model for the correct resolution of cases for the lower courts. A special position among the sources of law is occupied by the resolutions of the Constitutional Council of the Republic of Kazakhstan. According to article 87 of the Constitutional Law «On the Constitutional Council of the Republic of Kazakhstan», the recognition of a normative act or agreement, their individual parts as inconsistent with the Constitution of the Republic of Kazakhstan, that is, unconstitutional, serves as the basis for canceling this act, and the act itself is not subject to application by courts and other state bodies. Thus, the resolutions of the Constitutional Council of the Republic of Kazakhstan serve as a source of law, since they serve as the basis for changing, canceling an act or for adopting a new act. Resolutions of the Constitutional Council of the Republic of Kazakhstan acquire generally binding significance, enter into force immediately after their announcement and are not subject to cancellation and appeal. In fact, the Constitutional Council acts as a kind of legislator, since its decisions cause changes in legislation.

The analogy of the law established by the Law «On Legal Acts» is also an auxiliary method in law enforcement. The law provided for two forms of analogy — analogy of law and analogy of law. If we compare the legal force of these principles, then in the first place should be put the analogy of the law. This principle of determining a suitable source is used when there is a law governing such social relations. If there is no such law, then in this case the principle of analogy of law is used. The analogy of law consists in the use of «the meaning of legislation, general principles of law or principles of specific branches of law» for the regulation of social relations [19].

The question of whether the normative decisions of the Constitutional Council of the Republic of Kazakhstan are sources of law can be resolved using Article 5 of the Law «On Legal Acts», which establishes

that their legal force is equal to the legal force of those constitutional norms, the interpretation of which is contained in them. Thus, if one of the main properties of the sources of law is recognized as legal force, then on the basis of this admission it can be concluded that the decisions of the Constitutional Council are additional sources of Kazakhstani law. In the legal literature, it is usually indicated that the interpretations of the higher courts serve as the basis for a new understanding and application of certain rules of law. However, in contrast to case law in the civil law system, such interpretations serve as a secondary source of law. Interpretations of the highest courts seem to deepen and detail the law. Moreover, the judicial practice of the highest courts develops legal provisions that have normative content and act as generally binding regulators of public relations. They summarize the experience of applying specific legal norms and give the necessary certainty to their content. As a result, the decisions of the highest judicial bodies serve as a model for the correct resolution of cases for the lower courts. A special position among the sources of law is occupied by the resolutions of the Constitutional Council of the Republic of Kazakhstan. According to article 87 of the Constitutional Law «On the Constitutional Council of the Republic of Kazakhstan», the recognition of a normative act or agreement, their individual parts as inconsistent with the Constitution of the Republic of Kazakhstan, that is, unconstitutional, serves as the basis for canceling this act, and the act itself is not subject to application by courts and other state bodies. Thus, the resolutions of the Constitutional Council of the Republic of Kazakhstan serve as a source of law, since they serve as the basis for changing, canceling an act or for adopting a new act. Resolutions of the Constitutional Council of the Republic of Kazakhstan acquire generally binding significance, enter into force immediately after their announcement and are not subject to cancellation and appeal. In fact, the Constitutional Council acts as a kind of legislator, since its decisions cause changes in legislation.

The analogy of the law established by the Law «On Legal Acts» is also an auxiliary method in law enforcement. The law provided for two forms of analogy — analogy of law and analogy of law. If we compare the legal force of these principles, then in the first place should be put the analogy of the law. This principle of determining a suitable source is used when there is a law governing such social relations. If there is no such law, then in this case the principle of analogy of law is used. The analogy of law consists in the use of «the meaning of legislation, general principles of law or principles of specific branches of law» for the regulation of social relations [19].

The question of whether the normative decisions of the Constitutional Council of the Republic of Kazakhstan are sources of law can be resolved using Article 5 of the Law «On Legal Acts», which establishes that their legal force is equal to the legal force of those constitutional norms, the interpretation of which is contained in them. Thus, if one of the main properties of the sources of law is recognized as legal force, then on the basis of this admission it can be concluded that the decisions of the Constitutional Council are additional sources of Kazakhstani law.

The answer to the question of whether the regulatory decisions of the Supreme Court of the Republic of Kazakhstan are sources of law can be derived from the content of paragraph 3 of Article 5 of the Law «On Legal Acts». This paragraph establishes that in the form of decisions the Supreme Court provides «clarifications on issues of judicial practice.» What does clarification mean? The explanation, firstly, does not create a new legal norm, it is intended to explain to the law enforcement officer how to apply this or that legal norm or to interpret its content. In other words, decisions of the Supreme Court do not regulate public relations. While the source of law is characterized by such an important property as the regulation of social relations.

Judicial precedent is a decision of the judicial authorities in a specific case, which is subsequently taken as a mandatory rule when considering similar cases. Thus, this decision of the judicial authorities acquires the value of a kind of model for subsequent decisions, that is, it plays the role of a rule of law. Translated from Latin, «precedent» means «previous». More specifically, judicial precedent can be defined as a legal regulation, duly formalized, on which a court decision is based in accordance with established facts, which lower courts are obliged to follow when considering similar cases. The following features are inherent in the judicial precedent: 1) it has binding legal force; 2) the result of law-making activities of the courts; 3) is in a subordinate position in relation to the law, since: a) the action of the judicial precedent can be canceled by law; b) the court, creating a precedent, must act in accordance with the law; c) after the adoption of the law, the precedent ceases to be valid. It is important to note that for the lower courts, not all court decisions or sentences are binding, but only the legal position of the judge, on the basis of which the decision is made. In other words, the main part of the court decision, which constitutes the actual judicial precedent, is the reasoning part, which sets out the legal principles applied to legal issues arising from specific circumstances.

The rest of the judgment constitutes the so-called «incidentally said», which is not binding, but serves as a persuasive precedent. Judges have fairly broad powers when applying a precedent. They may, firstly, not apply the judicial precedent due to the peculiarities of the case under consideration; secondly, to choose a specific use case from all existing use cases and explain it in your own way; third, to formulate a new norm. Therefore, the case law has come to be known as «law created by judges» or judicial law. In the case-law form of law, the precedent has a leading value among other sources of law. Domestic jurisprudence does not officially recognize precedent as a source of law, since the judiciary should act as law enforcement officers, and not create, not create law. The case law has developed in Great Britain, New Zealand, Australia, Canada and some other, mainly English-speaking countries. Almost a third of the world's states adhere to the principles of case law. It plays an important role in the creation of a single European law and a single legal space in Europe. Recently, the attitude towards the precedent has changed in Kazakhstan and in the Russian Federation. The fact is that as a result of law enforcement practice, legal provisions are often developed that generalize legal practice and are capable, due to the lag of lawmaking from the development of social relations, from emerging needs, to act as a means of eliminating contradictions between the current law and the development of social relations. This allows you to protect the rights and legitimate interests of people, to ensure the stability of the rule of law. The answer to the question of whether the regulatory decisions of the Supreme Court of the Republic of Kazakhstan are sources of law can be derived from the content of paragraph 3 of Article 5 of the Law «On Legal Acts». This paragraph establishes that in the form of decisions the Supreme Court provides «clarifications on issues of judicial practice.» What does clarification mean? The explanation, firstly, does not create a new legal norm, it is intended to explain to the law enforcement officer how to apply this or that legal norm or to interpret its content. In other words, decisions of the Supreme Court do not regulate public relations. While the source of law is characterized by such an important property as the regulation of social relations.

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Moreover, in accordance with paragraphs. 2 of paragraph 1 of article 4 of the Constitutional Law of the Republic of Kazakhstan «On the MFC» Astana «to the current law of the Center are acts of the Center, which may be based on the principles, norms and precedents of the law of England and Wales [20]. At pre-

sent, science and practice are increasingly inclined to recognize the precedent as a source of law (albeit additional) and to give, in particular, the decisions of the plenums of the Supreme Court of the Republic of Kazakhstan the form of a precedent [21; 119]. This point of view is substantiated by the fact that these acts, firstly, represent the official interpretation of the rule of law and regulatory legal acts; secondly, they contain concretizing regulations and prescriptions; thirdly, they are concluded in the form of an official legal document, which is adopted in the established procedural order; fourth, they have legal force, including binding on all courts. For example, all member states of the Council of Europe must conform their legislative and law enforcement activities with the decisions of the European Court of Human Rights. The Court itself creates normative regulations — judicial precedents of an international nature and they are binding on all states that are members of the Council of Europe.

Judicial precedents are increasingly directly involved in the legal regulation of public relations. Further scientific research should be aimed at solving problems related to ensuring the uniformity of Kazakhstani case-law. Its flexibility, as a very positive quality of this source of law, is sometimes leveled out by inconsistency, when one and the same court does not take into account its own conclusions drawn earlier on a similar legal dispute.

The legal system in the Republic of Kazakhstan today is undergoing a process of development and transformation. It does this by perceiving individual institutions from other legal systems. Traditionally, the legal system of our state belongs to the Romano-Germanic legal family, in which the judicial precedent is not recognized as an independent source of law. However, the processes of globalization of all spheres of public relations taking place all over the world have also affected the nature and methods of their legal regulation. The globalization of the economy, meeting the needs of the economic development of states, active investment activities, primarily in the field of attracting foreign investment, demanded that our state take measures aimed at creating a convenient and reliable legal regime for foreign investors, most of whom are traditionally accustomed to working under the conditions of the English rights. Today, in almost all branches of domestic law, legal novels are being introduced, which are characteristic of English case law. This is especially noticeable in the financial sphere, in the branches of financial law and civil procedure law. The activities of the MFC «Astana» showed the need to introduce a special legal regime on its territory. Article 2 of the Law "On the IFC "Astana " establishes that the «special legal regime» applies only to the financial sphere. It follows from this that the resolution of disputes arising from financial legal relations is also carried out under the conditions of a «special legal regime». This regime means that when resolving disputes of a financial nature, in addition to the law of the Republic of Kazakhstan, the norms of the case law of England and Wales will be applied. As noted by S.K. Ukin, «they have created for the legal system of Kazakhstan a new, but not specified in the Constitution, source (form) of current law — case law» [22; 167].

Legal doctrine in many legal systems is recognized as a source of law. In ancient Rome, the courts necessarily referred to the works of the most famous Roman jurists — Ulpian, Paul, Gaius, Papinianus and Modestinus. In English courts, when creating a judicial precedent, references to the works of well-known lawyers are also possible. In Muslim countries, the works of well-known theologians and experts in Islam are considered the only source of law. It is formed by the system of views developed by legal science on the problems of legal regulation of social relations and other state-legal phenomena, which are based on general principles and values and reflect the patterns and trends of their development. The following features are characteristic of the legal doctrine: a) it is the result of professional scientific activity; b) serves as a way to express the positions of scientists on various problems of legal content; c) has a special form of expression — scientific research, textual presentation of any legal provisions, legal principles, etc.; d) has social significance, as it reflects the needs of the socio-economic, political and spiritual development of the state and society at a particular historical stage. There are three types of legal doctrine: 1) general legal; 2) a separate branch of law; 3) a separate legal institution. Legal doctrine serves as a source of law in two main areas: lawmaking and law enforcement. As for lawmaking, the legal doctrine finds its embodiment, firstly, in the development of draft laws, when scientific centers and the most authoritative representatives of legal science are involved in this work; secondly, when conducting a legal examination of draft laws; thirdly, when influencing the legal consciousness of the legislator. In the field of lawmaking, the legal doctrine is designed to ensure the effective operation of future norms of law, foreseeing the dynamics of the development of regulated social relations, compliance of the norms of law with objective realities and trends of social development. Legal doctrine should also be used as a source when making changes to existing legislation. In law enforcement, the legal doctrine is used as a source when identifying gaps in law, conflict of laws and when interpreting legal acts. For example, in accordance with subparagraph 3 of paragraph 3 of Article 26 of the

Constitutional Law «On the Constitutional Council of the Republic of Kazakhstan» «a member of the Constitutional Court in whose proceedings the appeal is, if necessary, involves scientists as specialists, experts for conducting research, examinations, and preparing conclusions» [23]. In these cases, law enforcement agencies do not create a new rule of law, but reproduce its content based on the legal doctrine or identifying it based on the generally accepted doctrine of law.

Conclusions

The legal system of the Republic of Kazakhstan today is in constant change and improvement. This is required by the tasks facing the Kazakh society and the state of Kazakhstan's entry into the fifty most developed states of the world, the integration of the state's economy into the world economic system, the formation of a developed civil society and, ultimately, an increase in the level of well-being, legal protection of all participants in public relations and ensuring and full implementation of constitutional human rights and freedoms. The system of law is not permanent data. It must develop, change in order to best meet the needs of the current stage of development. Determination of the main directions of development of the legal system of our state is an important task facing the theorists of law, is a fundamental factor for legal practice.

In different periods of the history of Kazakhstan, the system of its law was characterized by different sources (forms) of law. During the period of the Kazakh Khanate, customs played the main role as regulators of social relations. During this period, such important sources as «Zheti Zhargy», the laws of Khan Tauke and others appeared. representative body of the state. To regulate various social relations, a system of by-laws is formed, adopted in strict accordance, on the basis of and in pursuance of laws. The Soviet period in the development of Kazakhstani law was characterized by its own system of principles of law, on the basis of which laws were created and functioned.

The creation of an independent state, a change in the system of economic relations, the integration of Kazakhstan into the world community required reforming the entire system of law and legal relations. Keeping its belonging to the Romano-Germanic legal system, Kazakhstan chose the theory of natural law as the basis for the formation and development of its own law. The basic role of «general principles of law» is enshrined in a number of provisions of the Constitution of the state. «General principles of law» as the basic principles of this theory formed the basis for the formation of the entire system of legislation. «General principles of law» are the basis not only for the legal system of the Republic of Kazakhstan. They underlie the formation of the law of most states in the world. And they live up to their name. For example, in Article 38 of the Statute of the International Court of Justice of the United Nations, they are designated as the main sources of international law, on the basis of which the Court makes its decisions when considering interstate disputes.

Today, the construction of the system of law of the Republic of Kazakhstan is based on the principles of the Romano-Germanic legal family: the rule of law, the law is the main source of Kazakhstan law, etc. The adoption of the law «On Legal Acts» main directions of development of the Kazazkhstan legal system. Thus, a feature of modern legal development is the mutual penetration of the principles of law and sources that are characteristic of different legal systems. In modern conditions in the countries of the Romano-Germanic legal system, there is a tendency to increase the role of judicial practice. The decisions of the country's highest court (constitutional or supreme) are used as the basis for decisions of the lower courts. Despite the fact that judges in the countries of the Romano-Germanic system are not bound by the decisions of higher courts, there is a tendency towards an increase in the role of their decisions. At the same time, the legal nature of the normative decisions of the Supreme Courts (Constitutional Council) is considered in two ways. From a formal legal point of view, in the Romano-Germanic legal system, they are normative legal acts, from the point of view of Anglo-American law, they can be considered as a judicial precedent, clothed in the form of a normative legal act.

However, the legal system of our state is not forever an established set of legal acts. She is in constant development and improvement. The proof of this is the introduction of a special legal regime in the financial sphere on the territory of the MFC «Astana». The term «special legal regime» means that along with the current law of the Republic of Kazakhstan, the principles and precedents of English common law will be applied in this territory.

The creation of the MFC «Astana» with a special legal regime, recognition of the judicial precedent indicates that there is a convergence of legal systems, which does not exclude further transformation of the Kazakh legal system into a mixed one (Romano-Germanic and Anglo-Saxon).

The variety of sources of Kazakhstani law allows for their classification. We offer the division of sources into main, additional and auxiliary. The main sources of law directly regulate social relations, as they contain clear, precise prescriptions. The main sources include the Constitution, international treaties, codes, laws, bylaws. Additional ones include «general principles of law» and analogy of law. The analogy of the law established by the Law «On Legal Acts» is also an auxiliary method in law enforcement. The law provided for two forms of analogy — analogy of law and analogy of law. If we compare the legal force of these principles, then in the first place should be put the analogy of the law. Auxiliary sources serve to determine and search for a suitable rule of law to regulate a specific social relationship or a law enforcement case. These include the analogy of law and legal doctrine.

References

1 Общая теория права и государства: учеб. / под ред. В.В. Лазарева. — М.: Юрист, 1996. — 472 с.

2 Общая теория государства и права. Академический курс: [В 2-х т.], под ред. проф. М.Н. Марченко. — Т. 2. Теория права. — М.: Зерцало, 1998. — 636 с.

3 Юридическая энциклопедия. — М.: ИНФРА-М, 1999. — 1110 с.

4 Давид Р. Основные правовые системы современности / Р. Давид, К. Жоффре-Спинози. — М.: Международные отношения, 1999. — 400 с.

5 Тлепина Ш.В. Первые историко-правовые исследования в Казахстане: постановка проблем обычного права [Электронный ресурс] / Ш.В. Тлепина // Вестн. КазНУ. — 2012. — Режим доступа: http://articlekz. g com/article/9641

6 Ахметова Н.С. Обычное право казахов в XVIII и первой половине XIX века / Н.С. Ахметова. — Алматы: Изд-во «Қазақ университеті», 1997. — 216 с.

7 Зиманов С.З. Состояние и задачи разработки проблем обычного права казахов / С.З. Зиманов / В кн. Проблемы казахского обычного права. — Алма-Ата, 1989. — 144 с.

8 Закон Республики Казахстан от 8 апреля 2016 г. № 488-V. Об арбитраже (с изм. от 27.02.2017 г.) [Электронный ресурс]. — Режим доступа: http://online.zakon.kz/m/document/? doc_id=35110250#sub_id=20010

9 Гражданский кодекс Республики Казахстан. (Общая часть) от 24 декабря 1994 г. (с изм. и доп. на 01.01.2018 г.) — [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/document/? doc_id=10

10 Алексеев С.С. Право: азбука — теория — философия: Опыт комплексного исследования / С.С. Алексеев. — М.: Статут, 1999. — 712 с.

11 Зивс С.Л. Источники права / С.Л. Зивс. — М.: Юрид. лит., 1981. — 223 с.

12 Кашанина Т.В. Эволюция форм права / Т.В. Кашанина // Lex russica. — 2011. — № 1. — С. 34–53.

13 Байтин М.И. Сущность права. (Современное нормативное правопонимание на грани двух веков) / М.И. Байтин. — М.: Юрид. лит., 2005. — 167 с.

14 Мирошник С.В. Источник права и форма права: соотношение понятий / С.В. Мирошник // Пробелы в российском законодательстве // Юрид. журн. — 2013. — № 5. — С. 35–37.

15 Хрестоматия по всеобщей истории государства и права. — Т. 1 / под ред. К.И. Батыра, Е.В. Поликарповой. — М.: Юрист, 1996. — 520 с.

16 Гегель Г.В.Ф. Энциклопедия философских наук / Г.В.Ф. Гегель. — Т. 1. — М.: Наука, 1974. — 298 с.

17 Баймаханов М.Т. Нормативно-правовой механизм осуществления функций государства / М.Т. Баймаханов / В кн. Избранные труды по теории государства и права. — Алматы: Юрист, 2003. — 286 с.

18 Корнев В.Н. Принципы права в зарубежной правовой доктрине: природа, назначение, функции / В.Н. Корнев // Государство и право. — 2016. — № 11. — С. 59–67.

19 Закон РК от 16 апреля 2016 г. № 480. «О правовых актах» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/? doc_id=10215466с.

20 Конституционный закон РК от 7 декабря 2015 г. № 438. «О Международном финансовом центре «Астана» [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/? doc_

21 Ахметова Н.С., Турлаев А.В. Теоретико-правовые основы конвергенции двух систем /Гармонизация национального законодательства в рамках интеграционных процессов: материалы Междунар. науч.-практ. конф. — Караганда: Изд-во КарГУ, 2017. — С. 116–120.

22 Укин С.К. Вестернизация правовой системы Республики Казахстан: вопросы теории и практики // Теоретические и исторические основы укрепления казахстанской государственности и развитие национальной правовой системы: материалы Междунар. науч.-практ. конф. — Караганда: Изд-во КарГУ, 2019. — С. 165–170.

23 Конституционный закон Республики Казахстан от 29 декабря 1995 года № 2737 «О Конституционном совете Республики Казахстан» (с изм. и доп. по состоянию на 22.12.2017 г.) [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/? doc.

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Қазақ құқығының қайнар көздері жүйесінің дамуы

Зерттеудің мақсаты — Қазақстан Республикасы заңдарының қайнар көздерін тәуелсіз жүйелік құбылыс ретінде талдау, заң шығарушылық пен құқық қорғау органдарының бастапқы базасы мен тәжірибесін жетілдіру бойынша тұжырымдар мен ұсыныстарды тұжырымдау. Салыстырмалы құқықтық талдау әдісі негізінде жалпы құқық қайнарлары жүйесінің, басқа елдердің және Қазақстан Республикасының құқық қайнар көздерінің дамуы зерттелді. Тарихи зерттеу әдісі негізінде қазіргі дерек көздерінің жүйесін дамытудағы тарихи дереккөздердің рөлі мен маңызы ашылады. Жүйелік талдау әдісі құқық теориясында бар құқық көздерінің анықтамаларын зерттеу үшін қолданылады. Авторлардың құқықтың қайнар көзі мен формасы арасындағы байланыс туралы көзқарасы тұжырымдалған. Құқық көздерінің қасиеттері мен функциялары құқық жүйесі үшін факторлармен анықталды, олардың негізінде заң шығарушылық және құқық қолдану қызметі құрылады. Құқық көздерін жіктеу әдістері талданады, оларды жүйелеу және құқық қолдану процесінде олардың әлеуетін анықтау мақсатында құқық қайнар көздерін жіктеудің әртүрлі негіздерін қолдану мүмкіндіктері қарастырылды. Отандық құқық теориясына «көмекші» құқық көздері ұғымын енгізу мүмкіндігі зерттелді, өйткені ол халықаралық құқық теориясы мен практикасында бар. Қазіргі заманғы романо-герман және англо-саксон құқықтық жүйелерінің интеграциясының мүмкіндіктері мен негізгі заңдылықтары қарастырылған. Қазақстандық құқық жүйесінде «батыстану» тенденциясының бар екендігі туралы тұжырым жасалған; сот прецедентін «Астана» МФҚ аумағында «ерекше құқықтық режим» жағдайында құқықтың қайнар көзі ретінде пайдалану.

Кілт сөздер: құқықтық жүйе, құқық көзі, құқық нысаны, сот прецеденті, құқықтың жалпы қағидалары, құқықтық акт, Конституциялық Кеңестің қаулысы, құқықтық доктрина, құқықтық конвергенция, құқықтың қосалқы қайнар көздері, заң ұқсастығы, құқық ұқсастығы.

Н.С. Ахметова, Н.П. Старожилова

Развитие системы источников казахстанского права

Целью исследования является анализ источников права Республики Казахстан как самостоятельного системного явления, формулирование выводов и предложений по совершенствованию источниковой базы и практики правотворчества и правоприменения. На основе метода сравнительно-правового анализа исследовано развитие системы источников права вообще, источников права других стран и Республики Казахстан. На основе метода исторического исследования выявлены роль и значение исторических источников в развитии современной системы источников права. Метод системного анализа использован при исследовании существующих в теории права определений источников права. Сформулировано авторское видение по вопросу соотношения источника и формы права. Свойства и функции источников права определены как факторы для правовой системы, на основе которых строится правотворческая и правоприменительная деятельность. Проанализированы способы классификации источников права, рассмотрены возможности использования различных оснований классификации источников права с целью их систематизации и определения их потенциала в процессе правоприменительной деятельности. Исследована возможность внедрения в отечественную теорию права понятия «вспомогательные» источники права, как это существует в теории и практике международного права. Рассмотрены возможности и основные закономерности интеграции современных романо-германской и англо-саксонской правовых систем. Сформулирован вывод о существовании тенденции «вестернизации» системы казахстанского права; использование судебного прецедента в качестве источника права в условиях «особого правового режима» на территории МФЦ «Астана».

Ключевые слова: правовая система, система права, источник права, форма права, судебный прецедент, общие принципы права, правовой акт, постановление Конституционного совета, правовая доктрина, правовая конвергенция, вспомогательные источники права, аналогия права, аналогия закона.

References

1 Lazarev, V.V. (Ed.). (1996). *Obshchaia teoriia prava i hosudarstva [General theory of law and state]*. Moscow: Yurist [in Russian].

2 Marchenko, M.N. (Eds). (1998). *Obshchaia teoriia hosudarstva i prava. Akademicheskii kurs v 2-kh tomakh [General theory of state and law. Academic course in 2 volumes]. Vol. 2. Teoriia prava.* Moscow: Zertsalo [in Russian].

3 *Yuridicheskaia entsiklopediia* (1999) *[Legal encyclopedia]*. Moscow: INFRA-M [in Russian].

4 David, R. & Zhoffre-Spinozi, K. (1999). *Osnovnye pravovye sistemy sovremennosti [The main legal systems of our time]*. Moscow: Mezhdunarodnye otnosheniia [in Russian].

5 Tlepina, Sh.V. (2012). Pervye istoriko-pravovye issledovaniia v Kazakhstane: postanovka problem obychnoho prava [The first historical and legal research in Kazakhstan: setting the problems of customary law]. *Vestnik KazNU — KazNU Bulletin, Vol. 3, 45–54*. Retrieved from http://articlekz. g com/article/9641 [in Russian].

6 Akhmetova, N.S. (1997). *Obychnoe pravo kazakhov v XVIII i pervoi polovine XIX veka [Common law of Kazakhs in the 18th and first half of the 19th centuries]*. Almaty: Izdatelstvo «Qazaq universiteti» [in Russian].

7 Zimanov, S.Z. (1989). Sostoianie i zadachi razrabotki problem obychnoho prava kazakhov [The state and tasks of developing the problems of customary law of Kazakhs]. *Problemy kazakhskoho obychnoho prava — Problems of Kazakh customary law.* Alma-Ata [in Russian].

8 Zakon Respubliki Kazakhstan ot 8 aprelia 2016 hoda № 488-V «Ob arbitrazhe» [Law of the Republic of Kazakhstan of April 8, 2016 No. 488-V «About arbitration»] *online.zakon.kz* Retrieved from http://online.zakon.kz/m/document/? doc_id=35110250#sub_id=20010 [in Russian].

9 Hrazhdanskii kodeks Respubliki Kazakhstan. (Obshchaia chast) ot 24 dekabria 1994 h. [Civil Code of the Republic of Kazakhstan code of 24 December 1994 (General part)]. Retrieved from https://online.zakon.kz/document/? doc_id=10 [in Russian].

10 Alekseev, S.S. (1999). Pravo: azbuka — teoriia — filosofiia: Opyt kompleksnogo issledovaniia [Law: ABC — Theory — Philosophy: The Experience of Comprehensive Research]. Moscow: Statut [in Russian].

11 Zivs, S.L. (1981). Istochniki prava [Sources of law]. Moscow: Iuridicheskaia literatura [in Russian].

12 Kashanina, T.V. (2011). Evoliutsiia form prava [Evolution of forms of law]. *Lex russica*, *1,* 34–53 [in Russian].

13 Baitin, M.I. (2005). *Sushchnost prava. (Sovremennoe normativnoe pravoponimanie na hrani dvukh vekov) [The essence of law (Modern normative legal thinking on the verge of two centuries)]* Moscow: Yuridicheskaia literatura [in Russian].

14 Miroshnik, S.V. (2013). Istochnik prava i forma prava: sootnoshenie poniatii // Probely v rossiiskom zakonodatelstve [The source of law and the form of law: the relationship of concepts // Gaps in Russian legislation]. Y*uridicheskii zhurnal — Legal Journal, 3, 5–37* [in Russian].

15 Batyr, K.I. & Polikarpova, E.V. (Eds.). (1996). *Khrestomatiia po vseobshchei istorii hosudarstva i prava [Reader on the general history of state and law] T.1.* Moscow: Yurist [in Russian].

16 Marchenko, M.N. (Ed.). (1998). Obshchaia teoriia hosudarstva i prava. Akademicheskii kurs [V 2-kh tomakh] [General theory of state and law. Academic course in 2 volumes]. Vol. 2. Teoriia prava. Moscow: Zertsalo [in Russian].

17 Gegel, G.V. (1974). Entsiklopediia filosofskikh nauk [Encyclopedia of Philosophical Sciences]. T.1. Moscow: Nauka [in Russian].

18 Baimakhanov, M.T. (2003). Normativno-pravovoi mekhanizm osushchestvleniia funktsii hosudarstva [Regulatory and legal mechanism for the implementation of state functions]. *V kn. Izbrannye trudy po teorii hosudarstva i prava — Selected works on the theory of state and law*. Almaty: Yurist [in Russian].

19 Kornev, V.N. (2016). Printsipy prava v zarubezhnoi pravovoi doktrine: priroda, naznachenie, funktsii [Principles of law in foreign legal doctrine: nature, purpose, functions]. *Hosudarstvo i pravo — State and law*, *11, 59–67* [in Russian].

20 Zakon RK ot 16 aprelia 2016 h. № 480 «O pravovykh aktakh» [Law of the Republic of Kazakhstan of April 16, 2016. No. 480 «About legal acts»] *online.zakon.kz* Retrieved from https://online.zakon.kz/Document/? doc_id=10215466s. [in Russian].

21 Konstitutsionnyi zakon RK ot 7 dekabria 2015 hoda No. 438. «O Mezhdunarodnom finansovom tsentre «Astana» [Constitutional Law of the Republic of Kazakhstan of December 7, 2015 No. 438 About «The Astana» International Financial Center»]. *online.zakon.kz* Retrieved from https://online.zakon.kz/Document/? doc_ [in Russian].

22 Akhmetova, N.S. & Turlaev, A.V. (2017). Teoretiko-pravovye osnovy konverhentsii dvukh [Theoretical and legal foundations of the convergence of the two systems]. Proceedings from Harmonization of national legislation within the framework of integration processes ’XIX: *Mezhdunarodnaiia nauchno-prakticheskaiia konferenysiia (29 noiabrja 2017 hoda) — International scientific and practical conference. (pp.116–120).* Karaganda: Izd. -vo KarGU [in Russian].

23 Ukin, S.K. (2019). Vesternizatsiia pravovoi sistemy Respubliki Kazakhstan: voprosy teorii i praktiki [Westernization of the legal system of the Republic of Kazakhstan: issues of theory and practice]. Proceedings from Theoretical and historical foundations of strengthening Kazakhstani statehood and development of the national legal system. XIX *Mezhdunarodnaiia nauchno-prakticheskaiia konferenysiia (29 noiabria 2019 hoda) — International scientific and practical conference. (pp.165–170).* Karaganda: Izdatelstvo KarHU [in Russian].

24 Konstitutsionnyi zakon Respubliki Kazakhstan ot 29 dekabria 1995 hoda No. 2737 «O Konstitutsionnom sovete Respubliki Kazakhstan» [Constitutional Law of the Republic of Kazakhstan of December 29, 1995 No. 2737 «About the Constitutional Council of the Republic of Kazakhstan»]. *online.zakon.kz* Retrieved from https://online.zakon.kz/Document/? doc [in Russian].