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International legal regulation and reflection on the protection of the rights and interests of cross-border tourists between China and Kazakhstan

With the deepening of globalization and the effective control of the epidemic, cross-border tourism has gradually become a common lifestyle. With the implementation of Kazakhstan's visa-free policy for Chinese tourists and the rapid development of China's economy, tourism between China and Kazakhstan is becoming more frequent. However, both countries are emerging countries, and the legal protection mechanism for tourists' rights is still imperfect. The protection of the rights and interests of cross-border tourists has become a focus of attention. However, at the level of international cooperation, the protection of the rights and interests of cross-border tourists is still weak. Due to the local nature of knowledge, differences in legal systems in different countries, obstacles to judicial remedies, and imperfect dispute resolution mechanisms, the protection of the rights and interests of cross-border tourists faces great challenges. In view of this, it is of practical urgency to promote in-depth cooperation between China and Kazakhstan in the field of rule of law from the perspective of international law and establish an effective cross-border tourism dispute resolution mechanism.

Keywords: International law, legislations, dispute, resolution mechanism, cross-border passengers, cross-border tourism, passenger rights, China.

Introduction

In the current international legal system, the international community has paid close attention to the need for international cooperation in the field of cross-border tourist rights protection. In fact, it is difficult to achieve the goal of cross-border tourist rights protection by relying solely on the efforts of a single country. The urgent task is to build an efficient and convenient mechanism to achieve more extensive protection for cross-border tourists, eliminate the differences in rights protection between domestic and international tourists, and ensure that cross-border tourists can obtain equal protection without distinction, regardless of whether they are in the country of habitual residence or the country of travel. As a field of "communication and exchange", tourism can effectively promote the development of countries along the Silk Road, harmonious exchanges between regions, and help the economic belt take off. Tourism in different regions of the world, regional coordinated development exchanges are becoming increasingly close, and the process of cooperation is accelerating. The integration of tourism in the border regions of the European Union has become a prominent example of regional tourism cooperation in countries around the world. Therefore, in the context

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of promoting the "Belt and Road Initiative", it is of great practical and far-reaching significance to study how to strengthen cooperation between China and Kazakhstan in politics, economy, tourism, culture, and science and technology.

The research on the legal system construction of China-Kazakhstan International Tourism Cooperation Center lacks corresponding pertinence. This article carefully examines the research results of predecessors and ultimately concludes that previous research lacks constructiveness. Therefore, this paper studies the legal system construction of China-Kazakhstan International Tourism Cooperation Center, takes the tourism policy agreement and legal basis signed by China and Kazakhstan as conditions, and studies and explores the innovation of the legal system construction of China-Kazakhstan International Tourism Cooperation Center according to the international cooperation model.

Methods and materials

This article analyzes the current status of cross-border tourism between China and Kazakhstan and the legal status of the two countries on the legal rights of cross-border tourists, and points out that there is a lack of legal rights protection mechanism for cross-border tourists in the two countries. Therefore, this article points out that in order to protect the legal rights of cross-border tourists, it should be improved at both the international and domestic levels.

Results

Current status of rights protection of cross-border tourists between China and Kazakhstan

1. Current Status of Cross-Border Tourism between China and Kazakhstan

Before the outbreak of the COVID-19 pandemic, cross-border tourism between China and Kazakhstan showed a promising development trend. According to relevant data, in 2019, the number of tourists between China and Kazakhstan was quite considerable, among which the number of Chinese tourists traveling to Kazakhstan reached more than 1 million. However, due to the impact of the COVID-19 pandemic, cross-border tourism between China and Kazakhstan fell into a downturn.

With the end of the epidemic, cross-border tourism between China and Kazakhstan has gradually recovered and shown a rapid growth rate. According to data released by the Kazakhstan National Bureau of Statistics, in the first nine months of 2023, the number of tourists visiting Kazakhstan exceeded 750,000, and more than 200,000 were from China. In the first 10 months of 2024, about 122,000 Chinese tourists traveled to Kazakhstan, increasing up to 64% compared with the same period last year. At the same time, the number of tourists from Kazakhstan to China has also been steadily increasing, with more than 400,000 tourists visiting China.

In March 2024, the "Kazakhstan Tourism Year" was successfully launched, and Kazakhstan is gradually becoming a new popular outbound travel destination for Chinese tourists. The heads of state of China and Kazakhstan announced that 2025 will be the "China Tourism Year" in Kazakhstan, and clearly stated that they will work together to organize a series of subsequent activities to promote the tourism cooperation between the two countries to a new level.

2. China-Kazakhstan Cooperation Treaty on Protection of Rights and Interests of Cross-Border Tourists

Based on the geographical advantages of China and Kazakhstan, the two countries have continued to advance in the field of international cooperation, becoming members of a number of international and regional international organizations such as the United Nations, the World Tourism Organization, and the Shanghai Cooperation Organization, and signed a series of multilateral and bilateral treaties and agreements.

The General Agreement on Trade in Services (GATS) occupies a fundamental legal position in the field of trade in services. International tourism service trade is an important part of service trade. The basic principles, classification, and accession commitments of service trade established in the GATS constitute international obligations that all members must abide by. This is also the specific application of the GATS in the field of international tourism service trade [1; 13].

At the World Tourism Organization level, the 1980 World Tourism Conference adopted the Manila Declaration on World Tourism. The declaration not only clarifies the importance of tourism services in the international economic and political fields, but also recognizes that the right to travel has international human rights attributes and should be protected by law. In 1985, the World Tourism Organization adopted the Tourism Bill of Rights and Tourists' Code (also known as the Tourism Bill of Rights), which further elaborated on important rights concepts in the Manila Declaration on World Tourism, such as the right to travel freely, the right to paid vacation, and the right to a friendly reception, which are derived from the right to rest. In 1989,

the Hague Declaration on Tourism was adopted, which made a comprehensive and systematic analysis of the tourism industry, laying the foundation for clearly defining tourism, tourists and the tourism industry under the WTO legal framework and incorporating them into the scope of international tourism service trade. In 1990, the Global Code of Ethics for Tourism was officially launched, establishing ten basic principles. This document integrates similar ideas in many similar documents, norms and declarations in the past, providing an important reference framework for the development of the global tourism industry [2; 5-6].

Judging from the current practice of cross-border tourism services, many principles and institutional concepts established in the Manila Declaration on World Tourism, the Tourism Bill of Rights, the Hague Declaration on Tourism, and the Global Code of Ethics for Tourism have been widely recognized by countries around the world. Many countries have transplanted or borrowed the principles and systems in the above documents when formulating their domestic tourism-related legislation, and these concepts and systems have been consciously implemented by various countries in practice.

At the SCO level, in 2001, the governments of China, Russia, Kyrgyzstan, Kazakhstan and Tajikistan jointly signed the "Memorandum of Understanding among the Governments of the SCO Member States on the Basic Objectives and Directions of Regional Economic Cooperation and the Process of Trade and Investment Facilitation", aiming to strengthen cooperation among countries in various fields such as politics, economy and trade. The 2003 "Framework for Multilateral Economic and Trade Cooperation among the Member States of the Shanghai Cooperation Organization" further strengthened the relevant provisions of the "Memorandum" on the development of tourism service trade cooperation, and promoted the competent authorities of member states to plan and issue cooperation lists covering 13 areas including transportation infrastructure, trade, finance, humanities, digital, energy, and tourism. In 2024, the SCO adopted the "Joint Action Plan for the Implementation of the Outline for Tourism Cooperation Development among the Shanghai Cooperation Organization Member States in 2024-2025", which covers cooperation between national tourism departments, promotion of cooperation in the field of tourism products, cooperation in improving the quality of tourism services, protection of tourists' legitimate rights and interests and tourism safety assurance.

At the same time, China and Kazakhstan have signed a series of bilateral treaties and agreements. In 2015, China and Kazakhstan jointly issued the "Joint Declaration of the People's Republic of China and the Republic of Kazakhstan on the New Stage of Comprehensive Strategic Partnership". In the same year, the Tourism Bureau of Altay Prefecture, Xinjiang, China and the Foreign Affairs and Tourism Bureau of East Kazakhstan State, Kazakhstan signed a "Framework Agreement on Tourism Cooperation". In 2016, the tourism departments of China and Kazakhstan signed the Memorandum on the Convenience of Group Tourism for Chinese Citizens to Kazakhstan. The signing of these cooperation treaties has effectively promoted exchanges and cooperation between the two countries in various fields and comprehensively improved the overall level of the strategic partnership between China and Kazakhstan.

Discussion

Dilemmas of protecting the rights and interests of cross-border tourists between China and Kazakhstan are listed below.

At present, although China and Kazakhstan have jointly participated in many international organizations and signed a series of multilateral and bilateral agreements, the multilateral and bilateral international legal systems specifically for the protection of cross-border tourists' rights and interests are not complete. As the international cooperation mechanism for the protection of cross-border tourists' rights and interests has not been fully established, and the historical and cultural factors of the domestic laws of the two countries are different and imperfect, the legal obstacles encountered in the protection of tourists' rights and interests are increasing.

1. International cooperation mechanism is not sound

Both China and Kazakhstan are members of the World Tourism Organization and the United Nations. However, the Manila Declaration on World Tourism, the Tourism Bill of Rights, and the Global Code of Ethics for Tourism issued by the World Tourism Organization, which are related to protecting the rights and interests of tourists, can only be regarded as an initiative system and do not have legal binding force. It is difficult for them to play a substantive legal regulatory role in the cross-border tourism industry. Although the United Nations Guidelines for Consumer Protection, revised in 2013, added a multilateral international cooperation mechanism, it did not distinguish tourism services as a unique service area from other types of service consumption. Therefore, in cross-border tourism, the protection of tourists' rights and interests can only be implemented in accordance with the provisions of general consumer rights protection [3; 153].

Although China and Kazakhstan have signed a series of policies, agreements and treaties, such as the Treaty of Good-Neighborliness and Friendly Cooperation between China and Kazakhstan, the Joint Statement on the Establishment and Development of a Strategic Partnership between China and Kazakhstan, the 21st Century Cooperation Strategy between the People's Republic of China and the Republic of Kazakhstan, and the Memorandum on the Facilitation of Group Travel by Chinese Citizens to Kazakhstan, these documents are aimed at promoting economic cooperation and foreign trade, and also involve tourism-related content, which provides certain institutional arrangements and legal guarantees for China-Kazakhstan cooperation in protecting the rights and interests of cross-border tourists. However, these documents have problems such as narrow coverage, low effectiveness, insufficient details and poor operability. In practice, when the two countries face disputes and difficulties in protecting the rights and interests of cross-border tourists, they often have to rely on political and diplomatic channels to resolve them.

2. Differences in legal systems

One of the important reasons why the protection of the rights and interests of cross-border tourists between China and Kazakhstan needs to be strengthened at the level of international law is that there are objective and realistic differences between the legal culture and legal system of China and Kazakhstan. This difference makes legal disputes complex and uncertain, and makes cross-border tourism consumers face different levels of protection. For example, there are differences in the remedies and scope of protection between China's Consumer Rights Protection Law and Kazakhstan's consumer protection law, which may lead to cross-border tourism consumers not being able to obtain the full protection when encountering problems.

China's legal system is deeply rooted in the country's history and culture. After thousands of years of development and evolution, Confucian culture has had an extremely significant role in shaping Chinese legal concepts and practices, especially in its emphasis on social order and moral norms [4; 47]. Since the late Qing Dynasty, the introduction of Western legal concepts has promoted the Chinese legal system to go through multiple stages in modern times, from constitutional exploration to legal modernization during the Republic of China period, and then to the construction and continuous development of the socialist legal system after the founding of the People's Republic of China. Since the reform and opening up, while continuously improving the legal framework and focusing on strengthening legal construction and human rights protection, the Chinese legal system has actively learned from and absorbed international legal norms to further promote the maturity and perfection of the modern legal system.

In this context, China's legal system takes "Rule of Law" as its core essence and highly emphasizes the authority of the law and the strictness of its enforcement. The protection of tourists' rights and interests is mainly reflected in the Tourism Law of the People's Republic of China, which systematically stipulates the rights and obligations of tourists and aims to provide them with security and rights relief. This legal protection is influenced by the Confucian culture of collective harmony and social responsibility, and also reflects the respect and protection of individual rights in the modern legal system.

In contrast, Kazakhstan's legal system clearly reflects the unique imprint of its national history and culture. Before the Soviet era, legal affairs in Kazakh society were mainly mediated according to tribal traditions and Islamic law. During the Soviet era, Kazakhstan fully adopted the socialist legal system and uniformly implemented Soviet legal norms. After the disintegration of the Soviet Union, Kazakhstan began the process of building a legal framework to facilitate its transition to a market economy and democratic system. This move marked an important historical node in Kazakhstan's transition from traditional customary law to a modern legal system. This process covered the promulgation of a new constitution, the gradual establishment of a legal system, and the reform and improvement of the judicial system, ultimately forming a legal system that integrates elements of the continental legal system and gradually aligns with international legal norms [5; 33].

In the Tourism Law of the Republic of Kazakhstan, tourists are not only regarded as ordinary consumers, but also given the important role of "cultural ambassadors". The relevant content of the law on the protection of tourists' rights and interests often incorporates the emphasis on the national cultural image and social morality. The construction of this legal framework fully reflects the strategic intention of the Kazakhstan government to enhance the national cultural identity through tourism activities.

Therefore, although the laws of China and Kazakhstan both aim to protect the rights and interests of tourists, significant cultural differences often lead to misunderstandings and conflicts in the application of specific laws, thereby undermining the effective protection of tourists' rights and interests and resulting in adverse effects.

3. Obstacles to judicial protection

In the specific context of cross-border travel, cross-border travelers usually expect to obtain legal protection at the same level as in their own country based on their understanding and expectations of their own country's laws. However, there are differences in language, cultural identity, customs, and legal systems between China and Kazakhstan, which often make it difficult for tourists' rights to be fully and effectively protected. For example, if tourists encounter consumer rights disputes while traveling in Kazakhstan, they often subconsciously seek assistance based on China's Consumer Rights Protection Law, but Kazakhstan law may not have set up specific response mechanisms for such specific situations. This actual gap in the application of law not only greatly affects the tourists' travel experience, but also to a certain damage in the cooperative relationship between China and Kazakhstan.

In addition, cross-border tourists face significant information asymmetry problems in the process of safeguarding their legitimate rights and interests. Due to the lack of understanding of the laws of the tourist destination country, language communication barriers, and the lack of an authoritative and comprehensive information platform, it is difficult for tourists to obtain effective administrative and judicial remedies [6; 110-111]. The reality is that most tourism service centers fail to fully fulfill their responsibilities of providing relevant legal and protection information, which makes it difficult for tourists to successfully file complaints or initiate legal proceedings when their rights and interests are infringed. Even if tourists return to their habitual residence, they will still face difficulties in protecting their rights due to numerous complex issues such as jurisdiction disputes and difficulties in collecting evidence. This series of phenomena fully highlights the serious deficiencies in cross-border tourists' access to information on rights protection and the actual implementation of judicial remedies.

Cross-border tourists face many difficulties in safeguarding their rights abroad. The complexity of administrative and judicial relief procedures, language barriers, visa validity restrictions, high litigation costs, and unfamiliarity with the laws and litigation procedures of the destination country are intertwined and work together, making it difficult for tourists to effectively safeguard their rights and interests through local administrative or judicial channels. The difficulties faced by tourists are particularly prominent when faced with requirements such as filing complaints in the official language, strictly following specific procedural norms, long processing waiting periods, cross-border legal differences and high litigation costs. In addition, alternative dispute resolution methods such as mediation and arbitration are difficult to effectively promote in practice because the parties find it difficult to reach an agreement. Information asymmetry and the lack of specialized consulting and guidance service agencies for cross-border tourists have further exacerbated the difficulty of cross-border tourists in protecting their rights.

With the widespread popularity of the Internet, the travel and transaction patterns of cross-border tourists have undergone profound changes. While this change has brought convenience, it has also made cross-border tourists face severe challenges in protecting their rights after returning home. When tourists' rights are infringed, since the relevant legal relations are mostly formed in the destination country, after tourists return to their habitual residence, they will find it challenging to effectively protect their rights due to multiple factors such as difficulty in providing evidence, obstacles to execution, legislative differences, and jurisdictional disputes. Cross-border litigation is not only inefficient but also costly, and lacks practical feasibility for ordinary tourists.

Therefore, there is an urgent need to expand the information acquisition channels for cross-border tourists, strengthen cooperation between China and Kazakhstan at the administrative level, and establish and improve a cross-border consumer dispute mediation mechanism to avoid the many difficulties brought about by cross-border litigation, thereby better protecting the legitimate rights and interests of cross-border tourists. However, complaints or lawsuits initiated by cross-border tourists in their habitual residence become increasingly complicated due to foreign-related factors, which requires close and effective cooperation between China and Kazakhstan at the administrative and judicial levels. However, in actual operations, such cooperation is often scarce, which undoubtedly puts cross-border tourists in a double dilemma in the process of safeguarding their rights.

4. Inadequate dispute resolution mechanism

At present, the world has yet to establish an independent and unified litigation procedure for international tourism disputes. Most tourism dispute litigation has to follow ordinary transnational civil litigation rules, which has caused a series of problems.

a) Difficulties in litigation regarding cross-border tourism disputes

First, in terms of jurisdiction, international tourism civil disputes mainly cover two types: contractual disputes and tort disputes. The jurisdiction is usually determined based on the principles of territoriality, per-

sonal jurisdiction, agreement and exclusive jurisdiction. However, given the particularity of international tourism activities, the habitual residence of the parties is often inconsistent with the place where the tourism activities take place. In the absence of a jurisdiction agreement, conflicts between personal jurisdiction and territorial jurisdiction are very likely to arise. For example, when a tourist encounters a dispute while traveling abroad, both the court of their habitual residence and the court of the destination country may claim jurisdiction over the case based on their respective jurisdictional grounds, leading to a jurisdictional conflict.

Secondly, in cross-border tourism dispute litigation, the applicable law must be determined based on the conflict rules of the jurisdiction court. Due to differences in identification systems among countries, there is considerable uncertainty regarding whether tourism disputes should be governed by the standard conflict of laws rules for contracts or torts, or by specialized consumer protection conflict rules. For example, some tourism consumption disputes may be classified as different types of disputes under the legal systems of different countries, and thus be subject to different legal provisions. This uncertainty in the application of law puts the realization of tourists' rights and interests at risk, and may result in different judgments in courts of different countries for the same or similar disputes, undermining the fairness and consistency of the law.

b) Issues in cross-border tourism dispute arbitration

First, there are obstacles to reaching an arbitration agreement. In the arbitration settlement mechanism for international tourism disputes, arbitration agreements are often reached by the parties themselves before or after the dispute occurs, and the dispute is submitted to arbitration. However, tourism contracts are often drafted unilaterally by tourism operators, who tend to choose the jurisdiction of the courts in their own location, which makes it difficult to reach an arbitration agreement. For example, the contract contents of travel itineraries and service terms are all formulated by the operators. Consumers are in a subordinate position when signing the contract, making it difficult for them to fully negotiate the conclusion of an arbitration agreement.

Secondly, the characteristics of arbitration procedures are unfavorable. Arbitration procedures are essentially a kind of adjudication procedure. Compared with coordination dispute mechanisms such as mediation, they are less consultative, equal, flexible and participatory, and more confrontational. In cross-border tourism disputes, the power comparison between consumers and operators is already unbalanced, and this procedural characteristic is not conducive to the protection of consumer rights. For example, in the arbitration process involving tourism service quality disputes, consumers may find it difficult to fully express their demands and safeguard their rights in the highly confrontational arbitration procedure due to lack of professional legal knowledge and arbitration experience, which puts them at a disadvantage in the arbitration.

Furthermore, tourists have a weak awareness of arbitration. Traditional international arbitration introduces itself mostly as an international commercial arbitration, and parties involved in international tourism disputes usually lack sufficient knowledge and understanding of arbitration remedies. Both tourism industry practitioners and ordinary consumers do not have a sufficient understanding of the arbitration mechanism for tourism disputes. This lack of awareness has prevented the arbitration mechanism from fully playing its role in resolving cross-border tourism disputes.

c) The Dilemma of Civil Mediation of Cross-Border Tourism Disputes

First, the legal nature of the agreement reached through mediation by consumer associations or industry associations is unclear and lacks enforcement power. The parties may change their positions at will, which can render the time and effort spent on earlier mediation ineffective, leaving the dispute to be resolved through litigation. For example, after mediation of a tourism dispute, the tourism operator may refuse to perform its obligations because the mediation agreement has no enforcement power, and consumers can only restart the litigation process to protect their legitimate rights and interests.

Secondly, there is no international consumer association or industry association that can effectively mediate global tourism disputes at the international level. In the early days, some ADR (ODR) institutions specialized in consumer dispute mediation emerged, but they were unable to continue due to insufficient funds and government support. When dealing with international tourism disputes, there is a lack of an international mediation institution with strong influence and overall coordination capabilities, which seriously restricts the actual effect of mediation work and makes it impossible for many cross-border tourism disputes to be properly resolved through mediation.

d) Shortcomings of Negotiation and Settlement of Cross-Border Tourism Disputes

First, negotiation and reconciliation as a dispute resolution method is highly dependent on the personal will of the parties. The reconciliation process may be interrupted, delayed or terminated due to the non-cooperation of one party. Compared with professional dispute resolution institutions, negotiation and recon-

ciliation lacks complete supporting measures, such as translators and standardized documents, and the parties need to solve related problems on their own. For example, in the negotiation of cross-border tourism disputes, language barriers and the lack of standardized documents may lead to poor communication between the two parties, increasing the difficulty of dispute resolution.

Secondly, some parties have a weak sense of evidence and often only reach a verbal settlement agreement. Even if there is a written agreement, if the obligor refuses to perform, other dispute resolution channels are still needed. For example, if, after negotiating a tourism dispute, the operator fails to fulfill the compensation obligation in the written settlement agreement, the consumer can only seek protection through litigation or arbitration.

Furthermore, negotiation and settlement are essentially a bargaining process, and the final result is closely related to the negotiating power of the parties. In tourism disputes, consumers are often at a disadvantage compared to tourism operators. When the negotiating power is unbalanced, unfair results are likely to occur, such as consumers being suppressed by operators using their information and resource advantages and forced to accept unreasonable conditions.

Finally, negotiation belongs to the category of private remedies. As the "weak party" in international private law, international tourists are subject to limited legal protection for their private remedies. It is difficult to fully protect the rights and interests of tourism consumers by relying solely on negotiation. It needs to be institutionalized and supplemented with other dispute resolution methods.

To sum up, all kinds of solutions to international tourism disputes have defects and challenges to varying degrees. These solutions need to be continuously improved and optimized in the construction of international tourism legal systems and practical explorations, so as to better safeguard the legitimate rights and interests of participants in international tourism activities and promote the healthy and stable development of the international tourism industry.

Conclusions

International legal regulations on the protection of the rights and interests of cross-border passengers between China and Kazakhstan

1. Promoting China-Kazakhstan international rule of law cooperation

a) Innovation based on existing mechanisms: flexible construction of China-Kazakhstan international cooperation. The development of the China-Kazakhstan international cooperation mechanism should build upon the flexible advantages of the existing bilateral agreement and drive innovation. The bilateral agreement has unique operability and adaptability in dealing with the issue of protecting the rights and interests of cross-border tourists between the two countries. It can formulate rules and measures in a targeted manner based on the actual situation and special needs of the two countries. For example, the two sides can make detailed provisions in the agreement on the simplification of entry and exit procedures for tourists, sharing of tourism information, emergency rescue assistance, etc. Through innovative application of existing mechanisms and rules, such as expanding the scope of rights protection covered by the agreement and optimizing the cooperation process, it can effectively improve the convenience and safety of cross-border tourists traveling between the two countries and lay a solid foundation for the protection of tourists' rights and interests [7; 30].

b) Strengthening international rule of law through domestic legal systems: Overcoming legal and cultural differences. From the perspective of legal culture, China-Kazakhstan relations should respect each other's legal and cultural traditions, which is an important prerequisite for building a mechanism to protect the rights and interests of cross-border tourists. Although there are differences in the legal systems and cultures of the two countries, there are also commonalities and complementarities. In the process of promoting the protection of the rights and interests of cross-border tourists, we build upon the achievements of domestic rule of law construction and actively promote the integration of the rule of law principles between China and Kazakhstan. For example, my country's rich legal experience in consumer rights protection, tourism market supervision and other fields can serve as a reference for Kazakhstan's construction in related fields; and Kazakhstan's legal practices in certain specific fields can also provide useful reference for my country. Through in-depth exchanges and discussions between the two countries, we seek common ground and sign a cross-border tourist rights protection agreement, so that both sides can reach a consensus on the personal safety of tourists, tourism service quality standards, and dispute resolution mechanism construction, so as to give full play to the advantages of their respective legal systems and realize the all-round protection of cross-border tourists' rights.

c) Co-governance of soft law and hard law: Building a diversified protection system. The current legal governance between China and Kazakhstan is mainly based on soft law, but the role of hard law cannot be ignored. With its flexibility, diversity and openness, soft law has unique advantages in breaking through legal conflicts and barriers. For example, many forms of soft mechanism cooperation under the framework of the "Belt and Road" initiative, although they do not constitute strictly binding international treaties, can effectively express the willingness to cooperate and play a positive role in tourism information exchange and tourism industry self-discipline. However, soft law alone is not enough to provide adequate protection of rights and interests. The binding, mandatory and punitive nature of hard law can provide a bottom-line guarantee for the protection of cross-border tourists' rights and interests. Through the pilot signing of a legally binding cross-border tourist rights protection agreement, the rights, obligations, responsibilities, remedies and dispute resolution rules of both parties in the protection of tourists' rights and interests are clarified. For example, when tourists encounter infringements, hard law can stipulate clear compensation standards and accountability mechanisms, so that the protection of tourists' rights and interests has a legal basis, and it also provides a model for resolving legal issues in other similar international cooperation.

Building a foreign-related legal system for the protection of cross-border tourists' rights and interests and strengthening international cooperation are inevitable requirements for the sustainable development of cross-border tourism. In China-Kazakhstan international cooperation, effective protection of cross-border tourists' rights and interests is expected to be achieved through the exploration and practice of paths such as innovation based on existing mechanisms, strengthening international rule of law through domestic legal systems, and co-governance of soft and hard laws. My country should actively engage in the development of relevant international conventions and fully leverage its influence in international cooperation, not only to provide solid protection for the rights and interests of my country's cross-border tourists, but also to contribute to the prosperity and rule of law of cross-border tourism in countries along the "Belt and Road". In the future, with the further development and changes of the international tourism market, the China-Kazakhstan international cooperation mechanism also needs to be continuously improved and adjusted to continuously improve the level and effectiveness of cross-border tourist rights protection.

2. Establishing a cross-border tourism dispute resolution mechanism

"Traveling abroad, returning home to sue" is a common phenomenon in international tourism disputes. Even if tourists win the case after returning to their country of habitual residence, the road to rights protection is still long and challenging, and the goal of rights protection has not yet been truly achieved. To resolve international tourism disputes through cross-border civil litigation, tourists need to invest a lot of time and energy to successfully protect their rights.

In order to effectively deal with this problem, we can learn from the experience of the European Union, strengthen regional integration cooperation, sign multilateral agreements, and establish the Belt and Road Consumer Center Network (B&RCC-Net), which can be used to provide cross-border travelers with information about their rights when shopping in countries along the Belt and Road. At the same time, when travelers have disputes with cross-border sellers, they can assist in resolving cross-border complaints, such as encouraging and helping travelers to contact traders and assisting in handling complaints when tourists make requests.

Accelerating the construction of the "Belt and Road" ADR system has important practical significance. As early as 1998, the United States passed the "ADR Act" and has established a standardized ADR system. Singapore has a relatively mature community mediation and private mediation mechanism. As one of the countries with the fastest development of ADR, the United Kingdom's Center for Dispute Resolution (CEDR) has become one of the world's famous ADR institutions [8; 123].

With the help of the important platform of the Belt and Road Forum for International Cooperation, under the guidance of the Silk Road spirit of peaceful cooperation, openness and inclusiveness, mutual learning, mutual benefit and win-win cooperation, and referring to the Directive on Alternative Dispute Resolution Mechanisms for Consumers (the ADR Directive for short) issued by the European Parliament and the European Commission, we put forward the idea of building a Belt and Road ADR system and launching negotiations on an ADR agreement. The agreement must comply with the relevant provisions of treaty law and be signed, ratified and acceded to on a voluntary basis by the participating countries. If necessary, certain clauses can be set as clauses that allow reservations in order to attract as many countries as possible to participate in the system and expand the scope of application of this agreement.

In accordance with the "Belt and Road" ADR Agreement, and drawing on the experience of the Asia-Pacific Arbitration and Mediation Center and the Dubai International Arbitration Center, a "Belt and Road"

ADR committee or center will be established to be responsible for the routine work of the "Belt and Road" ADR system, and to cooperate and connect with existing dispute resolution mechanisms. It will also be responsible for collecting various data on "Belt and Road" ADR dispute resolution and conducting timely statistical analysis, laying the foundation for establishing a higher-level "Belt and Road" dispute resolution mechanism in the future [9; 132].

In accordance with the "Belt and Road" ADR agreement and system, the "Consumer ODR Regulations" of countries along the Belt and Road were issued, and a multilingual ODR platform was established to connect operators, consumers and ADR institutions in countries along the route, so that disputes and claims submitted by consumers or operators can be transferred to ADR institutions in a country along the route around the clock, thereby efficiently resolving cross-border tourism disputes.

Concluding Remarks

As the process of globalization continues to deepen, cross-border tourism is booming. As an important part of cross-border tourism, the importance of protecting the rights and interests of tourists in China-Kazakhstan cross-border tourism is becoming increasingly prominent.

Through the analysis of the current status of cross-border tourist rights protection between China and Kazakhstan, it can be seen that although the two countries are geographically close and have in-depth international cooperation in many aspects and have signed a series of multilateral and bilateral treaties and agreements, they still face many challenges in the actual protection of cross-border tourist rights. From the perspective of international cooperation, the relevant documents of the World Tourism Organization serve primarily as recommendations, the relevant United Nations guidelines do not treat tourism services specially, and the bilateral agreements also have shortcomings in terms of coverage, effectiveness level, content refinement and operability. At the national level, there are significant differences between the legal systems of China and Kazakhstan due to factors such as history and culture, which easily leads to misunderstandings and conflicts in the application of laws, which in turn affects the protection of tourists' rights and interests. In terms of judicial relief, tourists face problems ranging from information asymmetry to Jurisdictional disputes, difficulties in collecting evidence, and other obstacles make it difficult to defend rights abroad or after returning home; In terms of dispute resolution mechanisms, international tourism dispute litigation, arbitration, private mediation, and negotiation and reconciliation all have defects and are unable to effectively meet the needs of protecting the rights and interests of cross-border tourists.

To solve the above problems, it is necessary to promote China-Kazakhstan international rule of law cooperation. Innovation based on the existing mechanism can maximize the flexibility of the bilateral agreement. Leading the international rule of law with domestic rule of law can promote the exchange and integration of the two countries' legal cultures and reach a consensus on protecting the rights and interests of tourists. The co-governance of soft law and hard law will build a diversified protection system to provide comprehensive support for the protection of tourists' rights and interests.

Establishing a cross-border tourism dispute resolution mechanism, drawing on the EU experience to build a Belt and Road consumer center network, accelerating the construction of the Belt and Road ADR system, setting up relevant committees or centers and issuing "Consumer ODR Regulations" in countries along the route and establishing a multilingual platform will help integrate resources, improve efficiency, and provide cross-border tourists with more convenient and effective dispute resolution channels.

In summary, the protection of the rights and interests of cross-border tourists between China and Kazakhstan is a complex and systematic project, which requires continuous exploration and cooperation between the two countries under the framework of international law. This study hopes to provide a theoretical discussion on the protection of the rights and interests of cross-border tourists between China and Kazakhstan, and also hopes to provide a useful reference for the construction of cross-border tourism rule of law in countries along the "Belt and Road", so as to promote the development of global cross-border tourism in a healthier, more orderly and fairer direction, so that cross-border tourists in different countries can enjoy full and equal rights protection, and promote the prosperity of international tourism exchanges and cooperation.

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Қытай мен Қазақстан арасындағы трансшекаралық туристердің құқықтары мен мүдделерін қорғау жөніндегі халықаралық құқықтық нормалар мен ойлар

Жаһанданудың тереңдей түсуі және індетпен тиімді күресудің арқасында трансшекаралық туризм бірте-бірте жалпы өмір салтына айналды. Қазақстанның қытайлық туристер үшін визасыз саясатын жүзеге асыруы және Қытай экономикасының қарқынды дамуымен және екі елдің арасындағы туризм жиілей түсуде. Дегенмен, екі ел де дамып келе жатқан елдер және туристердің құқықтарын қорғаудың құқықтық механизмі әлі де жетілмеген. Трансшекаралық туристердің құқықтары мен мүдделерін қорғау басты назарға алынды. Халықаралық ынтымақтастық деңгейінде шекаралық туристердің құқықтары мен мүдделерін қорғау әлі де әлсіз. Мағлұматтардың жергілікті сипатына, әртүрлі елдердегі құқықтық жүйелердің айырмашылығына, сотта қорғау құралдарына кедергі және дауларды шешу механизмдерінің жетілмегендігіне байланысты трансшекаралық туристердің құқықтары мен мүдделерін қорғауда үлкен міндеттерге тап болады. Осыны ескере отырып, Қытай мен Қазақстан арасындағы құқық үстемдігі саласындағы терең ынтымақтастықты халықаралық құқық тұрғысынан ілгерілету және трансшекаралық туристік дауларды шешудің тиімді тетігін құру іс жүзінде өзекті.

Кілт сөздер: халықаралық құқық, заңнама, даулар, шешу механизмі, трансшекаралық жолаушылар, трансшекаралық туризм, жолаушылар құқығы, Қытай.

В. Хунвый, Л. Вэньхао, С. Минчжэ

Международно-правовые нормы и размышления о защите прав и интересов трансграничных туристов между Китаем и Казахстаном

С углублением процессов глобализации и эффективным контролем эпидемии трансграничный туризм постепенно становится обычным образом жизни. С реализацией Казахстаном политики безвизового режима для китайских туристов и быстрым развитием экономики Китая туризм между Китаем и Казахстаном становится все более активным. Однако обе страны являются развивающимися, и механизм защиты прав туристов все еще несовершенен. Защита прав и интересов трансграничных туристов становится актуальной проблемой. Однако на международном уровне сотрудничество в сфере защиты прав и интересов трансграничных туристов остается недостаточно развитым. Из-за локального характера знаний, различий в правовых системах разных стран, ограничение возможностей судебной правовой защиты и несовершенства механизмов разрешения споров обеспечение прав и интересов трансграничных туристов сталкивается с серьезными трудностями. В связи с этим практической необходимостью становится углубление сотрудничества между Китаем и Казахстаном в области верховенства права с точки зрения международного права, а также создание эффективного механизма разрешения споров в сфере трансграничного туризма.

Ключевые слова: международное право, законодательство, спор, механизм разрешения, трансграничные пассажиры, трансграничный туризм, права пассажиров, Китай.

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Legal framework for expanding the autonomy of universities in Kazakhstan

In the article is the legal issue of increasing the level of autonomy and independence of universities examined. The scientific interest and purpose of the study is to study the phased development of autonomy, managerial and financial independence of higher educational institutions of the republic, taking into account the legislative and regulatory approach. In this article are key mechanisms for enhancing the autonomy and managerial independence of universities, developed step by step within the context of the existing legal framework, presented. Relevant approaches that help formulate the current stage of this vector, which is being implemented in accordance with the Strategic Development Plan of the Republic of Kazakhstan until 2025, are proposed. This is an important condition for the successful implementation of the third modernization and the transition to a new model of economic growth through new technologies and digital transformations. The main research methods are historical analysis, a comparative and analytical approach to the study of stages of development and assessment of the existing legal regulation of the processes of expanding the autonomy of higher educational institutions. The work identifies systemic strategic changes envisaged and planned at the fourth stage of development, and also examines issues of effective legal and institutional support in the context of expanding freedom, autonomy and managerial and financial independence of higher educational institutions.

Keywords: educational law, quality of education, autonomy, independence, quality mechanisms, economic growth, educational policy, managerial freedom.

Introduction

Today, the legal basis for the managerial and financial independence of universities are key parameters of the educational process, in accordance with the principles of the Bologna Process. This approach is objectively determined for a more rapid, flexible and adequate provision of rapidly changing global and national economies with qualified personnel. Attention is paid to the historical development of this issue in sovereign Kazakhstan. We have identified three past stages of such development, associated with the country's gaining independence, entry into the Bologna process, and amendments to the Law of the Republic of Kazakhstan "On Education", adopted in 2018 and consistently implemented in the country's universities.

One of the key global trends and important indicators of integration processes is the expansion of internationalization and academic freedom, as well as increasing the managerial and financial independence of universities. The managerial independence of educational institutions is especially necessary for their effective development and improvement of the quality of educational services.

The main goal of the study is to consistently study the main stages of development of higher educational institutions and the transition to autonomy and managerial independence. Among the important tasks facing the study, the following are identified:

- study the theoretical aspects of the concepts of freedom and managerial independence of higher educational institutions from the point of view of the legal field;
- identify important vectors for the development of universities: gaining independence and expanding freedom of management and financial independence of universities;
- determine directions for improving the quality of education in conditions of managerial independence

In the context of the ongoing transformation of the education system, flexibility in training and a practice-oriented approach in preparing graduates of higher educational institutions are essential to provide the necessary qualified personnel.

This system should ensure the training of personnel with the necessary skills and competencies that meet the needs of the labor market. Therefore, it becomes important to preventively improve the content and

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methodology of education, the quality of training of specialists, and increase the competitiveness and demand of graduates. In this regard, improving the quality of education depends on the managerial and financial independence of universities and their efficiency.

Methods and Materials

The article used methods of historical analysis and a step-by-step approach, which made it possible to determine the classification of the stages of progressive transition and transformative changes of universities into independent structures with autonomy and managerial independence.

Based on the comparative analysis of the stages of development, the existing legal regulation of the processes of expanding the freedom of higher educational institutions, qualitative changes were substantiated, which made it possible to have a positive impact on improving the quality of education.

Results

Three main areas of university freedom were legally defined: academic, managerial and financial. Thus, academic freedom is the acquisition by universities of the authority to independently determine the content of educational programs to ensure the quality of education.

In the context of modern development of the knowledge economy, the need for qualified specialists and new professions is constantly growing. Therefore, it is necessary for universities to quickly respond to the challenges and demands of the labor market. The law proposed to expand the freedom of universities by 65 %–85 %. In this regard, universities have received the opportunity to independently develop educational programs. Today, educational programs for each specialty are developed independently by the university, taking into account the needs of the labor market. Through the unified information system of education, the Register of educational programs has been created with the aim of forming a unified database of educational programs.

In this regard, the Classifier was introduced to change the structure of the classifier in the areas of personnel training, within the framework of which universities develop their educational programs with the needs of the labor market. In accordance with this classifier, areas of personnel training are licensed, the university receives a license for a specific area of training specialists and independently develops and implements educational programs. At the same time, external assessment of the quality of higher education is carried out through the mechanism of independent accreditation.

Currently, the Register of Accreditation Bodies includes 12 agencies: 6 Kazakhstani and 6 foreign. The activities of the agencies are based on international standards. Thus, in order to create a competitive environment between Kazakhstani and foreign accreditation agencies, it was proposed to make amendments in terms of expanding the network of accreditation agencies recognized in the European and Asian continents, which will further improve the existing accreditation institution. As part of expanding the academic freedom of universities, students are given the right to determine their educational trajectory.

The academic independence of universities is closely interconnected with the university management system. Since state universities are regulated by legislation in the sphere of state property, which is a burden for them and contradicts their development strategy, mission and main goals. Therefore, it was necessary to change the organizational and legal form of universities by law. These changes allow universities to independently resolve issues of recruitment, form a student contingent in terms of training areas and create an effective academic structure for universities.

It should be noted that universities in the form of non-profit organizations have important advantages: corporate governance standards are aimed at using profits only for the further development of universities.

Therefore, in Kazakhstan, the norms for the transformation of state and national universities into non-profit joint-stock companies with 100 % state participation have been enshrined in law, and the mechanism for transforming private universities into commercial organizations has been changed. Although this does not become a mandatory condition.

However, according to the Business Code, when changing republican state enterprises into non-profit joint-stock companies, universities are limited in certain types of commercial activities. In this regard, in order to resolve this issue, an article on the regulation of the activities and competence of educational organizations was included in the Law of the Republic of Kazakhstan “On Education”, which was proposed according to the initiative of deputies within the framework of the draft law’s provisions.

According to its norms, universities are granted the right to engage in thirteen types of commercial activities and determine the main competencies of the educational organization. Universities also received the legislative right to:

- form an endowment Fund for Higher Education;
- create legal organizations for scientific activities by using extra-budgetary funding; open a start-up company;
- use additional sources of funding for the development of universities;
- open branches of foreign universities.

In the context of expanding academic and managerial independence, universities are offered flexible financing, which is aimed at increasing the efficiency of using budgetary and extra-budgetary funds, and developing the material and technical base and social support.

Therefore, it was important to move away from financing the specialty during the terms of study and move to credit financing without taking into account the periods of study. Therefore, the law provides for the granting of new powers to the Ministry of Science and Higher Education of the Republic of Kazakhstan to approve the rules for financing universities within the framework of the credit technology of education and the formation of state orders. In this regard, changes have occurred in the approval of the state educational order for the training of specialists with higher education from one year to three, which effectively affects the distribution of the state order.

In order to expand access to higher education, in accordance with the regulation of financial policy in universities, taking into account the interests of socially vulnerable groups of the population, the cost of education on a commercial basis is determined by the university independently.

Discussion

In the legal field of higher and postgraduate education in the Republic of Kazakhstan, it is possible to identify important vectors for the development of universities: gaining independence and expanding the freedom of management and financial autonomy of universities.

The first vector was determined by the Republic of Kazakhstan gaining independence and sovereignty, and the development of the education system in the context of an open economic policy. At this time, the main steps were taken in the institutional transformation of the educational system.

At the end of the 20th century, unique international educational projects appeared in the education system of Kazakhstan: The "Bolashak" Presidential Scholarship Program, aimed at training talented youth at the world's top universities (1993) [1]. This program was designed to ensure the formation of an intellectual hub of new personnel. During these years, new laws and regulations on education were adopted. Private educational organizations began to develop in education. The educational services market began to form in a competitive environment, the level of independence of universities increased. The private education sector became part of the academic community, enshrined in the legislative and regulatory framework.

The second vector of expansion of the administrative autonomy of universities was defined in 2010 with the entry of the Republic of Kazakhstan into the Bologna process. According to the developed and approved "State Program for the Development of Education of the Republic of Kazakhstan for 2011–2020", for the first time in the legal aspect, specific planning positions on the autonomy of higher education institutions were formulated. "The program developed the principles of autonomy of educational organizations, which define the independence of educational, scientific, financial, international and other activities and laid the groundwork for a gradual transition to university autonomy across the country" [2].

The third vector of obtaining the managerial independence of universities was defined in 2015 with the adoption of the step-by-step program "The Nation's Plan — 100 Concrete Steps". This is noted in the "State Program for the Development of Education for 2016–2019". The Nation's Plan, according to the 78th step, defines the step-by-step expansion of the academic and managerial independence of universities and, in accordance with international practice, the transformation of private universities into non-profit organizations [3].

In 2018, the above-mentioned development vectors were already partially implemented in accordance with the amendments and additions to the Law of the Republic of Kazakhstan "On Education". At this time, the main mechanisms for the formation and expansion of the managerial and financial independence of the country's universities were developed [4]:

- the special status of educational organizations was legally substantiated: Nazarbayev University, as a national and state one with the definition of features and competencies;

- the content of educational programs that are independently determined by the university has expanded;
- the step-by-step implementation of academic and managerial independence in the country's universities has begun;
- the implementation and development of Strategic Management in educational organizations;
- the refusal of state certification of educational organizations for accreditation;
- attracting foreign specialists to the Top management of universities;
- development of an internal university education quality system;
- development of Academic Policy for universities;
- election of university rectors.

The fourth vector of development of managerial independence and autonomy of the republic's universities is aimed at developing a plan for the Strategic Development of the Republic of Kazakhstan until 2025 to carry out the third modernization of the country in order to implement the tasks of increasing economic development and the quality of life of the population.

The primary objective by 2025 is to achieve high-quality, sustainable economic growth through the implementation of digital innovations, the development of human capital, the enhancement of educational service quality, and the improvement of graduates' competitiveness in the labor market [5].

Today, special attention is paid to the development of human resources and education. The following transitions have been identified as fundamental changes:

- from traditional educational programs to digital literacy, development of new skills and competencies in demand in the labor market, to a balance in the distribution of human resources between regions;
- from a local focus on the level of education to increasing the demand and competitiveness of domestic education in the international market;
- from formal education to the constant acquisition of new competencies and skills for personal development throughout life.

Such strategic changes must be systemic and effectively supported from the institutional and legal side.

In order to implement strategic development directions, the Law of the Republic of Kazakhstan "On Amendments and Supplements to Certain Legislative Acts of the Republic of Kazakhstan on Issues of Expanding the Academic and Managerial Independence of Higher Education Institutions" was developed and adopted [6].

The adopted normative legal act confirms important steps towards fundamental changes and additions that were introduced simultaneously into 19 legislative acts of 4 codes and 15 laws.

When considered in its entirety, it is essential to highlight the following legal aspects, which are regarded as the most fundamental. For example, the Law of the Republic of Kazakhstan "On Education" is aimed at legal support for the implementation of the most important strategic documents for the development of Kazakhstan in the area of responsibility of the education system, including the Strategy "Kazakhstan-2050", the Nation Plan "100 Concrete Steps", "Five Social Initiatives of the President of the Republic of Kazakhstan", the Strategic Development Plan of the Republic of Kazakhstan until 2025 and other documents aimed at developing the education system.

The main direction of development of the education system is the expansion of academic autonomy of universities. In this regard, universities have received new opportunities. The authorized body provides autonomy in determining the academic load, remuneration, in the implementation of scientific research after doctoral programs, granting academic leaves, transfer and reinstatement of students, etc. Universities with a special status have received autonomy in developing the content of educational programs taking into account the requirements of the State Educational Standard, as well as awarding doctoral degrees. All these changes in universities occur with the acquisition of managerial and financial autonomy.

It is important to grant the right to commercial universities to become non-profit joint-stock companies. In these universities, boards of directors are created, a corporate management system is created, and the opportunity for commercial activity is created to support their development.

For state universities, an important emphasis on independence is that accreditation services are removed from state procurement. In this regard, universities independently select accreditation agencies to conduct the procedure of external assessment of educational services. Therefore, the independence of universities in choosing accreditation agencies for state educational organizations, previously noted in the Law, has become a reality. A number of general legal measures have also been defined with this.

For example, the transition from specialties to graduate training areas, which specifically corresponds to the UNESCO International Standard Classification of Education (ISCED) and allows universities to respond more quickly and adequately to the needs of the labor market. In this regard, a new type of university licensing has been introduced, based on training areas.

Conclusions

Thus, the amendments and additions to the regulatory documents, together with the provisions of the Strategic Development Plan of the Republic of Kazakhstan until 2025, are aimed at further expanding the autonomy and managerial independence of the country's universities. This will effectively affect the quality of educational services, increasing the demand for higher education in the republic.

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А.Б. Жумагулова

Қазақстандағы жоғары оқу орындарының автономиясын кеңейтудің құқықтық негізі

Мақалада жоғары оқу орындарының автономиясы мен дербестік деңгейін арттырудың құқықтық мәселесі қарастырылған. Зерттеудің ғылыми қызығушылығы мен мақсаты заңнамалық және нормативтік тәсілді ескере отырып, республиканың жоғары оқу орындарының дербестігін, басқарушылық және қаржылық дербестігін кезең-кезеңмен дамытуды зерделеу. Автор мақалада құқықтық өрісті ескере отырып, кезең-кезеңмен дамуға сәйкес жоғары оқу орындарының дербестігі мен басқарушылық дербестігін кеңейтудің маңызды тетіктерін келтірген. Ұсынылған тәсілдер Қазақстан Республикасының 2025 жылға дейінгі Стратегиялық даму жоспарына сәйкес жүзеге асырылып жатқан осы вектордың ағымдағы кезеңін тұжырымдауға көмектеседі. Бұл үшінші жаңғыртуды сәтті жүзеге асырудың және жаңа технологиялар мен цифрлық трансформация арқылы экономикалық өсудің жаңа моделіне көшудің маңызды шарты. Негізгі зерттеу әдістері тарихи талдау, жоғары оқу орындарының автономиясын кеңейту процестерін қолданыстағы құқықтық реттеуді бағалау және даму кезеңдерін зерттеуге салыстырмалы-аналитикалық тәсіл. Жұмыста дамудың төртінші кезеңінде көзделген және жоспарланған жүйелік стратегиялық өзгерістер айқындалған, сондай-ақ жоғары оқу орындарының еркіндігін, дербестігін және басқарушылық және қаржылық тәуелсіздігін кеңейту жағдайында тиімді құқықтық және институционалдық қамтамасыз ету мәселелері зерделенген.

Кілт сөздер: білім беру заңы, білім сапасы, автономия, тәуелсіздік, сапа механизмдері, экономикалық өсу, білім беру саясаты, басқарушылық еркіндік.

А.Б. Жумагулова

Правовые основы расширения автономности вузов в Казахстане

В статье рассматривается правовой вопрос повышения уровня автономности и самостоятельности университетов. Научный интерес и цель исследования заключается в изучении поэтапного развития автономности, управленческой и финансовой самостоятельности высших учебных заведений республики с учетом законодательного и нормативного подхода. В статье представлены ключевые механизмы расширения автономности и управленческой самостоятельности вузов, разработанные в соответствии с пошаговым развитием и с учетом правового поля. Предлагаются актуальные подходы, которые помогают сформулировать современный этап данного вектора, который реализуется в рамках Стратегического плана развития Республики Казахстан до 2025 года. Это является важным условием для успешного проведения третьей модернизации и перехода к новой модели экономического роста на основе новых технологических и цифровых преобразований. Основными методами исследования являются исторический анализ, сравнительный анализ и аналитический подход к изучению этапов развития, а также, оценка, сложившегося правого регулирования процессов расширения автономности высших учебных заведений. В работе определены системные стратегические изменения, предусмотренные и планируемые на четвертом этапе развития, а также рассмотрены вопросы эффективного правового и институционального обеспечения в условиях расширения свободы, автономности, управленческой и финансовой самостоятельности высших учебных заведений.

Ключевые слова: образовательное право, качество образования, автономность, самостоятельность, механизмы качества, экономический рост, образовательная политика, управленческая свобода.

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Некоторые вопросы понятия исполнительного органа

В данной статье на основе анализа действующего законодательства Республики Казахстан, научных трудов казахстанских и зарубежных авторов, программных документов Главы государства рассмотрены понятия и основные особенности исполнительных органов Республики Казахстан. Актуализирует необходимость теоретического анализа указанных вопросов динамика развития нормативно-правовой основы государственно-управленческой деятельности и поступательное движение в сфере государственного строительства нового Казахстана. Обновление управляющего воздействия обусловливает теоретическое исследование понятия и видов исполнительных органов, а также определение места и специфики каждого из них в общей системе исполнительной власти на современном этапе развития казахстанского общества. В статье рассматриваются положения Административного процедурно-процессуального кодекса Республики Казахстан, Закона Республики Казахстан «О правовых актах» и обосновывается необходимость корректировки понятия государственного органа. На основе изучения Закона Республики Казахстан «О местном государственном управлении и самоуправлении в Республике Казахстан, и иных нормативных правовых актов подвергаются исследованию теоретико-правовые вопросы статуса исполнительных структур власти на местном уровне. Обосновываются организационно-правовые предложения по оптимизации законодательства в государственном управлении.

Ключевые слова: исполнительная власть, правовые акты исполнительных органов, виды органов, новый Казахстан.

Введение

Актуальность темы исследования. Поступательное движение в сфере государственного строительства нового Казахстана и динамика развития нормативно-правовой основы государственно-управленческой деятельности актуализируют теоретическое осмысление новых политико-правовых реалий. Организационная структура исполнительной власти представляет собой совокупность элементов, осуществляющих управленческое воздействие на различные сферы общественных отношений. Она не стоит на месте и постоянно адаптируется к новым экономическим, политическим и социальным трансформациям. Не будет преувеличением отметить, что именно исполнительные органы подвергаются модификациям в плане их статуса, задач и функций, компетенции и объема властных полномочий за все годы независимого Казахстана.

Системообразующим ядром в организационной структуре исполнительной власти является государственный орган, посредством которого формируется и реализуется государственно-управляющее воздействие в сферах, отраслях и в масштабе всего государства либо в административно-территориальных единицах.

Цель исследования: анализ специфики исполнительных структур власти с учетом динамики законодательства.

Задачи исследования: опираясь на действующее законодательство, исследовать понятие государственного органа; на основе анализа теоретических изысканий казахстанских и зарубежных авторов определить сущность, характерные черты и виды исполнительных органов РК; сформулировать предложения и рекомендации в действующее законодательство по исследуемым вопросам.

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Методы и материалы

Методология исследования опирается на общенаучные (диалектический, системный) и специальные (формально-юридический, сравнительно-правовой) методы и приемы изучения и анализа законодательства и правоприменительной практики в сфере государственного управления.

В русле конституционной реформы в законодательство внесены изменения, касающиеся статуса и полномочий исполнительных органов. Правительство РК наделено, правом принятия временных постановлений, имеющих силу закона, в случае наступления кризисных ситуаций, [1].

Расширены возможности использования выборов при формировании акимов сельских, поселковых, районных, а также городов областного подчинения.

Продолжается поиск оптимальной структуры центральных и местных исполнительных органов, что привело к изменениям в структуре Правительства.

Указом Главы государства утверждены концептуальные приоритеты развития государственного управления до 2030 года [2].

Теоретические и практические вопросы организационной структуры государственного управления подробно рассмотрены А.Д. Керимовым [3] и Г.С. Сапаргалиевым [4]. Особенности казахстанской системы исполнительных органов исследовал Р.С. Шукманов [5]. Проблемы правовой природы и организации местной исполнительной власти стали предметом исследования Т.С. Донакова [6]. Вопросы классификации исполнительных органов обстоятельно освещены ведущими казахстанскими административистами Р.А. Подопригорой [7] и А.А. Тарановым [8].

Актуальные вопросы сущности и понятия государственного органа исследованы в трудах российских ученых, таких как В.В. Лазарев [9; 326], С.А. Авакьян [10; 336] и М.В. Баглай [11; 332]. Сравнительно правовой анализ статуса исполнительных органов Казахстана и Кыргызстана проведен К.Ж. Шалкыбаевым [12; 17].

Вместе с тем отдельные аспекты исследования, представленной в статье требуют, на наш взгляд, определенного уточнения в законодательстве, например, понятие государственного органа и его видов в общей системе исполнительной власти. В Послании Президента Республики Казахстан К. - Ж. Токаева народу Казахстана дан курс на перезагрузку государственного управления. Первым шагом в этом направлении, как отмечает Глава государства, станет трансформация Канцелярии Премьер-министра в компактный аппарат Правительства, соответствующий передовым стандартам госуправления. «Дело не в смене названия, а в реальной реформе. Через оптимизацию вертикали центральных ведомств необходимо существенно расширить полномочия местных исполнительных органов. Это позволит приблизить решение насущных вопросов к регионам, к людям» [13].

Данный вектор стимулирует теоретический анализ законодательства и управленческой практики с целью выработки предложений и рекомендаций по их оптимизации в условиях нового Казахстана.

Результаты

С учетом изменений в Конституции Республики Казахстан сформулировано понятие исполнительного органа.

Система исполнительной власти включает в себя: Правительство РК, Аппарат Правительства РК, центральные исполнительные органы и их территориальные органы, акиматы, органы, финансируемые из местного бюджета, аппараты акимов области, города республиканского значения, столицы, района (города областного значения), района в городе, города районного значения, села, поселка, сельского округа.

Под государственным органом следует понимать организацию, осуществляющую от имени государства на основе Конституции Республики Казахстан, законов и иных нормативных правовых актов Республики Казахстан функций по: изданию правовых актов; управлению и регулированию социально значимых общественных отношений; контролю за соблюдением установленных государством правовых актов.

Заменить в пункте 15 статьи 1 Закона РК «О местном государственном управлении и самоуправлении в Республике Казахстан» и других нормативных правовых актах наименование «территориальные подразделения министерств и ведомств» на «территориальные органы министерств и ведомств» [14].

Новизна

На основе анализа действующего законодательства предложено внести поправки в АППК РК относительно понятия государственного органа.

С учетом изменений и дополнений в Конституции РК предложено определение понятия исполнительного органа.

Предложен перечень исполнительных органов с учетом действующего законодательства и практической роли и значения их в общей системе исполнительных органов.

Обсуждение

Исходной позицией для определения исполнительного органа служит понятие государственного органа. В научной и учебной литературе даются разные определения, отражающие позиции авторов на сущность и специфические признаки этого понятия. В целом можно сказать, что под государственным органом принято понимать образующую самостоятельную часть госаппарата и наделенную правовыми нормами необходимым объемом властных полномочий в рамках нормотворческой и правоприменительной деятельности для реализации задач и функций государства.

В пункте 25 статьи 4 Административного процедурно-процессуального кодекса (далее — АППК РК) определено, что «государственный орган — организация государственной власти, осуществляющая от имени государства на основании Конституции Республики Казахстан, законов и иных нормативных правовых актов Республики Казахстан функций по:

- изданию актов, определяющих общеобязательные правила поведения;
- управлению и регулированию социально значимых общественных отношений;
- контролю за соблюдением установленных государством общеобязательных правил поведения» [15].

По смыслу данного определения все три функции в совокупности дают нам определение государственного органа.

На наш взгляд, действующее определение государственного органа, данное в АППК РК, неточно отражает его признаки. Так, в качестве одного из признаков государственного органа, указанного в АППК РК, указывается право издавать нормативные правовые акты, каковыми являются акты с содержанием общеобязательных правил. Следует заметить, что ряд из предусмотренных законодательством структур исполнительной власти не наделены таким правом, например, исполнительные органы, финансируемые из местного бюджета, территориальные органы министерств и ведомств, аппараты акимов.

В статье 1 пункта 18 Закона РК «О правовых актах» под нормой права подразумевается общеобязательное правило поведения постоянного или временного характера, рассчитанное на многократное применение, распространяющееся на индивидуально неопределенный круг лиц в рамках регулируемых общественных отношений [16].

Пункт 25 данной статьи гласит, что нормативный правовой акт — письменный официальный документ установленной формы, принятый на республиканском референдуме либо уполномоченным органом, устанавливающий нормы права, изменяющий, дополняющий, прекращающий или приостанавливающий их действие [16].

Таким образом, общеобязательные правила поведения содержатся в нормативном акте, а ненормативный правовой акт не обладает таким свойством, не содержит нормы права, поскольку реализует установленные законодательством Республики Казахстан права и обязанности индивидуально определенных лиц либо разъясняет нормы, содержащиеся в нормативном правовом акте, а также является правовым актом индивидуального применения или правовым актом в области системы государственного планирования [16].

В статье 10 Закона РК «О правовых актах» устанавливаются иерархия и исчерпывающий перечень государственных органов, правомочных издавать нормативные правовые акты. Если вычленить из этого перечня исполнительные органы, то нормотворческая деятельность присуща Правительству РК (подпункт 4,7), министерствам (подпункт 8), ведомствам (подпункт 9), акиматам и акимам (подпункт 10) [16].

Отсюда следует, что не все исполнительные органы имеют право издавать нормативные правовые акты. Например, территориальные органы (подразделения) министерств и ведомств не наделены правом издания нормативных правовых актов. Но они по характеру осуществляемой деятельности,

полномочиям и структуре они представляют собой исполнительные органы министерств и ведомств на соответствующих административно-территориальных единицах и наделены правом издания ненормативных актов. Исполнительные органы, финансируемые из местного бюджета, также не имеют права издавать нормативные правовые акты. Руководители данных органов издают приказы, носящие ненормативный характер.

Если следовать логике пункта 25 статьи 4 АППК РК о том, что одним из признаков государственного органа должно быть осуществление функции по изданию актов, определяющих общеобязательные правила поведения, то местные исполнительные органы, финансируемые из местного бюджета, территориальные органы (подразделения)министерств и ведомств нельзя считать государственными органами, что вряд ли соответствует действительности.

Выход из данной противоречивой ситуации нам представляется в том, что в пункте 25 статьи 4 АППК РК нужно указать, что государственный орган уполномочен на осуществление функций по изданию не актов, определяющих общеобязательные правила поведения, а:

- правовых актов;
- управлению и регулированию социально значимых общественных отношений;
- контролю за соблюдением установленных государством правовых актов, то есть как нормативных, так и ненормативных.

Наряду с общими признаками, присущими всем государственным органам, структуры исполнительной власти обладают рядом отличительных свойств. Организационная структура этого вида госорганов сочетает в себе отраслевые, межотраслевые и территориальные связи; существует четкая иерархия звеньев: нижестоящие подчиняются вышестоящим; единоначалие сочетается с коллегиальностью.

В Конституционном законе РК «О Правительстве Республики Казахстан» установлено, что Правительство Республики Казахстан является коллегиальным органом, осуществляет исполнительную власть Республики Казахстан, возглавляет систему исполнительных органов и руководит их деятельностью [17]. Центральные исполнительные органы — министерства, осуществляют отраслевое руководство либо регулирование и координирование между отраслями. Ведомствам, входящим в состав министерства надлежит осуществление регулятивной, реализационной, контрольно-надзорной и стратегической деятельности в пределах компетенции соответствующего министерства.

Акиматы, аппараты акимов, исполнительные органы, финансируемые из местного бюджета, образуют подсистему исполнительной власти на территориальном уровне.

Несмотря на видовое разнообразие и сложность вертикальных и горизонтальных связей, объем задач, функций и полномочий каждого из звеньев иерархической структуры не вызывает сомнений, что системе органов исполнительной власти присуще единство. При этом следует отметить, что в количественном отношении исполнительные органы значительно превосходят другие ветви власти.

Во-вторых, отличительной особенностью исполнительных органов является то, что их деятельность носит непрерывный и постоянный характер, для чего имеется штат постоянных государственных служащих и работников.

В-третьих, целевым назначением исполнительных органов является организационно-правовое обеспечение реализации нормативных положений Конституции, законов и иных правовых актов, во исполнение которых они издают, в рамках компетенции, свои акты. В результате конституционных поправок внесены определенные коррективы в нормотворческую компетенцию Правительства РК. Пункт 3 статьи 61 Конституции РК предусматривает, что высший исполнительный орган «в случае внесения в Парламент законопроектов, предусмотренных частью второй пункта 2 статьи 61 Конституции РК, вправе принимать под свою ответственность временные нормативные правовые постановления, имеющие силу закона, по вопросам, указанным в части первой настоящего пункта, которые действуют до вступления в силу принятых Парламентом законов или о непринятия Парламентом законов» [1].

В-четвертых, для практического осуществления установленных законодательством целей, задач и функций центральные и местные исполнительные органы, государственные служащие обладают распорядительными полномочиями по осуществлению нормотворческой и правоприменительной деятельности в отраслях и сферах управления на общегосударственном и местном уровнях.

В-пятых, в формировании исполнительных органов предусматриваются различные организационно — правовые процедуры. Правительство РК образуется Президентом РК, при этом определенная роль в этом процессе отводится нижней палате Парламента, с которой согласовывается кандидатура

Премьер-Министра РК. Далее Президент РК осуществляет функции в отношении центральных исполнительных органов, а именно: по представлению Премьер-Министра утверждает организационную структуру и персональный состав Правительства, при этом самостоятельно назначает на должности трех министров: иностранных дел обороны и внутренних дел, а также освобождает от должностей членов, входящих в состав Правительства. Территориальные органы министерств и ведомств образуются вышестоящими органами по линии подчиненности.

Исполнительные органы в административно-территориальных единицах — акиматы, аппараты акимов, исполнительные органы, финансируемые из местного бюджета, образуются в соответствии с законодательством, регулирующим местный уровень госуправления.

Когда речь заходит о перечислении разновидностей исполнительных органов, авторами высказываются разные мнения.

Так, по мнению А.А. Таранова, к числу исполнительных органов, являющихся субъектами административного права, относятся Правительство РК, министерства, ведомства, Канцелярия (в настоящее время Аппарат) Правительства, акиматы [8; 52–59].

Аналогичного мнения придерживается Т.С. Донаков [6; 314-315]. Подопригора Р.А. отмечает, что к исполнительным органам наряду с Правительством, министерствами, ведомствами, акиматами и другими органами на местном уровне, следует также причислить и государственные органы, непосредственно подчиненные и подотчетные Президенту [7; 128].

Мы полагаем, что государственные органы, непосредственно подчиненные и подотчетные Президенту РК, в частности, агентства Республики Казахстан: по делам государственной службы, по противодействию коррупции, по стратегическому планированию и реформам, по защите и развитию конкуренции, а также КНБ РК и др., нельзя относить к исполнительным органам, поскольку данные органы имеют свое целевое назначение в общем механизме государственной власти и особый способ формирования.

Что касается территориальных органов министерств и ведомств, то, конечно, они относятся к разновидностям исполнительных органов. Однако в нормативных актах применительно к территориальным органам министерств и ведомств используется термин «подразделения». Например, в соответствии с пунктом 15 статьи 1 Закона РК «О местном государственном управлении и самоуправлении в Республике Казахстан» территориальное подразделение центрального государственного органа — это структурное подразделение центрального исполнительного органа, осуществляющее в пределах соответствующей административно-территориальной единицы функции центрального исполнительного органа [14].

Мы полагаем, что это не соответствует реальному назначению этих органов. Подразделение — это составная часть органа, например отдел или управление. А территориальный орган является исполнительным органом на территории, обладающим соответствующей компетенцией и полномочиями, а также правом издания ненормативных правовых актов во исполнение функций центрального исполнительного органа, которому он подчинен по вертикали.

Обратимся к понятию и видам исполнительных органов на уровне административно-территориальных единиц.

В соответствии с законодательством, регулирующим правовые основы местного государственного управления и самоуправления, «местный исполнительный орган (акимат) — коллегиальный исполнительный орган, возглавляемый акимом области, города республиканского значения и столицы, района (города областного значения), осуществляющий в пределах своей компетенции местное государственное управление и самоуправление на соответствующей территории» [14].

Также в подпункте 5 статьи 1 данного Закона дается понятие исполнительного органа, финансируемого из местного бюджета как государственного учреждения, уполномоченного акиматом на осуществление отдельных функций местного государственного управления и самоуправления [14].

Отсюда следует, что на территориальном уровне местными исполнительными органами являются акиматы и исполнительные органы, финансируемые из местного бюджета.

Среди исполнительных органов особое место отводится такой управленческой структуре, как Аппарат Правительства Республики. Согласно нормативному акту, определяющему статус этой структуры, он представляет собой государственный орган, на который возложено межведомственное и межотраслевое координирование деятельности исполнительных органов в центре и на территориях по выполнению поручений, относящихся к ведению Правительства Республики [18]. Должностное

лицо, возглавляющее данный орган, является членом Правительства и уполномочено издавать в рамках своей компетенции приказы, имеющие ненормативный характер.

Таким образом, Аппарат Правительства — это один из видов исполнительных органов. Уместно отметить, что Глава государства подчеркнул значимость данного управленческого органа в своем Послании народу Казахстана [13].

В соответствии со статьей 38 Закона РК «О местном государственном управлении и самоуправлении в Республике Казахстан» аппарат акима области, города республиканского значения, столицы, района (города областного значения), района в городе осуществляет информационно-аналитическое, организационно-правовое и материально-техническое обеспечение деятельности акима [14]. То есть, аппарат занимается внутриорганизационными вопросами в деятельности акима и акимата. Пункт 2-1 статья 3 Закона РК «О местном государственном управлении и самоуправлении в Республике Казахстан» гласит, что руководитель аппарата акима области, города республиканского значения, столицы, района (города областного значения), района в городе назначается на должность и освобождается от должности уполномоченным должностным лицом, определяемым Президентом Республики Казахстан, в порядке, устанавливаемом Президентом Республики Казахстан [14]. Пункт 4 статьи 38 указанного Закона устанавливает, что положение об аппарате акима, его структура, за исключением структуры аппарата акима области, города республиканского значения, столицы, утверждаются соответствующим акиматом [14].

В положениях об аппарате акима, утверждаемых акиматом предусматривается, что это государственный орган, руководитель которого вправе издавать приказы, носящие ненормативный характер.

Так, например, согласно подпункта 1 пункта 1 Положения о государственном учреждении «Аппарат акима Восточно-Казахстанской области» государственное учреждение «Аппарат акима Восточно-Казахстанской области» является государственным органом Республики Казахстан, осуществляющим руководство в сфере обеспечения деятельности акима Восточно-Казахстанской области. В соответствии с положением руководитель аппарата областного акима подписывает приказы аппарата акима области [19].

Согласно пункту 1 статьи 38-1 Закона РК «О местном государственном управлении и самоуправлении» аппарат акима города районного значения, села, поселка, сельского округа осуществляет наряду с информационно-аналитическим, организационно-правовым и материально-техническим обеспечением деятельности соответствующего акима также функции местного исполнительного органа по отдельным направлениям (исполнение бюджета, управление коммунальной собственностью) на вверенных территориях [14]. Возглавляет аппарат акима города районного значения, села, поселка, сельского округа аким города районного значения, села, поселка, сельского округа.

Из изложенного следует, что аппараты акимов данного уровня осуществляют не только внутриорганизационную деятельность, но и ряд внешних управленческих функций, поскольку создание акиматов на данном уровне не предусмотрено.

Изложенные положения действующего законодательства свидетельствуют о том, что Аппараты Правительства РК, местных исполнительных органов являются разновидностями исполнительных органов.

Выводы

Исполнительный орган представляет собой образуемую Президентом РК либо вышестоящим по линии подчиненности органом организацию государственной власти, осуществляющую исполнительно-распорядительную, подзаконную, юридически властную, а в предусмотренном статьей 61 Конституции РК порядке и законодательную деятельность в процессе повседневного и непосредственного руководства и регулирования экономической, социально-культурной и административно-политической сферами. Данное предложение повторяется в результатах исследования.

Исполнительная ветвь власти представляет собой иерархическую подчиненность и взаимодействие следующих звеньев: Правительство РК, Аппарат Правительства РК, центральные исполнительные органы-министерства со входящими в их структуру ведомствами, территориальные органы министерств и ведомств, акиматы, органы, финансируемые из местного бюджета, аппараты акимов области, города республиканского значения, столицы, района (города областного значения), района в городе, города районного значения, села, поселка, сельского округа.

Пункт 25 статьи 4 АППК РК изложить в следующей редакции: «государственный орган — организация, осуществляющая от имени государства на основе Конституции Республики Казахстан, законов и иных нормативных правовых актов Республики Казахстан функций по:

- изданию правовых актов;
- управлению и регулированию социально значимых общественных отношений;
- контролю за соблюдением установленных государством правовых актов.

Заменить в действующем законодательстве наименование «территориальные подразделения министерств и ведомств» на «территориальные органы министерств и ведомств».

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М.И. Билялова, К.С. Мусилимова

Атқарушы орган ұғымының кейбір мәселелері

Мақалада Қазақстан Республикасының қолданыстағы заңнамасын, қазақстандық және шетелдік авторлардың ғылыми еңбектерін, мемлекет басшысының бағдарламалық құжаттарын талдау негізінде Қазақстан Республикасының атқарушы органдарының ұғымы мен негізгі ерекшеліктері зерделенген. Аталған мәселелерді теориялық тұрғыдан талдау қажеттілігі, мемлекеттік басқару қызметінің нормативтік-құқықтық негізінің даму динамикасы, Жаңа Қазақстандағы мемлекеттік құрылыс саласындағы ілгерілеу қозғалысы өзекті болып отыр. Басқарушылық ықпалдың жаңаруы атқарушы органдар ұғымы мен түрлерін теориялық зерттеуді, олардың әрқайсысының қазіргі кезеңдегі қазақстандық қоғамның дамуындағы атқарушы билік жүйесіндегі орнын және ерекшеліктерін айқындауды талап етеді. Мақалада Қазақстан Республикасының Әкімшілік рәсімдік-процестік кодексі, «Құқықтық актілер туралы» Қазақстан Республикасының Заңының ережелері қарастырылып, мемлекеттік орган ұғымын нақтылаудың қажеттілігі негізделген. Сонымен қатар «Қазақстан Республикасындағы жергілікті мемлекеттік басқару және өзін-өзі басқару туралы» Қазақстан Республикасының Заңын, өзге де нормативтік құқықтық актілерді зерделеу негізінде жергілікті деңгейдегі атқарушы билік құрылымдарының мәртебесінің теориялық-құқықтық мәселелері зерттелген. Мемлекеттік басқарудағы заңнаманы оңтайландыру бойынша ұйымдастырушылық-құқықтық ұсыныстар негізделген.

Кілт сөздер: атқарушы билік, атқарушы органдардың құқықтық актілері, органдардың түрлері, Жаңа Қазақстан.

M.I. Bilyalova, K.S. Musilimova

Some issues of the concept of an executive body

This article examines the concept and main features of the executive bodies of the Republic of Kazakhstan based on the analysis of the current legislation of the Republic of Kazakhstan, scientific works of Kazakh and foreign authors, and program documents of the Head of State. The necessity for a theoretical analysis of these issues is highlighted, along with the dynamics of the development of the normative-legal framework of public administration activities and the progressive movement in the field of state-building of the new Kazakhstan. The renewal of managerial influence necessitates a theoretical study of the concept and types of executive bodies, as well as the identification of the role and specific characteristics of each of them within the overall system of executive power at the current stage of Kazakhstan's societal development. The article reviews the provisions of the Administrative Procedural-Processual Code of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan «On Legal Acts,» substantiating the need to adjust the concept of a state body. Based on the study of the Law of the Republic of Kazakhstan «On Local Government and Self-Government in the Republic of Kazakhstan» and other regulatory legal acts, theoretical and legal issues of the status of executive authorities at the local level are being studied. Organizational and legal proposals for optimizing legislation in public administration are substantiated.

Keywords: executive power, legal acts of executive bodies, types of bodies, new Kazakhstan.

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The legal regulation of climate policy in the field of greenhouse gas emissions: global challenges and ways of adaptation of Kazakhstan

The article focuses on examining the legal framework governing climate change and ecosystem protection, highlighting both international and national strategies. Key global agreements, such as the UN Framework Convention on Climate Change and the Paris Agreement, as well as Kazakhstan's legislative measures aimed at reducing greenhouse gas emissions and fostering sustainable economic growth, are analyzed. Particular attention is given to Kazakhstan's efforts to meet international commitments, including the introduction of an emissions trading system, the establishment of carbon budgeting standards, and the development of environmental regulations. The study aims to explore the challenges Kazakhstan faces in adapting to climate change and the role of legal norms in promoting green technologies and sustainable development. The research methodology combines legal analysis, a comparative approach (examining international and national contexts), analysis of empirical data, and evaluation of policies and laws regarding their environmental impact in Kazakhstan. The authors underline the necessity of robust legal frameworks in climate policy to achieve sustainable development, enhance energy security, and ensure social equity. The conclusion highlights the importance of refining legislation to reduce greenhouse gas emissions and facilitate the transition to a low-carbon economy, contributing to the effective realization of sustainable development goals and emission reductions.

Keywords: environment, environmental law, international standards, the right to a healthy environment, state waste regulation, waste emissions, greenhouse gas emissions, climate change legal regulation, environmental harm mitigation, liability for waste management violations, emissions trading system, free quotas.

Introduction

One of the most pressing issues of our time is the protection of the environment and the responsible use of natural resources. Nature forms the foundation of human existence, supplying essential material, energy, and spatial resources. Humanity relies on water, soil, air, biodiversity, land, and renewable energy sources such as solar power, wind, and tidal currents. Beyond serving as a source of resources for living and leisure, nature acts as a sink for emissions and waste, underscoring the critical need for its preservation to ensure a sustainable future.

As part of the global community, Kazakhstan cannot independently address the challenges posed by climate change. Without clear legal frameworks and robust international agreements to curb greenhouse gas emissions, the consequences of global warming, such as rising sea levels, extreme weather events, and loss of biodiversity may become irreversible.

To effectively adapt to climate change, it is essential to establish strong legal regulations and reliable indicators for monitoring air temperature, precipitation, and greenhouse gas emissions. Kazakhstan collaborates with the international community to regulate these areas by enacting laws and creating targeted plans. For example, climate change was a central topic during the 28th session of the UN Conference, where agreements were reached to reduce reliance on fossil fuels, including coal, oil, and gas. The extraction of these fuels is a significant source of greenhouse gas emissions, which harm the environment.

In its efforts to transition towards lower emissions in the energy sector and enhance energy efficiency, Kazakhstan faces several challenges. These include outdated thermal power plant infrastructure, insufficient

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implementation of mixed financial instruments to support green business projects, and underutilization of renewable energy technologies.

This study focuses on analyzing international climate policy documents related to greenhouse gas emissions while examining the legal aspects and adaptive measures within Kazakhstan's legislation to address global climate challenges. International standards and commitments promote global cooperation and enhance global responsibility to address climate challenges.

The world community refers to the following documents that take into account the global nature of climate change:

- The UN Stockholm Declaration of June 16, 1972 on the problems of the human environment;
- UN General Assembly resolution 44/228 of December 22, 1989 on the United Nations Conference on Environment and Development;
- Resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and 46/169 of 19 December 1991 on the protection of global climate for the benefit of present and future generations of mankind;
- The 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, as amended and amended on June 29, 1990;
- The United Nations Framework Convention on Climate Change of May 9, 1992. (Kazakhstan ratified the Convention on 05/17/1995);
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) dated December 11, 1997 (date of ratification of the Kyoto Protocol 19.06.2009);
- General Assembly resolution 70/1 of September 25, 2015. Transforming our world: The 2030 Agenda for Sustainable Development (Kazakhstan ratified the Paris Agreement on 12/06/2016).

These and other important documents laid the foundation for stimulating activities in areas of great importance to humanity and the planet.

In accordance with the principles and provisions of international documents and standards, as well as the 2030 Agenda for Sustainable Development, States have adopted new global goals (17 goals for transforming our world) in the field of sustainable development. Thus, the program of global actions of people and the planet in the XXI century was proclaimed. Where the fight against climate change and environmental protection are a kind of call to action to eliminate poverty in the world, emphasizing the urgent need for "greening" (that is, the implementation of projects in accordance with socio-environmental standards in the field of environmental and social obligations) of these goals. At the same time, States have the right to determine their environmental and development policies. At the same time, States must be held accountable for their actions that harm the environment.

Cooperating with the international community, our republic in responding to climate change has adopted the Environmental Code of the Republic of Kazakhstan [1]. Based on current legislation, environmental standards, management goals and priorities are being developed, taking into account economic and social costs.

The main instrument for the implementation of countries' commitments to limit and reduce greenhouse gas emissions into the atmosphere is the nationally determined contributions of countries to climate change mitigation.

The stated climate goals serve as a guideline for the development of domestic national legislation designed to ensure the achievement of these goals through the adoption of appropriate public policies and mechanisms. As the ONUV is revised and emission reduction targets are tightened in accordance with the Paris Agreement, measures may be revised. To achieve the goals, the authors investigated the requirements of international acts and regulations, as well as their relationship for their adaptation to legislation in the field of ecology.

It is difficult to overestimate the importance of legal regulation of climate control, since it plays a key role in ensuring sustainable development, protecting ecosystems and minimizing the negative impact of human activities on the climate.

Without clear legal norms and international agreements aimed at reducing greenhouse gas emissions, global warming can lead to irreversible climate changes, including sea level rise, extreme weather events and loss of biodiversity. The adopted laws are constantly being updated, nationally determined deposits are being tightened (according to the norms of the Paris Agreement, deposits should be updated every 5 years) and requires constant systematization and improvement of mechanisms for the implementation of best practices.

Methods and materials

Nature is a shared heritage of humanity, and the global community endeavors to address the challenges of the climate crisis through coordinated efforts and effective solutions. The article, dedicated to the legal regulation of climate change, employs a comprehensive approach that integrates international and national legal frameworks, with a focus on the specific legislative measures of the Republic of Kazakhstan.

The analysis of international agreements involves a systematic examination of global treaties such as the UN Framework Convention on Climate Change and the Paris Agreement, exploring their provisions, requirements, and the influence of these commitments on national legislation.

In studying Kazakhstan's national legislative initiatives, the article employs a legal analysis of current laws and regulations to evaluate their effectiveness in achieving climate-related objectives. This assessment highlights strengths and areas needing improvement within the existing framework.

To explore the challenges and barriers to adaptation, the study identifies critical obstacles faced by Kazakhstan in addressing climate change. These include underdeveloped infrastructure for adopting green technologies, insufficient legal support, and weak coordination between government institutions and the private sector.

The empirical method assesses Kazakhstan's environmental indicators, including greenhouse gas emissions, ecosystem health, and population well-being. This evaluation is grounded in data from governmental sources and reports by environmental organizations, providing a data-driven perspective on the state of the environment and progress toward climate goals.

Results

This study examines the international and Kazakh legal frameworks, along with measures implemented to address climate change and protect ecosystems, with a focus on the legal regulation of greenhouse gas emissions.

As part of its commitments under the Paris Agreement, Kazakhstan is actively evaluating its existing systems for measuring and reporting the outcomes of initiatives aimed at adapting to and mitigating the effects of climate change. Achieving carbon neutrality in the current century necessitates robust and consistent legal oversight of greenhouse gas emissions. The demand for a clear and comprehensive legislative framework to facilitate the implementation of international agreements is becoming increasingly urgent. Global warming and climate change demand prompt action, requiring collective efforts and adherence to timely and effective legal measures.

Today, Kazakhstan has a Strategy for achieving carbon neutrality of the Republic of Kazakhstan until 2060.

Kazakhstan is guided by the following principles for the implementation of the Strategy: purposefulness, unity and integrity; feasibility, fairness of transition; circular economy; phasing; openness and interaction with society; rationality (balance). All actions should be based on a set of these principles and contribute to achieving carbon neutrality goals by 2060.

The Ministry of Ecology and Natural Resources of the Republic of Kazakhstan (MENR RK) is the responsible body for conducting an inventory of greenhouse gases in the Republic of Kazakhstan. In accordance with the obligations of the Republic of Kazakhstan under the UNFCCC (United Nations Framework Convention on Climate Change), as well as in accordance with the Environmental Code of January 2, 2021, the MENR of the Republic of Kazakhstan annually prepares a national report on the emission inventory for industrialized countries [2].

On an annual basis, States provide information to the secretariat (Bonn, Germany) of the Kyoto Protocol and the body monitors compliance by States with their emission obligations [3].

These registries, in addition to accounting for unit stocks, take into account emissions trading, forming the basic infrastructure for the carbon market. The registry system ensures transparency and the ability to hold Parties accountable. The system also brings together key actors from various sectors and directions to increase climate ambitions and intensify action, stimulating even more meaningful steps.

In order to achieve low-carbon neutrality, the state needs to continue the following steps:

- to provide a legislative and institutional environment that meets the requirements of international agreements and takes into account the specifics of the national foundations and infrastructure of the country;
- create incentives for the modernization of existing industrial facilities by attracting international private investment in the decarbonization process;

- motivate private businesses by providing targeted support measures to socially vulnerable groups of the population;

- to introduce new information technologies for the control and monitoring of emissions at the national, sectoral and regional levels to digitalize the process;

- to implement advanced international standards in all sectors of the economy in order to make the transition to alternative and renewable energy sources (for example, reducing fuel and energy consumption, switching to ecological modes of transport, etc.).

Discussion

At first glance, the solutions may seem obvious, but problems arise when they are implemented. Many of these problems are related to the correct definition of the mechanisms of interaction between the state and citizens. That is, the adoption by the state of all necessary laws in the field of sustainable development shows insufficiency, therefore it should include such works as bringing legislation to the level of awareness of everyone, constant promotion of educational programs, continued active introduction of innovative technologies and methods in the field of sustainable economic growth and tougher liability for violations of legislation [4; 18].

Within the framework of the Paris Agreement, Kazakhstan is obliged to report on its nationally determined climate contributions and on its long-term development strategies with low greenhouse gas emissions after 2020.

Within the framework of the Paris Agreement, Kazakhstan has committed itself to reducing greenhouse gas emissions from 1990 levels (386.3 million tons) by 15 % (an unconditional goal) by 2030 (328.3 million tons). At the same time, according to the Strategy, there is a conditional goal — provided that international support is received to decarbonize the economy by reducing emissions by 25 %. More than 70 % of all greenhouse gas emissions come from the fuel and energy sector of Kazakhstan [5].

From February 16, 2005 (entered into force) under the Kyoto Protocol countries must limit and reduce greenhouse gas emissions in accordance with agreed national commitments.

The high level of greenhouse gas emissions in the energy sector is explained by the significant use of fossil fuels, which in 2020 accounted for 97.9 % of the total primary energy, while the share of alternative energy sources did not exceed 1.4 % [6].

Among the main tools to achieve the goal of the commitment to reduce emissions under the Paris Agreement is the National Emissions Trading System (ETS). The STV was implemented in stages: the first phase began in 2013 [7] — marked the beginning of the implementation of decarbonization measures; during the second stage in 2014-2015 [8] quotas were sold on the stock exchange for the first time. In 2015, the 3rd National Plan for the Allocation of quotas for Greenhouse Gas Emissions was developed. In 2016, the system had to be suspended in terms of quota allocation to make improvements. The third trading period of the ETS after the introduction of comprehensive amendments was launched on January 1, 2018 [9].

To date, the Kazakh national system reflects 43 % of the total national greenhouse gas emissions (in the metallurgical, electric power, oil and gas, chemical, mining, as well as in some (related to the production of building materials such as cement, brick, lime) manufacturing industries).

Since March 28, 2022, the "Rules of state regulation in the field of greenhouse gas emissions and removals" have been in force in the Republic of Kazakhstan [10].

In accordance with Article 286 of the Environmental Code of the Republic of Kazakhstan [1] in our country, the carbon balance should not exceed the allowable amount established for the carbon budgeting period (5 consecutive calendar years). The carbon budget determines the volume of quota-based and non-quota-based greenhouse gas emissions.

It is important to note that carbon quotas are currently provided to enterprises free of charge within the framework of the National Plan. In practice, allocated quotas often exceed production volumes and exceeding quotas does not encourage them to develop projects aimed at reducing greenhouse gas emissions.

In the statistical collection provided by the Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan for 2018–2022, environmental costs show an increase: in 2018 — 302,177,008 tenge, in 2019 — 420,392,105 tenge, in 2020 — 384,015,734 tenge, in 2021 — 416,955,575 tenge, in 2022 — 444,514,269 tenge.

But despite the annual increase in expenses, the company is slowly moving from the budget to environmentally innovative projects.

In 2018 — 84, 2019 — 72, 2020 — 65, 2021 — 88, 2022 — 97 enterprises took steps in the field of sustainable development, reducing the share of projects and products on greenhouse gas emissions.

Based on these and other indicators, the average life expectancy shows an increase: in 2018 — 73.15 years, in 2019 — 73.18, in 2020 — 71.37, in 2021 — 70.23, in 2022 — 74.44 [11].

The operator of the carbon unit trading system in the Republic of Kazakhstan is JSC Zhasyl Damu. In order to ensure the functioning of the carbon unit trading system in the republic, the organization forms the state register of carbon units. The services of the carbon unit registry are provided through a personal account through an electronic digital signature. That is, Kazakhstani companies and individuals can register without hindrance. But foreign companies and individuals do not always have the opportunity to come to our country and get access to this portal, which creates barriers to investment.

Emissions trading is becoming increasingly important worldwide as a suitable tool to combat climate change. However, in the absence of a global carbon market, unilateral carbon policies may eventually lead to carbon leakage, especially since carbon prices will rise in the future to achieve more ambitious emission reduction goals [12].

Industrial enterprises bear a significant share (92.8%) of environmental protection costs in line with the obligations set by the Paris Agreement. The statistical collection contains data on many indicators, and it can be argued that improvements in greenhouse gas emissions have a positive effect on public health to varying degrees. Due to the rapid heating of our planet, weather conditions change over time and the natural balance is disrupted, creating great risks for people and harming public health.

Environmental factors claim the lives of about 13 million people every year. Changing weather conditions lead to the spread of diseases, and extreme weather events increase mortality and complicate the work of health systems [13].

Kazakhstan's legal path to a sustainable energy future is linked to global cooperation in the field of adaptation to climate change. Using only a national carbon trading system or the inability to enact specific laws may prevent emissions from being reduced to the target limit, leading to an increase in global temperatures above 1.5 °C.

Despite the global measures being taken to combat climate change, everyone can make a personal contribution to reducing greenhouse gas emissions. For example, residents can reduce food waste or occasionally refrain from using their personal cars. Such actions help not only to support the efforts of legislators to tighten environmental standards, but also facilitate the transition to new legislative changes.

Conclusions

The study highlights that legislative measures undertaken by the state to reduce greenhouse gas emissions have the potential to address not only issues related to air temperature, precipitation, and emissions but also to positively impact various aspects of human life. These initiatives, foremost, contribute to enhancing public health and overall well-being.

International frameworks such as the UN Framework Convention on Climate Change, the Paris Agreement, and the Kyoto Protocol serve as foundational mechanisms for coordinating global actions. On the national level, legislative tools like Kazakhstan's Environmental Code and greenhouse gas accounting systems ensure the effective implementation of these international obligations.

Comprehensive progress indicators suggest Kazakhstan is increasingly prepared to adopt adaptive measures. However, the country's carbon market policies and related legislation must evolve to encourage enterprises to actively reduce greenhouse gas emissions. This requires the continuous refinement of environmental legal norms, informed by emerging data and insights in this domain.

Systematic reforms encompassing investment, technical regulation, and legal frameworks, particularly in key economic sectors, are essential to advancing emissions reductions and addressing climate change challenges.

Clear and stable legal frameworks in climate policy enhance predictability for private investors, fostering the development of green technologies and promoting investments in circular and sustainable development practices. This approach supports the transition to a low-carbon economy, strengthens energy security, and advances social equity in the face of a changing climate.

The legal regulation of climate control transcends mere ecosystem protection; it is a critical instrument for ensuring security, driving sustainable economic growth, and fostering international cooperation in the fight against climate change.

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А. Әбдіжәми, Д. Рүстембекова

Парниктік газдар шығарындылары саласындағы климаттық саясатты құқықтық реттеу: жаһандық сын-қатерлер және Қазақстанның бейімделу жолдары

Мақала климаттың өзгеруі мен экожүйелерді қорғау саласындағы құқықтық реттеуді халықаралық және ұлттық тәсілдерге баса назар аудара отырып, талдауға арналған. БҰҰ-ның Климаттың өзгеруі туралы Негіздемелік конвенциясы және Париж келісімі сияқты негізгі халықаралық келісімдер,

сондай-ақ парниктік газдар шығарындыларын азайтуға және тұрақты экономикалық өсуге бағытталған Қазақстан Республикасының заңнамалық бастамалары қаралған. Шығарындылардың сауда жүйесін, көміртегі бюджетінің нормаларын және экологиялық стандарттарды дамытуды қоса алғанда, халықаралық міндеттемелерді орындау үшін Қазақстан қабылдайтын шараларға ерекше назар аударылады. Зерттеудің мақсаты — климаттың өзгеруіне бейімделу процесінде елдің алдында тұрған қиындықтарды, сондай-ақ «жасыл» технологиялар мен тұрақты дамуды ынталандырудағы құқықтық нормалардың ерекшеліктерін зерделеу. Зерттеу мақсатына қол жеткізу үшін құқықтық талдаудың, салыстырмалы тәсілдің (халықаралық және ұлттық контекстер), деректерді эмпирикалық талдаудың және саясат пен заңнаманы олардың Қазақстанның экологиялық жағдайына әсері тұрғысынан бағалаудың үйлесімі сияқты мақала әдістері таңдалды. Авторлар тұрақты дамуды қамтамасыз ету, энергетикалық қауіпсіздік пен әлеуметтік әділеттілікті арттыру үшін климаттық саясат саласындағы нақты құқықтық нормалардың маңыздылығын атап көрсетеді. Қорытындыда тұрақты даму мақсаттарына неғұрлым тиімді қол жеткізу және шығарындыларды азайту үшін парниктік газдар шығарындыларын азайтуға және төмен көміртекті экономикаға көшуді қолдауға бағытталған заңнаманы жетілдіру қажеттілігіне баса назар аударады.

Кілт сөздер: қоршаған орта, экологиялық заңнама, халықаралық стандарттар, қолайлы қоршаған ортаға құқық, қалдықтарды мемлекеттік реттеу, қалдықтар шығарындылары, парниктік қалдықтар шығарындылары, климаттық өзгерістерді құқықтық реттеу, қоршаған ортаға зиянды азайту, қалдықтармен жұмыс істеу саласындағы нормаларды бұзғаны үшін жауапкершілік, шығарындыларға квоталар саудасы жүйесі, тегін квоталар.

А. Абдижами, Д. Рустембекова

Правовое регулирование климатической политики в области выбросов парниковых газов: глобальные вызовы и пути адаптации Казахстана

Статья посвящена анализу правового регулирования в области изменения климата и защиты экосистем с акцентом на международные и национальные подходы. Рассмотрены основные международные соглашения, такие как Рамочная конвенция ООН об изменении климата и Парижское соглашение, а также законодательные инициативы Республики Казахстан, направленные на сокращение выбросов парниковых газов и обеспечение устойчивого экономического роста. Особое внимание уделено мерам, принимаемым государством для выполнения международных обязательств, включая систему торговли выбросами, развитие норм углеродного бюджета и экологические стандарты. Целью исследования является изучение вызовов, с которыми сталкивается страна в процессе адаптации к изменению климата, а также выявление особенностей правовых норм, стимулирующих «зеленые» технологии и устойчивые развития. Для достижения целей исследования были выбраны методы статьи, которые представляют собой сочетание правового анализа, сравнительного подхода (международный и национальный контексты), эмпирического анализа данных и оценки политики и законодательства с точки зрения их влияния на экологическую ситуацию в Казахстане. Авторы подчеркивают важность четких правовых норм в области климатической политики для обеспечения устойчивого развития, повышения энергетической безопасности и социальной справедливости. Заключение акцентирует необходимость совершенствования законодательства, направленного на снижение выбросов парниковых газов и поддержку перехода к низкоуглеродной экономике для более эффективного достижения целей устойчивого развития и снижения выбросов.

Ключевые слова: окружающая среда, экологическое законодательство, международные стандарты, право на благоприятную окружающую среду, государственное регулирование отходов, выбросы отходов, выбросы парниковых отходов, правовое регулирование климатических изменений, снижение вреда окружающей среде, ответственность за нарушение норм в области обращения с отходами, система торговли квотами на выбросы, бесплатные квоты.

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Features of granting temporary protection status in European Union countries: a comparative legal analysis

This article is devoted to a comparative legal analysis of the granting of temporary protection status in European Union countries. In the context of modern migration crises caused by armed conflicts, the need for effective refugee protection mechanisms becomes a priority for states. The article examines the historical context of the adoption of Directive 2001/55/EC, its long-term inactivity, and its subsequent application to Ukrainian citizens. Particular attention is paid to the practice of implementing temporary protection in EU countries, including urgent legislative initiatives and political decisions aimed at ensuring stability for displaced people. The extension of temporary protection status for Ukrainian citizens until 2026 is analysed, along with its legal basis and impact on European migration policy. The article notes that the extension of temporary protection is based on the political will of EU countries, allowing them to avoid bureaucratic complexities and guarantee support for refugees in the face of continued military threats. This mechanism is considered an effective humanitarian response tool, ensuring the protection of Ukrainian citizens and contributing to legal harmonization within the European Union.

Keywords: European Union law, rights of displaced persons, temporary protection, human rights, refugees.

Introduction

The topic explored in this article, namely the features of granting temporary protection status in European Union countries: a comparative legal analysis is extremely relevant in modern conditions due to several key factors. One of the main factors is the large-scale forced migration processes. Over the past decades, the European Union has faced multiple migration crises, including: the Syrian crisis (2015-2016), during which over 1 million refugees arrived in the EU, and the second crisis related to the consequences of crisis in Ukraine (2022–present), when over 4 million Ukrainians received temporary protection in Europe. These events have highlighted the need for an effective protection mechanism for individuals forced to flee their countries.

Directive 2001/55/EC on "minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons" was adopted in 2001 following mass population displacements in Europe due to armed conflicts in the Western Balkans, particularly from Bosnia and Herzegovina and Kosovo. Since its adoption in 2001, this Directive had never been activated. This system was implemented for Ukrainian citizens.

Methods and Materials

The methodological procedures for the study of this issue are general scientific and special methods of scientific knowledge. The dialectical method of scientific knowledge made it possible to identify and characterize the problems of protecting the rights of Ukrainian citizens to get temporary protection status in the EU countries. The application of the comparative law method made it possible to compare obtaining temporary protection in different EU countries. A comprehensive literature review allowed us to determine the state of research on the issue in Ukraine and other countries. The formal logic method resulted in ways to overcome the problem.

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Results

The analysis of European and international legislation indicates that residents of Ukraine can stay in the EU under three main conditions: as a tourist, by applying for refugee status or international protection, or by obtaining temporary protection in the EU.

The "tourist" status allows for a stay of up to 90 calendar days within the Schengen Area from the date of entry.

The "refugee" status is defined according to the 1951 Refugee Convention. According to the Convention, a refugee is a person who, due to well-founded fears, has become a victim of persecution on the grounds of race, religion, nationality, citizenship, belonging to a particular social group, or political beliefs. The person is outside the country of their nationality and cannot seek the protection of that country or does not wish to do so due to such fears. Generally, to obtain refugee status, a person may apply in the first country of entry. The process for obtaining such status is governed by the Dublin Reglament [1].

Temporary protection is a special status that can be granted in the European Union (EU) to individuals fleeing the conflict in Ukraine. It provides certain rights and access to services for those who are eligible and allows them to stay in EU for a specific period. Temporary protection includes the possibility to receive shelter, social and medical assistance, access to education for children, as well as the ability to work without needing a work permit. This status differs from the status granted based on a temporary residence permit for 30 days, which you can be received at the border of Shengen Area [2].

Temporary protection is an extraordinary EU mechanism activated in exceptional circumstances involving a mass influx of refugees. The EU Temporary Protection Directive was first activated for Ukrainian citizens, providing immediate and collective protection to a large group of displaced persons arriving in the EU and unable to return home.

By adopting this measure, the Member States receive fewer asylum applications, because the rights that temporary protection entails for displaced persons mean that they do not have an immediate need to apply for international protection, overrunning Member States' asylum systems. Temporary protection thus reduces to a minimum the formalities necessary for displaced persons to receive shelter and protection.

Discussion

The legal basis for temporary protection includes: the Directive on Minimum Standards for Providing Temporary Protection of July 20, 2001, No. 2001/55/EC; the Council of the EU Decision on its activation for Ukrainians of March 4, 2022, No. 2022/382; the Commission's Communication on Operational Guidelines for the Implementation of Council Decision No. 2022/382, establishing the existence of a mass influx of displaced persons from Ukraine under Article 5 of Directive No. 2001/55/EC, which results in the implementation of temporary protection; and the legislation of each EU member state. One of the reasons for activating temporary protection as outlined by the Council in Implementing Decision 2022/382 is the risk of collapse of national asylum systems.

The concept of a "mass influx" of refugees, which is key to the implementation of Directive 2001/55/EC, cannot be fully tolerated and does not have a clear meaning. As for the situation in Ukraine, firstly, the EU member states recognized the Ukrainian displacement as a "mass influx", which is the first step towards granting temporary protection. The definition of "mass influx" is considered relative due to several criteria. First, the situation is dynamic, meaning that refugee situations can change rapidly, which makes it difficult to establish static criteria. Second, due to different national contexts, each country has its own specifics: the size of the territory, population, economic development, and existing migration policies, all of which influence how "mass influx" is perceived. Third, political decisions by EU member states and public opinion can affect the interpretation of this concept. Different EU countries may interpret the term "mass influx" in different ways, which may lead to an uneven distribution of responsibility for accepting refugees.

Directive 2001/55/EC was developed for situations involving a mass influx of refugees into the EU. The idea behind this mechanism is to prevent the overloading of asylum systems that are unable to process hundreds of thousands or millions of applications quickly. The European Commission forecasts, depending on various scenarios, between 2.5 and 6.5 million displaced Ukrainians seeking protection in the EU. Representatives of the European Union emphasize that Ukrainians fleeing are considered refugees. However, the directive itself uses a different term — displaced persons. The reason for this is that temporary protection and refugee status are different legal procedures. Persons with temporary protection status may apply for asylum and any other international protection available in the host Member State, which will be responsible for examining such an

application for asylum or international protection (the EU rules on the State responsible for examining the asylum application are therefore not amended), and applicants may submit such an application at any time.

On March 4, the Council of the EU unanimously adopted an executive decision to introduce temporary protection due to the mass influx of people fleeing Ukraine. The decision activates temporary protection for an initial period of one year. This period can be automatically extended for six months, up to a maximum of one year. The European Commission may propose to the Council of the EU to extend temporary protection for another year. The European Commission may also propose to end temporary protection if the situation in Ukraine allows for a safe and sustainable return. The directive does not apply to non-EU European countries (Serbia, Montenegro, Albania, North Macedonia, Bosnia and Herzegovina, Norway, Iceland, Switzerland, and the United Kingdom) — however, many countries have established similar regimes. Individuals who have received temporary protection can move freely not only between EU countries but also within the Schengen Area.

Under Directive 2001/55/EC, displaced persons are third-country nationals or stateless individuals who have had to leave their country and cannot return due to dangerous conditions resulting from the situation in that country, including individuals who have fled areas of armed conflict or epidemic violence.

Temporary protection allows displaced people to enjoy harmonized rights throughout the EU. Displaced people have the right to employment (both the right to be an employee and the right to engage in entrepreneurial activities), opportunities for education and professional retraining, as well as access to the social protection system in the host country, on equal terms with the citizens of that country. Individuals benefiting from temporary protection enjoy the same rights across the EU. These rights include: residence; access to the labour market and housing; medical care; social assistance; access to education for children. The EU Directive on temporary protection sets minimum protection standards. The actual level of assistance may vary between different member states.

The Temporary Protection Directive defines the decision-making procedure needed to trigger, extend or end temporary protection. It also lists the rights for beneficiaries of temporary protection:

- a residence permit for the entire duration of the protection (which can last from one year to three years);
- appropriate information on temporary protection;
- guarantees for access to the asylum procedure;
- access to employment, subject to rules applicable to the profession and to national labour market policies and general conditions of employment;
- access to suitable accommodation or housing;
- access to social welfare or means of subsistence if necessary;
- access to medical care;
- access to education for persons under 18 years to the state education system;
- opportunities for families to reunite in certain circumstances;
- access to banking services, such as the ability to open a basic bank account;
- move to another EU country, before the issuance of a residence permit;
- move freely in EU countries (other than the Member State of residence) for 90 days within a 180-day period after a residence permit in the host EU country is issued [3].

In the article of Olena Malinovska notes that the duration of temporary protection is limited. Initially, it is granted for one year. If the circumstances that lead to forced migration persist, this period is automatically extended twice by six months, thus adding another year. At the same time, the European Commission, which is responsible for ongoing monitoring and analysis of the situation, may at any moment propose to the Council of the EU to end temporary protection if the situation in the country of origin allows for the safe and sustainable return of refugees. Conversely, under other circumstances, the European Commission is authorized to advocate for its extension, but no longer than for one more year. Thus, the total duration of temporary protection cannot exceed three years. Olena Malinovska correctly emphasizes that the institution of temporary protection, over the course of its existence, has first proven its necessity, as there is an objective need for it, and secondly, it has undergone significant development, which included both the clarification of its parameters and their evolutionary changes [4].

As for Spain, considering that the decision to apply Directive 2001/55/EC on temporary protection ensures its compatibility with national systems of temporary protection established after its adoption, the Spanish government has adopted particularly generous internal regulations, especially in the current situation. Thus, after the crisis, it immediately expanded and improved the rights provided in its national system for individuals affected by the conflict in Ukraine, despite already having a more favourable national system than the one outlined in the directive. In Spain, the legal basis for granting temporary protection is Royal Decree 1325/2003 of

October 24, which approves the Regulation on the Temporary Protection Regime in the case of a mass influx of displaced persons, and Law 12/2009 of October 30: this law regulates the right to asylum and subsidiary protection in Spain [5].

Article 23 of the Decree provides the possibility to extend legal stay in Spain, specifically: «If, after the expiration of the temporary protection regime, the circumstances that led to its declaration still persist, beneficiaries may opt for the protection provided under Article 17.2 of Law 5/1984 of March 26, which regulates the rights and status of refugees. Interested individuals must submit an application in person at any of the locations specified in points a), b), c), and d) of Article 4.1 of the Regulation on the Implementation of the aforementioned law, approved by Royal Decree 203/1995 of February 10 [6].

According to the legislation of the Kingdom of Spain, Ukrainian citizens and their family members who left Ukraine after February 24, 2022, or who were already in Spain before that date, may receive temporary protection in Spain. Temporary protection can be requested by contacting the National Police at CREADE (Reception, Care, and Referral Centres) or at police stations authorized for this purpose. The application for temporary protection is reviewed within 24 hours and is valid for no less than one year and no more than three years. Upon granting, the following rights are acquired: residence permit and work authorization for self-employment and employment; access to education and vocational training; social assistance and adequate housing; access to healthcare [7].

Germany has become one of the EU countries that accepted the largest number of Ukrainian refugees. To ensure the legal status and social guarantees for these individuals, the German government developed special regulatory acts. § 24 of the Residence Act (Aufenthaltsgesetz, AufenthaltsG) is one of the most important provisions of German law regulating the provision of temporary protection. This regulation was particularly emphasized due to the large wave of refugees from Ukraine. Individuals who are eligible for protection from Ukraine have full access to the labour market and receive benefits in accordance with the Social Code II and Social Code XII. The employment rate of Ukrainian refugees in the summer of 2023 increased to 19 percent compared to 14.6 percent in 2022. Measures such as the «Turbo Plan for Labour Market Integration» are aimed at faster integration of refugees into the labour market [8].

The Federal Ministry of the Interior and Homeland Affairs of Germany adopted the Regulation on the Temporary Exemption of Displaced Persons from Ukraine. This regulation came into effect on March 9, 2022, and is retroactive to February 24, 2022. The regulation establishes a simplified procedure for the entry and residence of the relevant individuals and provides displaced persons with the necessary time to obtain the right to reside in the federal territory.

The validity of the regulation was limited to May 23, 2022. During this period, it was necessary to submit an application to the competent foreign national's registration department for the issuance of a residence permit in accordance with § 24 of the Residence Act (AufenthaltsG). Ukrainians can apply for a residence permit at the foreign national's registration department in the place of residence or stay. To avoid unauthorized stay, individuals must first submit an informal written application for a residence permit to the relevant foreign national's registration department in the place of residence or stay, providing their personal data (preferably a copy of the passport page with passport details), the reason for stay, and the date of first entry into the EU [9].

In their study, Philipp Heiermann and Kaan Atanisev note that refugees from Ukraine have full access to the labour market once they are granted a residence permit in accordance with Article 24, Paragraph 1 of the Residence Act. Almost a year and a half after the directive was implemented, the employment rate of Ukrainian refugees slightly increased from 14.6 % in 2022 to 19 % in the fall of 2023. However, it can also be anticipated that the actual thresholds for obtaining a residence permit for employment or starting education will remain an obstacle for many affected individuals in March 2025. In this regard, measures must be taken to timely design and develop transition scenarios. Experts also concluded that, despite the growing integration, only a few people have transitioned to other types of residence permits [10].

Conclusions

As mentioned above, the temporary protection mechanism was first launched on March 4, 2022. It was supposed to be valid until March 4, 2025, but on June 25, the EU Council decided to extend temporary protection until March 4, 2026, for more than 4 million Ukrainians seeking safe places to live. In her speech, Nicole de Moor, Belgium's Secretary of State for Asylum and Migration, said: "The situation in Ukraine is very dangerous for many people. And all those who are fleeing can continue to count on our solidarity". In accordance with their national procedures, the EU Member States had to adopt additional implementing acts to formalize the extension [11].

The decision to extend temporary protection until 2026 is based on the political will of EU member states and their readiness to support displaced persons. Although the text of the Directive does not explicitly provide for an extension beyond three years, the EU may invoke Article 78(3) of the Treaty on the Functioning of the European Union (TFEU), which allows for «temporary measures» in the event of emergency humanitarian crises — "If one or more Member States experience an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt temporary measures in favour of the Member State(s) concerned". This mechanism allows the EU to respond quickly to migration crises by adopting special measures to support the member states most affected by the influx of refugees or migrants [12].

As mentioned earlier, the maximum duration of temporary protection is three years (under Directive 2001/55/EC). In cases of prolonged conflicts, this may lead to legal uncertainty for beneficiaries who cannot return to their country of origin. The analysis of scientific articles and other sources allows us to conclude that examples such as the Ukrainian or the Syrian crisis indicate that prolonged conflicts require a more flexible approach to extending protection status. Therefore, experts believe that it is necessary to develop a legal mechanism for the automatic extension of protection status or the simplification of the transition to the asylum procedure.

The EU's decision to extend temporary protection for Ukrainian citizens reflects an effort to avoid bureaucratic complications. Instead of creating a new legal framework or requiring individual asylum applications, temporary protection serves as an efficient and rapid mechanism. Extending it until 2026 ensures stability for displaced persons, given the uncertainty surrounding the duration of the conflict.

I agree with the conclusions published by T. Kortukova in the article, which states that member states should strengthen their cooperation and coordination in managing temporary protection schemes. This includes the exchange of information, best practices, and resources, as well as joint efforts to address common challenges. By implementing these recommendations, the EU can enhance the effectiveness of temporary protection and ensure that it remains a valuable tool for safeguarding the rights of displaced persons during a crisis [13].

The provision of temporary protection to Ukrainians has been an important test for the European refugee protection system. Despite challenges, this experience demonstrates the EU's ability to respond quickly to humanitarian crises and provide protection to the most vulnerable populations. However, for long-term stability and refugee integration, efforts must continue at both the national and European levels.

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Еуропалық одақ елдерінде уақытша қорғау мәртебесін беру ерекшеліктері: салыстырмалы-құқықтық талдау

Мақала Еуропалық одақ (ЕО) елдерінде уақытша қорғау мәртебесін беруді салыстырмалы-құқықтық талдауға арналған. Қарулы қақтығыстардан туындаған қазіргі заманғы көші-қон дағдарыстары жағдайында босқындарды қорғаудың тиімді тетіктерінің қажеттілігі мемлекеттер үшін басым міндетке айналады. Автор 2001/55/ЕС Директивасын қабылдаудың тарихи ахуалы, оның ұзақ мерзімді белсенді болмауы және Украина азаматтары үшін кейінгі уақытта қолданылуын қарастырған. Көшуге мәжбүр болған адамдар үшін тұрақтылықты қамтамасыз ету мақсатында қабылданған шұғыл заңнамалық бастамалар мен саяси шешімдерді қоса алғанда, ЕО елдерінде уақытша қорғауды имплементациялау тәжірибесіне ерекше назар аударылған. Украина азаматтарының 2026 жылға дейінгі уақытша қорғау мәртебесін ұзарту, оның заңды негіздері және еуропалық көші-қон саясатына әсері талданған. Сонымен қатар уақытша қорғауды ұзарту бюрократиялық қиындықтарды болдырмауға және жалғасып жатқан әскери қауіп жағдайында босқындарға қолдау көрсетуге мүмкіндік беретін ЕО елдерінің саяси еркіне негізделгені атап өтілген. Бұл механизм Украина азаматтарын қорғауды қамтамасыз ететін және Еуропалық одақ шеңберінде құқықтық үйлестіруге ықпал ететін гуманитарлық әрекет етудің тиімді құралы ретінде қарастырылған.

Кілт сөздер: Еуропалық одақ құқығы, қоныс аударушылардың құқықтары, уақытша қорғау, адам құқықтары, босқындар.

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Особенности предоставления статуса временной защиты в странах Европейского союза: сравнительно-правовой анализ

Статья посвящена сравнительно-правовому анализу особенностей предоставления статуса временной защиты в странах Европейского союза. В условиях современных миграционных кризисов, вызванных вооруженными конфликтами, необходимость эффективных механизмов защиты беженцев становится приоритетной задачей для государств. В статье рассматривается исторический контекст принятия Директивы 2001/55/ЕС, её продолжительная неактивность и последующее применение в отношении граждан Украины. Особое внимание уделено практике имплементации временной защиты в странах ЕС, включая срочные законодательные инициативы и политические решения, принятые для обеспечения стабильности перемещённым лицам. Анализируется продление статуса временной защиты для украинских граждан до 2026 года, его правовые основания и влияние на европейскую миграционную политику. Отмечается, что продление временной защиты основано на политической воле стран ЕС, позволяя избежать бюрократических сложностей и гарантировать поддержку беженцам в условиях продолжающейся военной угрозы. Данный механизм рассматривается как эффективный инструмент гуманитарного реагирования, обеспечивающий защиту граждан Украины и способствующий правовой гармонизации в рамках Европейского союза.

Ключевые слова: Право Европейского союза, права переселенцев, временная защита, права человека, беженцы.

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Legal mechanisms for citizen participation in decision-making in the field of solid waste management

The aim of this study is to analyze the legal mechanisms for citizen participation in decision-making in the field of municipal solid waste (MSW) management in Kazakhstan, identify legal barriers, and develop proposals for their elimination. The increasing volume of waste, low recycling rates, and environmental risks require a comprehensive legislative approach to strengthening public engagement. The research methodology includes a comparative legal analysis of international experience (EU, USA, Japan, South Korea), an examination of national legislation, and a content analysis of publications addressing the legal regulation of public participation in waste management. The study identifies key challenges that hinder citizen involvement, such as deficiencies in legislation, the formal nature of public hearings, limited access to environmental information, weak digital infrastructure, and the lack of citizen incentive mechanisms. The research findings have led to recommendations for improving legal regulation, increasing transparency in decision-making, introducing a system of incentives for citizens, and digitalizing interaction processes. Integrating effective legal mechanisms for public oversight into waste management is crucial for enhancing the effectiveness of Kazakhstan's environmental policy. Civic engagement supports the implementation of sustainable development principles, strengthens environmental responsibility, and improves the waste management system.

Keywords: legal regulation, municipal solid waste, public participation, legal mechanisms, legislative barriers, public oversight, environmental information, digitalization, international experience, environmental policy, law enforcement practice, sustainable development, government regulation, citizen incentives, public hearings, environmental responsibility.

Introduction

The modern world is facing a growing crisis caused by a large-scale increase in the volume of municipal solid waste (MSW). In the context of urbanization, rapid consumption and the expansion of industrial production, waste has become not only an environmental but also a social problem requiring immediate solution. According to the Ministry of Ecology and Natural Resources of the Republic of Kazakhstan, approximately 4.1 million tons of municipal waste are generated annually in the country, of which only about 24 % is recycled, with the remainder being sent to landfills [1]. These figures underscore the severity of the problem, both for researchers and for the general public. Landfilling waste contributes to soil, water, and air pollution, negatively affecting ecosystems and public health.

International data further confirm the global scale of this issue. According to the United Nations Environment Program (UNEP), the volume of municipal solid waste worldwide reached 2.3 billion tons in 2023, with 38 % being managed in uncontrolled ways [2]. This crisis poses a significant threat to sustainable development, necessitating collective efforts from governments, civil society, and businesses to establish effective waste management mechanisms.

The involvement of civil society holds particular importance in addressing environmental challenges. In his address to the nation on September 1, 2024, President Kassym-Jomart Tokayev [3] emphasized the need to improve the environmental situation in Kazakhstan, highlighting that a commitment to cleanliness and order should become an integral part of the national character. The President stressed that one of the state's key priorities is to protect citizens from negative environmental factors, maintain ecological balance, and foster a culture of environmental stewardship.

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One notable initiative, as highlighted by the President, has been the nationwide environmental campaign “Taza Kazakhstan” (“Clean Kazakhstan”), which engaged approximately 3 million participants and resulted in the collection of over 1 million tons of waste, significantly improving the environmental situation. He called for this campaign to continue on a permanent basis, underscoring that caring for the environment should become a daily norm for every citizen.

A similar approach aligns with the principles of the Aarhus Convention [4], which emphasizes the right of citizens to participate in environmentally significant processes and access relevant information. Caring for nature and responsible attitude to environmental resources are considered not only as a necessity, but also as a strategic direction for the development of the state.

World practice convincingly demonstrates that public involvement in waste management plays a key role in improving the environmental situation and strengthening social cohesion. The examples of the countries of the European Union, Japan, South Korea and the USA confirm that separate waste collection and active participation of citizens can significantly reduce the volume of burial, contributing to the development of a sustainable environmental policy. The experience of developed countries shows that effective waste management is impossible without active interaction with society, which becomes an important partner in achieving environmental goals. However, in Kazakhstan, despite the adoption of the Environmental Code of 2021, significant gaps remain, making it difficult to implement these initiatives. Key problems include insufficient awareness of the population about the existing mechanisms of participation, imperfect legal regulation in the field of public control, as well as limited opportunities for the civil sector to interact with authorities.

To solve the problem, an integrated approach can be effective, combining legislative regulation, the practical implementation of innovative technologies for the management of solid waste and the formation of a culture of citizen participation in decision-making. Society faces not only the task of reducing waste volumes, but also the need to switch to sustainable production and consumption models.

The purpose of the study is to identify prospects for public involvement in waste management, including decision-making and control processes, by analyzing existing legislative mechanisms and developing recommendations for their improvement. Waste management has long been not only a task of the environmental agenda, but also a social necessity. In this context, legislation plays the role of a link between the state, society and business. But how effective is it in creating conditions for citizen participation? This is the central question of the present study.

To date, Kazakhstan’s regulatory framework has demonstrated significant achievements, including the adoption of a new environmental code, which lays the foundations for the transition to a circular economy. However, upon in-depth analysis, there is a feeling that legislation sometimes “closes in” within the framework of declarative norms, without providing real tools for involving the population in the waste management process. The problems are aggravated by the lack of consistency of individual legal acts and the weak integration of international standards into the national system.

The lack of clear mechanisms for public participation leads to the formalization of processes such as public hearings and environmental monitoring. Research shows that the lack of access to information and transparent procedures often generates public distrust of authorities. As the President stressed in his message to the people of Kazakhstan in 2022, it is difficult to achieve sustainable results without the active participation of citizens and their involvement in environmental projects. However, simply urging society to take responsibility will not resolve the issue: legislation should become a tool that stimulates the initiative “from the bottom up” and protects the rights of citizens to participate in decision-making.

The key to overcoming the existing gaps is to increase the openness of the legal system and its adaptation to the challenges of modern ecology. Successful international examples — from strict control over the implementation of environmental standards in EU countries to the development of civil society institutions in South Korea — show that effective legislative policy can not only strengthen environmental culture, but also become an incentive for social and economic transformations. It is important to emphasize that the involvement of citizens should be considered not as a duty, but as a right that allows them to actively influence the improvement of the environmental situation.

The scientific literature has not sufficiently studied the issue of a systematic analysis of interrelated barriers that prevent citizens from participating in the management of solid waste. It is necessary not only to eliminate individual problems, but also to develop a conceptual model of change that will ensure the sustainable participation of citizens in environmental policy.

The research has developed a concept based on five key principles. The first of them is to strengthen the legislative framework. This includes the consolidation of mandatory procedures for public participation and

the creation of public control mechanisms that will allow citizens to influence the adoption of environmentally significant decisions.

Transparency and accountability are the second principle aimed at increasing the availability of information. The openness of data on waste management plans and solutions will be an important step towards restoring trust between society and the state.

To solve the problem of low engagement, we emphasize the need to develop an environmental culture and raise public awareness. This involves the introduction of educational programs and information campaigns that will allow citizens to form an understanding of their role in solving environmental problems.

In addition, an important element of the concept is the creation of a system of incentives, such as grant programs and tax incentives, which will motivate citizens to participate in environmental initiatives. These measures have already proven their effectiveness in international practice and can be successfully adapted in Kazakhstan.

The final element of the concept is the digitalization of interaction processes. It is necessary to develop online platforms that will provide citizens with convenient access to participate in discussions, submit proposals and monitor the implementation of decisions.

The practical application of the proposed concept includes the development of a single digital platform, which will become a central tool for interaction between the state and society. Such a platform will ensure transparency and accessibility of information, simplify the process of citizen participation in decision-making and create conditions for an objective analysis of the effectiveness of waste management.

This study is based on an in-depth analysis of legal norms, an assessment of existing mechanisms of public participation and the development of recommendations aimed at improving them. It aims not only to point out the weaknesses of the legislation, but also to suggest a way to overcome them. This is seen as the main purpose of legal regulation — to serve as a basis for dialogue between the state and society, to support the initiative of citizens and to strengthen trust in the waste management system.

Methods and materials

The research is based on a comprehensive approach, including analysis of legislation, comparative analysis, document analysis and content analysis. As part of the analysis of legislation, the norms of the Environmental Code of 2021 and other normative legal acts regulating the sphere of MSW are being studied. The comparative analysis is conducted in order to study the experience of the countries of the European Union, the USA and Japan in the field of public engagement. The analysis of documents includes the study of scientific publications, reports of public organizations and government agencies, conference materials. Content analysis is used to study media publications on the environmental situation and waste management in Kazakhstan. Normative legal acts, scientific publications, reports of public organizations and government agencies, conference materials and publications in the media are used as research materials. A comprehensive analysis will allow to obtain objective results, identify prospects and formulate recommendations for improving legislation and practice of public involvement in waste management.

Results

In the course of the study, key problems were identified that impede effective public involvement in the management of MSW in Kazakhstan. These problems form a whole complex of interrelated barriers that require a systematic approach to their elimination.

One of the central problems is the lack of elaboration of mechanisms for citizen participation in legislation. The Environmental Code of 2021, although it enshrines the right of citizens to participate, does not contain clear procedures to ensure the implementation of this right. The lack of detailed regulation leads to the formalization of events such as public hearings, which are held without proper transparency and consideration of citizens' opinions. For the public, this creates the impression of the effectiveness of the process, which undermines confidence in government authorities and environmental policy in general.

Another significant obstacle is the limited accessibility of environmental information. Existing legal norms do not provide clear requirements for the format, completeness, or timeliness of data dissemination regarding MSW management. Citizens often lack sufficient information about planned projects and opportunities to participate in their discussion, which hampers their active involvement. Restricted access to information is considered one of the most demotivating factors for civic engagement.

Equally important is the low level of environmental awareness and understanding of citizens' rights among the population. Many citizens fail to recognize the importance of their participation in waste man-

agement processes, which stems from both the absence of educational programs and limited access to information. Data analysis indicates that this creates a "vicious cycle", where low engagement breeds distrust, and distrust further diminishes citizens' motivation to participate.

Infrastructure limitations exacerbate the situation. Inadequate funding for programs aimed at public involvement and the lack of advanced online platforms to facilitate interaction between citizens and government agencies represent significant barriers. In the context of digitalization, the absence of such technologies appears particularly paradoxical and calls for urgent solutions.

The identified barriers are not isolated but are closely interconnected. This interdependent nature of the problems requires a comprehensive approach that considers both legislative and practical aspects.

The research results demonstrate that addressing the issue of public involvement in municipal solid waste management necessitates a systematic approach. The identified barriers and proposed strategies for overcoming them pave the way for the development of a new model of environmental policy, wherein every citizen can perceive their significance and influence in addressing nationwide challenges.

Discussion

The analysis of the existing legislation of the Republic of Kazakhstan in the field of MSW reveals significant state efforts to establish a legal framework aimed at addressing one of the most pressing environmental challenges. Kazakhstan's environmental legislation has undergone substantial evolution with the adoption of the new Environmental Code [5] on January 2, 2021. This document serves as the primary legal instrument regulating waste management issues, including waste collection, recycling, and disposal, as well as environmental protection. It has replaced outdated provisions of earlier regulatory acts, such as the Law "On Environmental Protection" of 1997, which was repealed in 2007, and has clarified the norms of subordinate acts, many of which were subsequently revised or updated, including the order of the Minister of Ecology, Geology, and Natural Resources of the Republic of Kazakhstan No. 575, dated August 16, 2022.

The 2021 Environmental Code reflects a commitment to transitioning to the principles of a circular economy and introduces mechanisms for separate waste collection, recycling, and disposal. Special attention is given to the rights of citizens to participate in environmentally significant processes. The Code mandates public hearings and environmental assessments as compulsory measures; however, their practical implementation remains insufficiently effective. Infrastructure deficiencies, low public awareness, and limited transparency in governmental activities continue to hinder the effective realization of these provisions. The development of new subordinate acts in compliance with the 2021 Environmental Code and the improvement of enforcement practices remain critical for enhancing the efficiency of solid waste management.

While citizens' rights to participate in waste management are formally enshrined in regulatory acts, the mechanisms for their implementation are insufficiently developed. For instance, public hearings, intended to ensure citizen involvement in decision-making regarding the construction of landfills or the introduction of new waste management technologies, are often conducted without adequately considering public opinion. Similarly, environmental assessments, which could serve as tools for public oversight, are limited in their accessibility, undermining public trust in the decisions being made.

Key shortcomings of the current legislation include the lack of clear procedures for citizen engagement. As noted in the research, low public motivation to comply with waste management rules is partially attributable to the lack of effective state-provided incentives. Additionally, insufficient public awareness about waste sorting and disposal regulations, indicative of a lack of transparency in governmental operations and the absence of effective mechanisms for informing the population, exacerbates the problem. Moreover, the lack of clear procedures for public involvement and weak regulations holding the government accountable for failing to comply with public participation norms make public hearings largely a formality.

To address these issues, experts recommend legislative development, including the establishment of clear procedures for involving citizens in decision-making processes and formalizing governmental accountability. Simultaneously, it is essential to enhance transparency by ensuring access to information about plans and decisions in the waste management sector, as well as to introduce incentive systems that motivate citizens to actively participate in these processes [6; 22].

The issues of transparency and accountability in the sphere of MSW in Kazakhstan remain insufficiently regulated. According to a study conducted by the Center for Legal Policy Research [7; 27], despite the existing obligations of state and local authorities to inform the public about plans in the field of MSW, there are no detailed requirements regarding the format and completeness of the provided information. This defi-

ciency leads to insufficient public preparedness for engaging in discussions on environmental issues, ultimately reducing the quality of decision-making processes.

Addressing the challenges of waste management in Kazakhstan requires the strengthening of environmental legislation that would encourage resource users to reduce emissions of pollutants into the environment. Scientific studies [8; 151] emphasize that modern Kazakhstani legislation is oriented towards the adoption of European Union environmental standards, which includes the creation of an electronic waste management system and consistent improvements in waste disposal and recycling systems. Of particular importance in this policy is the principle of producer responsibility, fixed in 2021, which is aimed at involving manufacturers in waste minimization processes and stimulating the use of secondary resources.

Nevertheless, an analysis of the state of the waste management system in Kazakhstan reveals significant problems, including a large number of spontaneous landfills, the lack of waste disposal facilities that meet environmental safety requirements, and a low level of recovery of secondary resources. The violation of recycling technologies and the shortcomings of the regulatory framework are complemented by the lack of an integrated waste management system, including selective collection, sorting, processing and the creation of a secondary raw materials market. In addition, the low level of environmental culture and awareness of the population, limited technological capabilities and the lack of a unified waste monitoring system remain significant obstacles to the development of this area.

A review of international practices demonstrates that the successful involvement of the public in the management of MSW depends on a well-developed legal framework, available interaction tools and the availability of sustainable feedback mechanisms between authorities and citizens. The countries of the European Union, the USA and Japan have accumulated significant experience in this area, which can serve as a guideline for improving the waste management system in Kazakhstan.

In the European Union, waste management is based on the principles of a circular economy, which is reflected in the relevant EU directives. Public engagement plays a key role in these processes. Germany, demonstrating one of the highest rates of waste recycling in the world, actively uses electronic platforms to inform citizens about the separate collection and recycling of waste. These platforms provide data on the structure of waste, the location of processing plants and measures to reduce the environmental footprint. The system of electronic polls and voting allows to take into account the opinion of residents when developing new environmental initiatives, helping to strengthen confidence in the government [9].

In the USA, public participation mechanisms are based on the principle of open governance. At the federal level, digital platforms such as Regulations.gov enable citizens to submit comments and proposals on draft legislation and regulatory initiatives. Additionally, public forums and consultations organized by local authorities are widely used. For instance, in California, local environmental councils hold regular meetings with citizens to discuss waste management issues, ensuring that decisions are made with consideration of public opinion.

Japan stands out for its approach to engaging citizens through educational programs and the promotion of a culture of waste segregation. The country actively conducts awareness campaigns via schools, local communities, and the media. Japanese legislation guarantees mandatory public notification of waste management measures and provides opportunities for participation in environmental councils established at the municipal level [10].

Feedback mechanisms between the public and authorities in these countries range from simple electronic submissions to complex integrated monitoring systems. Feedback is a key component of effective governance, particularly during periods of reform and transformation. It allows for the consideration of diverse societal interests, the adjustment of regulatory methods, and balanced decision-making, thereby fostering public trust in governmental institutions.

Among the key trends in the development of feedback mechanisms are decentralization and the deconcentration of power. In Italy, for example, these trends are implemented through consultative meetings between central and regional authorities. The boundaries within the state apparatus are becoming increasingly blurred, as private entities and civic groups, such as chambers of commerce and universities, are included in governance processes, making administration more inclusive. Public and business participation also plays an increasingly significant role. In the United States and Japan, mechanisms exist that allow citizens and entrepreneurs to submit proposals on critical economic decisions. The development of lobbying institutions in the United States, Canada, and European countries, including Austria and Germany, is regulated by specific laws that ensure transparency in interactions between the private sector and the government. Monitoring systems conducted by both governmental and independent organizations facilitate objective evaluations of gov-

ernance effectiveness. External monitoring, like other feedback mechanisms, enhances transparency, strengthens societal trust, and contributes to the more efficient implementation of public policies [11; 2].

Legislative guarantees for citizen participation in environmental initiatives are a cornerstone of effective waste management governance. The Aarhus Convention, signed by most European countries, explicitly enshrines the right of citizens to participate in decision-making, access environmental information, and seek justice in environmental matters. These principles have been successfully integrated into the national legislation of EU countries, making public participation not merely a recommended practice but a mandatory component of environmental policy.

The applicability of these practices in Kazakhstan appears to be significant; however, their adaptation requires consideration of national specificities. First, it is essential to develop digital infrastructure that enables citizens to participate in environmental initiatives remotely. Second, ensuring the availability of information regarding waste management and related measures through electronic platforms and public registries is critical. Third, legislative changes are necessary to guarantee citizen participation in decision-making processes and to establish effective feedback mechanisms.

The integration of these practices, tailored to Kazakhstan's realities, has the potential to foster a more sustainable and transparent waste management system. Experiences from other countries demonstrate that active public participation not only enhances environmental conditions but also promotes a culture of environmental responsibility across society.

Public involvement in MSW is a cornerstone of sustainable environmental governance. Despite the legal provisions granting citizens the right to participate, public engagement in practice often encounters numerous obstacles. These challenges constitute a complex network of issues, each closely interlinked, amplifying their cumulative impact.

At the primary level, administrative barriers impede citizens' access to decision-making processes. The key difficulty lies in the inefficiency of procedures and the lack of accessible information. Public hearings, which could serve as a vital tool for public engagement, are frequently conducted in a perfunctory manner, lacking transparency. Notifications about such events are often limited, and their organization fails to consider the convenience of citizens — timing and locations may not be conducive for broader audiences. This lack of transparency deprives the public of the opportunity to adequately prepare and participate in discussions. This raises the question: if the state formally invites citizens to engage but fails to provide the necessary conditions, how meaningful is the right to participation?

These administrative challenges are closely tied to legal barriers. Although the 2021 Environmental Code affirms citizens' right to participate, it lacks clear procedural guidelines for public involvement. For instance, the legislation does not specify how citizen proposals made during public discussions should be addressed by authorities, nor does it provide mechanisms for appealing their disregard. This legal "silence" fosters a perception of procedural formality and erodes public trust in the potential for meaningful influence on environmental policy.

In this context, social barriers further exacerbate the alienation of citizens from decision-making processes. Low levels of environmental awareness and limited public knowledge of their rights amplify societal passivity. People either do not know how they can contribute to change or do not believe their voices will be heard. As a result, a vicious cycle emerges: the lack of public involvement leads to an absence of successful examples of collaboration between the state and society, which in turn deepens public mistrust.

These challenges are compounded by the lack of technical infrastructure that could facilitate interaction between the state and citizens. In the era of digitalization, many countries actively implement online platforms for submitting proposals and participating in environmental discussions. In Kazakhstan, such technologies are still in their infancy. Offline formats, such as public hearings, remain predominant, but their organization is often challenging and not always accessible to a wide audience. The absence of modern digital tools not only limits citizen participation but also reduces the effectiveness of government-public interaction.

These conclusions are supported by the outcomes of the conference held in Astana, where issues of public participation in decision-making processes on environmental matters were discussed. The conference materials addressed challenges related to citizens' access to environmental information and the obstacles they face when engaging in decision-making processes. Particular attention was paid to the implementation of the Aarhus Convention in Kazakhstan. The discussions highlighted the country's environmental "hotspots", the impact of pollution on food quality, the medical consequences of exposure to pollutants, the relevance of maintaining a pollutant registry, and the role of small grant programs in addressing local environmental problems [12].

Additionally, Aigul Solovyova, Chairperson of the Board of the Association of Environmental Organizations of Kazakhstan, proposed strengthening mechanisms for public oversight by establishing a unified environmental digital platform. According to her, an accessible database would ensure transparency, allow for monitoring and analysis, and reflect the recognition of the need to digitize public engagement processes in environmental issues [13].

Funding is a critical prerequisite for overcoming the aforementioned barriers. Organizing quality events, information campaigns, and establishing technical infrastructure require significant resources. Currently, budget allocations for such programs in Kazakhstan are limited, which hinders the implementation of promising initiatives for public involvement. Despite calls from the President of Kazakhstan to support domestic scientists and promote the development of science, grant funding remains insufficient to fully develop programs for citizen participation in environmental matters [14].

These interrelated barriers create a complex web of challenges that obstruct the development of an effective system for public involvement in decision-making. Each existing barrier undermines public trust in waste management processes. A comprehensive approach is required to ensure meaningful public engagement in waste management. This approach must address legal gaps, incorporate modern technologies, enhance environmental literacy, and increase funding for relevant programs. Efforts to overcome these barriers should not be limited to resolving isolated issues but should also aim to establish a system in which every citizen feels valued and accountable for addressing environmental challenges.

Kazakhstan's current environmental legislation reflects notable progress in integrating sustainable development principles. However, the existing legal framework requires further refinement to enable the public not only to participate formally in decision-making processes but also to exert tangible influence over MSW management. Addressing this issue necessitates not just closing specific legal gaps but also rethinking the underlying concept of state-citizen interaction to develop a more transparent and accessible system.

One of the primary objectives of such reform is the introduction of mandatory public participation procedures. At present, mechanisms for citizen engagement, such as public hearings, are insufficiently regulated. The explicit legislative establishment of obligatory procedures, including requirements for their organization, public notification, and incorporation of citizen feedback, could significantly enhance public perceptions of their role in environmental policymaking. Legislative examples from the European Union demonstrate that well-defined participation frameworks foster trust in decision-making processes. In Kazakhstan, however, the absence of such norms creates an impression of procedural formalism, undermining their effectiveness.

This issue is closely linked to the need for the development of public oversight institutions that could ensure adherence to the principles of transparency and accountability. Currently, these institutions operate on a voluntary basis without robust legal support, limiting their potential impact. Codifying the rights of public organizations and grassroots groups to conduct independent monitoring of environmental compliance, along with imposing obligations on public authorities to review the outcomes of such monitoring, could enhance the significance of public oversight. It is crucial not only to grant citizens the right to oversight but also to mandate government bodies to incorporate the results into their activities.

However, even with strong public oversight institutions, the system's effectiveness will depend on the accountability of public authorities in considering public opinion. This remains one of the most vulnerable aspects of Kazakhstan's legal framework. The adoption of regulatory acts obliging public authorities not only to receive proposals from citizens but also to provide reasoned responses regarding their acceptance or rejection would be a step toward creating a genuinely dialogic model of interaction. Such transparency is essential for strengthening citizens' trust in government structures, without which meaningful public participation is unlikely.

To further motivate citizens, obligations must be complemented by incentives for active participation. One effective mechanism could be grant programs supporting environmental initiatives such as organizing separate waste collection or participating in environmental monitoring. Tax incentives for individuals and companies actively involved in such initiatives could also serve as significant motivators. International practices, such as those in South Korea, demonstrate that financial incentives for environmental activity encourage not only citizen engagement but also the development of environmentally responsible businesses.

As the final link in this chain of changes, the potential of modern technologies should be considered. Digitalizing participation processes, including the creation of online platforms for submitting proposals, conducting public hearings, and accessing environmental information, would significantly simplify interactions between citizens and the government. The implementation of such technologies, accessible to broad seg-

ments of the population, could minimize barriers related to time constraints or procedural complexity, thereby improving the responsiveness of feedback mechanisms.

All these changes are interconnected: clear regulation of participation procedures will be effective only with the presence of oversight mechanisms, and their implementation is impossible without governmental accountability. Incentives and digitalization, in turn, can act as catalysts to ensure citizen engagement and strengthen trust in the system. The proposed measures will not only address current gaps but also establish conditions for the sustainable development of environmental policy, where every citizen feels their significance and responsibility.

Effective waste management largely depends on the active involvement of citizens in decision-making and the implementation of environmental initiatives. International experience demonstrates that public engagement not only enhances the quality of environmental policy but also strengthens societal trust in government institutions. It is worth noting that the success of such practices is rooted in a comprehensive approach that combines legislative support, educational programs, and the stimulation of public activity.

Conclusions

The conducted study has identified and systematized key challenges hindering effective public engagement in MSW management in Kazakhstan. The analysis revealed that the primary barriers include deficiencies in the legislative framework, insufficient regulation of citizen participation procedures, the formal nature of public hearings, limited access to environmental information, a low level of environmental awareness among the population, and a lack of funding and modern technical infrastructure.

Within the framework of the research, a conceptual model of a comprehensive approach to addressing these issues was developed. This model encompasses the improvement of legislation, enhancement of transparency and accountability of government authorities, promotion of environmental awareness, implementation of incentive systems for citizens, and the integration of modern technologies. These measures aim to eliminate barriers, improve the effectiveness of environmental policies, and establish a more sustainable waste management system.

The scientific value of the study lies in its comprehensive analysis of interrelated barriers to public engagement, as well as in the development of well-founded recommendations for overcoming these obstacles. The practical significance is reflected in the potential application of the proposed solutions to refine the regulatory framework and to design and implement environmental initiatives aimed at fostering active public participation in MSW management.

The results obtained can be utilized by government authorities to develop and implement more transparent and effective environmental policies and by public organizations to enhance the quality of their activities in the field of environmental protection. Furthermore, these findings may serve as a foundation for further academic research aimed at developing new approaches to engaging citizens in decision-making and oversight processes in waste management.

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А.А. Нукушева

Қатты қалдықтарды басқару саласында азаматтардың шешім қабылдау процестеріне қатысуының құқықтық тетіктері

Зерттеудің мақсаты Қазақстанда тұрмыстық қатты қалдықтарды (ТҚҚ) басқару саласында азаматтардың шешім қабылдау процестеріне қатысуының құқықтық тетіктерін талдау, заңнамалық кедергілерді анықтау және оларды жою бойынша ұсыныстар әзірлеу. Қалдықтардың көлемінің артуы, оларды қайта өңдеу деңгейінің төмендігі және экологиялық қауіптердің күшеюі азаматтардың белсенді қатысуын қамтамасыз ететін кешенді құқықтық тәсілді қажет етеді. Зерттеу әдістеріне халықаралық тәжірибені (ЕО, АҚШ, Жапония, Оңтүстік Корея) салыстырмалы-құқықтық талдау, Қазақстан Республикасының экологиялық заңнамасын зерттеу және қалдықтарды басқару саласындағы қоғамдық қатысу мәселелеріне арналған ғылыми жарияланымдарды контент-талдау кіреді. Зерттеу нәтижесінде азаматтардың қалдықтарды басқару жүйесіне қатысуына кедергі келтіретін негізгі проблемалар анықталды. Олардың қатарында заңнаманың жетілмегендігі, қоғамдық тыңдаулардың формалды сипаты, экологиялық ақпаратқа қолжетімділіктің шектеулігі, цифрлық инфрақұрылымның әлсіздігі және азаматтарды ынталандыру механизмдерінің жеткіліксіздігі бар. Зерттеу нәтижелері құқықтық реттеуді жетілдіру, шешім қабылдаудың ашықтығын арттыру, азаматтарды ынталандыру жүйесін енгізу және өзара әрекеттесу процестерін цифрландыру бойынша нақты ұсыныстар әзірлеуге мүмкіндік берді. Қоғамдық бақылаудың тиімді құқықтық тетіктерін қалдықтарды басқару жүйесіне интеграциялау Қазақстанның экологиялық саясатының тиімділігін арттырудың маңызды шарты. Азаматтардың белсенді қатысуы тұрақты даму қағидаттарын жүзеге асыруға, экологиялық жауапкершілікті арттыруға және қалдықтарды басқару жүйесін жақсартуға ықпал етеді.

Кілт сөздер: құқықтық реттеу, тұрмыстық қатты қалдықтар, қоғамдық қатысу, құқықтық тетіктер, заңнамалық кедергілер, қоғамдық бақылау, экологиялық ақпарат, цифрландыру, халықаралық тәжірибе, экологиялық саясат, құқық қолдану практикасы, тұрақты даму, мемлекеттік реттеу, азаматтарды ынталандыру, қоғамдық тыңдаулар, экологиялық жауапкершілік.

А.А. Нукушева

Правовые механизмы вовлечения граждан в процессы принятия решений в сфере управления твердыми отходами

Целью исследования является анализ правовых механизмов вовлечения граждан в процессы принятия решений в сфере управления твердыми бытовыми отходами (ТБО) в Казахстане, выявление правовых барьеров и разработка предложений по их устранению. Рост объемов отходов, низкий уровень переработки и связанные с этим экологические риски требуют комплексного законодательного подхода для активизации общественного участия. Методология исследования включает сравнительно-правовой анализ международного опыта (ЕС, США, Японии, Южной Кореи), изучение национального законодательства, а также контент-анализ публикаций, посвященных правовому регулированию общественного участия в управлении отходами. В ходе исследования выявлены ключевые препятствия, затрудняющие вовлечение граждан: несовершенство законодательства, формальный характер общественных слушаний, ограниченный доступ к экологической информации, слабая цифровая инфраструктура и недостаток механизмов стимулирования граждан. Результаты исследования позволили разработать рекомендации по совершенствованию правового регулирования, повышению прозрачности принятия решений, внедрению системы стимулов для граждан и цифровизации процессов взаимодействия. Внедрение эффективных правовых механизмов общественного контроля в управление отходами является важным условием повышения эффективности экологической политики Казахстана. Гражданская активность способствует реализации принципов устойчивого развития, укреплению экологической ответственности и совершенствованию системы управления отходами.

Ключевые слова: правовое регулирование, твердые бытовые отходы, участие общественности, правовые механизмы, законодательные барьеры, общественный контроль, экологическая информация, цифровизация, международный опыт, экологическая политика, правоприменительная практика, устойчивое развитие, государственное регулирование, стимулирование граждан, общественные слушания, экологическая ответственность.

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The rule of law and digital transformation of public administration

The purpose of the article is to consider the importance and necessity of achieving an optimal balance between ensuring the fundamental rights of the individual and the principles of the rule of law in the context of the rapid development of information and communication technologies, digitalization of all spheres of public life and public administration. Since as a result of widespread digitalization, the individual, society and the state interact in a new format of digital reality. Despite the obviousness of the thesis put forward, a legal analysis of the digitalization processes taking place in Kazakhstani society, the identification of risks and threats to individual rights, along with the development of recommendations for ensuring the principles of the rule of law, is necessary. The methodological basis of the study was general scientific conceptual approaches, as well as approaches and methods that are inherent in modern legal science. As one of the main methods, discourse analysis of regulatory documents and scientific materials was used, which made it possible to study the existing opinions and results in matters of interaction between the individual, society and the state. The achieved results are expressed in the fact that the authors considered the role of the state in relations with citizens and other institutions of civil society that function in the new digital reality. Particular attention is paid to the responsibility of the state for the correct construction of an information society based on modern digital technologies. As a result of the study, the authors come to the conclusion that the creation of digital reality has both positive and negative aspects that affect the functioning of state power and the principle of the supremacy of law. The authors state the need to strengthen information security issues, since the digital reality created on the basis of information and communication technologies requires careful legal regulation and protection.

Keywords: The rule of law, supremacy of law, human rights, digitalization, principles of law, e-government, digital technologies.

Introduction

The widespread introduction of information and communication technologies has created a digital world that influences the existing institutions of society, in terms of transforming the mechanism of relationships between the individual, society and the state. This is what we see in public administration, where openness and transparency of the activities of government bodies has become one of the priorities, and of course in the format of interaction with them, both citizens and civil society institutions.

The process of digitalization has given impetus to the active participation of citizens in the management of state affairs, and to the strengthening of public control over the activities of government bodies. Most

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countries have undertaken digital initiatives and created all the conditions for expressing opinions (for example, publishing draft legal acts), consulting citizens (for example, on tax, pension and labor legislation) and providing citizens with the opportunity to participate in decision-making and online voting (using Internet applications). This is due to the opened-up communication opportunities due to the introduction of new technologies, the development of the Internet with an increase in users. Citizens take part in the discussion and examination of draft legal acts on online platforms; express their point of view on the actions of government and administration bodies in social networks, exercise public control in accordance with the law, etc. It should be noted that the participation of citizens in the above processes is quite effective due to the fact that the opinions of Internet users are taken into account by government and administration bodies, since the state itself has become an active subject of digitalization and informatization.

The Republic of Kazakhstan has adopted a number of program documents in the field of digitalization that are aimed at distributing the efforts of government bodies to solve the main problems of digitalization in the areas of: developing a legal framework, providing public services, ensuring information security, protecting the rights of citizens and their personal data. In particular, the Concept of Cybersecurity ("Cyber Shield of Kazakhstan") [1], Strategy "Kazakhstan-2050": a new political course of an established state [2], the Concept of Development of Public Administration in the Republic of Kazakhstan until 2030 [3], the Concept of Legal Policy of the Republic of Kazakhstan until 2030 [4] and others. The designated documents indicate a change in the role of the state in relations with citizens and other civil society institutions, which also function in the new digital reality. This is due to the fact that the state itself is being transformed into an era of total digitalization and information openness, which is expressed in the creation of the Electronic Government portal (eGov.kz) with the ability to receive public services in a new format and the development of electronic document management.

The development of information and communication technologies and the formation of an information society have led to the emergence of an innovative direction in public administration and, in general, the basis for interaction between the state, society and the individual — electronic government (e-government). In these conditions, regardless of the principles and objectives, the reform of national governments is aimed at introducing information and communication technologies into the sphere of public administration to improve internal and external socio-economic and political interaction, increase the efficiency and quality of public services.

At the same time, the digitalization process has brought not only positive aspects to the life of society, but also left open a number of questions that require answers. Firstly, society must be prepared for further strengthening of digitalization processes and expansion of citizens' participation in the management of state affairs. Secondly, interaction of citizens, civil society institutions and the state in the format of digital space will require constant improvement, since this is a new format of relationships. Thirdly, building a client-centric state that will be focused on the individual requires strengthening information security issues, since the digital profile of the citizen being formed requires protection.

This article is devoted to the study of the identified issues.

Methods and materials

In order to obtain the most reliable scientific results, this study used a methodological toolkit determined by its subject.

The methodological basis of the study was philosophical, general scientific conceptual approaches, as well as approaches and methods that are inherent in modern legal science.

Using a dialectical approach, the legal forms of implementing the functions of the Republic of Kazakhstan as a legal state in their development and interaction were considered, changes that occurred in the context of digitalization were identified, and elements of the principle of the supremacy of law were considered. It determined the use of such a general scientific approach as an activity-based one, which made it possible to interpret the implementation of public administration through socially significant actions of subjects. Thanks to the techniques and means of structural and functional analysis, through the structure of legal activity and the interrelations between its elements, the legal forms of implementing the functions of the Republic of Kazakhstan as a legal state were characterized. Within the framework of the synergetic approach, the Republic of Kazakhstan was characterized as a dynamic system, the functions of which as a state governed by the rule of law are formed under the influence of both internal and external factors, and a choice is made and a new system is created in new digitalization processes. As one of the main methods, discourse analysis of regulatory documents and scientific materials was used, which made it possible to study the existing opin-

ions and results in matters of digitalization and interaction in these conditions of the individual, society and the state, and also made it possible to develop recommendations for improving the norms of the current legislation in the field of public administration of digitalization.

The work uses the provisions of the concepts of a democratic, legal, social state, which determine the model of the modern state of the Republic of Kazakhstan, which stipulates the content of Article 1 of the Basic Law of the country. The entire research process was accompanied by logical techniques (analysis, synthesis, induction, deduction, abstraction, generalization, analogy, modeling), which made it possible to clarify a number of provisions of the classical theory of the rule of law in the new conditions of digitalization.

In recent years, research in this area has increased, as the process of using information and communication technologies is gaining momentum. The researchers substantiate the need for "analyzing the specific relationships between good governance and the supremacy of law, as well as guaranteeing the observance of citizens' rights without abuse and corruption, taking into account the wave of digital technologies during the current Fourth Industrial Revolution" [5; 14.]. It is also assumed that there are: "positive and negative aspects in the process of the influence of digital technologies used in the information society on democracy, human rights and the supremacy of law in general" [6; 991], which can be agreed with when analyzing this aspect of the problem in our country. This thesis is confirmed by other researchers who believe that "the growth of digital technologies has led to the emergence of digital private and public powers that create significant social risks, challenge human rights and change the supremacy of law" [7; 3]. The increase in the number of studies of this kind indicates the growing relevance and significance of this issue in the context of Kazakhstan's realities.

Results

In the early 90s, a new era began in the Republic of Kazakhstan, which was marked by important transformations in state building, which was enshrined in Article 1 of the Constitution of the country: "The Republic of Kazakhstan asserts itself as a democratic, secular, legal and social state, the highest values of which are man, his life, rights and freedoms" [8].

According to the constitutional and legal norm, the Republic of Kazakhstan in its functioning and development is guided by the basic principles of a legal and democratic state, recognizing man and his rights as the highest value. And this suggests that in order to build a truly legal state, it is necessary to ensure and protect the fundamental rights and freedoms of man and citizen, extolling the universal value over the interests of the state.

In the legal literature, there are many approaches to defining the rule of law, identifying its features and essence, but they all agree on one thing: it is based on law and justice. In particular, Yu.A. Tikhomirov said that the persistent need for a just state gave rise to the idea of a rule of law [9; 17].

We believe that it is no coincidence that the Head of State K.Zh. Tokayev, speaking in 2022 with the Address to the people of Kazakhstan, entitled it "A Just State. A United Nation. A Prosperous Society", focusing on increasing the population's trust in the state, which is the cornerstone in the context of digitalization and information openness. After all, the modern digital world is changing the established principles of communication, on the one hand, making it possible to freely, openly and promptly express one's point of view, and and on the other hand, strengthening the state's ability to subject an online opponent, such as an Internet user, to complete control and isolation (blocking). In other words, the new digital reality, under the influence of rapidly developing information technologies, is changing the interaction between the state, citizens and civil society institutions, increasing the degree of participation in government decision-making, and at the same time providing an opportunity to control state power, which has always been the only dominant force. It is necessary to recognize that although state power is the dominant factor in the governance of the rule of law, it is stabilized by the principles of the supremacy of law and the protection of human rights. And as researchers note: "Despite the achievements of science and technology since the industrial revolution, no technological force has significantly changed this tripartite order" [7; 4]. However, the development of information and communication technologies and the emergence of the global Internet significantly affect human rights, state power and the supremacy of law. Studying the process of digitalization and its impact on state power, it is necessary to recognize the validity of the thesis that "the introduction of electronic technologies — the common good of the present and the future — should be carried out subject to compliance with the principle of the supremacy of law — also a generally recognized constitutional value" [10; 77.]. Since in modern Kazakhstani society, which is in line with the influence of digital information technologies and the Internet, the state and law are under pressure, which is reflected in

all spheres of public life. The state introduces new digital technologies by creating a legal basis for their functioning, and at the same time bears responsibility for the correct construction of an information society based on modern technologies applied everywhere in all spheres of the economy, politics and in the development of legislation. The e-government portal operating today in Kazakhstan is the initial stage of the introduction of digital technologies that significantly affect all subjects of this process (individual, society and the state). This thesis is noted by researchers who believe that "e-government is the first step towards building a government on new digital technologies" [11; 25]. Agreeing with this opinion, we state that the modern world presents new conditions for the further development of digital reality, which we are obliged to introduce into public life and government activities to avoid falling behind high-tech nations. And it is quite reasonably and fairly indicated in the legal literature: "the development of digital government practices contributes to the development of digital democracy" [12; 6]. This is precisely the digital world where digital tools should be the flagship in management procedures with the participation of all members of society and in the possibility of limiting the institutions of power.

In Kazakhstan, a lot of work has been done to expand informatization and implement the concept of "electronic government", which has improved the system of state governance and reached a fundamentally new, higher level — the formation of Kazakhstan as a "digital state". And this is not just a change in the term "electronic" to "digital", but a focus on changing the substantive characteristics of state governance, creating a simplified format for interaction with citizens of the country. In recent years, there have been many studies devoted to the transformation of electronic government into digital, on the basis of which it is possible to derive general characteristics that will be modernized: increasing the influence of the global Internet on the life of modern society and state development in general; increasing the share of Internet technologies in the daily implementation of citizen rights and in interaction with government agencies; enhancing citizen participation in the management of public affairs, including changing the methods of participation, which will be facilitated by digital technologies. The growing role of the global Internet in the life of society and the state, the gradual increase in its influence on the rights of citizens, the expansion of the possibilities of its use in the political and legal system of the modern state, prompted the need to study it, in connection with which the hypothesis of a "digital state as a form of post-state world order" was put forward in the legal literature [13; 103]. In solidarity with it, we believe that the vector for the development of a digital state is the future for all countries, since digital technologies are increasingly being introduced into the process of communication between citizens and government bodies every day, as well as in the expansion of electronic governance. And the coordination of powers is deduced as the main principle of electronic governance [14; 18]. The category of "electronic government" was initially reflected in the repealed Law of the Republic of Kazakhstan dated January 11, 2007 No. 217-III "On Informatization", and then in the adopted new Law of the Republic of Kazakhstan dated November 24, 2015 No. 418-V "On Informatization". The differences in the normative provisions of the said acts on what constitutes the category of "electronic government" are seen in the change of its essence from "state management system" to "information interaction system". The importance of such terminological clarification is that the country's progress towards the creation of a digital government will ultimately allow the constitutional characteristics of the Kazakh state to be filled with updated content and will lead to the creation of a new format of interaction, based on the principle of open, transparent and direct dialogue between the state and all subjects of civil society.

The tasks of the electronic government: ensuring the process of information communication between all government bodies, developing unified databases of information; implementation of services by government bodies using electronic means in a simple form and without restrictions; supporting the development of an electronic market for goods and services in order to increase the competitiveness of domestic industries at the global level; developing electronic democracy; improving the standard of living of the population; introducing an electronic voting system and electronic legal proceedings, etc. The content of e-government lies in the integration of all governmental structures through the use of internet technologies into a unified system that aligns internal processes with a single user interface. This is why the user is given the opportunity to interact not with multiple separate units sequentially, but with a single electronic intermediary that represents all departments.

So, we can say with confidence that the electronic government of any country is aimed at solving three interrelated key issues: providing citizens and businesses with effective means of receiving various electronic services; providing the state apparatus with effective means of decision-making and rendering administrative services; organizing electronic interaction between authorities, citizens and businesses. At the same time, e-government also plays a major role in improving quality, improving the supply system, analyzing and evalu-

ating decisions, and ensuring control over the activities of government agencies. Such a diverse role of e-government in modern society is especially important from the standpoint of building a legal state associated with the technologies of the digital age, since a modern state is obliged to ensure the maintenance and reasonable adaptation of the principle of the supremacy of law in public administration, namely such aspects as: legality, fairness and expediency of the exercise of state power; equality of all before the law and the court; protection of the individual and fair justice; openness and transparency of the exercise of state power; compliance with the norms of the Constitution and the implementation of constitutional control, etc.

The rule of law, which is developing in line with the modern digital reality, is an important condition for the implementation of the idea of a client-centric (client-oriented) state, perceiving it as the goal of implementing the democratic principles of state building. In addition, the conceptual frame of digitalization processes has become the model of a "listening state", which emphasizes feedback from the public, taking into account its ideas, opinions and criticism.

Special attention in the context of considering the digitalization of all spheres of public life and public administration deserves the provision and protection of human rights. Foreign researchers also draw attention to this, believing that "these days, the boundaries between physics, digital technologies and biology are erased, the Internet is easy to use, the legal system does not respond in time, legal and technical control is weak, and actions are taken that violate human rights and interests" [5; 16].

The main target of violations is the right to privacy of citizens, since personal information about a citizen (the so-called "digital profile") is the main element of the electronic public administration mechanism. The totality of personal data of each citizen of the Republic of Kazakhstan, located on the web portal of the "electronic government", includes the most complete information about the person, his/her life activity and is differentiated depending on the state bodies providing certain public services. Undoubtedly, the web portal "Electronic Government" has the ability to accumulate information about a citizen from almost all portals of state bodies, which allows it to be quickly transferred at the request of the applicant. In addition, the system of collecting personal data, its storage and use is automated, since the volume of personal data that the Electronic Government has is very extensive. At the same time, despite the careful legal regulation of the technical process of personal data circulation, there is a periodic threat of violation of the confidentiality of stored information, which causes concern among citizens. Despite all the efforts of the state, the level of legal regulation and protection of personal data has a number of errors that do not allow for the full safety of the collected confidential information for the functioning of the electronic government. The researchers see the reason for the poor protection of personal information in the fact that the traditional legal concept does not take into account the new circumstances of the digital reality and does not distinguish between online and offline environments, which has led to the emergence of opportunities to violate the privacy regime.

Discussion

As of today, the situation in the field of personal data protection has become one of the key factors of social concern in Kazakhstan, affecting the effectiveness of ensuring the information security of the state. This has become especially noticeable against the background of recent years, when almost every few months the media started talking about leaks of confidential data of Kazakhstanis. That is, the confidentiality of personal data is often violated in ways that the owner of this data does not know about, which indicates the latency of this problem. As a rule, these are customer databases that are sold or transferred by employees of companies, banks, government agencies, etc. for various reasons, as well as personal data obtained through blackmail, threats, espionage. This may be resentment for dismissal from work, pursuit of profit, a desire to ruin the reputation of the organization and much more. It is precisely this personal data, obtained illegally, and not as a result of a technical failure or data leak, that is in high demand on the sales market.

Many Kazakhstanis are not informed about such illegal distribution of personal data until they encounter adverse consequences, which are manifested in the illegal use of data by strangers or organizations. Essentially, this involves receiving advertising emails and notifications from various companies where a person has never registered or made a purchase, yet their email or mobile phone number is in the company's client database. Moreover, this is the most harmless of the encountered violations of personal data of Kazakhstanis, since their illegal use brings quite a lot of moral, material, financial losses. In particular, as a result of unauthorized access to personal data, their illegal use is becoming increasingly widespread among various fraudsters and cybercriminals. Basically, these are illegal manipulations with personal data in the field of banking services: issuing a loan to a third party, gaining access to and using other people's payment cards, bank accounts, electronic digital signatures, etc. However, in addition to such violations that threaten the well-being

of an individual citizen, the illegal receipt and use of personal data can also turn into a problem for ensuring the national security of the state. As a rule, such situations are typical in the field of espionage in the field of personal data of citizens. For example, on February 20, 2024, information appeared on social networks that data of Kazakhstanis was found in a leak of Chinese government documents [15]. A completely natural question arises: where does personal information about citizens of a neighboring state come from in Chinese government documents, for what purpose and how was this information collected? At present, the national security agencies of the Republic of Kazakhstan, together with the Ministry of Digital Development, Innovation and Aerospace Industry, are trying to understand the current situation. Neither the state bodies of Kazakhstan nor the technical infrastructure of organizations engaged in their collection, accumulation and storage were prepared for such resonant situations in the sphere of personal data.

Thus, the state, as the initiator of the introduction of information and communication technologies in the management process, must ensure the security of all entities involved, making the sphere in which all the information necessary for the effective exercise of state power secure. This is particularly important since the management of digital platforms raises key constitutional issues. After all, in connection with the development of digitalization in public administration, we are talking not just about the organizational and technical design of functions, but about the emergence of digital power that accumulates the ability to influence with the help of information resources. Researchers also point to this, believing that when managing digital platforms, it is necessary to take into account the values of the supremacy of law and the constitutional rights of the individual [16].

Thus, the question of legitimacy in the management of digital platforms arises. Today, the operator of the information and communication infrastructure of the "electronic government" is JSC "National Information Technologies", created in accordance with the Resolution of the Government of the Republic of Kazakhstan dated April 4, 2000 No. 492 "On the development of a single information space in the Republic of Kazakhstan". However, the need to modernize the eGov portal by placing it on a large platform was discussed, since it currently serves about 400 different information systems. Various options for solving this issue were considered, including the possibility of transferring the e-government portal to companies specializing in this area. This will lead to a situation where the volume of data controlled by governments will be significantly less than that of companies in the field of information technology. Of course, such a decision caused controversy in society, since the question of the legitimacy of managing a digital platform and violating the confidentiality of information with limited access arose, and, therefore, it was about transferring digital power into private hands, which would pose a threat to national security. We are already witnessing similar threats in the form of cyberattacks on personal data, which are subsequently used for cyber fraud.

Conclusions

A modern legal state in its development must take into account the potential of digital technologies and establish interaction with citizens and civil society institutions in accordance with the requirements of digital transformation. In addition, there is a need to modernize the functional characteristics of government agencies taking into account the new digital reality, in the context of general transformation processes in the state and legal life of society.

It is appropriate to emphasize that the process of digitalization in the state is not the task of a separate subject of state power, or one of the spheres of social development, since the scale and substantive depth of the process is aimed at the general transformation of all spheres of public life, which inevitably entails the restructuring of the entire technological environment of processes.

In this regard, the state must have a clear understanding of the direction of global scientific and technological progress in order to develop a strategic plan for its own advancement, outlining key indicators for the coming years. The technological gap with leading nations could significantly impact the qualitative aspects of state-building.

Emphasizing the correctness of the Republic of Kazakhstan's decision, made during the implementation of the State Program for the Formation and Development of the National Information Infrastructure (approved by the Presidential Decree on March 16, 2001), to introduce electronic governance methods in the field of public services, we highlight the predominance of positive outcomes. In this regard, the society is faced with a new strategic goal, which consists in building a digital government, which will take a long time. In this context, a number of important trends in the development of digital reality should be taken into account in improving public administration: 1) it is necessary to take into account the achievements of digitalization processes and their further development when modernizing the activities of government agencies; 2) it

is necessary to improve the legal acts of the state for their functioning in the digital reality, since it must be adapted to the working conditions taking into account digital technologies; 3) it is necessary to expand the involvement of citizens and civil society institutions in the online process of managing public affairs, developing legal regulation of such participation, otherwise the Internet users already involved in this, instead of constructive public opinion, will fill the media space with critical statements; 4) expanding the participation of citizens and civil society institutions in public administration in the online space should be accompanied by the formation of appropriate mechanisms for influencing government structures; 5) government bodies and authorities should strive to change the format of their work, namely, to move away from the role of an ordinary official-holder of information, and become an intermediary capable of promptly, openly and transparently identifying and solving problems in the digital reality with the participation of stakeholders; 6) when building interaction between the state and civil society institutions, it is important to move away from hierarchy and verticality, giving priority to horizontal relationships, which will allow a faster transition to the plane of a client-centric state; 7) It is essential to enhance citizens' trust in government agencies and civil society institutions, which will allow for more constructive interaction based on partnerships; 8) it is obvious that in the national sphere of ensuring the protection of citizens' rights in the context of the introduction of digital technologies, there are a number of open issues that require resolution on the basis of a fundamentally new state policy in the field of information security and taking into account the improvement of the legal framework providing for liability for violation of the information rights of an individual. The activities of the rule of law in the context of ongoing digitalization must take into account the need to create digital legislation aimed at the effective protection of the individual, his rights and freedoms as the most important element of an open civil society.

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Құқықтық мемлекет және мемлекеттік басқарудың цифрлық трансформациясы

Мақаланың мақсаты ақпараттық-коммуникативтік технологиялардың қарқынды дамуы, қоғамдық өмір мен мемлекеттік басқарудың барлық салаларын цифрландыру жағдайында жеке тұлғаның негізгі құқықтары мен құқықтық мемлекет қағидаттарын қамтамасыз етудің оңтайлы теңгеріміне қол жеткізудің маңыздылығы мен қажеттілігін қарастыру. Өйткені кеңінен таралған цифрландыру нәтижесінде жеке тұлға, қоғам және мемлекет цифрлық шындықтың жаңа форматында өзара әрекеттеседі. Ұсынылған тезистің айқындығына қарамастан, қазақстандық қоғамда болып жатқан цифрландыру процестерін құқықтық талдау, жеке тұлға құқықтарына төнетін тәуекелдер мен қатерлерді анықтау, құқықтық мемлекет қағидаттарын қамтамасыз ету саласында ұсынымдар әзірлеу талап етіледі. Зерттеудің әдіснамалық негізі жалпы ғылыми тұжырымдамалық тәсілдер, сондай-ақ қазіргі құқықтық ғылымға тән тәсілдер мен әдістер. Негізгі әдістердің бірі ретінде нормативтік құжаттар мен ғылыми материалдарға дискурстық талдау қолданылды, бұл жеке тұлға, қоғам және мемлекеттің өзара әрекеттесу мәселелерінде бар пікірлер мен нәтижелерді зерттеуге мүмкіндік берді. Қол жеткізілген нәтижелер авторлардың жаңа цифрлық шындықта жұмыс істейтін азаматтармен және азаматтық қоғамның басқа институттарымен қарым-қатынаста мемлекеттің рөлін қарастырғанынан көрінеді. Заманауи цифрлық технологияларға негізделген ақпараттық қоғамды дұрыс құру үшін мемлекеттің жауапкершілігіне ерекше назар аударылады. Зерттеу нәтижесінде цифрлық шындықты құру мемлекеттік биліктің жұмыс істеуіне және заң үстемдігі принципіне әсер ететін оң және теріс аспектілері бар деген қорытынды жасалған. Ақпараттық қауіпсіздік мәселелерін күшейту қажеттілігі айтылған, өйткені ақпараттық-коммуникациялық технологиялар негізінде құрылған цифрлық шындық мұқият құқықтық реттеу мен қорғауды қажет етеді.

Кілт сөздер: құқықтық мемлекет, құқық үстемдігі, адам құқықтары, цифрландыру, құқық қағидаттары, электрондық үкімет, цифрлық технологиялар.

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Правовое государство и цифровая трансформация государственного управления

Цель статьи — рассмотреть важность и необходимость достижения оптимального баланса между обеспечением фундаментальных прав личности и принципами верховенства закона в условиях быстрого развития информационно-коммуникационных технологий, а также цифровизации всех сфер общественной жизни и государственного управления. В результате широкомасштабной цифровизации индивид, общество и государство взаимодействуют в новом формате цифровой реальности. Несмотря на обоснованность выдвинутой гипотезы, требуется юридический анализ процессов цифровизации, происходящих в казахстанском обществе, выявление рисков и угроз правам личности, а также разработка рекомендаций в области обеспечения принципов верховенства закона. Методологической основой исследования являются общенаучные концептуальные подходы, а также подходы и методы, присущие современной юридической науке. В качестве одного из основных методов использован дискурсивный анализ нормативных документов и научных материалов, что позволило изучить существующие мнения и результаты по вопросам взаимодействия между личностью, обществом и государством. Достигнутые результаты заключаются в том, что авторы исследовали роль государства в отношениях с гражданами и другими институтами гражданского общества, функционирующими в новой цифровой реальности. Особое внимание уделено ответственности государства за правильное построение информационного общества на основе современных цифровых технологий. В результате исследования авторы приходят к выводу, что создание цифровой реальности имеет как положительные, так и

отрицательные стороны, влияющие на функционирование государственной власти и соблюдение принципа верховенства закона. Автор утверждает необходимость усиления работы в области информационной безопасности, так как цифровая реальность, созданная на основе информационно-коммуникационных технологий, требует тщательной правовой регламентации и защиты.

Ключевые слова: верховенство закона, права человека, цифровизация, принципы права, электронное правительство, цифровые технологии.

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Theoretical and legal foundations of the formation of the legal definition of artificial intelligence: challenges and prospects

The purpose of this study is to analyze the theoretical and legal foundations of the formation of the legal definition of artificial intelligence (AI) in the context of its rapid development and implementation in various spheres of public life. The study examines the existing problems associated with the lack of a unified legal definition of AI, as well as analyzes approaches to its regulation applied in various countries and international organizations, including the European Union and the United States. The research methods used were the analysis of regulatory legal acts, scientific publications, as well as comparative legal analysis. As a result of the study, it was revealed that the lack of a unified legal definition of AI creates significant legal difficulties that hinder effective regulation of this area. It has been established that approaches to the definition of AI and its regulation differ significantly in different jurisdictions, which leads to conflicts and legal uncertainty. The need to develop agreed international standards and definitions of AI, as well as mechanisms for allocating responsibility for harm caused by AI, and personal data protection was emphasized. In conclusion, the importance of an integrated and interdisciplinary approach to the development of a legal system capable of effectively regulating relations related to AI is emphasized.

Keywords: Artificial intelligence, legal regulation, legal status, definition of AI, international cooperation, responsibility of AI, ethical principles, regulatory framework, digitalization, information technology, data protection, legal risks, automation, innovation, cybersecurity.

Introduction

In recent years, there has been a rapid development and implementation of artificial intelligence (AI) technologies in various spheres of public life in Kazakhstan. AI applications cover areas such as public administration, healthcare, education, finance, logistics, agriculture, and industry. In particular, in the field of healthcare, AI is used to diagnose diseases through the analysis of medical images, which increases the accuracy and speed of diagnosis. In education, AI contributes to the personalization of learning by adapting educational programs to the individual needs of students. In the financial sector, AI is used to analyze large amounts of data, which improves risk management and increases operational efficiency [1].

Realizing the importance of AI for the country's future, the Government of the Republic of Kazakhstan has approved the Concept of Artificial Intelligence Development for 2024–2029. This strategic document is aimed at creating an AI ecosystem, including the development of infrastructure, data, human capital and scientific research. Special attention is paid to the formation of a regulatory framework and acceleration programs, which demonstrates the comprehensive approach of the state to the development of this advanced technology [2]. However, despite the obvious advantages and prospects of using AI, its rapid spread raises a number of legal and ethical issues. The lack of a unified legal definition of AI and relevant regulations can lead to legal gaps and uncertainties in regulating this area. The Concept of Legal Policy of the Republic of Kazakhstan until 2030 emphasizes the need to develop legal mechanisms aimed at resolving issues of liability for harm caused by AI, as well as determining the legal status of products created with its participation [3]. In this context, it is particularly important to note the initiative to develop a draft law "On Artificial Intelligence" aimed at establishing legal regulation in the field of AI, including interaction between government agencies, individuals and legal entities. This bill also provides for the adoption of ethical standards, state regulation and the definition of the legal regime for the functioning of AI facilities [4].

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The relevance of research on the theoretical and legal foundations of defining artificial intelligence arises not only from its widespread use across various sectors of society but also from the urgent need to establish appropriate legal regulations that balance innovative development with the protection of citizens' rights and freedoms.

The lack of a unified legal definition of AI creates significant legal difficulties that hinder effective regulation of this rapidly developing field. Currently, there are no legislative acts in the Republic of Kazakhstan that directly regulate AI, which creates a legal vacuum in this area [5; 42]. Developing a universal definition of AI is complicated by the interdisciplinary nature of this technology, which requires combining knowledge from various fields such as statistics, linguistics, robotics, mathematics, economics, logic, and law. This leads to different approaches in defining AI, which makes it difficult to form a single legal standard [6; 253].

The lack of a clear legal status of AI leads to uncertainty about responsibility for actions committed with its participation. In particular, difficulties arise in determining the subjects responsible for the harm caused by AI, as well as in matters of intellectual property of works created with its help [3]. In addition, the lack of a single definition of AI makes it difficult for international cooperation and the harmonization of legislation in this area. Differences in national approaches to AI regulation can lead to legal conflicts and hinder the development of cross-border technologies [7]. It can be said that the lack of a unified legal definition of AI creates serious legal difficulties that require the development of coordinated approaches and regulations that ensure effective and fair regulation of this area.

Currently, there is no unified approach in the scientific community to determining the legal status of AI, which creates significant gaps in research and theoretical schools. Existing concepts range from recognizing AI as an object of law to offering it the status of an independent subject of legal relations. However, none of these theories has been universally accepted, which indicates the need for further research in this area [8; 126].

One of the key gaps is the absence of clear criteria to distinguish AI as both an object and a subject of law. The absence of such criteria makes it difficult to determine the rights and obligations associated with the use of AI, as well as to establish responsibility for its actions. In addition, many studies focus on the technical aspects of AI, overlooking its legal nature and the possible legal consequences of its use [9; 138]. Existing theoretical schools offer different approaches to the legal regulation of AI. Some scientists insist on the need to develop special regulations governing the use of AI, while others consider it sufficient to apply existing legal norms and adapt them to new technologies. However, none of these approaches provides an exhaustive solution that takes into account all the features and risks associated with AI [10; 68].

From our point of view, existing research does not sufficiently take into account the dynamic nature of AI development and its ability to self-learn. This leads to the fact that the proposed legal models quickly become outdated and do not meet the real needs of society. An integrated and interdisciplinary approach is needed, combining the efforts of lawyers, engineers, philosophers and other specialists to develop a flexible and adaptive legal system capable of effectively regulating AI-related relationships. Gaps in existing research and theoretical schools require the development of new concepts and approaches that can adequately reflect the complexity and versatility of AI, as well as ensure its effective and safe use in the legal field.

Methods and materials

In the course of the research, an integrated approach was used, including several methods and sources. The analysis of regulatory legal acts covers national and international documents, such as the Concept of Artificial Intelligence Development in Kazakhstan (2024–2029), the Concept of Legal Policy of the Republic of Kazakhstan until 2030, Federal Law No. 123-FL of the Russian Federation, the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems, as well as the “Bill of AI Rights” There is also a Framework convention on Artificial Intelligence in the USA. The analysis of scientific publications is based on the study of modern research on the legal status, ethical aspects and international regulation of AI. Documents from international organizations (the UN, the OECD, the Council of Europe, and EU expert groups) were used to substantiate the conclusions. Considerable attention is paid to comparative analysis, which makes it possible to identify differences in approaches to the definition and regulation of AI in the European Union, the United States and other jurisdictions. The complex nature of the methods used ensures the depth and comprehensiveness of the research, however, the lack of an explicit description of the methodology in a separate section limits the transparency of the approaches used.

Results

In the context of the rapid development of AI technologies, various countries and international organizations are making efforts to form legal definitions and regulate this area. However, there is still no single, universally accepted definition of AI, which leads to a variety of approaches and terminological interpretations.

In the European Union, a High–level Expert Group on Artificial Intelligence (AI HLEG) [11] in 2019 proposed a definition according to which AI is a system that demonstrates intelligent behavior by analyzing its environment and taking actions with a certain degree of autonomy to achieve specific goals. This definition focuses on the ability of AI systems to perceive, reason, and make decisions, as well as their autonomy.

In the Russian Federation, the concept of AI was legislated in 2020. According to Federal Law No. 123-FL, AI is defined as a set of technological solutions that allow simulating human cognitive functions and obtaining results comparable to the results of human intellectual activity when performing specific tasks. This definition emphasizes the imitation of human cognitive functions and focuses on the practical application of AI technologies [12; 116].

International organizations are also taking steps to develop definitions and standards in the field of AI. In 2018, the Council of Europe adopted the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems, where AI is considered as a set of technological solutions capable of performing tasks that require intellectual efforts normally inherent in humans. This approach focuses on the ethical aspects of the use of AI, especially in the context of judicial systems [13; 72].

There is no single federal definition of AI in the United States of America. Various departments and organizations offer their own interpretations. For example, the National Institute of Standards and Technology (NIST) [14] defines AI as a system capable of perception, learning, reasoning, and decision-making, reflecting a functional approach to understanding AI. NIST is engaged in fundamental research, evaluation, and standards development for AI, including software, hardware, architectures, human interaction, and teamwork, as well as all relevant intersections and interfaces that are vital to trust in AI computing. In addition, NIST has developed an "AI Risk Management Framework" designed for voluntary use and aimed at improving the ability to take reliability aspects into account in the development, implementation and evaluation of AI products, services and systems.

Analyzing the existing definitions, it can be noted that most of them focus on the ability of AI systems for autonomous decision-making, imitation of human cognitive functions and applicability in various fields. However, the lack of a unified approach and a variety of terminological interpretations create difficulties in international cooperation and harmonization of legal norms in the field of AI. The development of a coherent and comprehensive definition of artificial intelligence is a necessary step for effective legal regulation of this field. This approach will eliminate existing discrepancies and ensure uniformity in the understanding and application of AI technologies at the international level.

Analyzing the existing legal definitions of AI in various countries and international organizations, we can identify several key elements and criteria that are often used to characterize AI:

The ability of AI to process and analyze large amounts of data to identify patterns and make informed decisions is a key element;

Many definitions emphasize the ability of AI to mimic or reproduce human cognitive functions such as thinking, learning, analysis, and decision-making. For example, in V.A. Laptev's article, AI is defined as "the ability of intelligent systems to perform creative functions normally inherent in humans" [15; 83];

The ability of AI to act autonomously, without direct human intervention, is another important criterion. The European Charter of Ethics on the Use of Artificial Intelligence in Judicial Systems and Related Fields describes AI as a system that "demonstrates reasonable behavior by analyzing its environment and taking action with a certain degree of autonomy to achieve specific goals" [16; 54];

Some definitions focus on the ability of AI to adapt to new data and learn from it. This allows the AI to improve its productivity and efficiency in completing tasks. The same article by Laptev V.A. notes that AI includes systems that are "capable of learning and adapting based on data analysis" [15; 84];

Other definitions include an indication of the need for AI to comply with established ethical and legal standards. The European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems [17] emphasizes the importance of observing the principles of transparency, impartiality and respect for fundamental rights when using AI.

These criteria reflect the desire of legal systems to take into account the complexity and diversity of AI technologies when regulating them. However, despite certain achievements in the formulation of AI characteristics, in practice there are significant gaps and contradictions in approaches to its legal regulation.

One of the key problems is the lack of a unified approach to determining the legal status of AI. Various concepts are proposed in the scientific literature, including recognizing AI as an object of law or granting it the status of an independent subject of legal relations. However, the lack of universal acceptance of these approaches indicates the need for further development and unification of legal regulation of AI [18; 90]. In addition, existing definitions of AI often focus on its technical characteristics, overlooking legal and ethical aspects. This leads to uncertainty about responsibility for AI actions, personal data protection, and respect for human rights. Bakhteev D.V. notes that the lack of a clear legal status of AI creates difficulties in determining the subjects responsible for its actions [19; 11]. There is also a gap between the rapid development of AI technologies and the slow process of adapting legislation. Many legal systems do not have time to respond to new challenges related to AI, which leads to legal gaps and conflicts.

These contradictions and gaps in existing definitions and approaches to AI indicate the need to develop a coherent legal framework that takes into account both technical and ethical aspects of the use of AI. Only an integrated and interdisciplinary approach will make it possible to create an effective regulatory system capable of adapting to rapidly changing conditions and ensuring a balance between innovation and the protection of human rights and freedoms.

The rapid development of AI in recent years has significantly outpaced the speed of law-making, which leads to legal gaps and challenges in its regulation. In the Republic of Kazakhstan, the issue of the need for legal regulation of AI was first identified in 2021 in the "Concept of Legal Policy until 2030" [20]. The document emphasizes the need to address issues of allocating responsibility for the harm caused by AI, as well as determining the ownership of intellectual property rights to works created with its participation. However, despite the recognition of these problems, legislative initiatives in the field of AI remain under development. The lack of specialized regulations governing the use of AI creates uncertainty in law enforcement practice and may hinder the introduction of innovative technologies. The accelerated pace of AI development and its penetration into many areas of life require adequate and timely legal regulation.

The slow pace of the law-making process is due to several factors. One of the problems is the complexity and diversity of AI technologies which make it difficult to create general legal norms that could embrace all the possible areas of its application. Third, lack of technical expertise among legislators may cause some delays in the adoption of appropriate laws. Many lawmakers and lawyers may lack a strong technical understanding of AI, making it challenging to create effective rules and standards. Furthermore, legal systems are usually reactive to the social relations that are already in place while AI technologies are progressive, creating new forms of relationships and risks. This results in a situation where the existing legal norms are not yet adapted to the new realities and there are legal vacuums.

In the present world where AI is gradually finding its way into almost all aspects of life from the economic sector to the healthcare sector it is important to accelerate the process of law making. This paper aims to explore how to accelerate the legal system to develop versatile and flexible legal frameworks that can keep pace with technological changes to ensure the safe implementation of AI in society.

Today there are critical variations in the legal regulation of AI between the European Union (EU) and the United States of America (USA) which results in conflicts of jurisdiction and legal challenges in the international arena.

The EU has set its sights on the strict regulation of AI, and for all the right reasons, namely to protect fundamental rights and ensure security. The European Commission on Ethics in Science and New Technologies (EGE) has identified a set of principles based on the core values of the EU treaties and the Charter of Fundamental Rights. These principles place humans at the centre of technological progress. There are three ethical principles that underpin the reliability of the development and use of AI systems: respect for individual autonomy, fairness, solidarity and honesty, as well as openness and transparency.

In 2018, a group of leading experts in AI (AI HLEG) was established by the European Commission to provide advice on the legal and ethical implications of AI. The Ethics Guide for Artificial Intelligence developed by the group in April 2019 identified three key criteria: legality, ethics, and reliability of AI. The Law on Artificial Intelligence (AIA), presented by the European Commission on April 21, 2021, defines the subjects of AI application (suppliers, users, as well as suppliers and users from third countries whose products are used in the EU).

It should be noted that, according to sources, the AIA does not apply to private users and does not provide mechanisms for protecting the rights of individuals, such as procedural rights or the right to compensation for damages. Also, the sources emphasize that the AIA needs to be improved in various aspects [21; 376].

Unlike the EU, the United States strives to maintain its international leadership in the field of AI by adhering to a policy of "soft regulation" that creates favorable conditions for innovation and technological progress. This strategy has been reflected in a number of initiatives aimed at strengthening the country's position in the global technology race. So, in 2019, President Donald Trump signed a decree aimed at strengthening the global leadership of the United States in the field of artificial intelligence. This step highlighted the country's desire to dominate the development and application of AI technologies, laying the foundations for a national strategy in this area.

As a continuation of this policy, a draft "AI Bill of Rights" was presented in 2022, which included principles such as creating secure systems, protecting against discrimination, ensuring privacy, transparency, and the ability to choose between using a machine or a human. However, despite its importance, this document remains a recommendation and has no legal force. This approach confirms the desire of the American government and companies to maintain a balance between innovation and minimal interference in the process of their development. Nevertheless, in recent years, there has been a noticeable trend in the United States towards borrowing elements of the European regulatory model, which is manifested in the release of the Principles for the Development, Deployment and Use of Generative Artificial Intelligence Technologies. However, like the AI Bill of Rights, these principles are purely advisory in nature, remaining within the framework of a "soft regulation" approach [22; 253].

The differences in approaches between the EU and the US create difficulties for companies operating in both markets. Strict EU requirements may conflict with more lenient US standards, leading to legal uncertainty and additional costs for businesses. U.S. Secretary of Homeland Security Alejandro Majorca's noted that uncoordinated regulation of AI on both sides of the Atlantic could lead to confusion and security vulnerabilities [23].

These disagreements highlight the need to harmonize legal standards in the field of AI at the international level. Without coordinated approaches, companies face uncertainty, and governments face risks to the security and rights of citizens. Cooperation between jurisdictions and the development of common principles for regulating AI are key steps for effective management of this technology on a global scale.

In the context of the rapid development of artificial intelligence (AI) technologies, a number of ethical and legal dilemmas arise that require careful analysis and regulation. One of the most significant issues is the responsibility for the harm caused by AI and the protection of personal data.

The lack of a clear legal status of AI in the legislation of the Republic of Kazakhstan creates uncertainty regarding the allocation of responsibility for the harm caused by its actions. Currently, various concepts of regulating the legal status of AI are presented in the scientific literature. The following models stand out among them:

– AI as an object of law, similar to a property or technological asset;

– AI as a legal entity equated to legal entities;

– AI as an "electronic person" with legal duties and rights formulated specifically for autonomous systems [24].

The criteria for recognizing AI as a legal entity are external isolation, personification, and the ability to develop, express, and implement a unified will. However, this approach does not always take into account the complexity and autonomy of modern AI systems.

AI systems often process large amounts of personal data, which creates risks of violating the right to privacy. The Law "On Personal Data and their Protection" [25] is in force in Kazakhstan, but its provisions do not fully take into account the specific features of AI data processing. Companies are responsible for violations of this law, but no direct regulation of the use of AI in the context of data protection has been undertaken yet.

In 2024, the Office of the Data Protection Commissioner of the Astana International Financial Center, together with the Digital Rights Center Qazaqstan law firm, developed a guide on data protection and artificial intelligence. The document contains recommendations on the use of personal data in AI systems and is aimed at reducing the associated risks [26].

These ethical and legal dilemmas require the development of an integrated approach that takes into account both the technical and legal aspects of using AI. It is necessary to create a regulatory framework that ensures a balance between the development of innovation and the protection of fundamental human rights.

Discussion

The fragmentation of definitions of AI in various jurisdictions and international organizations significantly complicates the process of international cooperation and generates significant legal risks. The lack of a unified approach to the definition of AI leads to discrepancies in law enforcement practice, which makes it difficult to develop and implement agreed international standards and norms. Differences in definitions of AI between countries create obstacles to effective cooperation in the development, application and regulation of these technologies. The lack of agreed international standards in the field of AI leads to fragmentation of legal regulation, which, in turn, complicates international cooperation and creates legal risks.

In addition, a variety of approaches to the definition of AI can lead to conflicts of jurisdiction and complicate the process of resolving cross-border disputes related to the use of AI. The article by Lev M.Yu., Leshchenko Yu.G., Medvedeva M.B. emphasizes that the lack of harmonized international standards in the field of AI can lead to legal uncertainty and increase risks for all participants in the process [27; 2001]. The authors of this study express concern about the current fragmentation of legal definitions of AI and emphasize the need to develop consistent international standards and definitions. Legal risks can only be minimized, and effective international cooperation in the field of AI can be ensured, through collaborative efforts and the harmonization of approaches.

In the context of the rapid development of AI technologies, there is a need to develop a universal legal definition that can ensure a balance between flexibility, necessary to stimulate innovation, and concreteness, ensuring the protection of the rights of subjects. On the one hand, an excessively narrow and detailed definition of AI can limit the development of new technologies that do not fall under the established definition, which will lead to a deterrence of innovation. On the other hand, too general definition can create legal uncertainty, making it difficult to apply legal norms and protect the rights of subjects.

The Concept of Legal Policy of the Republic of Kazakhstan until 2030 [20] emphasizes the need to develop legal mechanisms capable of adequately responding to the rapid development of technologies, including AI. The document notes that legal regulation should be aimed at creating conditions for innovative development, while ensuring the protection of citizens' rights and freedoms.

When forming a legal definition of AI, it is necessary to take into account the need for its adaptability to future technological changes, as well as to ensure clarity and certainty for law enforcement practice. This will create a legal framework that promotes the development of AI without prejudice to the rights and interests of legal entities. Achieving such a balance is a key factor for effective and fair legal regulation of AI in modern society.

Further, there is a need to develop effective mechanisms for its regulation. We should consider the prospects in this area, including the harmonization of legislation through international organizations, the creation of specialized regulatory bodies to assess AI risks, and the introduction of ethical principles into legal norms.

International organizations such as the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD) play a key role in shaping global standards for AI regulation. In 2024, the UN Economic and Social Council emphasized the need to develop universal principles and standards to ensure the responsible use of AI, focusing on ethical aspects and human rights [28].

OECD plays an important role in shaping the rules for the development and implementation of AI at the global level. In May 2019, the OECD adopted the "Recommendations of the Council on Artificial Intelligence" (OECD AI Principles), which were signed at the meeting of the OECD Council at the ministerial level. This document became the first intergovernmental standard in the field of AI management, which underlines the importance of international coordination in regulating this complex and rapidly developing field.

The OECD AI Principles are advisory in nature and are divided into two blocks: five principles for responsible AI development and five recommendations in the field of national policy and international cooperation in the field of AI [29; 76]. These principles and recommendations provide the basis for a responsible and ethically sound approach to the development and application of AI technologies. In addition, the document provides a terminology framework that clarifies key concepts, including definitions of AI systems, their lifecycle, actors, and stakeholders.

Of particular historical significance is the fact that the signing of the OECD Principles of AI was the first time when states agreed on the rules for the development of AI at the international level. This step not only consolidated a common approach to ethical issues related to AI, but also served as the basis for further initiatives in this area. The Principles have been signed by 46 countries, including not only OECD members, but also 8 States outside its structure, which demonstrates a broad international consensus on the need to regulate this area. However, the importance of the OECD AI Principles goes beyond their original purpose: they contribute to the harmonization of AI standards, as many countries and international organizations refer to the definitions and approaches proposed by the OECD. Thus, this standard has become an important guideline for developing national strategies and establishing mechanisms for international cooperation.

To effectively monitor and manage the risks associated with AI, it is necessary to create specialized regulatory bodies. A group of UN experts stated [30] that global management of artificial intelligence is "mandatory". Experts urge the UN to lay the foundations for the first inclusive global institutions to regulate fast-growing technologies.

They note that AI is "transforming our world", offering enormous potential for good, from opening up new fields of science and accelerating economic growth to improving public health, agriculture, and optimizing energy networks. However, if AI remains unmanaged, its benefits may be confined to a select few countries, companies, and individuals. More advanced systems "could upend the world of work", create autonomous weapons, and pose significant risks to peace and security.

The Group has developed principles that should form the basis for the formation of new institutions for AI governance, including international law, and especially human rights law. They call on all Governments and parties involved in AI to cooperate to protect human rights. The group's recommendations include the creation of an international scientific committee on AI to form a global understanding of its capabilities and risks, as well as a global dialogue on AI governance at the United Nations to consolidate future institutions based on the principles of human rights and international law. This is consistent with your idea of the need to create specialized regulatory bodies to assess threats and develop security standards.

It is also proposed to create a global AI fund so that technologies can bridge the gap between rich and poor countries and contribute to the achievement of the UN development Goals for 2030, as well as the "Exchange of standards" to ensure technical compatibility. Currently, only seven of the 193 UN member states are participants in seven recent notable AI governance initiatives, while 118 countries, mostly from the global South, are "completely absent" from any conversation. The Expert Group stresses that "technology is too important and the stakes are too high to rely solely on market forces and a fragmented mosaic of national and multilateral actions".

Despite the fact that experts do not recommend the creation of a new UN AI agency at this stage, they emphasize the importance of exploring such a possibility in the future, similar to the International Atomic Energy Agency, which has knowledge and some regulatory powers.

Integrating ethical principles such as transparency, accountability, and fairness into legal norms is an important step to ensure responsible use of AI. In 2024, the first legally binding AI treaty was signed, known as the Framework Convention on Artificial Intelligence, which sets out the basic principles for AI systems, including data protection, law enforcement, and transparency. This treaty highlights the need to ensure that AI is consistent with human rights, democracy, and the rule of law [31].

Thus, the harmonization of legislation through international organizations, the creation of specialized regulatory bodies and the introduction of ethical principles into legal norms are key areas for ensuring the safe and responsible development of AI.

In the course of our research, certain limitations have been identified that must be taken into account when forming the legal framework for regulating AI. Effective implementation and application of legal norms in the field of AI largely depends on the political will of the country's leadership. Without top-level support, even the most thoughtful legislative initiatives may remain unrealized. The desire to purposefully influence the process of technology development requires the removal of legal barriers that hinder the development of the digital economy. This highlights the importance of the active participation of government agencies in shaping and supporting legal initiatives in the field of AI.

Given the identified limitations, the proposed legal definitions and mechanisms for regulating artificial intelligence require constant revision and adaptation to new realities. The conclusions and recommendations presented in the study can be used as a starting point for further discussions and developments in the field of legal regulation of AI, and thus to the development of a fair and effective legal system that is capable of addressing the challenges of the present day.

Conclusions

The study has been carried out to identify and discuss key issues pertaining to the legal regulation of AI. In particular, it was found that the absence of a single legal definition of AI and the absence of generally accepted international standards are the significant legal issues and obstruct the ability to regulate this area. The methods of defining AI and the varying approaches used by different countries and international organizations such as the European Union, Russian Federation and United States of America are analyzed. It was observed that the majority of the definitions are based on the principles of decision making, simulation of human cognition and the use of AI in different industries.

Furthermore, the study establishes that there are crucial variations in the approaches to the legal regulation of AI between the EU and the USA which results in conflicts of jurisdiction and legal challenges in the international arena. The EU is very much keen on strong regulation of AI, and more specifically, on the protection of fundamental rights. The U.S. has a policy of what might be called “soft regulation”, one that is more oriented toward encouraging innovation. The problem of liability for harm caused by AI, and personal data protection was also addressed, which is an important aspect for the development of an effective legal system.

The key results of the study revealed that the absence of a single definition of AI and international standards in the regulation of this area is difficult and incompatible to regulate effectively without such a framework and creates barriers to cooperation between international regimes. There are conflicts of jurisdiction as the EU and the US have different approaches to the regulation of AI. Therefore, there is a need to agree on standards and mechanisms such as identifying who is to blame for the harm caused by AI and personal data protection. For the purpose of this paper, it is emphasized that regulation is best implemented as a hybrid model, which means that it has to be multidisciplinary and interdisciplinary in approach, including the establishment of specific regulatory bodies to monitor risks and the integration of ethical principles into legal norms to ensure that the use of AI is both efficient and safe.

The practical importance of the research is that it reveals critical issues and deficiencies in the legal system regulating AI which is relevant for government entities creating policies for this area. The outcomes of the study can be used as a reference for the formulation of national strategies and action plans for the development and regulation of AI. Moreover, the study may be helpful for companies engaged in AI-related business as it offers a clearer view of the legal matters involved in their operations and ways of avoiding risks.

From a scientific point of view, the research is aimed at the development of the theory of legal regulation of AI, systematizing of various approaches and concepts. It also focuses on the necessity of an interdisciplinary approach towards the research of AI and its legal implications. The results of the study can be used as a basis for further scientific work in this field and also to contribute to the development of an international dialogue on AI regulation.

The results of the research can be used in such fields as legislative development, where they can be used to develop new laws on the use of AI in different areas of the economy and society and to formulate public policy to inform national strategies and programs for the development of AI. In the area of education, they will aid in training specialists in the field of law, information technology and artificial intelligence, as well as in enhancing legal awareness of the population. To businesses, the findings of the study will aid companies that are using AI in their legal update and risk management. In international cooperation, they can contribute to the convergence of laws and the enhancement of the relationship between countries. In judicial practice, the results can be applied to the development of approaches to the consideration of cases involving AI, including questions of responsibility and protection of rights.

In conclusion, the study emphasizes the necessity of an integrated and interdisciplinary approach to the legal regulation of AI, and the role of international cooperation in the face of challenges arising from the rapid development of this technology.

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Жасанды интеллектің құқықтық анықтамасын қалыптастырудың теориялық және құқықтық негіздері: мәселелері мен болашағы

Мақаланың мақсаты жасанды интеллектің (ЖИ) құқықтық анықтамасын қалыптастырудың теориялық және құқықтық негіздерін оның қарқынды дамуы және қоғамдық өмірдің әртүрлі салаларына енуі жағдайында талдау. Жұмыста ЖИ-дің бірыңғай құқықтық анықтамасының болмауына байланысты мәселелер зерттелген, сондай-ақ Еуропалық одақ пен АҚШ-ты қоса алғанда, әртүрлі елдерде және халықаралық ұйымдарда қолданылатын және оны реттеу тәсілдері талданған. Зерттеу әдістері ретінде нормативтік-құқықтық актілер, ғылыми жарияланымдар, сондай-ақ салыстырмалы-құқықтық талдау қолданылды. Зерттеу нәтижесінде бірыңғай құқықтық анықтаманың болмауы және осы саланы тиімді реттеуге кедергі келтіретін айтарлықтай құқықтық қиындықтар туғызатыны анықталды. Жасанды интеллекті анықтау және оны реттеу тәсілдері әртүрлі юрисдикцияларда айтарлықтай ерекшеленетіні айқындалды, бұл қақтығыстар мен құқықтық белгісіздікке әкеледі. Келісілген халықаралық стандарттар мен ЖИ анықтамаларын, сондай-ақ ЖИ келтірген зиян үшін жауапкершілікті бөлу және дербес деректерді қорғау тетіктерін әзірлеу қажеттілігі айтылған. Қорытындылай келе, ЖИ-мен байланысты қатынастарды тиімді реттеуге қабілетті құқықтық жүйені дамытуға кешенді және пәнаралық көзқарастың маңыздылығы көрсетілген.

Кілт сөздер: жасанды интеллект, құқықтық реттеу, құқықтық мәртебе, жасанды интеллект анықтамасы, халықаралық ынтымақтастық, жасанды интеллект жауапкершілігі, этикалық принциптер, нормативтік-құқықтық база, цифрландыру, ақпараттық технологиялар, деректерді қорғау, құқықтық тәуекелдер, автоматтандыру, инновациялар, киберқауіпсіздік.

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Теоретико-правовые основы формирования правового определения искусственного интеллекта: проблемы и перспективы

Целью данного исследования является анализ теоретико-правовых основ формирования правового определения искусственного интеллекта (ИИ) в условиях его стремительного развития и внедрения в различные сферы общественной жизни. В данной работе исследуются проблемы, связанные с отсутствием единого правового определения ИИ, а также анализируются подходы к его регулированию, применяемые в различных странах и международных организациях, включая Европейский Союз и США. В качестве методов исследования были использованы анализ нормативно-правовых актов, научных публикаций, а также сравнительно-правовой анализ. В результате исследования было выявлено, что отсутствие единого правового определения ИИ создает значительные юридические сложности, препятствующие эффективному регулированию данной сферы. Установлено, что подходы к определению ИИ и его регулированию существенно различаются в разных юрисдикциях, что приводит к конфликтам и правовой неопределенности. Подчеркивается необходимость разработки согласованных международных стандартов и определений ИИ, а также механизмов распределения ответственности за вред, причиненный ИИ, и защиты персональных данных. В заключение, освещается важность комплексного и междисциплинарного подхода к разработке правовой системы, способной эффективно регулировать отношения, связанные с ИИ.

Ключевые слова: искусственный интеллект, правовое регулирование, правовой статус, определение ИИ, международное сотрудничество, ответственность ИИ, этические принципы, нормативно-правовая база, цифровизация, информационные технологии, защита данных, правовые риски, автоматизация, инновации, кибербезопасность.

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The Experience of the Republic of Turkey in Combating Cybercrime and Issues of Preventing Criminal Offenses in the Field of Information Technologies

Cybercrime is a relatively new type of crime. With the widespread use of the Internet and its integration into all areas of life, this type of crime and the methods of committing it are also evolving. Therefore, the main goal of this article is to explore the establishment of specialized police units and the development of new crime prevention policies in Türkiye to combat cybercrime. In this study, the policies developed by the General Directorate of Security of Türkiye to fight cybercrime are analyzed using the classical approach model within the framework of state policy processes. The institutional analysis method was applied in the research. The study examines the legal regulations issued by Türkiye in combating cybercrime, the technical units established, its personnel policy, and the factors that influenced the development of these policies. Additionally, a comparison is made with the policies in this field in Kazakhstan.The relevance of the topic lies in addressing the importance of measures aimed at protecting information constituting a state secret and legally protected personal data of citizens within Kazakhstan's cyberspace.

Keywords: Combating cybercrime, fraud, cyber police, cyberspace, state system, information terrorism.

Introduction

Considering the transboundary nature of security issues in the field of information technology, we conclude that it is necessary to improve international cooperation in this area in accordance with the principles of equal legal international information exchange.

The development of international legal norms regulating interstate relations in the field of improving cooperation between the law enforcement agencies of the Republic of Kazakhstan and foreign countries in the use of global information infrastructure, as well as in the prevention, detection, suppression, and elimination of the consequences of the use of information and telecommunication technologies for terrorist and other criminal purposes, requires the harmonization of national standards and certification systems in this field with international systems.

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Methods and materials

In the study of foreign practices in combating criminal activities in the field of information technology, analytical and comparative legal methods were used. Specifically, the analytical method was applied in examining the legislation of the Republic of Turkey on information security, while the comparative legal method was used to study Turkey's experience in implementing legal regulations related to information cybersecurity measures. In addition, the scientific research of domestic and foreign scholars in this field was analyzed.

Discussion

In the direction of organizational-administrative and organizational-technical support, it is required to implement a set of measures to ensure the information security of critically important objects of informatization, to ensure a unified state technical policy in the field of information security, including the system of information protection. To solve this issue, it is necessary to create a unified state system for monitoring the information space, as well as to establish the information system and infrastructure of the operational center for ensuring information security. In addition, it is required to improve the unified information and communication network of state bodies, to create an operational center for ensuring information security to protect critically important infrastructure in the field of information technologies, to develop a unified electronic mail system for state bodies, to establish at least two geographically distributed centers for storing backup databases of state bodies, to develop a national identification system in the cyberspace of the Republic of Kazakhstan, to create cybersecurity hubs, and to improve the quality and reliability of systems ensuring the information security of the "electronic government", aimed at preventing unauthorized access, data loss, and distortion.

In the direction of human resources provision, it is required to improve the system of training personnel in the field of information security and the protection of state secrets, as well as to address the issues of staffing law enforcement agencies, including units dealing with countering information terrorism and information crimes. Enhancing the effectiveness of educational and training programs related to information security and the protection of state secrets is very important. Chief Scientific Researcher of the Academy of Law Enforcement Agencies, Lazzat Temirzhanova, stated: "Currently, employees investigating crimes in the field of information technology lack sufficient qualifications. In this case, in addition to having the appropriate legal knowledge, it is necessary to be proficient in IT technologies. For this reason, a large percentage of criminal cases in this area remain unsolved". In their article, Litvinenko M.V. and Chukova D.I. expressed the following opinion regarding human resources: "Combating cybercrime is a national-level issue. The effectiveness of investigating crimes in the field of computer information is directly related to the preparation of specialists in this field. We believe that training specialists to fight cybercrime will be more effective if the theoretical and methodological foundations for applying deep information and technical knowledge are introduced, and a model for training legal professionals to investigate computer crimes is developed" [1; 59]. We believe that the issue of training qualified specialists is very important for increasing the effectiveness of combating offenses in the field of information technology, and this issue should receive significant attention.

We believe that Kazakhstan should closely collaborate with countries that have extensive experience in combating this type of crime. For example, it is essential to hold regular seminars for exchanging experiences with specialists from countries that have ratified the European Security Convention. Additionally, planned specialized training courses should be organized to enhance qualifications.

The Republic of Turkey's National Security Committee has been conducting measures to combat cybercrime since 1991. However, it can be said that strict and active monitoring of these types of crimes began to be implemented starting from 1997.

Results

The history of the establishment of organizations combating crime in the field of information technology.

Although crimes in the field of information technology were defined in the Turkish Penal Code No. 765 in 1991, it is important to note that it was only six years later that the issue of combating cybercrime was included in the main agenda of the Security Committee. From 1997 to 2011, the National Security Committee established the "Department for Combating Crimes in the Field of Information Technology" under the In-

formation Processing Division. However, initially, this divisions was involved in administrative work, and the staff recruited for the organization had no experience in judicial and criminal procedural areas.

The National Security Committee's significant political step in combating cybercrime was realized on April 18, 1998, during an extraordinary meeting with the creation of the "Computer Crime and Information Security Organizations". On March 1, 1999, a working group on information crimes was organized. The objectives of the organization were also defined: investigating violations in the field of information technology, identifying types of offenses, and establishing the necessary regulations in the relevant authorities' legal acts. As a result of these measures, many international sources were studied, and a system for assessing the threat level of cybercriminals was introduced. Additionally, the department's staff was tasked with continuously conducting exchange programs. In 2006, the department's name was changed to the "Department for Combating Crimes in Information Technology and Systems" [2; 98]. Currently, this department is named "Crimes in Information and High Technology". The Cybercrime Division worked under the department responsible for combating smuggling and organized cybercrime. In addition, provincial units were provided with technical support, and later, this technical department was tasked with investigating electronic evidence, as well as coordinating the "Directorate of Information Security" [2; 98]. In 2006, the department opened its centers in Istanbul, Sakarya, Bursa, Izmir, Antalya, Adana, Van, Diyarbakir, Malatya, Erzurum, Samsun, Ankara, and Kayseri. It is worth noting that the Cybercrime Center in Istanbul stood out for its high level of activity and effectiveness. Since other provincial security units did not have a separate police unit to fight cybercrime, and many companies and institutions working in this field had their headquarters or branches in Istanbul, with the approval of the Ministry of Internal Affairs, the "Counteracting Crime in the Information Space" Directorate was established in Istanbul on April 25, 2007 [2; 99].

In 2011, in order to centralize and consolidate the various departments of departmental agencies and provincial organization branches, prevent the duplication of investments, and ensure the effectiveness of the fight against cybercrime, a decision was made by the Cabinet of Ministers, under Resolution No. 2011/202515, to create a centralized department named "Fight Against Information Crimes" under the Security Department within the framework of an extraordinary meeting of the Cabinet of Ministers. Other goals of this policy included: improving and diversifying the fight against information crimes and crimes committed through communication tools, the need for new structures in combating this crime, saving resources, reducing duplicated services between departments, uniting specialized personnel from different departments under a single organization, and striving to prevent and reduce criminal offenses in the field of information technologies by continuously enhancing their knowledge and qualification levels. Additionally, it aimed to improve the effectiveness of crime investigations. This organization was renamed the Cybercrime Department on February 28, 2013, upon the proposal of the Ministry of Internal Affairs (SSMDB — Siber suçlarla mücadele daire başkanlığı, meaning Cybercrime Combat Division) [2, 99].

The main task of the Cybercrime Department is to provide judicial and informational services and combat crimes related to online fraud, fraud in payment systems, obscene publications, illegal betting, gambling, and cyberterrorism. Therefore, this organization can be considered as an efficient department, staffed with highly qualified specialists capable of providing technical support to other departments and fighting cybercrime. In collaboration with the Cybercrime Department, employees from the Anti-Drug, Financial Crime, Human Trafficking, and Organized Crime Units, as well as the Terrorism and Public Security Departments, are involved in combating theft and fraud. The department also deals with cybercrimes related to copyright infringement, in accordance with Law No. 5846, to protect authorship and creative works. These units are also responsible for investigating cybercrimes within their respective service areas.

The powers of the Turkish Cybersecurity Department can be found on the website www.bugun.com.tr. The list of their activities is as follows:

1. Using informants and undercover investigators during the investigation of criminals to infiltrate criminal organizations and gather evidence.

2. Implementing the use of evidence, expert opinions, services, and statements from individuals or legal entities for the prevention of crimes.

3. Department employees are authorized to listen to any messages and calls, monitor suspects or suspected individuals, and install technical equipment in public places and workplaces of suspects.

4. They have the right to utilize the advantages of emergency services for the benefit of the state and society, to preserve political, social, and cultural security, and to obtain necessary data, audio, and video recordings.

5. Cyberpolice assist in accessing information systems in different geographical locations during important investigations.

The Turkish Cybercrime Department not only performs the function of monitoring information technologies but also operates as a police department carrying out operational police duties. Under the Cybercrime Department, 81 cybercrime units were established across provinces to ensure the security of information technologies. The following departments work within these units: The Forensic Bureau, the Crime Investigation and Search Bureau, the Court Transaction Monitoring Bureau, the Virtual Patrol Monitoring Bureau, and the Operational Support Monitoring Bureau. We can see that the functions of these departments are mainly focused on combating cybercrime. Additionally, the Virtual Patrol Office's activities are also part of this department's duties. These departments emphasize the need to actively use social media platforms for disseminating messages aimed at preventing cybercrime and connecting with the online community. For example, the Cybersecurity Department in the Cyber Bureau, with 2,700 employees, collects information about crimes committed in cyberspace by monitoring the social media of 45 million people in Turkey.

It should be noted that the Ministry of Internal Affairs has established an effective centralized apparatus in Turkey's major cities to combat cybercrime, as most cybercriminal offenses occur in large cities where the internet is widely used. The European Union's Secretariat is contributing to strengthening the potential of law enforcement and judicial authorities by implementing the "Strengthening Cooperation in the Fight Against Information Crimes" project. This project aims to promote cooperation in areas such as combating cybercrime and facilitating information exchange between national and international governments. This cooperation has been ongoing since 2009. The EU Secretariat's efforts in this area are being carried out not only with the Ministry of Internal Affairs but also in collaboration with the Gendarmerie General Command and organizations related to telecommunication services. The project, which began in 2013, is scheduled to conclude in 2019, with plans to hold 138 training sessions and seminars both domestically and internationally. The cost of the project is 4,400,000 euros [3].

The recruitment of civilian employees into the police forces is one of the long-established methods in the Republic of Turkey. There are several reasons for this practice. First and foremost, it is related to financial costs and reward levels, as the salaries of civil servants are calculated to be 20 % lower than those of police officers. Additionally, employees in this department are required to be in civilian clothing when conducting operations, searching for criminals, and making arrests.

Employees in this department must possess the skills and capabilities to investigate crimes committed using electronic technologies, as well as any crimes related to electronic evidence. Furthermore, security department personnel combating cybercrime must continuously improve their professional skills, such as learning foreign languages. Knowledge of foreign languages is necessary to work effectively with foreign partners. Additionally, employees must be proficient in using information technologies for cybercrime detection. Specifically, they need to be able to identify methods for finding cyber-criminal evidence required for expert analysis. Since evidence in cybercrimes resides in information technologies, expert specialists are needed to gather and report such evidence. For this reason, law enforcement agencies that collect evidence must develop their technical and administrative capabilities [4].

Turkey, therefore, still requires additional expert specialists in the judicial-investigation sector dealing with cybercrimes. A global issue is the lack of potential, capabilities, and resources in police departments for combating cybercrime. It should also be noted that only cases reported by the victims are taken into consideration, and investigative work is conducted based on those reports. In other words, the judicial-information services aimed at obtaining electronic traces and evidence used in criminal investigations and cybercrime cases, as well as collaborating with the necessary sector organizations to prevent crimes, enhance the effectiveness of the fight against cybercrime. The strategy of continuous education for personnel fighting cybercrime should be a strategic priority. The principles of this work are as follows: conducting forensic examinations for criminal cases, providing assistance to other institutions, and introducing a continuous training strategy for local law enforcement employees to improve the qualifications of specialists in the field of cybercrime investigations for network security; organizing continuous training on electronic evidence collection not only for specialized units but also for all law enforcement agencies; increasing the number of employees capable of conducting high-level research and digital analytical reviews due to the constantly evolving nature of cybercrimes and the rapid growth of crime in this field. Since training new specialists to fight cybercrime is expensive, measures to improve the qualifications of existing employees are implemented regularly.

Within the framework of KOMDB (Committee for Combating Organized and International Crime), the following seminars and trainings were conducted: “Methods and Forensics of Recovering Computer and Internet Criminal Evidence”, “Seminar on Crime Analysis”, “Seminar on Finding Cybercrime Traces”, “Conducting Research on Electronic Evidence”, “Seminar on Crimes on the Internet”, “Confidential Course on Electronic and Computer Crimes”, “Course on Recovering Criminal Evidence,» and «Methodology of Investigating and Investigating Crimes in Information Technologies”.

After the establishment of SSMDB (Committee for Combating Cybercrime), the training of personnel in this field was transferred to the authority of the mentioned committee.

Since 2014, every year, between 909 and 1500 trainees, in line with the basic and advanced training needs of employees, have been learning to effectively and successfully work with various types of cybercrime and criminal organizations related to information technology. The Security Committee has been conducting training for cybercrime units at foreign police organizations. Between 2014 and 2016, about 100 employees, within the framework of an international relations project in Kosovo, Georgia, Kazakhstan, Bosnia, and Herzegovina, participated in training seminars on methods of combating cybercrimes over six semesters [5].

Due to the international nature of cybercrime, cooperation and information exchange with other countries are crucial. In this regard, Turkish police have made bilateral agreements with the security organizations of 39 countries, and they plan to hold training sessions related to conducting international operations against cybercrime until 2019.

Moreover, Turkey had announced in 2021 its intention to train nearly 21,000 professionals who will monitor offenders in the field of information technology. Therefore, from the information provided above, we can observe that Turkey is actively pursuing its cybersecurity policy both in the military and civilian security sectors. In the current era of information technology, it is well-known that conducting an active security policy in this area is a key guarantee of internal stability within countries.

Above, the analysis reveals that in Kazakhstan’s information technology network, there is poor coordination of measures for protecting legally protected data and information, as well as systemic fragmentation in ensuring the integrity and confidentiality of information. This lack of a unified system negatively impacts the protection of legally protected data sources and critical information.

The issue of a shortage of qualified personnel in the information and communication sector, including in information security, remains a critical issue. The preparation of specialists and the enhancement of their qualifications in this field are highly relevant issues.

Additionally, the relatively low level of legal and information culture, as well as the skills needed for the safe use of cyberspace in Kazakh society, poses a significant risk. The low level of citizens’ literacy regarding cybersecurity is also a contributing factor to the issue. Moreover, cybersecurity measures should not only be implemented by the government but also by individuals. For instance, citizens should ensure they keep their personal information, details about their relatives, home addresses, places of work or study, and bank card numbers confidential, and avoid disclosing them to others. By adhering to this simple algorithm, individuals can contribute to preventing cybercrimes.

Conclusions

Considering the information security policies implemented in Turkey regarding the protection and preservation of information technologies, the following conclusions can be made:

1. The legal provision of the information sector in our country is significantly behind the needs of time. Legal mechanisms regulating information-legal relations arising during the search, acquisition, and consumption of various types of information, information resources, information products, and information services are developed insufficiently.

2. The current state of ensuring action against cybercrimes is characterized by the insufficient coordination of the legal mechanisms in use, fragmentation of efforts to develop and improve them, lack of effectiveness, contradictions in legal norms, and underdevelopment of legal statistics.

3. The problems mentioned above clearly indicate that they pose a significant threat to the country’s information security in the context of legal provision in the information sector.

4. In Kazakhstan, establishing a network of centralized and streamlined institutions, along with creating a central monitoring body dedicated to ensuring cybersecurity, is highly relevant and would yield effective results.

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Түркия Республикасының киберқылмыспен күресу тәжірибиесі және ақпараттық технологиялар саласындағы қылмыстық құқық бұзушылықтардан алдын алу мәселелері

Киберқылмыс — қылмыстың салыстырмалы түрде жаңа түрі. Әсіресе, ғаламторды кеңінен қолдану және оның өмірдің әр саласына енуіне байланысты қылмыстың бұл түрі мен оны жасау жолдары да өзгеруде. Мақаланың негізгі мақсаты — мамандандырылған полиция бөлімшелерін құруды және киберқылмыспен күресу үшін Түркиядағы қылмыстың алдын алудың жаңа саясатын әзірлеуді зерттеу. Бұл зерттеуде Түркияның Бас қауіпсіздік басқармасы киберқылмыспен күресу үшін әзірлеген саясат мемлекеттік саясат процестері шеңберінде классикалық тәсіл моделін қолдану арқылы талданған. Зерттеуде институционалдық талдау әдісі қолданылды. Сондай-ақ Түркияның киберқылмыспен күрес саласындағы құқықтық нормалары, құрылған техникалық бөлімшелер, кадрлық саясаты, сондай-ақ осы саясаттың дамуына әсер еткен факторлар да қарастырылған. Қазақстандағы осы саладағы саясатпен қосымша салыстыру жүргізілді. Тақырыптың өзектілігі мынада: мемлекеттік құпияны құрайтын ақпаратты және Қазақстанның киберкеңістігінде азаматтардың заңмен қорғалатын дербес деректерін қорғауға бағытталған шаралардың маңыздылығын зерделеу.

Кілт сөздер: киберқылмыспен күрес, алаяқтық, киберполиция, кибер кеңістік, мемлекеттік жүйе, ақпараттық терроризм.

А. Шукан, Я. Ердоган, Г.Б. Каржасова

Опыт Турецкой Республики в борьбе с киберпреступностью и вопросы профилактики уголовных правонарушений в сфере информационных технологий

Киберпреступность — относительно новый вид правонарушений. С широким распространением интернета и его интеграцией во все сферы жизни эволюционирует как этот вид преступлений, так и способы его совершения. Поэтому основная цель этой статьи — изучить создание специализированных полицейских подразделений и разработку новой политики предотвращения преступности в Турции для борьбы с киберпреступностью. В данной статье политика, разработанная Генеральным управлением безопасности Турции для борьбы с киберпреступностью, анализируется с помощью модели классического подхода в рамках процессов государственной политики. В исследовании был применен метод институционального анализа, рассматриваются правовые нормы, изданные Турцией в области борьбы с киберпреступностью, созданные технические подразделения, кадровая политика, а также факторы, повлиявшие на ее разработку. Дополнительно проводится сравнение этой области с политикой Казахстана. Актуальность темы заключается в рассмотрении важности мер, направленных на защиту информации, составляющей государственную тайну, а также охраняемых законом персональных данных граждан в киберпространстве Казахстана.

Ключевые слова: борьба с киберпреступностью, мошенничество, киберполиция, киберпространство, государственная система, информационный терроризм.

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On the possibility of using the provisions of the Budapest Convention on cybercrime in the investigation of crimes in the field of online fraud

The article explores the potential of applying the provisions of the Budapest Convention on Cybercrime to improve the effectiveness of online fraud investigations in Kazakhstan. The main purpose of the work is to analyze the possibilities of the Convention in combating the growing threat of this type of crime, especially given their cross-border nature. The authors apply a comprehensive methodological approach, including an analysis of documents, a comparative study of legislation and an analysis of the practice of its application in other countries. The study revealed inconsistencies between the national legislation of Kazakhstan and the provisions of the Convention. The main issues relate to the definition of cybercrimes, digital evidence collection procedures, and international cooperation. Based on successful cases of the Convention's application in other countries, recommendations are proposed for improving legislation and law enforcement practice in Kazakhstan. In particular, the authors emphasize the need to adapt national legislation to the standards of the Convention, create specialized units to combat cybercrime, introduce digital platforms for data analysis and enhance international cooperation. This will increase the effectiveness of countering online fraud and strengthen Kazakhstan's position in the global fight against cybercrime.

Keywords: cybercrime, online fraud, Budapest Convention, international cooperation, digital evidence, legislation of Kazakhstan, law enforcement practice.

Introduction

The rapid development of information and communication technologies benefits modern society, but at the same time generates new, technologically more complex risks and threats. In recent years, there has been a rapid increase in cybercrime, especially in the field of online fraud.

According to Resolution No. 281 of the Board of the National Bank of the Republic of Kazakhstan dated October 29, 2018 On Approval of the Cybersecurity Strategy of the Financial Sector of the Republic of Kazakhstan for 2018–2022 [1], cybercrime is defined as a type of crime involving legally punishable acts committed using information technology in cyberspace.

According to Cybersecurity Ventures, it is expected that by 2026, the annual global damage from cybercrime will exceed 20 trillion US dollars [2]. This forecast highlights the scale of the problem and the need to strengthen measures to counter such threats. In recent years, there has been a significant increase in cybercrime in Kazakhstan, especially in the field of online fraud. According to the Committee on Legal Statistics and Special Accounts of the Prosecutor General's Office of the Republic of Kazakhstan, the number of registered cases of online fraud has increased more than 40 times over the past few years: from just over 500 cases in 2018 to 21.8 thousand in 2023 [3].

In the first half of 2024, 9,936 cases of online fraud were registered, which is 4.1 % more than in the same period of 2023 [4]. Fraud related to online purchases on marketplaces and bulletin boards is especially common: about 24 % of all cases [5]. The damage from such crimes is also increasing. In 2023, the amount of damage amounted to 17.5 billion tenge [6], and in the first seven months of 2024, the damage reached 7.1 billion tenge, of which only 11 % were reimbursed. Despite the efforts of law enforcement agencies, most cases of online fraud remain unsolved. In 2022, about 70 % of criminal cases for such crimes were suspended due to the failure to identify the perpetrators [7].

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According to the rating of the Global Cybersecurity Index 2024 (GCI) [8] on the cybersecurity of countries based on 83 indicators in 5 key areas: legislation, technical equipment, organization, capacity development and international cooperation, Kazakhstan fell into the Tier 2 category — "Advancing", next to countries such as China, Austria, Canada and Azerbaijan. The report involved 194 countries. For comparison, in the previous ranking (2020/2021), based on the old methodology, Kazakhstan ranked 31st. Although the rate of development of the information society in Kazakhstan is quite high and the country has been ranking higher in the international rankings, the rise of cybercrime is also increasing and therefore there is the need to improve on the cybersecurity measures and finding better ways of fighting online fraud. This is particularly important given the need to learn more about international practices related to these issues and to ensure that the provisions of the Budapest Convention on Cybercrime are fully integrated into the investigation and prevention of such crimes.

Cybercrime has become transnational with the increase in the rate of digitalization and globalization and thus requires an appropriate response from individual states. There are several problems regarding the scope of domestic mechanisms and their misalignment with international standards that limit national legal frameworks including those of Kazakhstan from combating these threats. Cybercrime is an emerging challenge that Kazakhstan is grappling with; however, some progress has been made, for instance, in 2008 the country ratified the UN Convention against Transnational Organized Crime [9]. But the challenges in dealing with the cross-border nature of cybercriminal activity are evident given the increasing number of online fraud cases that require quick action and cooperation with other countries.

A key international framework for dealing with cybercrime is the Budapest Convention on Cybercrime of 2001 [10]. The convention was adopted with the aim of harmonizing national legislation, enhancing the means of cybercrime investigation, and improving cooperation between international organizations. It offers state parties guidance on measures to fight cybercrime, and prompts them to consider amending their substantive and procedural criminal laws. This includes establishing liability for cybercrime-related offenses and defining the methods by which criminal investigations and prosecutions should be carried out. It also has recommendations for States parties on mutual assistance and is a mutual legal assistance treaty (i.e., an agreement on cooperation in investigation and prosecution of some and/or all offences defined as such in the national laws of both parties) for countries that do not have such a treaty with the country which seeks our assistance.

Kazakhstan is not a party to the Budapest Convention on Cybercrime yet, which limits its ability to integrate into global mechanisms to combat cybercrime. However, in April 2023, Kazakhstan received an invitation to join this convention, which indicates recognition of the country's efforts in the field of cybersecurity [11].

The limitations of national legislation are reflected in the lack of unified approaches and standards in the definition of cybercrime, collection and exchange of digital evidence. This hinders the creation of effective mechanisms for cooperation with international partners. An analysis of existing problems shows that the harmonization of national legislation with international standards, including the provisions of the Budapest Convention, can increase the effectiveness of countering online fraud and other types of cybercrime.

The rapid development of digital technologies has a significant impact on the socio-economic sphere of Kazakhstan. At the same time, the growth of cyber threats, including online fraud, is becoming a serious challenge to national security and law enforcement. The problem is complicated by the cross-border nature of cybercrimes, which requires coordinated action by law enforcement agencies at the international level [12; 71]. In this situation, the provisions of the Budapest Convention are an important resource, as they ensure the unification of standards and form the basis for international cooperation.

For Kazakhstan, which is not a party to the Budapest Convention, the issue of harmonization of national legislation with international standards remains one of the key tasks in the field of countering cybercrime. Accession to the Convention could not only strengthen national efforts to investigate and prosecute cybercriminals, but also help build trust between Kazakhstan and its international partners. The application of the Convention's provisions, such as joint investigations and the rapid exchange of information, opens up new opportunities for effective solutions to the problem of online fraud.

In the context of increasing digital transformation and economic globalization, the importance of the Budapest Convention as an international legal instrument continues to grow. Its potential to strengthen the rule of law in cyberspace makes this document particularly relevant for countries such as Kazakhstan that seek to develop their approaches to cybersecurity and countering online crimes.

The purpose of this article is to analyze the possibilities of applying the provisions of the Budapest Convention on Cybercrime to improve the effectiveness of online fraud investigations in Kazakhstan.

Methods and materials

This study uses a comprehensive methodological approach, including an analysis of documents, a comparative analysis of legislation and an analysis of the practice of applying the provisions of the Budapest Convention. The analysis of the documents included the study of the text of the Budapest Convention, the legislation of the Republic of Kazakhstan in the field of combating cybercrime, as well as analytical materials and reports of international organizations. A comparative analysis of the legislation was aimed at identifying the compliance of the national legislation of Kazakhstan with the main provisions of the Budapest Convention. The analysis of the practice of applying the Convention was based on a study of publicly available materials, including judicial practice and reports from law enforcement agencies in different countries. This methodological approach made it possible to conduct a comprehensive analysis of the possibilities of applying the provisions of the Budapest Convention in Kazakhstan and formulate recommendations for improving national legislation and practice in countering online fraud.

Results

The Budapest Convention on Cybercrime is a key international instrument aimed at combating cyber threats. Its provisions create a universal legal framework for the criminal prosecution of cybercrimes, including crimes related to fraud in the digital environment [13; 306]. In the context of online fraud investigations, articles dealing with both direct violations and supporting procedures related to obtaining and processing digital evidence are of particular importance.

Article 7 of the Convention defines computer fraud as the intentional insertion, modification, deletion or suppression of computer data in order to cause property damage by deception. The introduction of this rule creates the basis for the criminal prosecution of fraudulent activities related to data manipulation in electronic systems. For Kazakhstan, the relevance of this article is particularly high, given the growing number of cases of unauthorized interference in payment systems and e-commerce platforms. From January to August 2022, 11.7 thousand cases of Internet fraud were detected in Kazakhstan, and 7 billion tenge worth of damage was caused [14]. The inclusion of this provision in the national legislation of the Republic of Kazakhstan would contribute to more effective prosecution of online fraud, which is often cross-border in nature.

The provisions of article 8 focus on the creation and use of fake computer data in order to mislead other users or systems. This aspect is also closely related to crimes aimed at stealing funds or personal information. In Kazakhstan, where efforts to digitalize the economy are accompanied by an increase in cyber threats, the application of this article can support the process of investigating crimes related to the use of forged electronic documents, especially in the financial sector. Due to the presence of a large set of national and international payment systems in the market of the Republic of Kazakhstan, there are a number of risks when working in cyberspace [1].

One of the central rules of the Convention for the investigation of online fraud is article 14, which regulates access to digital evidence. This article focuses on the need to harmonize legal procedures between countries to ensure effective access to electronic data, which is critical for investigating crimes committed in a cross-border format. For Kazakhstan, active participation in international initiatives to combat cybercrime underscores the importance of developing robust internal mechanisms. These mechanisms are crucial for ensuring compliance with the Convention's provisions, particularly through strengthened cooperation with foreign Internet service providers.

Chapter III of the Budapest Convention holds particular significance for Kazakhstan due to the increasing necessity of cross-border data exchange in online fraud investigations. The articles on mutual legal assistance, such as Article 27, set up a legal procedure for accelerating the acquisition of data related to criminal activities occurring via the Internet from platforms outside the jurisdiction of the country. Incorporating these procedures into the legal system of Kazakhstan could not only improve the effectiveness of investigations but also strengthen international cooperation — a significant factor, given the globalization of cyber threats.

A defining characteristic of online fraud is that it is inherently transnational in its nature and facilitated by the global reach of the Internet [15; 70]. In this regard, the provisions of the Budapest Convention on cross-border cooperation are pivotal. They equip member states with tools to address crimes that cross national boundaries effectively. Central to these efforts are information exchange mechanisms, streamlined co-

operation among law enforcement agencies and improved access to digital evidence, all of which are critical for effective international collaboration.

The enforcement of the Budapest Convention provisions is a significant step in enhancing Kazakhstan's capabilities in the fight against cybercrime. Such measures as improving legal bases and creating favorable conditions for cooperation with international organizations directly contribute to the fight against online fraud and other cybercrimes. Thus, the integration of Kazakhstan's domestic efforts with the global standards is in line with the country's efforts to develop effective responses to the challenges of the digital sphere.

Article 23 of the Convention is a cornerstone in facilitating international cooperation in cybercrime investigations. This provision has paved way to a comprehensive legal framework for coordinated actions, information exchange and mutual assistance between states. Adopting these measures as Kazakhstan presents a significant opportunity to enhance the country's interactions with foreign partners and thus to have more effective and timely responses to cybercrime. The simplified and structured approach of Article 23 makes transnational investigations easier and brings domestic practices in line with internationally recognized legal norms. Therefore, the mechanisms provided for in the Convention are incorporated into the legal system of Kazakhstan, which enhances the country's capacity to fight the complexities of modern cyber threats through partnership.

Another important provision is Article 25 which controls the availability of data stored outside of the national jurisdictions. In this regulation, law enforcement agencies are allowed to request and use basic information like Internet traffic logs and user account details from foreign service providers. Since most digital crimes occur on platforms based abroad, this article is crucial to enhance the efficiency of investigations. Likewise, Article 27 defines and simplifies the measures regarding mutual legal assistance requests for obtaining evidence, searching and seizing data in the context of international cooperation. To implement this article for Kazakhstan, legislative changes are needed and the creation of specific structures to manage international collaboration is necessary.

Furthermore, the 24/7 rapid response network described in Article 35 presents new possibilities for accelerating the exchange of information in cases of online fraud. In this regard, for Kazakhstan, which is strategically located at the intersection of global transportation and digital networks, this initiative greatly enhances the nation's capacity to fight transnational threats. Nevertheless, to achieve the best results, several issues must be solved, including: limited technical resources; compatibility with international procedural standards; and modernization of the technological infrastructure. To overcome these challenges, further actions are clearly required. These include the development of specialized training programs, the enhancement of the logistical capacity of law enforcement agencies and the enhancement of cooperation with international partners.

Ensuring cross-border cooperation on the basis of the provisions of the Convention is becoming an important tool in the fight against online fraud. The combination of legal, organizational and technological tools is the basis for creating mutual confidence between the countries and creation of a global system for fighting cyber threats.

The implementation of the provisions of Budapest Convention into the laws of Kazakhstan is an important step towards enhancing the efficiency of the fight against cybercrime. The Convention provides for measures such as criminalization of major types of cybercrime, simplification of access to digital evidence and the development of international cooperation. An analysis of the current legislation of the Republic of Kazakhstan shows the need for further improvement of certain norms in order to comply with international standards, which will become the basis for strengthening law enforcement practices and increasing the level of national cybersecurity.

Kazakhstan's criminal legislation establishes liability for a range of cybercrime-related offenses, including provisions of the Criminal Code of the Republic of Kazakhstan (CC RK) [16], specifically Article 190 ("Fraud") and Article 205 ("Unauthorized Interference with the Operation of an Information System") [16]. The lack of clear differentiation between traditional and cyber fraud creates legal and practical challenges in the qualification and investigation of crimes. This, in turn, leads to difficulties in preparing the evidence base necessary for successful criminal prosecution. However, the specifics of the Convention suggest a more detailed approach to the definition of cybercrimes, such as computer fraud (article 7 of the Convention) and data forgery (article 8). At this stage, there are no separate rules in the Criminal Code of the Republic of Kazakhstan concerning fraudulent manipulation of data in digital systems, which creates a legal gap in the investigation of a number of crimes committed exclusively using information and communication technologies.

Although the Criminal Procedure Code of the Republic of Kazakhstan [17] contains provisions regulating the collection and processing of evidence, their adaptation to the requirements of the digital age remains limited. One of the key requirements of the Budapest Convention is the availability of procedures for the prompt collection, preservation and provision of digital evidence (Articles 14–21). In Kazakhstan, legislation partially regulates this process through the norms of the Criminal Procedure Code of the Republic of Kazakhstan (CPC RK) concerning the seizure of electronic media and obtaining information from Internet service providers. However, there are no clearly established mechanisms in the existing legal framework, e.g., mandatory temporary storage of data by Internet service providers and specific practices of cooperation with foreign service providers. This essentially hampers the capability of law enforcement agencies to secure crucial evidence in many cases, including those that are cross border crimes.

In the fight against cybercrime Kazakhstan is actively developing cooperation with international organizations and partner countries. The standards for mutual legal assistance and operational data exchange are articles 23–35 of the Budapest Convention. At the present time the national legislation of Kazakhstan provides a legal basis for international cooperation that includes the execution of requests for legal assistance and joint investigations. However, there is one of the problems — there are no sufficiently well-defined procedures for direct communication with foreign ISP's, and there are no clear rules for requesting foreign countries within the 24/7 network or for interacting with foreign jurisdictions during joint investigative activities. It can also lead to some delays in the course of investigation and can reduce the effectiveness of the investigation.

A review of the laws of Kazakhstan shows that the country has made significant efforts to meet the standards set by the Budapest Convention; however, there are some issues that require further attention. Major problems are: 1. Not enough detail on offences of cyber fraud; 2. Low capabilities of the law enforcement agencies in preserving and acquiring digital evidence; 3. No standards for effective cooperation with foreign countries [18; 57].

To close these gaps, it is advised to modify the Criminal Code of the Republic of Kazakhstan to incorporate provisions covering cybercrimes, for instance computer fraud and data forgery. Further, modifying the Criminal Procedure Code (CPC) to provide for the storage and handling of digital evidence is also important. Also, establishing a dedicated structure for international cooperation via the 24/7 network would add weight to Kazakhstan's fight against cross border online fraud.

The practical use of the Budapest Convention is based on the fact that it facilitates international cooperation and sets standards for legal mechanisms to fight cybercrime including cyber fraud. Studying the cases where its provisions were used to investigate such crimes is a great way to understand their applicability and effectiveness in cross border operations.

The Convention is a major international treaty that establishes Joint Investigation Teams (JITs) as a central means of combating transnational crime. These teams are very useful in the collection of digital evidence like servers that have been used in fraudulent activities. The institutional support and operational coordination that the Convention provides really does improve the efficiency of the investigation. For example, Article 16 of the Budapest Convention, the data preservation provision, was very useful in a fraud case involving fake social media accounts. The cooperation with the platform providers located in the United States assisted Kazakhstan's law enforcement authorities in collecting the proof of the crime, although the perpetrators sought to erase it from the digital domain. This effort resulted in the identification and prosecution of people behind the scheme [19].

These examples reflect the central role of the Budapest Convention in cybercrime investigation especially in an international context. In this regard, Kazakhstan's experience with the effective application of the Convention stresses the need to enhance the cooperation with international partners. Important actions are: enhancing the mechanisms for mutual legal assistance, increasing cooperation through the 24/7 network, and promoting the adoption of data retention measures in the national laws. Moreover, the experience with the application of the Convention's provisions in practice underlines the necessity of the specialized professional training for law enforcement personnel. Such training should focus on the proper application of international instruments in the fight against cybercrime.

In the end, successful case studies prove that compliance with the standards of the Convention does improve the efficiency of the fight against cybercrime. This not only safeguards the rights and interests of citizens and organizations in the digital realm but also enhances the position of Kazakhstan in the global battle against cybercrime.

Discussion

Over the past two decades, the Budapest Convention has been the principal international instrument for combating cybercrime. It has been widely ratified and implemented by a number of states and has been found to be practical and effective in combating online fraud and other cyber-crimes. Studying the international experience allows identifying the critical aspects of successful implementation and, therefore, serves as a reference point for assessing Kazakhstan's practices against the global standards.

Views on the Budapest Convention are quite divergent. Some countries have pointed out that it has no enough tools for cooperation and for that reason support the need to develop a new framework; but other countries especially the EU and OECD members have explained that the Convention is a good framework for collaboration globally. They argued that it promotes international cooperation and was signed by a geographically diverse group of countries [20; 219].

Member states of the European Union are a good example of the effective implementation of the measures through the harmonization of the laws and the establishment of the common standards. For instance, Germany, one of the earliest signers of the Convention, incorporated the provisions on computer fraud (Article 7) of the Convention into its Criminal Code (Strafgesetzbuch, StGB). Another significant success is the existence of dedicated structures including the Cybercrime Investigation Division of the Federal Criminal Police Office (Bundeskriminalamt, BKA) [21]. This division guarantees proper functioning of the 24/7 network and has a strong cooperation with international partners. The integration of technical and legal measures by Germany is a good practice that Kazakhstan should follow especially in setting up of specialized agencies.

Estonia, a country famed for its digital prowess, is a good example of how digitalization can support legal frameworks. After the Convention was ratified, Estonia introduced automated monitoring systems and network traffic analysis tools that are vital for detecting and preventing online fraud. The country's international cooperation is evident in cases such as the November 2022 arrest of two nationals involved in cryptocurrency fraud amounting to $575 million. This is because the investigation was done in partnership with the United States, which shows the efficiency of collaboration within the legal frameworks [22].

Many of the Budapest Convention's provisions have been adaptively learned by Kazakhstan, but this is in comparison to much lower standards than the best international practices. Kazakhstan does not have a specialized agency fighting cybercrime, which restricts the efficiency and speed of investigations, unlike Germany. Additionally, its relation with the 24/7 cybercrime network is not yet compatible with the EU standards.

This approach of Estonia shows how the integration of technical solutions can improve the existing systems of digital law enforcement. Cyber-crime prevention and investigation has been enhanced greatly through these advancements in technologies. Such technologies are still in the process of being adopted in Kazakhstan, and this demands substantial financial resources and complete training. Moreover, the success of Estonia in the cooperation with foreign partners in the course of international investigations is also due to the existence of strong collaboration with the foreign partners. Kazakhstan has started similar cooperation; however, such cooperation has to be institutionalized to ensure that it is sustained in the future.

The United States, also a signatory of the Budapest Convention, serves as a valuable benchmark for comparing Kazakhstan, as it has integrated the Convention's provisions and bilateral legal assistance agreements into its domestic law. The main focus of the U.S. strategy is the effective application of instruments analogue to the 24/7 network and active implication in the international cooperation in the fight against fraud. By contrast, Kazakhstan has limited participation in bilateral agreements and uses the Convention at a general level. To this end, Kazakhstan should expedite the negotiation of agreements with major international partners including China, the EU and the United States, especially for the data sharing with large internet service providers (ISPs).

Global practices reflect that the effective implementation of the Budapest Convention requires an integrated approach to legislative reforms, institutional development, and technological innovation. The experiences of Germany, Estonia and the United States are varied strategies that can inform Kazakhstan's efforts. To achieve similar results, Kazakhstan must prioritize the following measures within its national framework:

- The establishment of a specialized agency to combat cybercrime;
- The creation and use of digital platforms for data monitoring and analysis;
- The enhancement of international cooperation by the negotiation and conclusion of bilateral treaties.

These strategies, if adopted, would allow Kazakhstan to better align with international standards and thus better position itself to meet the multifaceted challenges of cybercrime.

A comparison shows that based on the successful practices available, Kazakhstan has the potential to adopt the provisions of the Budapest Convention and even improve its capabilities in the fight against cybercrime, including online fraud. Nevertheless, integrating international norms such as the Budapest Convention into national legislation entails inherent challenges. These are rooted in variations in legal systems, levels of digitalization, and preparedness for international cooperation. Paring down to the root issues identified in comparing national legislation with the Convention's requirements offers a chance to plug those gaps by adopting the best of international practices.

One major problem is that there is no uniform definition of cybercrime. For instance, the Budapest Convention specifically spells out computer data fraud in Article 7 and computer forgery in Article 8, giving clear legal definitions. By contrast, the Kazakhstani laws classify such offences within more general categories like fraud (Criminal Code Article 190) or forgery (Criminal Code Article 385). This lack of distinction for digital crimes creates legal ambiguities as to what constitutes a crime and what does not, and thus what can be investigated.

Procedural inconsistencies only compound these challenges as well. Articles 16 and 17 of the Budapest Convention set forth the means of preserving and making available digital data, but Kazakhstan's procedural codes are not fully compliant with these provisions. For example, there are no rules governing the obligations of Internet service providers to store temporarily traffic data, as is the case in several European countries, and hence there is a risk of missing crucial evidence which can compromise international legal assistance.

Another major difficulty is limited national capacity to interface with foreign jurisdictions. Article 27 of the Budapest Convention sets up standardized procedures for mutual legal assistance but their practical implementation is problematic. The problem with data requested from providers in countries that are not Convention countries is that they are particularly difficult to obtain, more bilateral agreements are required to solve this problem. These procedural inefficiencies are then coupled with slow bureaucratic processes and the absence of harmonized protocols.

Germany and France are examples of countries that have overcome these challenges. Germany has also improved its legislation to fill the gaps in the cybercrime definitions and has enacted particular provisions for computer fraud and data manipulation which have improved the investigation processes. Compliance with Article 16 of the Convention has inspired regulations of providers' data retention for a certain period of time which enhances the cooperation international. Just like France, Kazakhstan needs to establish a similar body like the Interagency Centre for Combating Cybercrime that handles all the mutual legal assistance requests and cuts down on the time taken to respond. These institutional frameworks can be a good reference for Kazakhstan to create a more effective mechanism of sharing information with its international partners.

In order to fulfil the provisions of Article 19 of the Budapest Convention which deals with the access to the stored data, Kazakhstan has taken some measures. The Law of the Republic of Kazakhstan "On Access to Information" of November 16, 2015, No. 401-V provides a legal basis for accessing non-restricted information [23]. However, the progress can only be sustained with regulatory changes and the development of dedicated institutions to facilitate cross-border cooperation. These efforts are in line with the objectives of the Concept of Digital Transformation. In the fight against cybercrime and in order to fulfil the international obligations, Kazakhstan has to further develop its legal system and institutional arrangements. The implementation of the Budapest Convention and other international standards will increase the country's cyber security and build partnership globally.

Conclusions

The Budapest Convention on Cyber Crime is a primary international legal instrument that addresses cyber threats and includes provisions for online fraud. They cover almost all issues, from the legalization of norms to digital evidence collection and promotion of cooperation. The relevance of the Convention for Kazakhstan can be illustrated by the growing cybercrime rates. Because online fraud is borderless and cannot always be addressed through national measures, standard setting becomes of vital importance. Therefore, it is crucial to leverage the full potential of its mechanisms by aligning Kazakhstan's national legislation with the Convention's provisions. This would help improve the effectiveness of information exchange, the rate of access to digital evidence, and the unity of legal processes. One of the most significant provisions is Article

35, which mandates the creation of a round-the-clock rapid response network, which could be a useful strategy to improve international law enforcement cooperation.

Implementing the changes required by the Budapest Convention will not only strengthen the domestic legal system of Kazakhstan but will also lead to the development of better cooperation with the international partners. Thus, with the help of the Convention as a reference point for matching the national legal standards to the international standards, Kazakhstan can significantly contribute to the formation of a sustainable digital ecosystem. This way, the country will be better prepared to fight cybercrime and at the same time enhance its position in the international community as a country that can be trusted in the fight against cyber threats.

The importance of this research is in the fact that it offers the ways to enhance the effectiveness of online fraud investigations with the help of the enhanced approaches. The main measures are the creation of dedicated cybercrime structures, the creation of new and improved digital tools for data analysis, and the enhancement of international cooperation through the conclusion of bilateral treaties and the simplification of the MLA system. If these measures are to be implemented, it will enhance Kazakhstan's institutional arrangements and, therefore, support the sustainable development of the digital ecosystem.

The scientific contribution of this study is evident in its comprehensive analysis of how international legal frameworks are employed to combat transnational cybercrime. Through the use of case studies, the research shows the practical application of the Convention's provisions and offers practical recommendations for improving legal and investigative practices. These findings can be used as a starting point for future research, especially regarding the experiences of non-ratifying countries and the implications of technological change for strategies designed to prevent cybercrime.

Thus, aligning the Kazakh legislation with the Budapest Convention is a significant progression that will help the country to improve its capacity in fighting online fraud and advance its role in the cybercrime fight globally. The proposed solutions are a good starting point for developing a comprehensive approach to the various issues posed by the modern digital environment and creating the basis for a secure and sustainable cybersecurity system.

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Онлайн алаяқтық қылмыстарын тергеуде Будапешт киберқылмыс жөніндегі конвенциясының ережелерін қолдану мүмкіндігі туралы

Мақалада Қазақстандағы онлайн алаяқтықты тергеудің тиімділігін арттыру үшін киберқылмыс туралы Будапешт конвенциясының ережелерін қолдану әлеуеті зерттелген. Жұмыстың негізгі мақсаты — осы қылмыс түрінің өсіп келе жатқан қауіп-қатеріне қарсы күресте, әсіресе оның трансшекаралық сипатын ескере отырып, Конвенцияның мүмкіндіктерін талдау. Авторлар құжаттарды талдауды (Конвенция мәтіні, Қазақстан Республикасының заңнамасы, талдау материалдары), заңнаманы салыстырмалы зерттеуді (Қазақстан нормаларының Конвенция ережелеріне сәйкестігін анықтау) және оның басқа елдерде қолданылу тәжірибесін сараптауды қамтитын кешенді әдістемелік тәсілді қолданған. Зерттеу барысында Қазақстанның ұлттық заңнамасы мен Конвенция ережелерінің арасындағы сәйкессіздіктер анықталды. Негізгі мәселелер киберқылмыстарды анықтау, цифрлық дәлелдерді жинау рәсімдері және халықаралық ынтымақтастыққа қатысты. Басқа елдерде Конвенция ережелерін табысты қолдану жағдайларын негізге ала отырып, авторлар Қазақстанда заңнама мен құқық қолдану тәжірибесін жетілдіруге арналған ұсыныстар әзірледі. Атап айтқанда, ұлттық заңнаманы Конвенция стандарттарына бейімдеу қажеттігін, киберқылмыспен күресуге арналған мамандандырылған бөлімшелер құруды, деректерді талдау үшін цифрлық платформаларды енгізуді және халықаралық ынтымақтастықты жандандыруды ұсынады. Бұл онлайн алаяқтыққа қарсы күрестің тиімділігін арттыруға және Қазақстанның жаһандық киберқылмыспен күрестегі орнын нығайтуға мүмкіндік береді.

Кілт сөздер: киберқылмыс, онлайн алаяқтық, Будапешт конвенциясы, халықаралық ынтымақтастық, цифрлық дәлелдер, Қазақстанның заңнамасы, құқық қолдану тәжірибесі.

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О возможности применения положений Будапештской конвенции о киберпреступности при расследовании преступлений в сфере онлайн-мошенничества

В статье рассматривается потенциал применения положений Будапештской конвенции о киберпреступности для повышения эффективности расследований в сфере онлайн-мошенничества в Казахстане. Основной целью работы является анализ возможностей конвенции в борьбе с растущей угрозой этого вида преступлений, особенно учитывая их трансграничный характер. Авторы применяют комплексный подход, включающий анализ документов (текста конвенции, законодательства Республики Казахстан, аналитических материалов), сравнительное изучение прав человека на предмет соответствия законодательства Казахстана положениям конвенции и анализ практики её применения в других странах. В ходе исследования выявлены несоответствия между национальным законодательством Казахстана и положениями конвенции. Основные проблемы касаются определения киберпреступлений, процедур сбора цифровых доказательств и международного сотрудничества. На основе успешных кейсов применения конвенции в других странах, предложены рекомендации по совершенствованию законодательства и правоприменительной практики в Казахстане. В частности, авторы подчеркивают необходимость адаптации национального законодательства к положениям Конвенции, создания специализированных подразделений по борьбе с киберпреступностью, внедрения цифровых платформ для анализа данных и активизации международного сотрудничества. Это позволит повысить эффективность противодействия онлайн-мошенничеству и укрепить позиции Казахстана в глобальной борьбе с киберпреступностью.

Ключевые слова: киберпреступность, онлайн-мошенничество, Будапештская конвенция, международное сотрудничество, цифровые доказательства, законодательство Казахстана, правоприменительная практика.

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Insurance interest under the law of England

The article is devoted to one of the elements of the insurance contract. The author notes that the doctrine of insurable interest was developed in England in the middle of the 18th century. The classic definition of insurable interest in property insurance is contained in a court judgment. Initially, insurable interest was an "economic interest" — a real and expected possibility of property damage due to an insured event. It was first legislated in the Marine Insurance Act of 1745. In the 20th century, the Marine Insurance Act of 1745 was replaced by the Marine Insurance Act of 1906. A new definition of insurable interest was given. In addition to the economic interest, the insured had to prove a legal interest, namely the existence of a legal or equitable relationship to the object of insurance. Further, the article discusses the types of insurable interest. Thus, depending on the source of fixation the insurable interest can be statutory and contractual. It is noted that the Law Reform Commission is currently preparing amendments concerning insurable interest. Most members of the Commission are inclined to the position that the requirement of insurable interest should be removed from English law in property insurance contracts. It is also important to note that insurable interest in English law is not considered as the subject (object) of an insurance contract — the works of scholars speak about the subject of insurance.

Keywords: insurable interest, doctrine of insurable interest, types of insurable interest, economic and legal interest, judicial practice, insurable interest as a subject of insurance.

Introduction

The choice of this topic is not accidental. Over the years, under my scientific supervision, several theses related to the insurance law of Russia have been successfully defended, including others on related subjects. One of them is devoted to the contract of directors and managers' liability insurance in the law of England and Russia [1]. In 2023, I published a monograph titled Contract Law in England: A Comparative Legal Study (3rd edition), Chapter 11 of which addresses current issues regarding the insurance contract in English law.

Methods and Materials

For a comprehensive and complete study of the topic, comparative legal and hermeneutic methods were primarily used. Of course, other general scientific and specific scientific methods were also used in the process of conducting this study. In particular, the method of legal interpretation, which made it possible to focus on understanding laws through their content, scope of application, as well as purpose and historical con-

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text, which made it possible to identify how the provisions of laws are applied in national jurisdictions. Along with this, the historical method was used, which made it possible to comprehensively study the process of formation and development of insurance legislation in different states and identify common patterns in different national jurisdictions. Together, these above-mentioned methods help study individual legal categories and institutions, in particular, and contribute to the development of legal science in general.

The comparative legal method made it possible to compare legal concepts, legal phenomena and processes of the same order in different legal systems and identify the common and differences between them, provided that the objects are comparable. The hermeneutic method was used to interpret legal terms and legal concepts to determine their meaning and understanding in legal science and practice in different countries.

The materials for writing this article were regulatory legal acts on insurance of various states and scientific and practical comments from specialists in this field.

Discussion

First, let us take a brief look at the history of insurance. According to one version, the beginning of the insurance business is believed to have started in the XVII century in Edward Lloyd's coffee house in London. In the coffee house the merchants agreed to create a special money fund, which would be used to pay off the damage caused to the merchant who was in trouble (for example, in case of shipwreck or loss of a ship). According to another version, the first insurance organization ("Insurance Chamber") was established in 1310 in Bruges (Germany) to protect the property interests of merchants and craft guilds [2; 9]; [3; 10-11]. We believe that this issue is not simple, as it may seem at first glance. Historically, it is necessary to distinguish different moments when the first insurance contracts (agreements) appeared, when insurance companies were created and when certain types of insurance emerged. This reflects both historical progression and logical reasoning.

Along with marine insurance, fire insurance also emerged. A powerful impetus for the creation of this type of insurance was the Great Fire in London in 1666, when it destroyed almost the entire city center. A special "Fire Policy" financed by a certain group of people was established to insure houses and other buildings.

The idea of life and health insurance on a commercial basis was realized in later times. Thus, the first life insurance company was established in England in 1765. In continental Europe and America, the corresponding insurance companies appeared only in the XIX century.

It should be particularly noted that English laws (statutes) do not contain a legal definition of the concept of insurance contract, but the traditional definition is contained in the decision on the case of *Prudential Insurance v Inland Revenue* [4]. Channel J. noted that "This… contract whereby for some consideration, usually but not necessarily for periodical payments called premiums, you secure for yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. Then, the event must have some amount of uncertainty about it".

For comparative analysis: there is no legal definition of a single concept of an insurance contract in the Civil Code of the Russian Federation.

The Civil Code of the Russian Federation (Articles 929, 934) contains separate definitions of personal and property insurance contracts. We think that this should not be interpreted as legislator's rejection of the unified concept of insurance contract. The definition of property and personal insurance contracts includes the criterion of losses, which is not decisive for the separation of insurance contracts from other types of civil law contracts. This criterion, indicating the existing differences between personal and property insurance in no way detracts from the significance of the general concept of an insurance contract, which is the legal basis for the emergence of any insurance legal relations. The legislator should return to a unified concept of insurance contract [3; 195–197]. For example, Article 803 of the Civil Code of the Republic of Kazakhstan contains a single concept of the insurance contract. According to this provision of the Civil Code of the Republic of Kazakhstan, under the insurance contract, one party (the policyholder) is obligated to pay the insurance premium, while the other party (the insurer) is required to provide an insurance payment to the policyholder or another individual designated in the contract (the beneficiary), in the amount specified in the agreement (the sum insured), in the event of an insured occurrence. [5; 300-301].

It is well known that, in addition to the classical definition of the structure of legal relations (subjects, objects, and content), another classification of the elements of insurance legal relations can be applied in the field of insurance. They (elements) include insurance risk, insured event, insurable interest, insurance

amount and insurance payment, insurance premium (insurance premiums) and insurance tariffs. These elements are of a special nature.

For the purposes of this publication, let us consider insurable interest in English pre-contract law. Thus, English law states that a person entering into an insurance contract must have an insurable interest in the subject matter of the insurance. The potential policyholder must have a "relevant relationship" to the person or property he or she wishes to insure. Not only the insurer, but also society as a whole must be satisfied that the potential policyholder's purpose in taking out the insurance is appropriate.

The doctrine of insurable interest was developed in England in the middle of the 18th century. In this case, the legislators and practice pursued two main goals:

1. To prevent undesirable consequences in the form of deliberate destruction of the insured object or killing of the insured person in order to receive insurance compensation under the policy (moral hazard);

2. To distinguish insurance contracts from gambling, which was illegal in England[*].

The classic definition of *insurable interest in property insurance* is found in the decision in the case of *Lucena v Craufurd* [6]: it is "a right to property or a right derived from contracts in respect of property which in any event may be lost by unforeseeable circumstances affecting the possession or enjoyment of a party". Thus, *the insurable interest was originally an "economic interest" — the real and expected possibility of property damage due to an insured event*. It was first enshrined in law in *the Marine Insurance Act 1745*, which established the nullity (void) of marine insurance contracts concluded without insurable interest. Thirty years later, the need to take measures to prevent gambling through life insurance contracts led to *the Life Assurance Act of 1774*. This statute was aimed at preventing life insurance without a legitimate interest — such contracts were recognized as void. It (the statute) is applied even nowadays for life insurance and "other events except goods and ships". Thus, at the end of the XVIII century *the Marine Insurance Act 1745 and the Life Assurance Act 1774* signaled the legal necessity of insurable interest in marine and life insurance under the fear of nullity of the contract.

The 19th century was marked by a further consolidation of views on gambling. In 1845 *the Gaming Act 1845* was passed [7]. It established that all contracts in which the policyholder could not prove his interest were regarded as bets and could not be enforced (unenforceable). Since a bet is a contract in which neither party has an interest in its subject matter, this provision had the effect of making all contracts in which an interest could not be demonstrated unenforceable (and therefore unenforceable).

In the 20th century, *the Marine Insurance Act 1745* was replaced by *the Marine Insurance Act 1906* [8]. A definition of insurable interest was given: A person is recognized as having an interest in a marine adventure [9], *if he/she has a relationship (governed by common law or equity) to it or property* which is at risk during the adventure and in connection with which he/she may benefit from the preservation or timely arrival at the destination of the property, or may suffer loss, damage or delay in transit, or be liable to third parties in respect of the property. Thus, in addition to an economic interest, the policyholder had to prove a legal interest, namely a legal or equitable relationship to the subject matter of the insurance (a legal connection to the subject matter of the insurance).

Three years later, Parliament decided to introduce a sanction against persons who enter into marine insurance contracts without insurable interest. *The Marine Insurance (Gambling Policies) Act 1909* г. [10] stated that this was an offence.

In 1925 the Court of Appeal made a precedent-setting decision in the case of *Macaura v Northern Assurance Co Ltd* [11]: Mr. Macaura, being the sole shareholder of the company, insured timber belonging to the company in his own name. Macaura, being the sole shareholder of a company, insured on his own behalf timber belonging to the company. The property was damaged by fire, but when the claimant brought a claim for damages against the insurer it was refused. The House of Lords held that the claimant had no insurable interest as he *had no right* to the company's property. This decision extended the doctrine of "legal interest" to property insurance and finally established it in English law.

After 1909, the legislation remained unchanged for 100 years until *the Gambling Act 2005)* [12]. This statute repealed Section 18 of the Gaming Act 1845, stating that "the binding effect of a contract on gambling does not mean that it (the contract) is unenforceable". This provision came into force in September

[*] Insurance and wagering have in common that the reward depends on uncertain (random) events. In a bet, however, neither party is interested in the contract or the insured object, but only in receiving a specific sum of money (share) in case of winning. In an insurance contract, by contrast, the policyholder suffers a loss if the insured object is destroyed.

2007. Consequently, *for the purposes of determining whether a contract is enforceable (with the exception of marine and personal insurance contracts), the insurable interest is no longer relevant in England.*

Results

Analyzing the above definitions, it can be concluded that, under English law, an insurable interest arises when the following conditions are met:

1. The existence of an objective (legal) connection (based on common law or equity) with the subject of insurance — this is confirmed by both statutes and case law. A similar regulation is provided for in the Civil Code of the Russian Federation: for example, Clause 1 of Article 930 considers it possible to conclude a property insurance contract only in favor of a person who has an interest in preserving the property based on law or contract. This connection can be defined as the "legal interest".

2. The existence of an "economic interest" — a "real possibility" of loss for the "policyholder". In other words, the policyholder must have a benefit in preserving the thing and its loss, damage or destruction must have a non-favorable consequence for him/her.

The point of interest is when the insurable interest should take place. Unlike the Russian law, where the insurable interest, being the object of insurance, must take place at the conclusion of the contract and throughout its validity (clause 1, part 1, Article 942 of the Civil Code of the Russian Federation) under the fear of nullity, the situation in English law is fundamentally different. Indemnity insurance (or loss insurance) provides compensation for the number of losses incurred. Contingency insurance (non-indemnity insurance) provides payment of a predetermined amount. For indemnity insurance, the insurable interest is necessary only when the losses actually incurred (losses can also be potential, if their amount and basis are accurately established) take place, i. e. at the moment when the amount of compensation can be measured. Therefore, people can insure, for example, a house they have agreed to buy, even though they do not yet own it at the time the insurance contract is concluded. For insurance in case of unforeseen circumstances, the exact amount of damage incurred cannot be accurately calculated. Therefore, the existence of an insurable interest is required at the time of concluding a contract [13].

It is also important to note that depending on the source of the insurance interest, it can be statutory or contractual. A statutory interest is an insurable interest that is required by statute (e. g. the Marine Insurance Act 1906 and the Life Assurance Act 1774), i.e. in marine and life insurance. As for the other types of insurance, insurable interest is now contractual. The legal consequences in the absence of a "legal" and "contractual" interest are different. In case of non-compliance with the requirements established by law, the insurance contract is void, both parties lose the right to enforce the contract, and the court has the right to refuse the claim, even if the insurer does not refer to the insured's lack of insurable interest. If the policyholder had no insurable interest under the particular contract, until recently (before the Gambling Act 2005), the contract remained valid, but the policyholder lost the right to enforce it. Now, as we can see, the presence or absence of a contractual interest does not affect the enforceability of the insurance contract. As for the legal insurable interest, most researchers are of the opinion that the Gambling Act 2005 has not influenced the requirements of the Marine Insurance Act and the Life Assurance Act 1774, therefore the requirements of the legal insurable interest continue to apply in order to distinguish between insurance and wagering contracts and to prevent the policyholder's bad faith.

The introduction of the Gambling Act 2005 was not accidental — initially strict requirements relating to insurable interest were softened by judges' positions, which were then reflected in the legislation. For a long time, some members of the House of Lords had indicated that the "economic interest" was a sufficient basis for being able to insure an object. However, practice and legislation then favored a narrower framework for the existence of the "interest": in the event of destruction of the subject matter of the contract, the policyholder had to prove the "legal interest" — the existence of a legal connection (based on common law or equity) with the subject matter (in addition to the occurrence of material loss) [14]. In *Cowan v Jeffrey Associates* [15] in circumstances similar to the decision in *Macaura v Northern Accurance Co Ltd* discussed above, Lord Hamilton regretted that he had been unable to ignore the House of Lords' decision in *Macaura* in favor of the concept of the real possibility of loss. It may be stated that Lord Hamilton's dissenting opinion initiated a departure from a strictly formal definition of insurable interest. Professor M. Clarke in criticizing the decision in *Macaura v Northern Assurance Co Ltd* suggests that, as the sole shareholder and investor in the company, Mr. Macaura had in fact suffered loss by reason of the loss of the forest and the court should have taken that fact into account. In the US, this decision is also considered too harsh and the only justification is that the insured's actions contained fraud, which was difficult to prove, and therefore the court found an al-

ternative justification for the legitimacy of the denial of indemnity [16; 32-33]. In *Feasey v Sun Life Assurance Co of Canada* [17] Lord Waller held that "anything less than an interest based on common law or equity is considered sufficient to give rise to an insurable interest" [16; 37]. This precedent is today the leading judgment in cases concerning insurable interest. According to the decision in question, an insurable interest exists if:

1. The policyholder has a right based on law (common or statutory) or equity to the subject matter of the insurance;

2. The policyholder merely owns the subject matter of the insurance;

3. If the policyholder does not own the object of the insurance but is responsible for its loss or damage or bears the risk of loss due to such loss (damage). This position is similar to Lawrens J. dissenting opinion in *Lucena v Craufurd*.

Waller J. divided the court cases according to the manner in which the insurable interest is expressed into 4 groups, 3 of which have to do with property insurance[*].

*Thus, today the unity of legal and economic criteria is not necessary — it is sufficient to establish only the presence of one of them***.**

The academic community echoes the practice: M. Clarke also notes that the formal requirement of "legal connection" prevents the possibility of concluding insurance contracts for persons who have an essential economic interest in the property. For example, investors, employees of the company, and subcontractors cannot insure the property. It is for this reason that the concept of "link to property" has been abolished in Canada, Australia and the USA and has never been applied in Germany, Switzerland and France [16; 26–36]. D. Lord believes that the doctrine of insurable interest is obsolete in modern society. The development of the principles of good faith, full disclosure of information by the insured when entering into a contract, and the obligation of the insured to notify the insurer of a change in risk, in his opinion, leaves no room for the insurable interest [18]. As early as 1884, Brett J. pointed out that once the premium has been paid by the insured to the insurer, the insurable interest fulfils a purely technical function and carries no merit for the relationship of the parties [19]. Waller J. considered that the absence of an insurable interest should not prevent commercial contracts between the insurer and the policyholder [16].

In accordance with the needs of practice, English judges have developed precedents that allow insurance contracts to be entered into by persons with so-called "limited" insurable interests. For example, a custodian, mortgagor, pledgee, mortgagee, landlord, tenant, trustee, and beneficiary are deemed to have a sufficient interest in property to insure it. However, such persons may not obtain indemnity greater than the amount of their interest [20].

Today, English legal scholars conclude that the insurable interest has lost its significance: after the Gambling Act 2005, wagering contracts became enforceable: "the relationship of a contract to gambling is not an obstacle to its enforceability" [21]. Consequently, the purpose that the insurable interest was intended to serve no longer exists. The Law Commission is currently preparing changes to the law relating to insurable interest. Most members of the Commission are inclined to the position that the insurable interest requirement should be removed from English law in property insurance contracts [20]. One of the arguments in favor of levelling the importance of the insurable interest is the existence of the common law "indemnity principle" [22; 41-42]. This principle establishes that the policyholder can only receive payment from the insured if he or she suffers property damage[†]. If the policyholder cannot prove the existence of a damage due

[*] Cases in which the court has defined the subject matter of the insurance as property where the object of the insurance is the recovery of the property value. Waller J. held that in this case the requirement of insurable interest is strict — the insured must show a legitimate property interest in the subject matter of the insurance for the policy to be valid. This group includes the cases of *Lucena v Crauford and Macaura*. In our opinion, this group corresponds to the property insurance contract in the Civil Code of the Russian Federation (Article 930); 2. Cases where the subject matter of the insurance may relate to specific property, but the interpretation of the policy goes beyond that subject matter to cover such insurable interest as the policyholder has. Waller J. cites the case of *Wilson v Jones* as an example. In our view, cases arising out of business risk insurance contracts (Article 933 of the Civil Code of the Russian Federation) may be referred to this category; 3. Cases where "the court recognized an interest that was not strictly proprietary". For example, in *the Moonacre* case. This case had similarities to *the Macaura* case. Mr. Sharp insured a yacht owned by his company in which he was the sole shareholder and had no lien or claim on the property. Contrary to this, the High Court found that Mr Sharp had a sufficient insurable interest because he was free to use the yacht and had a duty to keep it safe. In this category of cases, Waller J. concluded that "an interest is recognized even if it is not based on common law, equity or property".

[†] The principle of indemnity can be expressed as either a statutory implied condition or an actual contractual condition. In the former case, the question of whether the policyholder has suffered damage is determined by the law of property. For example, the law of bailment determines whether the carrier has suffered a loss. This is different if the "indemnity principle" is expressed as an actual

to an insured event, the contract is not recognized as invalid or void — the person simply cannot receive compensation for the individual insured event. It is logical that if a person suffers material damage as a result of destruction of the object of insurance, he/she has an interest in this object. However, this rule is not identical to the insurable interest. The latter is intended to distinguish an insurance contract from a bet in order to recognize the enforceability of the contract and to prevent the policyholder from acting in bad faith, whereas the "principle of indemnity" is aimed at ensuring that the insured receives payment strictly equal to the amount of his loss. The principle of indemnity also takes place in the Russian law. It (the principle) finds its expression, for example, in clause 1 of Article 929 of the Civil Code, where it is established that under the contract of property insurance the insurer undertakes for a fee (insurance premium) stipulated by the contract, upon the occurrence of an insured event, to compensate the insured or the beneficiary for losses in the insured property or losses *in connection with other property interests of the insured* (to pay insurance compensation) within the amount determined by the contract (insurance amount), in Article 947 of the Civil Code of the Russian Federation, which establishes that the sum insured may not be higher than the insured value on pain of nullity of the contract in the part of such excess,* as well as in the norms of the Civil Code of the Russian Federation on unjust enrichment.

Conclusions

1. There is no legal definition of insurable interest in English law. The classic definition of insurable interest in property insurance is found in *Lucena v Craufurd*.

2. The insurable interest in English law is not regarded as the subject (object) of the insurance contract — the works of scholars speak about the subject of insurance (subject of insurance). The subject of insurance is understood as the property to which the policyholder's interest is linked, for which the insurance coverage is valid, and in relation to which the insured event may occur. Thus, the subject of insurance in English law coincides with the theoretical object of insurance protection developed in Russian theory.

3. English judges have developed precedents that allow insurance contracts to be entered into by persons with the so-called "limited" insurable interests.

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contractual condition — in this case the regulation is more flexible — the parties can stipulate in the contract the types of damages to be compensated under the policy.

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В.С. Белых

Англия құқығы бойынша сақтандыру мүддесі

Мақала сақтандыру шарты элементтерінің біріне арналған. Сақтандыру мүддесі доктринасы Англияда XVIII ғасырдың ортасында әзірленгені атап өтілді. Мүліктік сақтандырудағы сақтандыру мүддесінің классикалық анықтамасы сот шешімінде қамтылған. Бастапқыда сақтандыру мүддесі «экономикалық мүдде» болды, яғни сақтандыру жағдайына байланысты мүліктік залалдың туындауының нақты және күтілетін мүмкіндігі. Заңнамалық бекіту алғаш рет 1745 жылғы Теңізді сақтандыру туралы заңында көрсетілген. XX ғасырда 1745 жылғы теңізді сақтандыру актісі (Marine Insurance Act) 1906 жылғы теңізді сақтандыру туралы (Marine Insurance Act) заңмен ауыстырылды. Онда сақтандыру мүддесінің жаңа анықтамасы берілді. Экономикалық мүддеге қоса сақтанушы заңдық мүддені де дәлелдеуі тиіс болды, атап айтқанда, құқық немесе әділеттілікке негізделген сақтандыру пәніне қатынастың болуы. Әрі қарай, мақалада сақтандыру мүддесінің түрлері қарастырылған. Осылайша, қамтамасыз ету көзіне байланысты сақтандыру мүддесі заңды (statutory) және шарттық (contractual) болуы мүмкін. Қазіргі уақытта Заңнаманы реформалау жөніндегі комиссияның (Law Commission) сақтандыру мүддесіне қатысты түзетулер әзірлеп жатқаны атап өтілді. Комиссия мүшелерінің көпшілігі мүліктік сақтандыру шарттарында сақтандыру мүддесі туралы талап ағылшын құқығынан алынып тасталуы керек деген ұстанымға сүйенеді. Сондай-ақ, ғалымдардың еңбектерінде сақтандыру нысанасы маазмұны (subject of insurance) туралы айтылады және ағылшын құқығындағы сақтандыру мүддесі сақтандыру шартының пәні (объектісі) ретінде қарастырылмайтынын атап өтеді.

Кілт сөздер: сақтандыру мүддесі, сақтандыру мүддесі доктринасы, сақтандыру мүддесінің түрлері, экономикалық және заңдық мүдде, соттық тәжірибе, сақтандыру мүддесі сақтандыру пәні ретінде.

В.С. Белых

Страховой интерес по праву Англии

Статья посвящена одному из элементов договора страхования. Отмечается, что доктрина страхового интереса была разработана в Англии в середине XVIII века. Классическое определение страхового интереса в имущественном страховании содержится в судебном решении. Первоначально страховой интерес представлял собой «экономический интерес» — реальную и ожидаемую возможность наступления имущественного ущерба из-за страхового случая. Законодательное закрепление впервые было изложено еще в Законе о морском страховании 1745 года. В XX веке на смену Marine Insurance Act 1745 года пришел Marine Insurance Act 1906. Было дано новое определение страхового интереса. В дополнение к экономическому интересу страхователь должен был доказать еще и юридический интерес, а именно наличие основанного на праве или справедливости отношения к предмету страхования. Далее в статье рассматриваются виды страхового интереса. Так, в зависимости от источника закрепления

страховой интерес может быть законным (statutory) и договорным (contractual). Отмечается, что в настоящее время Комиссия по реформированию законодательства (Law Commission) готовит изменения, касающиеся страхового интереса. Большинство членов Комиссии склоняются к позиции, что требование о страховом интересе должно быть исключено из английского права в договорах имущественного страхования. Также важно отметить, что страховой интерес в английском праве не рассматривается как предмет (объект) договора страхования — в работах ученых говорится о предмете страхования (subject of insurance).

Ключевые слова: страховой интерес, доктрина страхового интереса, виды страхового интереса, экономический и юридический интерес, судебная практика, страховой интерес как предмет страхования.

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Genesis and formation of juvenile courts in foreign countries

The purpose of this article is to explore the genesis and formation of juvenile courts in foreign countries, highlighting their historical development, foundational principles, and evolution over time. Utilizing a comparative methodology, the research examines legal frameworks, policy changes, and societal influences that have shaped juvenile justice systems in selected countries. The analysis includes a review of primary legal documents, historical records, and contemporary research to provide a comprehensive understanding of the factors contributing to the establishment and growth of juvenile courts. The results of the research reveal distinct patterns and commonalities in the formation of juvenile courts across different jurisdictions. Key findings indicate that the emergence of juvenile courts was often driven by a combination of social reform movements, changes in legal philosophy regarding youth crime, and the need to address juvenile delinquency with a rehabilitative rather than punitive approach. The conclusion underscores the significant contribution of this research by demonstrating how historical and socio-legal contexts have shaped juvenile justice systems worldwide. This article contributes to the broader understanding of juvenile justice by providing insights into the foundational principles that continue to influence contemporary juvenile court practices. Findings of the study emphasize the importance of historical context in shaping current juvenile justice policies and the ongoing need for reforms that prioritize the well-being and rehabilitation of young offenders.

Keywords: juvenile courts; mediation; juvenile justice; family court; judicial system; protection of minors.

Introduction

In recent decades, the institution of juvenile justice has been widely discussed worldwide, namely: what this institution represents, what are the consequences of its implementation in practice, what are the risks of such implementation, etc. To answer these and many other questions, it is primarily necessary to focus on analyzing the genesis of this institution, its development in foreign countries in order to identify the advantages and disadvantages in those countries where this institution has been functioning for a long period.

In our opinion, a historical-legal analysis of the development of juvenile justice in foreign countries will help to choose the most acceptable and effective option not only for combating juvenile delinquency but also for their civil legal protection.

Roman law, later legal acts of the Middle Ages, and especially the legislation of the XVIII-XIX centuries did not leave us any legal evidence that there were attempts to protect minors from harsh punishment for committed acts. In general, judicial protection of minors historically emerged in civil, not criminal law. In the Digests of Emperor Justinian (6th century AD), in book four, there is title IV "On persons who have not reached 25 years old". From the text of the edict, it is clear that the protection of persons under the age of 25 was carried out by their guardians, and it mainly concerned property transactions. Roman law has left us another evidence of state protection of children — the doctrine of parents patriae. The state was declared the ultimate guardian of the child. In the history of juvenile justice, it was declared more than once (for example, at the time of the creation of "children's courts" at the end of the XIX century and when doubts arose about the high efficiency of these courts — at the end of the XX century) [1; 29].

The Laws of the Twelve Tables of first formulated the principle of forgiving punishment. It applied mainly to minors and in some subsequent works interpreting the content of the mentioned laws, it was formulated as forgiveness justified by minority.

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The above-mentioned laws prescribed not to impose punishment under the following two conditions: 1) when the minor did not understand the nature of the criminal act; 2) when the criminal act itself was not completed. This principle was widespread for a long time in countries that adopted Roman law.

The absence of special legal protection for children and adolescents was characteristic of many legislative acts, for example, the "Mirror of the Swabians" (a collection of German laws of the 12th century), the "Carolina" (the criminal-procedural code of King Charles V, 16th century). And although they reflected the mentioned forgiveness of punishment, the laws themselves had reservations allowing to bypass this principle. Thus, in "Carolina", article CL-XXIX mentioned criminals who, due to their youth, are "deliberately deprived of mind". In relation to such persons, the law prescribed to "seek advice from knowledgeable people on how to act in accordance with all the circumstances of the case and whether to apply punishment". Therefore, the "knowledgeable people" (experts) decided whether to punish a minor or not. The so-called expert-judge played such a role even in later times, even in the adversarial process.

In the second half of the 18th century, there were already statistical data on the lack of special protection for children and adolescents in court during the execution of punishment. English lawyer P. King, studying crime in England for the period 1762–1782, found that the legal vulnerability of children held in prisons was, in his words, absolute. A significant portion of the prisoners consisted of boys of the youngest age and girls aged 10–13. They were all held together with adult convicts in one room [2; 8].

The absence of special legal protection for minors could be found in the laws of many countries in the early and even in the mid-19th century. Such laws were in force, for example, in the USA. They established equal criminal liability and punishment for children and adults, the same judicial procedure for all persons appearing before the court. Only in the mid-19th century in this country and in a number of other countries did laws begin to appear and special institutions were created, where the task was to provide elementary protection for children and adolescents at various stages of justice.

The second half of the 19th century marked a gradual but steady change in the traditional approach to juvenile offenders. In 1869, in Boston, courts were first organized specifically for juvenile cases, and the first experience of applying probation (educational supervision) to them was carried out, which subsequently became one of the most common and most effective methods of dealing with juvenile offenders.

Methods and materials

For the purpose of a comprehensive study of the topic, we primarily used the comparative legal and hermeneutic methods. Undoubtedly, many general scientific methods were also applied in the course of this research, but among the specific scientific methods, the aforementioned methods were mainly used. The comparative legal method involves comparing legal concepts, phenomena, and processes of the same order and identifying similarities and differences between them, provided that the objects are comparable. Hermeneutics is understood as the method of interpreting legal terms and concepts, in the search for the meaning of legal texts, along with the study of the problems of multiple meanings.

Results and discussions

Establishment of the First Juvenile Courts.

The fundamental turning point came only at the very end of the 19th century and culminated in the creation of a special court for juveniles. This court was established on July 2, 1899, in Chicago, as it became clear that without special justice for juveniles, the fight against child and youth crime is doomed to failure, due to the unprecedented rise in juvenile crime at the end of the 19th century.

In England and Wales, since 1908, there has been a system of specialized courts for juveniles; however, the consideration of cases of crimes committed by juveniles was not within the jurisdiction of these courts, instead, they were heard by courts of general jurisdiction — the Royal Courts.

In Scotland, at the beginning of the 20th century, a special system of juvenile justice developed, which has an administrative rather than judicial character. Special commissions conducted "hearings on children's cases". A board composed of trained public representatives, after discussing the case with the parents, social workers, teachers, and the child, would make a decision on enforcement measures. This decision could be appealed to the court [3; 541].

At the very beginning of the existence of courts for juveniles, autonomous juvenile justice was created in the USA, Canada, Belgium, France, Greece, the Netherlands, Russia, Poland, Hungary, Egypt, Japan, Australia, New Zealand, and Switzerland.

In Germany, Austria, Spain, Portugal, and Switzerland, the functions of guardianship courts were combined with the functions of juvenile courts. Some countries opted to create specialized panels of judges for juvenile cases. This occurred in Ireland, Italy, Greece, and Japan [1; 48]. The national experiences of countries where juvenile courts began to function effectively and subsequently became prototypes for modern juvenile justice systems are of interest. However, it can be argued that the initial juvenile courts achieved their objectives. A significant contribution was made in the area of dealing with juveniles in the judicial process — courts treated children not as criminals, but as young individuals in need of assistance, approval, and guidance, focusing on the need to expose the antisocial nature of their actions.

In the mid-1970s, turbulent transformations of the classic and customary forms and objectives of juvenile justice began. Changes in juvenile justice occurred for reasons common to all countries where it existed, as well as for reasons that can be defined as national. Common factors included the rise and deterioration of juvenile crime statistics and the insufficient effectiveness in combating it. National reasons depended on the specific state of the justice system concerning juvenile offenders. Modernizing juvenile justice occurred in two directions: the family court as an integrated body of judicial protection of the rights and lawful interests of minors, and an administrative body for juvenile affairs, an alternative to the court.

The concept of the modern family court views it as a court of mixed, comprehensive jurisdiction — criminal, civil, and family. Changes in juvenile justice by replacing juvenile courts with family courts occurred only in few countries.

The concept of establishing a family court stems from the intention to address all issues related to juvenile offenders — often defined in relevant laws as requiring "care, control, and protection" — within the jurisdiction of a specialized judicial body. This body should address not only issues related to juvenile offenses but also those that arise in the judicial process regarding juvenile offenses (guardianship, custody, sanctions against parents, property disputes, etc.).

The listed issues did not comply with the competence of juvenile courts since they related to civil litigation. Therefore, in the process of modernizing juvenile justice, the question of replacing juvenile courts with courts of civil jurisdiction became relevant. Proposed projects for the reorganization of juvenile justice emphasized that juvenile courts cannot address many issues when it comes not to imposing punishment and other measures of enforcement on a juvenile offender, but to protecting the rights and lawful interests of children and adolescents. Thus, the idea of creating a family court emerged. Its model was the already functioning family courts in Japan and guardianship courts in Austria. In Japan, family courts were established in 1947-1948. Following Japan, transformations occurred in France, England, Belgium, Luxembourg, and the United States.

In general, the competence of the family court covers the following issues:

– crimes and offenses of minors;

– crimes committed by adults causing harm to minors;

– the entire complex of family law issues related to the protection of the rights and interests of minors, including supervision and guardianship of minors, education of school-age adolescents, improvement of family atmosphere, etc. [4; 212].

As for the existing family courts in other modern countries, it is possible to mention the dual system in the United States, where there are courts for juvenile cases and family courts, and experimental family courts in France.

Further we find it reasonable to conduct a detailed analysis of the models and the history of the development of family courts in France, Germany, Japan, and other foreign countries.

Legal Regulation of the Juvenile Courts in France.

The beginning of the formation of juvenile justice in France is considered to be the Criminal Code of 1791, amended in 1810, which led to a revision of views on the child, who had been perceived in law as a "young adult". This concerns the appearance of elements of exemption from punishment for juvenile offenders or mitigation of their punishment within the framework of the general judicial system. The principle of "discernment", formulated during debates in the National Assembly in 1791, determined the structure of criminal justice for minors for the next one and a half centuries. This principle was reflected in the provisions of the Criminal Code of 1791 in Section V (Articles 1–4) "Influence of the age of convicts on the nature and duration of punishment": discernment is a fundamental condition for bringing a minor to criminal responsibility; if it is established that the defendant, who has not reached the age of 16, acted without discernment, he is acquitted; if it is established that the defendant, aged between 13 and 16, acted with discernment, the punishment is imposed in a mitigated form compared to an adult offender (for example, instead of the death penalty, he will be sentenced to 20 years of imprisonment in a in a correctional institution). In case of acquittal, a juvenile offender is

subjected to an educational measure, which is considered not as punishment but as a compulsory measure capable of correcting his behavior.

As for the serving of sentences by minors together with adult offenders, at first, separate premises were created in prisons for containing juvenile offenders, but from the 1830s, the idea of their reeducation rather than just punishment began to develop [5; 27].

In the second half of the 19th century, a broad international movement began for the creation of specialized justice for minors. It was during this time that the widely known "American model" gained popularity, and its symbol — the first juvenile court, opened in Chicago in 1899.

In 1912, an international congress on childhood issues held in Paris was the first to address juvenile justice problems. By that time, specialized juvenile courts existed in several countries: in the USA, they were established in 26 out of 46 states, in Germany in 1908, and after the creation of the first court, their number reached approximately 200 within four years (Congrès international des tribunaux pour enfants, 1912) [6]. The congress participants formulated the following principles of juvenile justice in a resolution:

– Juvenile offenders should not be subject to criminal prosecution on general grounds.

– Special requirements should be imposed on juvenile judges (ability to communicate with children, empathy towards them, knowledge in the field of social, pedagogical, and psychological sciences).

– Interaction of judicial bodies with the probation service.

– Conducting investigations into the circumstances of the offense accompanied by the collection and recording of social, psychological, and medical information about the juvenile offender, the confidentiality of which must be ensured.

– Minimization of the use of coercive measures against minors.

– In the absence of specialized juvenile jurisdiction, joint hearings on cases involving minors should be avoided.

– Taking necessary measures in the interests of children subjected to abuse (Congrès international des tribunaux pour enfants, 1912).

By the law of July 22, 1912, France established a court for children for the first time [7]. The "Law on Juvenile Courts and Conditional Early Release" established a classification of minors into three age groups (up to 13 years, 13–16 years, and 16–18 years) in order to differentiate the measures applied based on age. A minor under the age of 13 was considered lacking "understanding" and therefore not subject to liability. Only educational measures could be taken against them. Henceforth, juvenile offenders began to be subject not only to punitive measures but also to educational ones.

The Ordinance of February 2, 1945, regulated criminal justice concerning minors for over 70 years (Ordonnance No. 45-174, 1945) [8]. Significant changes were made to it over time, with scholars and practitioners recognizing the need to modernize the text without questioning its fundamental principles. The first principle of the above-mentioned Ordinance was the idea of the necessity of specialized justice: criminal cases where minors are charged with committing a crime or offense are not transferred to general criminal courts but are only heard in juvenile courts or courts for minors. The second principle emphasized the preference for educational measures. Article 2 of the Ordinance provided that the juvenile court could take protective, assistance, supervision, and educational measures at its discretion. The above-mentioned Ordinance defined the sequence of measures: first, educational measures, then, if necessary, an educational sanction, and finally, punishment as a last resort. The third principle involved a deep study of the personality of the juvenile offender, as well as their social and family situation. Another important principle was the mitigation of criminal liability: minors cannot be punished as severely as adults. For example, a minor older than 13 cannot be sentenced to imprisonment exceeding half the sentence imposed on an adult offender (Ordonnance No. 45-174, 1945) [8].

Thus, the juvenile justice system in its modern form was established in France by the Juvenile Delinquency Ordinance of February 2, 1945, the adoption of which marked the end of a long period of experiments, leading to the development, recognition, and subsequent legal formalization of the idea of the special social status of minors and, consequently, the necessity to provide them with special forms of judicial treatment, differing both in substance and form from treatment of adults [9].

The Ordinance of December 23, 1958, "On the Protection of Children and Adolescents at Risk", amended articles 375–382 of the Civil Code of France and empowered the juvenile judge to take any protective and educational measures concerning minors up to the age of 21 whose "health, safety, morality, or education are in danger" (Ordonnance No. 58-1301, 1958) [10].

Regarding the reform of the juvenile justice system in France, the Law of March 23, 2019, No. 2019-222 "On the Development and Reform of the Judicial System for the Period 2018–2022" included an article authorizing the government to reform criminal legislation applicable to minors. In particular, the following tasks were set: simplification and acceleration of legal proceedings; strengthening educational impact on minors until a verdict is sentenced, especially concerning juvenile recidivists; regulation of the procedure for compensating damage.

The adoption in 2019 and the entry into force on September 30, 2021, of the Code of Juvenile Criminal Justice marked the end of a lengthy process of modernizing the legal foundations of criminal justice for juvenile offenders in France (Code de la justice pénale des mineurs, 2019) [11].

This Code eliminates the category of educational sanctions and now distinguishes only two educational measures that can be applied by the juvenile judge: judicial warning and judicial educational measure.

The judicial educational measure consists of a set of obligations and prohibitions that the juvenile judge can modify at any time:

– Integration module (daycare, placement in a boarding school or an educational institution);

– Compensation module (direct compensation obligations (to the victim), indirect compensation for damage (in the interests of society));

– Health module (providing necessary medical care, placement in a medical institution);

– Placement module (determining the place of residence).

The Code of September 30, 2021 (Code de la justice pénale des mineurs, 2019) [11], replacing the famous French Ordinance of February 2, 1945 (Ordonnance No. 45-174, 1945) [8], was adopted with a dual aim: to judge "better" and "faster". This historic reform has been criticized by some experts who considered it too "repressive".

Legal Regulation of the Juvenile Courts in Germany.

German legal experience in the field of juvenile justice is particularly interesting for the following reasons:

– The existence of a fairly progressive restorative juvenile justice system in Germany;

– A long historical development of juvenile justice in Germany since 1532 (with the Law on Courts for Minors adopted in 1923).

– The first specialized courts for minors in Germany emerged in 1907-1908, and by 1910, special juvenile courts were established in almost all major cities (Frankfurt, Cologne, Breslau, Berlin, Stuttgart, etc.).

In Germany, as in most continental countries, jurisdiction over cases involving minors was initially assigned to specialized courts regardless of the severity of the offense, while in common law countries, such courts only handled minor and moderate cases, with serious crimes falling under the jurisdiction of general courts. The concept of juvenile justice was developed in Germany in 1923 and reflected two aspects: reducing the responsibility of adolescents and selective application of sanctions to them.

Since 1953, Germany has had a law on courts for minors, which defines the main provisions of criminal proceedings concerning minors, based on international standards for dealing with this category of offenders. In Germany, minors in terms of criminal law are considered young offenders who were 14 years old at the time of the offense but have not yet reached the age of 21.

It is correct that differentiation by age criteria is made not only in determining criminal liability for minors but also in applying procedural measures to them. Juvenile courts in Germany are not separate judicial bodies but specialized departments within the general criminal courts system. However, they form a system with all the signs of independence, including a special composition and jurisdiction, their own legal basis, and special principles of judicial procedure. One of the peculiarities of juvenile justice proceedings in Germany is a deeply individualized approach to adolescents, which is expressed in specific actions of the judge to establish contact with the minor, methods of investigating case circumstances, the language of judicial proceedings understandable to the minor, involvement in studying the personality of non-legal specialized institutions [12; 61]. At all stages of investigation and trial proceedings, information about the adolescent's personality, collected by a special socio-psychological service, plays an important role, and this service, based on its activities, provides a report to the prosecutor and the police, actively interacts with juvenile courts. Such a symbiosis is regarded as essential because the primary goal of juvenile justice is the reintegration of young individuals, who may be subject to punishment, into a crime-free life, while also instilling in them the necessary skills and abilities. [13]. In other words, the aim is not retribution but preventing recidivism by compensating for deficiencies in the indi-

vidual's socialization. Accordingly, criminal and criminal procedural law regarding juveniles provides for auxiliary, supportive, and protective measures.

The experience of Germany in refraining from formal sentencing in juvenile cases (at the pre-trial and trial stages at the initiative of the prosecutor), actively utilizing deferred prosecution in the form of probation, and the so-called diversion (from Latin *diversio* — deviation, diversion) seems quite effective. The latter measure is increasingly applied in juvenile procedural practice and involves terminating proceedings even in cases where there are sufficient grounds, from the perspective of the prosecution or the court, to bring charges or render a guilty verdict. Interestingly, Germany has a Forgiveness Day when 95 % of cases involving juveniles are terminated. The effectiveness of diversion has been analyzed in terms of the recidivism rate among those who received a guilty verdict and those for whom proceedings were terminated. The percentage was roughly the same [13], confirming the thesis of the interchangeability of measures when it comes to crimes of minors and moderate severity and suggesting the possibility of foregoing the most punitive and repressive forms of responding to juvenile crimes [14; 65].

The main principles of the German juvenile justice system include:

– Priority of alternative sanctions (minimal intervention);
– Priority of mediation and restorative justice;
– Priority of educational community sanctions;
– Detention as a last resort (for the shortest possible term from 6 months to 5–10 years);
– Even in the most serious cases, the case cannot be heard in adult courts;
– Juvenile court jurisdiction includes cases involving individuals aged 14 to 17 and those aged 18 to 21;
– Children (up to 14 years), adolescents (from 14 to 17 years), and young adults (from 18 to 21 years) have the right to support and education, as well as protection of their personal development by social authorities.

The German juvenile justice system incorporates substantive and procedural legal provisions that take into account the age-specific characteristics of offenders. As for the types of legal consequences for juvenile offenders in Germany, they include educational measures, coercive measures, as well as correctional and safety measures.

Educational measures include obligations such as: obeying instructions regarding place of residence; living with a family or in a social institution; attending school or work; being under the supervision of a designated person; participating in social training courses; reconciling with the victim; avoiding certain individuals or places of entertainment; participating in traffic rules education.

Given the open nature of the above-mentioned list, it can be concluded that the legislator grants juvenile judges broad powers and allows room for the judicial discretion in resolving many issues. Coercive measures, for which German law does not provide a legal definition, include warnings; obligations such as making restitution for damage caused by the crime; apologizing to the victim in person; performing community service; paying a sum of money to a socially useful institution; arrest: during free time (utilizing free time from work and education); for a short term (2–4 days); for a longer term (1–4 weeks).

Correctional and safety measures include: placement in a psychiatric clinic; placement in a treatment facility for compulsory treatment for alcoholism or drug addiction; supervision of behavior; revocation of driving privileges; deprivation of liberty (however, this measure is not a priority in Germany. Deprivation of liberty is applied only in the most extreme cases when intervention through alternative measures is deemed ineffective) [15].

Analysis of the list of legal consequences for juvenile offenders makes it possible to conclude that the German juvenile justice system is quite progressive. Its leading principles include the presence of an "educational idea", orientation towards the personality of the offender, and a flexible system of sanctions. Studying the development of the juvenile justice system in Germany, as well as considering modern conditions, including economic conditions, provides significant experience for improving legislation and judicial practice in cases involving juveniles in other countries.

Nevertheless, it is important to understand that the German model, like any other, requires adaptation to specific conditions and the establishment of appropriate infrastructure. In practice, there are several obstacles that may be characteristic of certain countries, such as resistance to changes in approaches to juvenile offenders, lack of a unified concept of juvenile justice reform, lack of uniformity in legal regulation, as well as insufficiently qualified personnel.

Legal Regulation of Juvenile Courts in Japan.

The Japanese approach to juvenile justice views it as separate from criminal proceedings. The main documents laying down the legal basis of juvenile justice in Japan are the 1947 Child Welfare Act and the 1948 Juvenile Act, which have been amended numerous times since their adoption. Japan operates a successful system of special family courts. For instance, within the family court, there is a section for medical and psychiatric consultation, with attached social workers. Their status is equivalent to that of probation officers in English and American justice systems [4]. A notable feature of Japanese family courts is that all cases are handled based on social investigation rules. This means that the primary focus is not on punishment but on the protection of juveniles who have come into conflict with the law or found themselves in challenging life circumstances [16; 60].

Cases involving children may be considered under criminal proceedings only if the child is at least 16 years old or has committed a particularly serious offense that warrants lifelong imprisonment or the death penalty. Children who commit offenses cannot be detained, as this sanction is replaced with educational measures and rehabilitation. Additionally, when courts handle cases involving children, the principle of transparency does not apply. Justice in such cases is conducted confidentially, within closed proceedings. However, since 2000, an exception to this rule has been made, allowing victims to attend proceedings.

Before juvenile cases are considered, probation services prepare reports for family courts, detailing all circumstances of the case. Similar practices exist in the UK, where such reports are prepared by interagency commissions. As research shows, more than 50 % of juvenile cases in Japan never even reach the hearing stage. This is because, for achieving the necessary educational effect, pretrial detention is considered sufficient. In other situations, punishments may include directing children to specialized correctional educational institutions or various support centers.

As analyzed by researchers from Kyoto University, the number of offenses committed by children in Japan is increasing rapidly, with their severity also escalating. Consequently, Japanese legislation is trending towards more open judicial proceedings for cases involving juveniles and the use of punitive measures against such offenders. These changes aim to minimize juvenile delinquency, restore social justice, rehabilitate offenders, and prevent further criminal activity [17; 73].

In 2007, amendments to the Juvenile Act were made, tightening the approach to juveniles: harsher penalties were established for those committing serious crimes; the age of criminal responsibility in exceptional cases for particularly serious crimes was lowered to 12 years old; in case of recidivism, offenders are sent to correctional institutions rather than specialized educational institutions as before; the police were granted the right to conduct searches and seize evidence in criminal cases involving children under 14.

However, the basic approaches to overcoming juvenile delinquency remain intact. The Juvenile Act states that the specificities of responsibility for offenses by juveniles are predetermined by their limited understanding of law, age-related psychological characteristics, and incomplete socialization. When applying educational measures or imposing punishments, courts are obliged to investigate the juvenile's past, personality, environment, and circumstances of the offense.

As noted by Japanese researcher A. Ogawa, in recent decades, there have been significant changes in the nature of juvenile offenses, especially in serious cases: offenses have become more violent and serious; aggression among juveniles has become more common; even when juveniles commit offenses, they may not realize their criminality; motivations for offenses have changed (from poverty-driven in the post-war period to "because it's fun" nowadays); some parents have lost authority in the family, and teachers have lost control over discipline in schools [18].

Even when a minor commits a crime, Japanese juvenile justice, based on principles of humanism and compassion, seeks primarily to provide education and rehabilitation and avoids punitive measures, as adolescents are still in the midst of physical and mental development. They retain a flexible character, highly susceptible to influence. It is important not to forget the goal of juvenile justice: upbringing and rehabilitation based on ensuring the well-being of children. It should not be punitive. However, it is undeniable that there are still a small number of juveniles for whom the application of conventional educational and protective measures is impractical, especially in cases of serious crimes. Therefore, while the importance of applying educational and rehabilitation measures in "ordinary" cases should not be forgotten, in a limited number of serious cases, the application of stricter measures is inevitable for the protection of society.

Review of Approaches to the Institute of Juvenile Justice in Foreign Countries.

Further we consider it necessary to briefly review the issue regarding approaches to punishing juveniles in other foreign countries. In the United Kingdom in 1993-1994, a series of legislative acts were introduced that toughened measures for juvenile offenders and doubled the maximum term of imprisonment in correctional institutions. The results of such legislation were so negative that they became one of the reasons for subsequent

reforms carried out by the Labor Party. Under the new system, all juvenile offenders were classified into groups depending on the severity of the offense, repeat offenses, and the prognosis for the adolescent's future socialization.

The main emphasis in the juvenile justice system was placed on crime prevention. The enforcement of the law was entrusted to interdepartmental commissions for working with juvenile offenders. Currently, there are 156 commissions in England and Wales, indicating the diversity of needs and behavioral models of juveniles. Those commissions work together with social workers, municipal service teachers, probation inspectors, police officers, as well as psychiatrists and child psychologists. Judges in the UK have a wide range of sanctions available for youth: starting from curfews, warnings, and counseling sessions, to imposing community service (unpaid) and imprisonment in correctional institutions (from age 16-17). It should be acknowledged that the latter, more stringent measures, have the least rehabilitative effect, with a significantly higher percentage of recidivism after them.

In 2009, a new law was introduced allowing offenders to compensate victims for the harm caused. Additionally, judges are now required to justify the decision not to use alternatives to imprisonment if such options are available. Five years after the start of the reforms, it was noted that the innovations represent a qualitatively new model of providing state services, work with offenders is now much more effective, and the recidivism rate has significantly decreased. One of the facts confirming this was the closure of three correctional institutions for juvenile offenders.

In European countries, the juvenile justice system is broadly similar to that in England. An interesting feature is the possibility of mediation, reconciling the victim with the offender. In the case of reconciliation, it is possible to withdraw the offense from the criminal justice system and completely terminate criminal proceedings without applying sanctions.

In England, Ireland, and the Netherlands, such a decision is made by the police, while in Germany, it is made by the public prosecutor. Moreover, the public prosecutor or judge may suspend the proceedings, during which the adolescent can perform restitution work, after which the case will be closed.

In Scotland, Bulgaria, and Estonia, juvenile offenders may be referred to social services, where decisions on the application of educational measures are made. Various sanctions may be applied in court, similar to those in England, with priority given to measures with the greatest educational value. The issue of imposing fines on juveniles is ambiguous since teenagers usually do not earn money.

In some countries, such as Belgium, Bulgaria, Croatia, Italy, Scotland, Serbia, and Spain, the imposition of fines is not practiced. In Finland, the amount of the fine is comparable to pocket money that a teenager may have (Integration of Juvenile Offenders into Society, 2011) [19].

Regarding family court models, the Family Division of the High Court of England is of particular interest from the perspective of protecting the rights and interests of juvenile individuals. Its competence is extremely broad in all matters related to family and children. This court can act as both a court of first instance and an appellate court within its jurisdiction. The cases heard by this court as a court of first instance include divorce, adoption, guardianship, and custody matters.

In Austria, guardianship courts, adopted as a model of family court, extend their jurisdiction to minors up to the age of 21. Guardianship courts apply educational measures to offenders and protective measures to individuals in need of protection. Guardianship courts also address conflicts between parents when they disagree with recommendations regarding the upbringing of children provided by the Childhood Bureau. Juvenile offenses are within the jurisdiction of existing juvenile courts in Austria. However, in cities like Vienna and Graz, these courts are combined with guardianship courts, resulting in shared jurisdiction for the merged courts.

The mixed jurisdiction court, whose primary model is the family court, could not fully replace the juvenile court. Firstly, it was difficult to include the main issues of traditional juvenile court jurisdiction — criminal responsibility and punishment of minors for crimes — within the competence of the family court. While the juvenile court struggled with civil jurisdiction issues, the family court couldn't overcome the barrier of criminal proceedings, especially for serious crimes. The consequence of these difficulties was the slow spread of family courts, their inclination towards civil jurisdiction, and the retention of courts for juveniles.

Administrative bodies for juvenile affairs, alternative to the court, have been established in several countries. Their competence, tasks, and procedural activities are determined by regulatory, predominantly departmental acts. Laws usually specify the cases and categories of cases in which the intervention of administrative non-judicial bodies instead of judicial intervention in juvenile affairs is possible, who decides on this issue, and what forms such non-judicial intervention takes.

Non-judicial bodies alternative to the court owns all the characteristics of a legal institution with corresponding legal nature and functions. The establishment of alternative bodies was associated with dissatisfaction with the effectiveness of juvenile justice. Alternative intervention consists of the possibility to choose an administrative non-judicial body instead of the court, including cases where the court itself may perform such a function by law. The second option is the possibility of using the function of an administrative body alongside the functions of the court within the judicial process. In this case, the functions of the administrative body cannot be considered alternative to judicial activity since they do not replace justice but only complement it. However, classifying this activity as alternative has its grounds. It should not be forgotten that in some countries, such alternative has gained legal right to exist within juvenile justice framework and yields the expected results.

The competence of administrative bodies authorized to intervene in juvenile affairs instead of the court primarily lies in the legal protection of children and adolescents. In some countries, there are special preventive-protection bodies intended for the prevention of juvenile offenses. These bodies include special committees for juvenile affairs: youth protection committees in Belgium; commissions for the social welfare of children and adolescents in Scandinavian countries (Denmark, Norway, Sweden) and Finland.

The Scandinavian model of the activity of welfare committees involves not replacing the juvenile court with such a committee but rather dividing their jurisdiction over the range of cases they consider. In all other cases, the option always involves the possibility of choosing between judicial and non-judicial intervention for a given case [4].

The comparison between the functions and tasks of the listed administrative bodies, which are empowered by law to intervene as an alternative to the court, demonstrates both significant similarities and substantial differences.

The similarity in tasks and functions of the listed alternative bodies includes the following:

– They are all legally authorized to intervene, not only to protect the rights and lawful interests of minors, but also in cases involving juvenile offenses.

– They all carry out common preventive tasks in combating offenses and in eliminating unfavorable living and upbringing conditions for adolescents.

– They include individuals whose professions are related to issues of child and adolescent upbringing, as well as the protection of their rights and interests; representatives of the community.

– Overall, the procedure for handling cases in these bodies, where juvenile offenses or offenses against them are concerned, is regulated by law or other legal acts.

Conclusions

Thus, it can be concluded that the European juvenile justice system has generally proven to be effective, attentive to the rights of the child and the value of their personality, and sufficiently flexible in terms of sanctions applied to juvenile offenders. However, the legal space in Europe is characterized by diversity and distinctive features of each specific country.

In our opinion, particular attention should be paid to the preference for educational measures over punishment, a deep understanding of the psychology and personality of a minor, and the specialization of judges who deal exclusively with juvenile cases.

Among the principles of juvenile justice, special attention should be paid to education and rehabilitation since the practice of foreign countries shows that punitive measures do not reduce the number of repeat offenses. In our view, punitive measures should only be applied to a limited number of offenses committed by juveniles.

Nowadays, the Singaporean judicial system is one of the most progressive and high-tech, which significantly contributes to the efficiency of handling various categories of cases, including family matters. The merits of the Singaporean judicial system include the mandatory use of mediation procedures in resolving family disputes, adherence to the principles of creating proper conditions for children's upbringing, promoting the protection and rehabilitation of children and their reintegration into society, and the use of the latest scientific and technological advancements to simplify and ensure access to justice for every citizen, ultimately aiming to fulfill not only the social function of justice, but also the social function of the state as a whole.

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Д. Оспанова, С. Мороз, А. Ниязова

Шетелдердегі кәмелетке толмағандардың істері жөніндегі соттың генезисі мен құрылуы

Мақаланың мақсаты — шетелдердегі кәмелетке толмағандардың істері жөніндегі соттардың генезисі мен қалыптасуын зерттеу, олардың тарихи дамуын, іргелі принциптері мен уақыт бойынша эволюциясын атап көрсету. Салыстырмалы әдістемені пайдалана отырып, авторлар әртүрлі елдердегі кәмелетке толмағандарға қатысты әділет жүйесін қалыптастырған құқықтық базаны, саясаттағы өзгерістерді және әлеуметтік әсерлерді зерттейді. Талдауда кәмелетке толмағандардың істері бойынша соттардың құрылуы мен дамуына ықпал ететін факторларды жан-жақты түсіну үшін негізгі құқықтық құжаттар, тарихи жазбалар мен қазіргі заманғы зерттеулер қарастырылған. Зерттеу нәтижелері әртүрлі юрисдикцияларда кәмелетке толмағандардың істері жөніндегі соттардың қалыптасуының әртүрлі заңдылықтары мен ортақ белгілерін көрсетеді. Негізгі қорытындыда кәмелетке толмағандар істері жөніндегі соттардың пайда болуы көбінесе әлеуметтік реформалар қозғалысының, жастар арасындағы қылмысқа қатысты құқықтық философияның өзгеруінің және кәмелетке толмағандар арасындағы қылмысты жазалаудың орнына оңалту тәсілі арқылы шешу қажеттілігінің үйлесімімен байланысты екенін айқындайды. Қорытындыда тарихи және әлеуметтік-құқықтық контексте дүниежүзіндегі кәмелетке толмағандарға қатысты сот төрелігі жүйесін қалай қалыптастырғанын көрсету арқылы осы зерттеудің елеулі үлесі зерделенген. Мақала кәмелетке толмағандарға қатысты сот төрелігінің қазіргі заманғы тәжірибесіне әсер етуді жалғастыратын негізгі қағидалар туралы ақпарат беру арқылы кәмелетке толмағандарға қатысты сот төрелігін кеңірек түсінуге ықпал етеді. Зерттеу нәтижелерінде кәмелетке толмағандарға қатысты әділет саласындағы қазіргі саясатты қалыптастырудағы тарихи контекстің маңыздылығы және кәмелетке толмаған құқық бұзушылардың әл-ауқаты мен оңалту мәселелеріне басымдық беретін реформалардың тұрақты қажеттілігі сипатталған.

Кілт сөздер: кәмелетке толмағандардың істері жөніндегі соттар, медиация, ювеналды әділет, отбасылық сот, сот жүйесі, кәмелетке толмағандарды қорғау.

Д. Оспанова, С. Мороз, А. Ниязова

Генезис и формирование ювенальных судов в зарубежных странах

Целью данной статьи является изучение генезиса и формирования ювенальных судов в зарубежных странах, с акцентом на их историческое развитие, основополагающие принципы и эволюцию с течением времени. Используя сравнительную методологию, исследователи анализируют правовое регулирование, изменения политики и общественные влияния, которые сформировали систему ювенальной юстиции в разных странах. Анализ включает обзор основных юридических документов, исторических записей и современных исследований, обеспечивая всестороннее понимание факторов, способствующих созданию и развитию ювенальных судов. Результаты исследования выявляют различные закономерности и общие черты в формировании ювенальных судов в различных юрисдикциях. Основные выводы указывают на то, что возникновение ювенальных судов часто было обусловлено сочетанием движений за социальные реформы, изменениями в правовой философии в отношении молодежной преступности и необходимостью решение проблемы преступности среди несовершеннолетних с помощью реабилитационного, а не карательного подхода. В заключение подчеркивается значительный вклад данного исследования, демонстрирующего, как исторические и социально-правовые контексты сформировали систему ювенальной юстиции во всем мире. Эта статья вносит вклад в более широкое понимание ювенальной юстиции, предоставляя информацию об основополагающих принципах, которые продолжают влиять на современную практику ювенальных судов. Результаты исследования подчеркивают важность исторического контекста в формировании текущей политики ювенальной юстиции и постоянную необходимость реформ, ориентированных на благополучие и реабилитацию несовершеннолетних правонарушителей.

Ключевые слова: ювенальные суды, медиация, ювенальная юстиция, семейный суд, судебная система, защита несовершеннолетних.

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The concept and correspondence between internal and external will (expressed will) within structure of a civil transaction

This article is focused on such elements in the structure of a civil transaction as the will and expressed will, as well as on specifics of judicial proceedings in cases on challenging transactions with defects of the will and expressed will. The study of the indicated categories is important for determining the composing elements of a transaction, its existence and validity, as well as for the correct derivation of a civil transaction's concept. The practical significance is the opportunity to determine the ways for assessing the possibility of applying provisions on transactions to various forms (types) of expressed wills, including the provisions on the invalidity of transactions with defects of the will and expressed will. The author while conducting the research set herself of solving the following main tasks: what the will is and what the process of its formation is, how the will and expressed will correspond to each other, the possibility of executing an expressed will in a way other than performing actions, which category is predominant and why, as well as how it affects the resolution of disputes on the invalidity of transactions with defects of the will and expressed will. Thus, the purpose of the research is to establish the process of formation of a will, methods of performing an expressed will and their correspondence. The author has used a wide combination of existing general scientific and special legal methods of scientific cognition in the course of the research, which led to the following results. The research of the categories of the will and expressed will within the structure of a civil transaction conducted by the author has been carried out in relation to the primary subjects of private law and to the ultimate beneficiaries of goods — individuals. Based on theoretical analysis, the author distinguishes these categories in order to establish the priorities while assessing the defects of the will and expressed will, as well as determines their sequence by proving the primacy of the will.

Keywords: will, external will, expressed will, civil transaction, contract, legal effect, theory of trust, theory of expression, theory of the will.

Introduction

The will and expressed will are psychological and legal categories that are inextricably related to civil legal relations, most often preceding their emergence, change or termination.

These categories have a special place in the theory and structure of a civil transaction. The will and expressed will are the key composing elements of a transaction [1; 53]. A transaction is often identified with the expressed will [2], by defining the will and expressed will as one of the conditions for a transaction's validity [3; 392].

The legal category of the "expressed will" is inextricably related to the concept of the "will". The expressed will is expression of will, most often accomplished through actions, less often — through the act of omission, in such a way that the will becomes obvious to everyone. That is the reason why the expressed will is often called as external will, while the will is called internal [4; 217].

However, not every expressed will can generate legal consequences and have an effect in legal relations. The expressed will that cannot generate private and legal consequences is not relevant to private law.

The study of the categories of internal and external will is becoming especially relevant in the context of the development of digital technologies that allow transactions to be concluded online. In such a situation, a change in the approach to determining the priority of internal will over its external expression will allow the interests of the subjects of turnover to be protected most objectively and fairly.

The observance over the process of generating a private legal effect from the expression of will seems to be important. We believe that the determinant of this process is the subject's interest (most likely, the

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property one). In our opinion, the process of expressing the will (expressed will) may look like in the following form: a person's interest predetermines the formation of his will for a specific legal effect (desired to be achieved). For example, it may be the will to begin, change or terminate legal relationships. Then such a will is notified to third parties in such a way that the orientation of the will towards a specific interest becomes obvious and is expressed through the execution of an active action or through an act of omission. Such an action (act of omission) aimed at expressing the will, predetermining a certain legal consequence, is an expressed will in the form of a transaction. The will, being "an impulse to action" [5; 9], launches the process from a desire to a legal effect through actions. That is the reason when the correspondence between such categories as "will" and "expressed will" is important for the purposes of this research.

In connection with the above-defined relevance, the author intends to solve the following research tasks:

1) to carry out a theoretical review of the concepts of internal and external will;

2) to determine the role of the categories of internal and external will in transactions and in establishing the conditions of the validity of a transaction;

3) to conduct an analysis of the relationship of the categories under study with law enforcement practice.

Methods and materials

The methodological basis of the research was a combination of general scientific, special legal and other methods of scientific cognition.

By applying methods of analysis and synthesis, the author divided the studied categories into structural components for a more detailed examination, resulting in the combination of data and the identification of the concept of "expressed will" along with other related categories.

While using the methods of induction and deduction, the author analysed existing theories of the correspondence between the will and expressed will and after obtaining conclusions on them formed general conclusions based on the results of the research.

Systematic approach was applied to establish the primacy of the category of "will" in relation to the category of "expressed will" for assessing the defects of the will and expressed will while establishing the validity of a civil transaction.

While analysing and interpreting legal norms on a civil transaction, the author used the formal and legal method of scientific cognition. The usage of the comparative and legal method allowed the author to identify the experience of a number of foreign jurisdictions and, in particular, German one, for determining the ways of improving the national legislation in the researched area.

Besides, the author used the casuistic method and the method of legal modelling, which assisted to carry out an empirical analysis.

The author used a combination of other general scientific and special legal methods to achieve the most objective and comprehensive results.

To write this article, more than 30 sources were analyzed, starting from F.C. Savigny's "System of Roman Law" and general teachings on the transaction in the works of German pandects and ending with modern scientific works that examine the issues of the relationship between will and expression of will as structural elements of a civil-law transaction. The comparative approach helped to determine existing models of the relationship and establish the conditional priority of internal will over external will.

Results

An analysis of the evolution of the concept of expression of will and approaches to the relationship between the categories of will and expression of will allowed us to identify three dominant models of the relationship between the categories under study:

1) Willenstheorie — a theory of will that assumes the priority of internal will over its external fixation;

2) Erklärungstheorie — a theory of expression, according to which the external expression of will has priority over the internal (subjective) component;

3) Vertauenstheorie — a theory of trust, according to which both components, internal and external will, have the same meaning.

A general assessment of the civil legislation of the Republic of Kazakhstan allows us to establish that the Vertauenstheorie model has been adopted in Kazakhstan, however, an assessment of individual elements contained in the provisions on the grounds for invalidity of a transaction due to defects in will and expression

of will has revealed the fact of an insignificant priority of will over expression of will. On the one hand, such an approach is optimal given the definition of the legal interest of a person as a determinant of will. But the subjective component often cannot be assessed, especially at the time of the dispute. It seems fair to presume the transformation of will due to inaction of a person whose will did not correspond to the expression of will, in matters of challenging a transaction made by him.

The following formula is presented in this regard: if a person has not challenged a transaction made in opposition to his internal will within a reasonable period, this means that his will has been transformed and has come to correspond to the legal effect that has occurred, which should henceforth be considered desirable for such a person.

Such an approach will protect bona fide participants in the turnover and the turnover itself, preserving the participants' right to trust and formal certainty in relations with other persons.

The specified approach will allow law enforcement practice to move from the model of "protecting the appearance of a transaction" to the model of "protecting the interests" of the parties to the transaction when concluding online transactions. After all, participants in online transactions often accidentally accept an offer that creates the appearance of a perfect acceptance without this appearance corresponding to the internal will of the subject.

Discussion

The category of "will" is the object of various scientific studies: philosophical, psychological and even linguistic. The will is the focus of interest for legal science in dynamics: namely, its formation and external expression [6].

V.A. Ojgenziht noted that "will is the process of mental regulation of subjects' behaviour" [5; 9]. That is the reason that the will is most often revealed in legal science through intention or through desire, often identifying these two concepts and noting the lack of a fundamental difference between intention and desire [1; 53]. However, we believe that the will as an intention to achieve a certain legal effect can be significant as a composing element of a transaction, and the desire in this respect may not always generate such an intention. If we follow the theory that "the process of the will's formation and its expression, as a result of which the will of a person becomes recognizable to third parties is a volitional process" [7; 11], then the desire in such a process precedes the intention.

The importance of intention in the volitional process was also noted by Roman lawyers. The need for the correspondence between the party's intention to the expression of this intention was noted in the Digest of Justinian, where it was stated that "the one who says something and wants another, does not say anything that he means, because he does not want it..." [8; 264].

Thus, one should agree with the statement made by V.A. Ojgenziht that the process of forming the will begins with motivation as awareness of needs, which leads to the formation of desires [5; 16]. Then there is goal-setting and determination of "the ways to achieve the goals" [9; 208-209], which is expressed in the formation of the intention to achieve a specific legal effect and is reflected in the final decision, after which such a decision is notified to third parties (the will is expressed).

Intention is the final point for the formation of the will and reflects a precisely formed focus on a specific result.

Thus, someone may have several desires: to have a bicycle, to spend vacations in Europe, to save up funds to mortgage. These desires may be in conflict with each other, when the achievement of one of them may threaten the impossibility of achieving another — competition of desires. Overcoming the competition forms an intention, where someone makes a decision to purchase a bicycle (the will is formed) and through the performance of specific actions informs others about the formed will — carries out an expressed will (for example, through the acceptance by implicative actions of a public offer,) leading to a specific legal result (conclusion of an agreement).

Therefore, the formation of the will precedes the expressed will, which has a constitutive (divestive, dispositive) effect, and reflects the intention of a person to generate these consequences. Some authors calls such an intention as "internal will" the presence of which "is not enough to conclude a transaction" and believes that "informing others" about this will can clearly lead to a certain legal effect [4; 217], which is called as external will.

Intention as a factor that generates the will is also the subject matter of studying the philosophy of mind and the philosophy of law, "where this term, despite the general agreement regarding the relevance of the intention to the theory of responsibility…, is used differently" [10; 205]. In the philosophy of mind "the term

of “intentionally” is associated with the denial of coincidence or error. It turns out that analysis of an intentional act is possible only through the description of the corresponding context of using the word of “intentionally”, which denies coincidence or error, as well as through the explanation of coincidence or error” [10; 216].

The commission of an action or act of omission that may lead to the legal result, where the intention was formed on is the expressed will, and only their conjunction reflects the purity of the will and expressed will. It reflects their unity for private law purposes.

In this regard, the formula derived by H. Hart and S. Hampshire seems to be interesting and is as follows: “I think that I will do this, but I am not sure” and “Now I know what I will do” [11; 215–229]. It testifies and confirms the thesis that an intention does not always reflect a desire and they cannot be identified, since “despite the fact that a desire and intention have similar usage” [10; 218], their difference is revealed in the fact that “intentions are differently related to actions than desires. One can intend to do only those things that one thinks is able to do; when you intend to do something, if your intention has been formed, then it will be accomplished as it should be, for example, in the way the agent expected it to be done. These two aspects distinguish intentions from such phenomena as desires” [12; 169].

Thus, if we want a certain legal effect to occur, then we need an external notification from the formed will. That is, an expression of will made in the proper legal form is an expressed will. In this case it is important to determine the facts, where such an expression of will can be derived from.

E. Godeme points out the need for external, sensory facts. There is not enough just a simple intention [13; 42]. The expression of will must be made in such a way that the intention of the one who expresses the will for the legal effect, which is the goal and the intention of the one expressing the will is aimed at, is obvious to any third party. Otherwise, the expression of will is invalid when it does not reflect the true intention of a person, which often leads to the recognition of the legal effect as null and void. (invalidity of a transaction).

In this regard, we should agree with the thesis on the unity of the will and expressed will. The will and the expressed will are two aspects of the same process, reflecting a person’s mental attitude towards the action being performed. It is originally that the will and expressed will must correspond to each other. A transaction may cause disputes between the participants in case if the will is oriented towards one action, but expressed will expresses the intention to perform another action, which prevents the transaction to be performed. Thus, the unity of the will and expressed will is important for a transaction” [4; 218].

Such a position is not always recognized in the absolute sense. Thus, Ya.A. Kantorovich writes that “Roman jurisprudence did not allow studying the will, once it was expressed in the required form. The Romans expressed this formalistic point of view on a contractual obligation in the well-known concise formula: although, being unstrained, I would not have wished for this legal result, however, being enforced, I nevertheless wished it” [14; 153]. We believe that it is not about indifference to the will under a proper expressed will in any case, but rather about a deviation from the concept of the unity of the will and expressed will in particular cases. Thus, F.C. Savigny, in relation to such a formula, pointed out the prevalence of the opinion in Roman law that an error in the guiding motives, as a rule, does not affect the validity of legal transactions. Even if the motive has been expressed and it turns out to be inconsistent (falsa causa), the transaction does not become less valid because of it [15; 381]. Motive and intentions, motive and the will are not identical phenomena. The motive may be important for the formation of the will, but not always, therefore, inconsistency between the legal effect from the expressed will and the motives does not affect the validity of a transaction.

V.N. Urukov also provides several examples from the classical Roman law indicating the possibility of expressing the will in various ways, including stiplatio, which created an abstract obligation in its original form [7; 14]. The Romans classified obligations into abstract and causal, where consideration (reason) was of no importance for the first category and only the method of expressing the will was externally important. Thus, “consideration should be understood... a certain justification for the existence of the phenomenon under consideration. In other words, by finding consideration of a transaction or obligation, we answer the following question: why is a transaction made, why does an obligation exist?” [16; 81].

Obviously, the legal effect for contracts with consideration (obligations arising from them), where the will of a person is directed to, is predetermining and therefore, a defect of the will can lead to the invalidity of the expressed will and subsequently consideration in such cases is “an obligatory element both of the expressed will and the obligation arising from it” [17].

For abstract transactions (obligations), "the lack of an indication on the basis presumes the validity of a transaction" [18; 15]. Since the stipulation was essentially an abstract transaction, the reason for its execution and its connection to the internal will's orientation had no impact on the validity of the transaction.

Modern legislation often reflects the concept of the unity of the will and expressed will. Thus, paragraph 5 of the Article 159 of the Civil Code of the Republic of Kazakhstan determines the nullity of a transaction committed by a person recognized incompetent due to mental illness or dementia, since the legislator proceeds from the fiction of the prevalence of the will of such persons established by a prejudicial act. Even if there is a proper expressed will, the legal effect will not arise, since the behavioural act aimed at the expressed will cannot express the true will of such a subject due to the defect of such a will. And such an example is not singular. Thus, "A transaction, which is entered by a citizen, although capable, but at the moment of its commitment was in a state that he could not realize the meaning of his actions or guide them, may be recognized by the court as invalid..." (paragraph 7 of the Article 159 of the Civil Code of the Republic of Kazakhstan). The same is applied to transactions concluded as a result of a wrong belief having significant importance, under the influence of fraudulent behaviour, one-sided transactions. All these examples reflect the legislator's recognition of the key role of the will in a transaction, where a defect, even with a properly expressed will in the correct form, can lead to the legal effect being "canceled".

In this regard, the standpoint of the German legislator with respect to unilateral expressed wills is interesting. Thus, according to the Section 116 of the German Civil Code, "A declaration of intent is not void by virtue of the fact that the declaring person has made a mental reservation that they do not want for what they are declaring to be realised. The declaration is void if it is to be made to another person and that person knows of the reservation" [19; 34].

Thus, both the fact of expressing the will must be obvious to other persons and sufficiently clearly indicate the orientation of the inner will to a legal effect for the occurrence of such a legal effect, and the fact of inconsistency between the inner will and its external expression must be known to a person, who is the subject of such an expression of will in order to establish the defect of the will. We believe it involves persons who acquire some rights or benefits as a result of such an expressed will, persons in whose interests the will is expressed. In this regard, we should note the special place of legal interest in the process of the expressed will, called by V.A. Ojgenziht as "from desires to action" [5; 9]. Nevertheless, "expedient actions aimed at satisfying one's desires purposely" [5; 9] are carried out in the process of the expressed will in order to "realize into reality something you consider expedient" [5; 9], that is, corresponding to your interest. It is precisely "interest that is the material basis of law" [20; 9].

Thus, the interest acts as the determinant of the entire volitional process.

Civil science knows various doctrines of the will and expressed will.

The expressed will has only evidentiary value according to the theory of will, while the will has determining value [21; 10]. This theory is aimed at the interests of the expressor of will and against the interests of a person who is the subject of the expressed will regardless of his good faith [22; 441-442].

The legal effect depends on the content of the external will — the expressed will in accordance with the doctrine of reliability (theory of validity) of K. Larenz [22; 113]. Essentially, the internal will of a "declarant" and the will externally expressed in the "declaration" is the starting point for the occurrence of legal consequences [23; 431]. Merely desiring legal consequences is not sufficient for the "declaration of intent" (expressed will) to be valid. Legal consequences are achievable when performing permitted actions (legal acts) that declare the inner will through its external manifestation [23; 434]. This theory became the basis of the Section 116 of the German Civil Code.

Despite the well-known criticism of the theory of credibility [21; 12], we believe that it is closer to the principle of justice and reasonableness than the theory of will.

Faultlessness of the expressed will is also important for the validity of a transaction.

Legal consequences stem from the will. However, the internal will cannot be recognized, and due to its hidden and unformalized nature, it cannot create consequences without being externally expressed. For legal relationships (or legal consequences) to arise, formalization is required to ensure the alignment of the parties' expectations regarding lawful behaviour. Without this, legal relationships cannot be established. Therefore, the will becomes a legal fact only when it is expressed externally and formalized. The form acts as a means of regulation — the point where the parties' wills and legal norms intersect. Without formalization, the subject of the agreement cannot be determined [15; 38].

If the will directly contradicts the expressed will — for example, when expressed under the impact of violence, threat, fraudulent behaviour — the defect of the will is obvious and gives rise to the invalidity of a

transaction. If the inconsistency between the will and expressed will was known to the counterparty, then he is not in good faith, therefore he has no protected interest and a transaction is invalid. If he was not aware of such an inconsistency between the will and the form, then his interest must be protected.

But a completely different algorithm is applicable in case of a good faith error of the subject who expressed it. The approach of the German legislator concerning the consequences of such an inconsistency between the will and expressed will seems to be fair in this regard. It is not fair to deprive a person, who is the subject of the expressed will, given his good faith, of his expectations from the expressed will (transaction) only because of the error of a person expressing the will. Even if it is a good faith error.

Despite the fact that such a provision is obvious and can be applied by law enforcement agencies in disputes on recognizing a transaction as invalid due to defects of the will even without the direct legislative guidance, case-law of the republic of Kazakhstan does not apply this approach. On the one hand, there is no direct legislative consolidation, on the other hand, there is a regulatory approach while forming the opinion of the courts.

The civil legislation of the Republic of Kazakhstan only indirectly indicates the reception of such a doctrine. For example, only a significant error may be the basis for invalidity of a transaction according to paragraph 8 of the Article 159 of the Civil Code of the Republic of Kazakhstan. But even in this case, the burden of proving a significant error is upon an action by the party which acted under the influence of misguidance; and the interests of the person who is the subject of the expressed will are protected by the presumption of his good faith, as well as by the presumption of reasonableness of the person expressing the will [30].

The expressed will (Willenserklärung) as a civil category was most broadly defined for the first time by German civilises who were supporters of law that were based on the pandect of Justinian and its first usage was related to promises (Versprechung) [24; 70]. However, there was no consensus among scholars until the XIX century in regard to the terminology and significance of the used terms denoting the expressed will. The expressed will was mentioned for the first time in 1807 in the work of G.A. Heise, in the Section focused on transactions [25; 29–32], and the most complete content of the expressed will was revealed in the work of F.C. Savigny, where he identified several components of the expressed will: 1) the will; 2) expression of will; 3) correspondence of the will to the expression [26; 99].

The first element of the expressed will, defined by F.C. Savigny, points out the relationship between the expressed will and the inner will, only in case when I inform other persons about the content of the inner will for a specific effect, I carry out the expressed will. Without a formed inner will, there is no its divulgation, objectification.

The second element indicates the possibility of objectifying the will by the expressed will — to make it public, to make it known to third parties, resulting that the consequences may occur (both legal and others related to satisfying the interests of the volitional party).

The third element is similar to the first one but narrows the relationship between the will and expressed will also by their content, which must correspond to each other [1; 61].

In this regard, A.A. Panov's reasoning that the expressed will performs three main functions seems to be correct: "firstly, … the function of objectification of the inner will, that is, a manifestation of the will. Secondly, … the generation of legal consequences of the corresponding volitional act, and … the fixation of the content of the inner will" [1; 61-62].

Most certainly, the function of objectifying the inner will is the main function of the expressed will. But it is important to determine, in the context of a transaction, how this function is carried out.

The expressed will is most often implemented through a certain behavioural act expressed in a positive action of a subject. Such actions can be expressed both through words (both in writing and orally) and through implicative actions. But the main feature of such actions is the possibility of generating precisely civil consequences. Otherwise, such a behavioural act will not have the characteristics of the expressed will as a civil transaction.

Moreover, not all actions that objectively indicate their certain orientation should be considered the very behavioural act that expresses the will.

In this regard, the position of D.D. Grimm seems to be interesting; he pointed out that "An action is not the sole, and certainly not the primary, basis for evaluating someone's volitional acts. When analysing an action, at the first step it is necessary to determine whether it represents an act of will at all, and if it does, the next step is to understand what kind of volitional act is behind it. In other words, the goal is to interpret the meaning of the action. The first step in solving this task requires consideration of the surrounding circumstances under which the coordinated series of movements took place. As for the second part, it's important to

recognize that similar signs or movements can represent different volitional acts and be directed toward various purposes. Furthermore, individual actions alone cannot serve as a basis for concluding whether they carry independent significance or are merely components of a larger, more complex action" [27; 234].

Thus, two methods of accepting an inheritance are defined by the civil legislation of the Republic of Kazakhstan: legal and actual. If the first is subject to strict rules on the form and involves the performance of formalized actions taken in a jurisdictional manner, then the second involves the performance of certain actual, not always formalized actions that may reflect the intentions of a person to acquire an inheritance. However, if an heir does not have such intentions and the actual actions are committed for a different, non-legal succession purpose, then such actions cannot give rise to legal consequences, which is reflected in paragraph 2 of the Article 1072-1 of the Civil Code of the Republic of Kazakhstan establishing the possibility of an heir to bypass the presumption of acceptance of an inheritance while performing actual actions upon proving the fact of the absence of a volitional component.

Thus, not every action is a manifestation of the act of will.

The expressed will is not always expressed in positive actions of a subject. There are frequent cases of expressing the will through passive (negative) behaviour — act of omission, which can bring to the attention of others the will of a subject for a specific legal effect.

Both the "In law, both the intent and internal content of the will, as well as its external expression — which makes it accessible to understanding by third parties and judicial authorities — are important. The methods of externally expressing the will are quite varied. While the primary method of communication is through words, they are not the will itself, but merely a means of expressing it (a distinction seemingly not made in Ancient Roman Law). Moreover, words are not the only way to express the will" [28; 142].

Positive sources of law establishing preclusive periods for the implementation of a subjective right formalize the expression of the will through an action of omission, which is capable of generating a legal effect after the expiration of such preclusive periods. Thus, the Civil Code of the Republic of Kazakhstan, in effect until January 12, 2007, established that an heir could acquire an inheritance if they did not renounce it within six months from the date they learned, or should have learned, of their right to inherit (the Article 1072, paragraph 1 of the Article 1074 of the Civil Code of the Republic of Kazakhstan). That is, the heir had the opportunity to express their intention to accept the inheritance through an act of omission — by not refusing within a specified period, after which the intended legal effect took place (in the form of the emergence of the ownership right to the property of a testator, the transfer of his / her property rights, obligations, etc.) [29].

Another example of expressing the will through a passive (negative) behavioural act — an act of omission (or, in other words, silence) — is the form of accepting the guarantor's (surety's) offer by the creditor to conclude an indemnity contract (contract of guarantee). According to paragraph 3 of the Article 331 of the Civil Code of the Republic of Kazakhstan "The written form of guarantee or surety agreements shall be deemed to the complied with, provided the guarantor or surety notified in writing the creditor of his liability for the execution of the obligation by the debtor, and the creditor did not refuse the proposal of the guarantor or surety during the period of time which is reasonably required for such a refusal" [31]. The behaviour of the creditor within a certain reasonable period demonstrating the absence of a refusal of the guarantor's (surety's) proposal to conclude an indemnity contract is an example of acceptance by silence (act of omission), stipulated by paragraph 2 of the Article 396 of the Civil Code of the Republic of Kazakhstan [30].

In addition, the expressed will fixates the will, making it known at a certain stage. And if the internal processes influencing the formation of the internal will, as well as the internal will of a subject change due to the dynamism of their nature, then the fixation makes the will that was expressed from outside, unchanged in the context of legal consequences that is aimed at protecting the interests of those persons who are subjects of such a will as a result of the expressed will [31; 195].

This position is supported by I.B. Novickij, who determines that "Subsequent changes in the decision, desire, motives, as a general rule, cannot be grounds for changing the already expressed legally significant will" [31; 195].

Thus, the legal effect arises due to the fixation of the will through its expression and objectification in such a way that it becomes accessible to third parties and expresses the intentions of a person for a certain effect from such an expression of will.

The correspondence between the will and expressed will is also of great importance in the theory of the transaction.

There are many theories of the correspondence between the will and expressed will, however, the most famous are three theories developed in German civil law:

1) Theory of the will — Willenstheorie;

2) Theory of expression — Erklärungstheorie;

3) Theory of trust (credibility) — Vertauenstheorie.

According to the first theory — Willenstheorie, if the will does not correspond to the expressed will, the inner will is the decisive one. In this regard, I.A. Pokrovsky wrote: "... There can be no talk of a legal effect of the contract if there is no such a will: there is only the appearance of the contract, but not its essence" [32; 246–248]. On one hand, this theory rightly points to the relationship between the expressed will and the inner will for the purposes of legal consequences; however, on the other hand, the supporters of this theory did not consider the interests of good faith of third parties, who may be subjects of the legal effect from the expressed will.

The theory of expression — Erklärungstheorie reflects the completely opposite effect because of the inconsistency between the will and expressed will, determining that the legal consequences should not be changed, if the will and expressed will do not coincide [7; 37].

According to the theory of trust — Vertauenstheorie, the will and expressed will have the same significance for establishing the legal effect; and the preference of one of the components depends on the "interests of the turnover, but the good faith of persons performing a transaction should be of great importance" [7; 37].

However, in most cases the theory of the will and the theory of expression are opposed, such an opposition according to J. Schapp is of paramount importance in the doctrines on a transaction [24; 74].

The current Civil Code of the Republic of Kazakhstan reflects both concepts. Thus, the affected will can lead to the invalidity of a transaction, which makes the will as a predetermining factor of the legal effect, however, a defect of the will stated in paragraphs 8 and 9 of the Article 159 of the Civil Code of the Republic of Kazakhstan does not invalidate a transaction, but makes it contentious, which means the validity of such a transaction until the court establishes its invalidity, as well as in case of a missed limitation period, which is «truncated» for the purposes of challenging transactions due to a defect of the will — one year from the moment when the party became aware of the challenge ability grounds. On one hand, such a provision may indicate the prevalence of the theory of expression, given that the law does not establish the nullity of such transactions without judicial recognition. On the other hand, the law, in our opinion, allows changing the will after its expression, aimed at the desire for a legal effect from a transaction. That is, if a subject of the expressed will does not report about a defect of the will with the intent of cancelling the legal effect from the expressed will, then it means that his will has changed and corresponds to the occurred legal effect.

We believe that such an interpretation gives reason to believe that the theory of the will prevails over the theory of expression.

Thus, when the courts asses the circumstances indicating the presence or absence of defects of the will and expressed will, they should establish not only the compliance of the external will including the process of its formalization, but also determine the priority of this external will. However, if the will-expressing subject does not initiate a dispute within the existing limitation periods (the author believes it is reasonable to establish a truncated one-year limitation period for this category of disputes), then such an act of omission should be assessed as evidence of the transformation of the will (the will "catches up" with the expressed will).

Conclusions

Thus, the expressed will is an external expression of the internal will aimed at a certain legal effect in the form of the emergence, change or termination of rights and obligations, which is capable to satisfy the interest of the expressed will's subject. It is the interest that predetermines the formation of the will and is an indicator of the determination of the will's compliance with the legal effect from the expression of the will. The expressed will itself is realized through a behavioural act in an active or passive form, which records the will at the moment of such an act's commission and makes such a will unchanged for the purposes of the raised legal relationship. The expressed will is the very legal fact-action that serves as the basis for the emergence of a civil legal relationship from transactions. That is the reason that the concept of a transaction contained in the Article 147 of the Civil Code of the Republic of Kazakhstan is informatively incorrect. It is more properly to reveal the concept of a transaction not through actions, because one can express the will and make it obvious to everyone, in particular, through silence and through the act of omission, but through

the expressed will. Thus, a civil transaction is the expressed will of subjects aimed at such possible variants of legal effect as the emergence, change or termination of civil rights and obligations.

It is indisputable that the subjects of the expressed will with a private and legal effect can only be subjects of civil law in their classical ternary version — individuals, legal entities, the state.

However, the process of expressing the will will not always be identical for all of these subjects. It is clear that this process differs for collective subjects (legal entities, the state) from the process of the expressed will by individual subjects (individuals). But different forms and methods of the expressed will depending on certain factors may exist even within these groups of subjects.

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Азаматтық мәміле құрылымындағы ішкі және сыртқы ерік (ерік білдіру) арасындағы қатынас

Мақала азаматтық-құқықтық мәміле құрылымындағы ерік пен ерік білдіру секілді элементтер, сондай-ақ ерік пен ерік білдіруден тыс жасалған мәмілелердегі дауласу туралы істер бойынша сот ісін жүргізу ерекшеліктеріне арналған. Аталған санаттарды зерттеу мәміленің құрамын, оның жасалуын және жарамдылығын анықтау үшін, сонымен қатар азаматтық-құқықтық мәміле ұғымын дұрыс қорытындылау үшін өте маңызды. Жұмыстың практикалық маңыздылығы мынада: ерік білдірудің әртүрлі нысандарына (түрлеріне) мәмілелер туралы ережелерді, оның ішінде ерік пен ерік білдіруден тыс мәмілелердің жарамсыздығы туралы ережелерді қолдану мүмкіндігін анықтаудан көрінеді. Зерттеу жүргізу кезінде автор өзінің алдына негізгі міндеттер ретінде келесі мәселелерді шешуді қойды: ерік дегеніміз не және оны қалыптастыру процесі қандай, ерік пен ерік білдіру бір-бірімен қалай байланысты, ерік білдіруді басқа жолмен жасауға бола ма, категориялардың қайсысы басым және ерік пен ерік білдіруден тыс жасалған мәмілелердің жарамсыздығы туралы дауларды шешуде қалай әсер ететіндігі. Осылайша, зерттеудің мақсаты — ерікті қалыптастыру үрдісін, ерік білдірудің әдістерін және олардың арақатынасын анықтау. Зерттеуді жүргізу кезінде автор қолданыстағы жалпы ғылыми және арнайы құқықтық әдістердің кең жиынтығын қолданды, бұл келесі нәтижелерге әкелді. Автордың азаматтық-құқықтық мәміле құрылымындағы ерік пен ерік білдірудің категорияларын зерттеуі жеке құқықтың бастапқы субъектілеріне және игіліктердің түпкі бенефициары — жеке тұлғаларға қатысты жүзеге асырылды. Теориялық талдау негізінде ерік пен ерік білдірудің ерекшеліктерін бағалауда басымдықтарды белгілеу мақсатында осы категориялардың аражігін ажыратады, сондай-ақ олардың реттілігін анықтайды, еріктің негізділігін дәлелдейді. Зерттелетін категорияларды жан-жақты талдау мақсатында автор уақыт шеңберімен және бағытымен шектелмей, бұрын жүргізілген зерттеулерге жүгінеді. Сонымен, зерттелетін құбылыстардың қалыптасқан пәнаралық байланысына сүйене отырып, алынған нәтижелерді психология және философия сияқты ғылым салаларындағы ерік пен ерік білдіру категорияларын зерттеумен байланыстыра, неміс азаматтық ойының классиктерінің еңбектері пайдаланылған.

Кілт сөздер: ерік, ішкі ерік, ерік білдіру, мәміле, шарт, құқықтық әсер, сенім теориясы, ерік білдіру теориясы, ерік теориясы.

Е.Л. Бабаджанян

Соотношение внутренней и внешней воли (волеизъявления) в структуре гражданско-правовой сделки

Данная статья посвящена анализу воли и волеизъявления в структуре гражданско-правовой сделки, а также особенностям судопроизводства по делам об оспаривании сделок с пороками воли и волеизъявления. Исследование этих категорий имеет большое значение для определения состава сделки, её заключенности и действительности, а также для целей корректной формулировки понятия гражданско-правовой сделки. Практическая значимость исследования заключается в оценке возможностей применения положений о сделках с различными формами волеизъявлений, в том числе положений о недействительности сделок с пороками воли. Основной задачей автора стало раскрытие процесса формирования и взаимосвязи воли и волеизъявления, а также анализ возможности совершения волеизъявления иначе, чем через выражение действительной воли. Тем самым, цель исследования — это установление процесса формирования воли, способов совершения волеизъявления и их соотношение. При проведении исследования автор использовал широкую комбинацию общенаучных и специально-правовых методов научного познания, что привело к определенным результатам. Проведенное исследование категорий воли и волеизъявления в структуре гражданско-правовой сделки осуществлялось применительно к первичным субъектам частного права и конечным бенефициарам — физическим лицам. На основе теоретического анализа автор проводит разграничение данных категорий для целей установления приоритетов при оценке пороков воли и волеизъявления, а также определяет их последовательность, доказывая первичность воли. Для целей всестороннего анализа исследуемых категорий автор обращается к проведенным ранее исследованиям, не ограничиваясь временными рамками и направленностью, использует работы классиков немецкой цивилистической мысли и соотносит полученные результаты с исследованиями категорий воли и волеизъявления в психологии и философии, исходя из установленного междисциплинарного характера.

Ключевые слова: воля, внутренняя воля, волеизъявление, сделка, договор, правовой эффект, теория доверия, теория изъявления, теория воли.

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Кәсіпкерлердің құқықтарын сот арқылы қорғау мәселелері

Мақала Қазақстан Республикасындағы кәсіпкерлердің құқықтарын сот арқылы қорғауды талдауға арналған. Сот арқылы қорғау құқығы Қазақстан Республикасының Конституциясында бекітілген негізгі құқықтардың бірі. Кәсіпкерлік қызметпен айналысатын кәсіпкерлерді сот арқылы қорғаудың маңызы зор, өйткені бұл олардың мемлекеттік органдар мен өзге де субъектілердің заңсыз әрекеттерінен қорғау құқығын ғана емес, сонымен қатар нарықтық экономика жағдайында кәсіпкерлік қызметтің тұрақтылығын қамтамасыз етеді. Зерттеу жұмысының өзектілігі кәсіпкерлер тарапынан ұзақ мерзімді сот процестеріне, соттардың шамадан тыс жүктелуіне, сот шешімдерін орындау мәселелеріне, сондай-ақ құқықтық сауаттылықтың төмен деңгейіне қатысты өсіп келе жатқан сынмен байланысты. Мақаланың мақсаты Қазақстандағы кәсіпкерлердің құқықтарын сот арқылы қорғау мәселелерін анықтау және оларды шешу жолдарын табу. Зерттеудің міндеттері құқықтық ережелерді талдау, сот тәжірибесін зерделеу, сондай-ақ кәсіпкерлік қызмет үшін құқықтық ортаны жақсарту бойынша ұсыныстар әзірлеу. Жұмыста дауларды шешудің баламалы әдістерін жетілдіруді, кәсіпкерлердің құқықтық сауаттылығын арттыруды және тұтастай алғанда сот жүйесін жетілдіруді қоса алғанда, кәсіпкерлердің құқықтарын қорғауға байланысты негізгі мәселелер қарастырылған. Зерттеу нәтижелері тәжірибелік құндылыққа ие және құқық қорғаушыларға, кәсіпкерлермен өзара іс-қимыл жасайтын мемлекеттік органдарға, сондай-ақ кәсіпкерлік қызмет субъектілеріне қызықты болуы мүмкін. Олар бизнес ортасын жақсартуға және құқықтық қорғауды күшейтуге ықпал ете алады.

Кілт сөздер: кәсіпкер, кәсіпкерлік қызмет, кәсіпкерлердің құқықтарын қорғау, кәсіпкерлік құқық, соттық қорғау, сот, бизнес, құқықтар мен бостандықтар, кәсіпкерлік қызмет субъектісі.

Кіріспе

Қазіргі жағдайда, кәсіпкерлік қызмет субъектілерінің мемлекетпен қарым–қатынасы өзара әрекеттесу тетігі деп аталатын белгілі бір жүйе шеңберінде жүзеге асырылады, оның басты мақсаты жеке және қоғамдық мүдделерді келістіру арқылы өзара пайда алу. Кәсіпкерлік пен жария билік субъектілерінің өзара іс–қимыл механизмдерін айқындайтын ең жоғары құндылық адам мен азаматтың, оның ішінде кәсіпкерлердің құқықтары мен бостандықтарын тану, сақтау және қорғау. Сонымен қатар, Қазақстан Республикасының 1-бабында өзін жариялаған құқықтық мемлекеттің міндеті бұзылған құқықты әділ және тез қалпына келтіру ғана емес, сондай-ақ келтірілген зиянды өтеу. Осылайша, мемлекеттің кәсіпкерлік қызмет субъектілерінің құқықтары мен бостандықтарын қорғаудың тиімді тетіктерін құруы олардың өзара әрекеттесу процесінің қажетті және маңызды құрамдас бөлігі болып саналады. Демек, адам, оның құқықтары мен бостандықтары ең жоғары құндылық болып табылатын қазіргі қоғамда соттық қорғауына конституциялық құқықтың кепілдігі мен мызғымастығы «әркімге оның құқықтары мен бостандықтарын сот арқылы қорғауға кепілдік беретін» құқықтық мемлекет құрылымының негізі болып табылады (Қазақстан Республикасы Конституциясының 13–бабы) [1]. Осы тектес ережелер Біріккен Ұлттар Ұйымы Бас Ассамблеясының № 217 А (III) резолюциясымен 1948 жылғы 10 желтоқсанда қабылданған Адам құқықтарының жалпыға бірдей декларациясының 8–бабында қамтылған [2].

Кәсіпкерлердің құқықтары мен заңды мүдделерін қорғаудың құқықтық әдістерінің жиынтығы Қазақстан Республикасының қолданыстағы Конституциясында, Азаматтық, Кәсіпкерлік кодекстерінде және Қазақстан Республикасының өзге де заңнамалық актілерінде белгіленген кәсіпкерліктің құқықтық режимінің ажырамас бөлігі. Сонымен бірге кәсіпкерлердің құқықтары мен заңды мүдделерін қорғаудың әр түрлі тәсілдері жеке құқықтық институттарға кіреді, олардың

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нормалары кәсіпкерлік қызмет саласындағы қатынастарды реттейді. Қазақстандағы кәсіпкерлік сөзсіз, маңызды салалардың бірі. Оның қолайлы дамуымен біздің экономикамыз бәсекеге қабілетті және тиімді болады деп күтуге болады.

Кәсіпкерлік — бұл мүлікті пайдалану, тауарларды өндіру, сату, жұмыстарды орындау, қызметтер көрсету арқылы таза кіріс алуға бағытталған дербес, өз тәуекелімен жүзеге асырылатын бастамашыл қызмет. Бұдан кәсіпкердің өз қызметі бағытталған оң нәтиже алмау ықтималдығы бар екендігі шығады. Оған қол жеткізудің бірден бір кепілі берілген құқықтарды кедергісіз жүзеге асыра отырып, қорғауды қамтамасыз ету. Осы орайда кәсіпкерлік қызмет субъектілерінің құқықтарын қорғау нысандарын талдай отырып, тиімді тетіктерін анықтау зерттеу жұмысының негізін қалыптастырмақ.

Қазіргі нарықтық экономика жағдайында кәсіпкерлердің сот арқылы қорғалу құқығы тұрақты және ашық кәсіпкерлік ортаның негізі екені анық. Кәсіпкерлер үшін сот арқылы қорғану дауларды болдырмау, алдын алу мен шешудің, сонымен қатар олардың мүдделерін жеке және заңды тұлғалардың да, мемлекеттік органдардың да заңсыз араласуынан қорғаудың маңызды тетігін білдіреді. Қазақстан дамушы құқықтық жүйесі бар ел ретінде кәсіпкерлік қызмет субъектілерінің құқықтарын сот арқылы қорғауды тиімді қамтамасыз ету саласында әрине түрлі сындарға тап болады. Бұл зерттеу жұмысында мәселелерді анықтауға, олардың себептерін талдауға және шешімдерді ұсынуға баса назар аудара отырып, Қазақстандағы кәсіпкерлік құқықтарды сот арқылы қорғаудың негізгі қырлары қарастырылады.

Зерттеу жұмысының мақсаты Қазақстандағы кәсіпкерлердің құқықтарын сот арқылы қорғауды зерттеу, мәселелерді анықтау және оларды шешу жолдарын ұсыну, сонымен қатар соттық механизм арқылы кәсіпкерлердің құқықтарын іске асырудың тәжірибелік қырларын талдау. Жұмыстың маңызды қыры қолданыстағы сот тәжірибесінің тиімділігін және сот жүйесін жетілдіру бойынша ұсыныстарды бағалау.

Әдістер мен материалдар

Жүргізілген зерттеудің дұрыстығы және авторлардың дәлелдерінің негізділігі танымның эмпирикалық және теориялық әдістерін (сипаттау, талдау, синтез, индукция, дедукция) қолдану арқылы қамтамасыз етіледі. Жалпы ғылыми әдістерден басқа, зерттеу жұмысында арнайы — құқықтық әдістері қолданылды, олар: ресми–құқықтық, салыстырмалы–құқықтық.

Зерттеудің теориялық негізі ретінде ғалымдар М.К. Сулейменовтің, С.П. Мороздың, В.Ф. Яковлевтің мерзімдік басылымда жарияланған ғылыми мақалаларына талдаулар жасалды.

Зерттеу жүргізу материалдарына «Қазақстан Республикасының Кәсіпкерлік кодексі», 2015 жылғы 29 қазандағы № 375-V ҚРЗ; «Қазақстан Республикасының Азаматтық процестік кодексі», 2015 жылғы 31 қазандағы қабылданған № 377-V ҚРЗ пайдаланылды.

Талқылаулар

Кәсіпкерлік өз тәуекелімен жүзеге асырылатын және жүйелі түрде таза пайда табуға бағытталған тәуелсіз бастамашыл қызмет ретінде Қазақтан Ресупликасының Конституциясында бекітілген конституциялық құрылымның негізін құрайтын адам мен азаматтың құқықтары мен бостандықтарын жүзеге асырудың бір түрі. Кәсіпкерлік қызметті дамыту еліміздің мемлекеттік саясатының басты бағыты болғандықтан, оған дәлел мемлекет басшысы Қасым-Жомарт Тоқаевтың Қазақстан халқына Жолдауларында әр уақытта кәсіпкерлікті дамыту мен қолдауға қатысты міндеттер қоятындығы, атап айтқанда «Әділетті мемлекет. Біртұтас ұлт. Берекелі қоғам» атты Мемлекет басшысының 2022 жылғы 1–қыркүйектегі Қазақстан халқына Жолдауында [3] баса назар аударуы, мемлекет кәсіпкерлікті дамытудың тиісті кепілдіктерін көтермелеп, қамтамасыз етуі, кәсіпкерлердің құқықтарын қорғауы керектігін айқын көрсетеді.

Бұл мәселені тереңірек талдай отырып, кәсіпкерлердің құқықтарын қорғау мәселелерін зерттеушілер кәсіпкерлік қызмет пайда табуға бағытталғандықтан, уақыт пен материалдық шығындарды кірістермен сәйкесінше өлшеуді талап ететіндігін дұрыс атап өтті. Осы ерекшеліктерге байланысты «кәсіпкерлік қызмет, бір жағынан, кәсіпкерлерге қойылатын талаптардың жоғарылауын, екінші жағынан, үлкен еркіндік пен әрекет ету ережелерін жеңілдетуді көздейді. Тиісінше, кәсіпкерлік құқықтарды қорғауды жүзеге асыру қарапайым және жедел шаралар мен рәсімдерді талап етеді» [4; 199].

Кәсіпкерлердің құқықтарын қорғау деп олардың иелерінің бұзылған немесе даулы құқықтары мен мүдделерін қалпына келтіру немесе тану жөніндегі нормативтік белгіленген шаралардың (тетіктердің) жиынтығы түсініледі, олар белгілі бір нысандарда, белгілі бір тәсілдермен, заңмен белгіленген шекараларда, бұзушыларға заңдық жауапкершілік шараларын, сондай-ақ осы шараларды іс жүзінде іске асыру (орындылығы) тетігін қолдана отырып жүзеге асырылады. Құқықтарды қорғау тәсілдері деп бұзылған құқықтарды қалпына келтіру немесе тану жүргізілетін және құқық бұзушыға ықпал ету жүзеге асырылатын заңмен бекітілген мәжбүрлеу сипатындағы материалдық-құқықтық және іс жүргізу шаралары түсініледі. Кәсіпкерлік құқықтарды қорғаудың материалдық-құқықтық тәсілдері — бұл материалдық құқықтың қорғау нормаларына сәйкес құқықтарды қорғау жөніндегі іс-қимыл тәсілдері.

Қорғаудың іс жүргізу тәсілдері — бұзылған құқық туралы дауды қарау процесінде кәсіпкерлердің құқықтарын қорғауды қамтамасыз ететін тәсілдер. Солардың бірі біздің зерттеу жұмысымыздың арқауы болып отырған кәсіпкерлердің құқықтарын сот арқылы қорғау.

Кәсіпкерлердің құқықтарын сот арқылы қорғауды реттейтін негізгі ережелер Қазақстан Республикасының Конституциясында, Азаматтық, Кәсіпкерлік, Азаматтық процестік кодексте, сондай-ақ өзге де бірқатар нормативтік құқықтық актілерде қамтылған.

Әрекет етуші кәсіпкерлік заңнамаға сәйкес, әрбір кәсіпкерлік субъектісінің өз құқықтарын, бостандықтары мен заңды мүдделерін сот арқылы қорғауға құқығы бар [5], яғни кәсіпкерлік қызмет субъектілері бұзылған немесе даулы құқықтарын, бостандықтарын немесе заңды мүдделерін қорғау үшін Қазақстан Республикасының заңдарында белгіленген тәртіппен сотқа жүгінуге құқылы.

Белгілі бір елде сот төрелігін жүзеге асырудың әртүрлі ұйымдық нысандарының дамуының салдары сот ұйымының көп жүйелілігі, оның ішінде соттардың әр түрлі дауларды шешуде терең мамандануы, олардың жекелеген санаттарын белгілі бір белгілер бойынша бөлу осы қатынастардың қоғам өмірі үшін маңыздылығына байланысты. Бұл процесс экономикалық өмірі дамыған және оған сәйкес құқықтық жүйесі бар әртүрлі елдерге тән.

В.Ф. Яковлевтің жалпы және мамандандырылған соттарды құру жалпыеуропалық стандарттарға сәйкес келетін демократиялық сот жүйесін құру ережесі [6; 11] деген пікірді алға тартқаны кездейсоқтық емес, демек судьялардың істердің қандай да бір санатына мамандануы бұл істердің жалпы юрисдикциялық соттарға қарағанда жоғары кәсіби базада осындай соттарда қаралатынын дәлелдейді.

Осы орайда айтар болсақ, заңды тұлға құрмай-ақ кәсіпкерлік қызметті жүзеге асыратын азаматтар (дара кәсіпкерлер), сондай-ақ Қазақстан Республикасында заңды тұлғалар тараптары болып табылатын мүліктік және мүліктік емес даулар бойынша азаматтық істерді қарау үшін мамандандырылған ауданаралық экономикалық соттар құрылды. Яғни, экономикалық соттарды құру қажеттілігі Қазақстан Республикасы Тұңғыш Президентінің 1999 жылғы 22 қарашадағы «Қазақстан Республикасы Президентінің жанындағы Шетелдік инвесторлар кеңесі екінші мәжілісінің кеңестері мен ұсыныстарын орындау жөніндегі шаралар туралы» № 95 Өкімінде көрсетілген еді. Осыған орай Қазақстан Республикасы Президентінің 2001 жылғы 16 қаңтардағы № 535 Жарлығымен байқап көру ретінде Алматы және Қарағанды қалаларында ауданаралық мамандандырылған экономикалық соттар құрылған болатын [7]. 2001 жылғы маусымда өткен Қазақстан судьяларының үшінші съезінде республиканың Тұңғыш Президенті мамандандырылған соттар жүйесін — бірінші кезекте экономикалық және әкімшілік соттарды кезең-кезеңмен құру жөніндегі жұмысты жалғастыру міндетін қойды. Байқап көру ретінде құрылған экономикалық соттардың 2001 жылғы қызметін талдау республиканың барлық облыстары мен Астана қаласында экономикалық соттарды құру орынды болатынын көрсетті. Соған сәйкес, мамандандырылған ауданаралық экономикалық және әкімшілік соттарды құру туралы Қазақстан Республикасы Президентінің 2002 жылғы 9 ақпандағы № 803 Жарлығына сай Астана қаласында, Ақмола, Ақтөбе, Алматы, Атырау, Шығыс Қазақстан, Жамбыл, Батыс Қазақстан, Қостанай, Қызылорда, Маңғыстау, Павлодар, Солтүстік Қазақстан, Оңтүстік Қазақстан облыстарында қолданыстағы заңдарға сәйкес экономикалық дауларды қарауға уәкілетті мамандандырылған ауданаралық экономикалық соттар құрылды [8; 299]. Қазіргі кезде экономикалық соттардың қызметін қамтамасыз ету жөніндегі тиісті құқықтық база жасалды, атап айтқанда Қазақстан Республикасының Азаматтық іс жүргізу заңнамасына өзгертулер мен толықтырулар енгізілді, онда бұл соттардың қарауына жататын істер айқындалған.

Жүргізілген талдау жұмыстарының нәтижесіне тоқталар болсақ, оның ішінде аталған соттарда қарастыралатын істерді саралау арқылы, кәсіпкерлердің көпшілігі өз құқықтарын сот арқылы қорғау

процесінде бірнеше негізгі мәселелерге тап болатындығы айқындалды. Оның бірі, сот процестеріндегі кідірістер, демек, экономикалық дауларды қараудың орташа уақыты ақылға қонымды мерзімдерден едәуір асып кетеді, бұл әрине кәсіпкерлер үшін қосымша шығындарға әкеледі.

Осы орайда нақтылайтын болсақ, біздің мемлекетіміздегі сот төрелігінің жай-күйі және азаматтық құқықтарды қорғау туралы теріс пікір қалыптастырудың себептерінің бірі соттың ұзақ мерзімді шешім қабылдауы. Қазақстан Республикасының Азаматтық процестік кодексіне соттар жұмысының заманауи форматтарын ендіру, артық сот рәсімдері мен шығындарын қысқарту мәселелері бойынша өзгерістер мен толықтырулар енгізу туралы 2020 жылғы 10 маусымдағы № 342-VI Қазақстан Республикасының Заңымен (ҚР АПК 150-бабы) азаматтық құқықтарды қорғаудағы жағдайды одан әрі нашарлатты, өйткені қазір 5 күннің орнына сотта татуластыру рәсімдерін қолдану үшін 10 жұмыс күні бар және тек теріс нәтиже болған жағдайда ғана іс жүргізуге талап қоюды қабылдау туралы ұйғарым шығарылады. Бұл ереже азаматтар мен заңды тұлғалар өкілдерінің сот жүйесіне деген сеніміне теріс әсер етеді және жалпы сот төрелігінің мақсаттарына қол жеткізуге ықпал етпейді [9; 17]. Сонымен қатар, сот шешімдерін орындаудың тиімсіздігі, яғни кейбір жағдайларда кәсіпкерлердің пайдасына шығарылған шешімдердің уақытылы орындалмауы немесе әкімшілік кедергілердің орын алуы. Тағы бір мәселе, кәсіпкерлердің құқықтық сауаттылығының төмендігі, көптеген кәсіпкерлік қызмет субъектілері өздерінің құқықтары мен оларды қорғау мүмкіндіктерін білмеуі, ол өз кезегінде олардың мемлекеттік органдардың немесе өзге де тұлғалардың құқық бұзушылықтарына қарсы тұру қабілетін қиындатады. Сондай–ақ, соттардың шамадан тыс жұмысбастылығы, соттарда қаралатын істердің көптілігі, бұл сот ісін жүргізудің сапасын төмендетеді және ұзақ кідірістерге әкеледі. Бізбен жүзеге асырылған бақылауларға сәйкес бұл мәселелердің жүйелі екенін көрсетті және оларды шешу сот жүйесі мен кәсіпкерлерге арналған білім беру бағдарламаларын жетілдіруге кешенді қарауды қажет етеді.

Зерттеу жұмысының мақсаты кәсіпкерлердің өз құқықтарын сот арқылы қорғаудағы негізгі мәселелерін анықтау және оларды шешудің нақты шараларын ұсыну, зерттеу барысында жоғарыда аталғандай соттардың шамадан тыс жүктемесі, істерді қараудың кешігуі және құқықтық сауаттылықтың жеткіліксіздігі сияқты негізгі мәселелер анықталды, осылайша зерттеу нәтижелері мәлімделген мақсаттар мен міндеттерге толық сәйкес келеді. Осыған сәйкес жұмыстың негізгі тұжырымдамасы кәсіпкерлердің құқықтарын сот арқылы қорғауды жақсарту.

Нәтижелер

Азаматтық құқықтарды қорғау сияқты, кәсіпкерлердің құқықтарын қорғаудың негізгі әмбебап нысаны сотқа жүгіну. Сот арқылы қорғау — адам мен азаматтың құқықтары мен бостандықтарын мемлекеттік қорғаудың элементтерінің бірі.

Осы орайда О.Я. Белявскаяның «сот арқылы қорғау — бұл адам мен азаматтың құқықтары мен бостандықтарын мемлекеттік қорғаудың бір әдісі. Ол арнайы органдар, яғни соттармен жүзеге асырылатын мемлекеттік қызметтің дербес бағыты болып табылады», [10; 17] – деген пікірін орынды деп санаймыз.

Сонымен қатар, Ю.О. Столярова сот қорғау институты адам мен азаматтың құқықтары мен бостандықтарын іске асырудың қазіргі заманғы конституциялық кепілдіктер жүйесінің маңызды элементі болып табылатынын атап өтеді [11; 1511].

Сот қорғау нысаны мемлекет уәкілеттік берген органдардың бұзылған немесе даулы құқықтарды қорғау жөніндегі қызметі деп түсініледі. Оның мәні құқықтары мен заңды мүдделері заңсыз әрекеттермен бұзылған тұлға бұзылған құқықты қалпына келтіру немесе құқық бұзушылықтың алдын алу үшін қажетті шаралар қабылдауға уәкілетті мемлекеттік немесе басқа құзыретті органдарға қорғау үшін жүгінеді.

Соттық қорғау жүйесінің негізгі элементтерінің бірі соттар мен сот төрелігінің тәуелсіздігінің болуы, бұл кәсіпкерлердің мүдделерін мемлекеттік құрылымдардың араласуынан қорғауға кепілдік береді. Сонымен қатар, Қазақстанның құқықтық жүйесі дамуын жалғастырып жатқанымен жетілдіруіне қарамастан, кәсіпкерлер сот органдарында өз құқықтарын іске асыру кезінде бірқатар қиындықтарға тап болатынын ескеру қажет.

Атап өткеніміздей, кәсіпкерлік қызмет субъектілері өздерінің бұзылған құқықтары мен заңды мүдделерін қорғау мақсатында, оларды қалпына келтіріп және алдын алу үшін азаматтық іс жүргізу заңнамасында белгіленген тәртіппен сотқа жүгіне алады. Егер Қазақстан Республикасының

Азаматтық процестік кодексінде және өзге де заңнамаларына сәйкес оларды қорғау өзге сот тәртібімен жүзеге асырылмаса, соттар азаматтық сот ісін жүргізу тәртібімен бұзылған немесе даулы құқықтарды, бостандықтар мен заңмен қорғалатын мүдделерді қорғау туралы істерді қарайды.

Соттар азаматтық, отбасылық, еңбек, тұрғын үй, әкімшілік, қаржылық, шаруашылық, жер қатынастарынан, табиғи ресурстарды пайдалану және қоршаған ортаны қорғау қатынастарынан және өзге де құқықтық қатынастардан, оның ішінде бір тараптың екінші тарапқа үстемдік бағынуына негізделген қатынастардан туындайтын даулар бойынша талаптарды қарайды. Сондай–ақ, сотта мемлекеттік орган мен оның лауазымды тұлғасы қабылдаған актіге дау айтылуы мүмкін. Соттар сонымен қатар, ерекше іс жүргізу тәртібімен істерді қарайды, кәсіпкерлік қызмет субъектілеріне қатысты Қазақстан Республикасы азаматтарының төлем қабілеттілігін қалпына келтіру, сот арқылы банкроттығы, сондай-ақ дара кәсіпкерлер мен заңды тұлғалардың берешегін қайта құрылымдау, олардың оңалтылуы, банкроттығы, оларды банкроттық рәсімін қозғамай тарату туралы іс жүргізу (Қазақстан Республикасының Азаматтық процестік кодексінің 42–тарауы) [11] сияқты істердің санаттарын бөліп көрсетуге болады.

Ерекше атап кететін болсақ, тараптардың кәсіпкерлік қызмет субъектісі, яғни заңды тұлға құрмай кәсіпкерлікпен айналысатын дара кәсіпкерлермен және заңды тұлғалар болып табылатын мүліктік және мүліктік емес дауларды мамандандырылған ауданаралық экономикалық соттар қарайды және шешеді. Осылайша, даулы құқықтық қатынастардың сипаты және даудың мазмұны — тараптардың субъективті құрамы ретінде соттылықтың негізгі белгісі қалыптасады. Дегенмен, басқа соттың соттылығына жататындығы заңда айқындалған істерді ескеру қажет.

Мамандандырылған ауданаралық экономикалық соттар Қазақстан Республикасының заңдарында көзделген жағдайларда қаржы ұйымдарын және банк конгломератына бас ұйым ретінде кіретін және қаржы ұйымдары болып табылмайтын ұйымдарды қайта құрылымдау туралы істерді, дара кәсіпкерлердің және заңды тұлғалардың берешегін қайта құрылымдау, оларды оңалту және олардың банкроттығы, сондай-ақ оларды банкроттық рәсімін қозғамай тарату туралы істерді де қарайды [12].

Мамандандырылған соттар құру туралы шешім елдің нарықтық экономикаға көшуімен мемлекет қызметінің көптеген салаларын құқықтық реттеу айтарлықтай өзгеріп, соттың азаматтар мен ұйымдардың құқықтары мен заңды мүдделерін қорғаудағы рөлі күшейгендіктен туындады — соттарда қарау үшін құқықтың белгілі бір салаларында мамандандыру қажет болатын өтініштер саны өсті, бұл судьялардан заңнаманың кең көкжиегін, құқықтың нақты салаларының теориялық мәселелерін де, оларды қолдану тәжірибесін де терең білуді талап ететін құқық қолдану процесінің күрделілігіне байланысты.

Мамандандырылған ауданаралық экономикалық соттар ұзақ уақыт бойы өз мақсаттарын ақтады. Мұндай соттар қызметінің тар бағыты судьяларға басқа істерге алаңдамай, экономикалық даулардың ерекшелігі мен күрделілігіне үңілуге мүмкіндік береді, бұл тұтастай алғанда республика бойынша істердің осы санаты бойынша сот төрелігін іске асыру сапасына оң әсерін тигізді, алайда мұндай соттардың соттылығын айқындаудағы мәселелер іс жүзінде орын алуда. Аталған азаматтық істің соттылығын анықтау үшін дау кәсіпкер азаматтар арасында немесе ұйым мен кәсіпкер азамат арасында пайда болуы керек. Қалыптасқан сот тәжірибесі бойынша, егер даудың тарабы кәсіпкер болып табылмайтын кемінде бір жеке тұлға болып табылса, мұндай дауды мамандандырылған ауданаралық экономикалық сотта қарауға болмайды және аумақтылығы бойынша аудандық сотқа беруге жатады. Әрине ол өз кезегінде бірқатар мәселелер тудырады, оның ішінде уақыт алушылық пен әкімшілік кедергілердің пайда болуы.

Субъективті азаматтық құқықтарды қорғау бойынша Қазақстан Республикасында азаматтық сот ісін жүргізуді одан әрі жаңғыртуға ұлттық сот ісін жүргізуге заманауи цифрлық технологияларды енгізу және электрондық сот төрелігін қалыптастыру оң әсер етеді. Оны құқықтық қамтамасыз етуге «Қазақстан Республикасының Азаматтық процестік кодексіне соттар жұмысының заманауи форматтарын ендіру, артық сот рәсімдері мен шығындарын қысқарту мәселелері бойынша өзгерістер мен толықтырулар енгізу туралы» 2020 жылғы 10 маусымдағы № 342-VI Қазақстан Республикасының Заңы бағытталған [13; 67]. Өздеріңіз білетіндей, пайда болған азаматтық-құқықтық, ең алдымен мүліктік дауларды жедел шешу мәселесі кәсіпкерлік қызметте өте өзекті болып отыр. Сондықтан Қазақстан Республикасының Азаматтық процестік кодексіне жоғарыда аталған заңмен енгізілген өзгерістер мен толықтырулар сот отырысында техникалық құралдарды пайдалануды кеңейтуге, тараптардың тең құқықтылығы мен соттың бейтараптығы қағидатын

міндетті түрде сақтай отырып, процестік үнемдеуді қамтамасыз етуге ықпал етеді. Дегенмен, оның жеткілікті емес екенін көрсетеді.

Әрине, сот арқылы қорғауды арнайы жасалған әмбебап құқықтық механизм ретінде қарастырған жөн. Сонымен бірге, құқықтанушы ғалымдар, қорғау құқығын жүзеге асыратын субъектінің құқықтық жағдайына байланысты, сотпен бірге азаматтық құқықтарды қорғаудың әкімшілік, төрелік, нотариаттық және қоғамдық нысандарын бөледі. М.К. Сүлейменов субъективті азаматтық құқықтарды қорғауда мынадай нысандарды қамтиды: юрисдикциялық (жалпы тәртіп), әкімшілік (арнайы тәртіп), сондай–ақ құқықтық емес нысан-азаматтық құқықтарды өзін-өзі қорғау [14; 13] немесе азаматтық құқықтарды, оның ішінде кәсіпкерлердің құқықтарын қорғаудағы балама тәсілдер. Осы тұста кейбір елдерден айырмашылығы, Қазақстан сот жүйесіндегі реформаларды және медиация мен төрелік сияқты дауларды шешудің баламалы әдістерін дамытуды қоса алғанда, сот қорғауын жақсартуға қадамдар жасауда екенін айта кеткен жөн.

Сонымен қатар, ТМД-ның басқа елдерінде жүргізілген зерттеулер арасындағы елеулі айырмашылықтардың бірі кәсіпкерлердің құқықтық сауаттылығының рөліне баса назар аудару. Зерттеу жұмыстарының көпшілігінде құқықтық сауаттылық мәселесі. Қазақстанда, авторлардың пікірінше, кәсіпкерлер арасында қорғаудың құқықтық тетіктерін жете бағаламау тиімді сот қорғауына кедергі келтіретін себептердің бірі. Бұл кәсіпкерлер өз құқықтарын білмей, тек соңғы шара ретінде сотқа жүгінуге мәжбүр болған жағдайлардың мысалында көрсетілген, бұл олардың дау-дамайдағы жағдайын едәуір нашарлатады.

Көптеген зерттеулерде соттардың шамадан тыс жүктемесі ТМД елдеріндегі сот жүйесінің негізгі мәселесі ретінде тану. Сот процестерінің кешігуі барлық жерде тіркеледі, бұл кәсіпкерлер үшін қосымша шығындарға әкеледі және сот жүйесіне деген сенімді төмендетеді.

Басқа жұмыстарда келтірілген деректерге сүйенсек, әсіресе соттардың шамадан тыс жүктемесіне, сот шешімдерін орындаудағы қиындықтарға және істерді қараудың ұзақ мерзімдеріне қатысты мәселелермен келісуге болады. Бұл мәселелер ТМД елдерінің көпшілігінде жиі кездеседі және көптеген зерттеулермен расталады. Дегенмен, бұл мәселені судьялардың санын көбейту немесе сот инфрақұрылымын кеңейту арқылы шешуден гөрі, дауларды шешудің балама әдістерін кеңінен енгізу арқылы болады деген пікірмен көбірек келісеміз. Осы баламалы тетіктер белсенді дамып келе жатқан Қазақстанның үлгісі оларды енгізу кәсіпкерлік дауларды шешу процесін едәуір жеделдете алатынын растайды.

Қорытынды

Құқықтық реттеудің жекелеген олқылықтарының болуына және мемлекеттік саясаттың анық болмауына қарамастан, сот арқылы қорғау қоғамдық тәртіпті сақтаудың, конституциялық құрылыстың негіздерін қорғаудың маңызды құралы болып қала береді және адам мен азаматтың, оның ішінде кәсіпкерлердің құқықтары мен бостандықтарын қорғау тетігінде орталық орын алады. Елде жүргізіліп жатқан сот реформалары Қазақстан Республикасының Конституциясына және халықаралық құқық нормаларына сәйкес азаматтардың құқықтық қорғалуын және қоғам мен мемлекеттің жұмыс істеуін қамтамасыз етудегі сот органдарының рөлін арттырудың алғышарты болады деген сенімдеміз.

Қорытындылай келе, кәсіпкерлікті қорғау саласында әлі де көптеген мәселелер бар деп айтуға болады. Мысалы, кәсіпкерлікті қолдаудың бағдарламаларын толық қанды жүзеге асырмау, оларды қаржыландырудың жеткіліксіздігі, қолдау көрсету кезінде кәсіпкерлердің құқықтарын бұзу, оның ішінде ақпараттық бағдарламалар, мемлекеттік қызметтерді көрсету кезінде шаруашылық жүргізуші субъектілердің құқықтарын бұзу, кәсіпкерлік қызметке әкімшілік кедергілер жасау жағдайлары әлі де орын алуда. Сондай-ақ, зерттеу барысында Қазақстанда кәсіпкерлердің құқықтарын сотта қорғаудың негізгі мәселелері анықталды, мысалы, соттардың шамадан тыс жұмыс бастылығы, істерді қараудың ұзақ мерзімдері, құқықтық сауаттылықтың төмен деңгейі және сот шешімдерін орындаудағы мәселелер. Мамандандырылған экономикалық соттардың жұмысын жетілдіру, дауларды шешудің баламалы әдістерін (медиация және төрелік) дамытуды, сондай-ақ білім беру бағдарламалары мен ақпараттық ресурстар арқылы кәсіпкерлердің құқықтық сауаттылығын күшейтуді қоса алғанда, осы мәселелерді шешу жолдары ұсынылды. Бұл ұсыныстарды енгізу Қазақстандағы кәсіпкерлердің құқықтарын сот арқылы қорғауды айтарлықтай жақсартуға мүмкіндік береді.

Ұсынылған шаралардың кәсіпкерлердің сот арқылы қорғалуын жақсарту, сот жүйесіне деген сенімді арттыру және Қазақстанда бизнес жүргізу үшін неғұрлым қолайлы жағдайлар жасау үшін

тікелей қолданылу мүмкіндігі жүргізілген зерттеудің тәжірибелік құндылығын көрсетеді. Жұмыстың ғылыми құндылығы кәсіпкерлердің құқықтарын қорғау мәселелерін, оның ішінде құқықтық, ұйымдастырушылық және білім беру аспектілерін шешудің кешенді тәсілін әзірлеу. Зерттеу нәтижелері заңнамалық және сот тәжірибесінде, сонымен қатар, кәсіпкерлердің құқықтық сауаттылығын арттыруға бағытталған білім беру бағдарламалары үшін, сондай-ақ кәсіпкерлермен жұмыс істейтін құқық қорғау ұйымдары мен кеңесшілер үшін пайдалы болады деген сенімдеміз.

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Г.Б. Асетова, Г.А. Ильясова

Проблемы судебной защиты прав предпринимателей

Статья посвящена анализу судебной защиты прав предпринимателей в Республике Казахстан. Право на судебную защиту является одним из основных прав, закрепленных в Конституции Республики Казахстан. Для субъектов, занимающихся предпринимательской деятельностью, важна эффективная судебная защита, поскольку она обеспечивает не только осуществление права на защиту от противоправных действий государственных органов и иных субъектов, но и стабильность предпринимательской деятельности в условиях рыночной экономики. Актуальность исследовательской работы обусловлена растущей критикой со стороны предпринимателей на долгосрочные судебные процессы, перегруженность судов, проблемы исполнения судебных решений, а также низкий уровень правовой грамотности. Целью статьи является выявление проблем судебной защиты прав предпринимателей Казахстана и нахождение путей их разрешения. Задачами исследования являются анализ правовых положений, изучение судебной практики, а также выработка рекомендаций по улучшению правовой

среды для предпринимательской деятельности. В работе рассмотрены основные вопросы, связанные с защитой прав предпринимателей, включая совершенствование альтернативных методов разрешения споров, повышение правовой грамотности предпринимателей и совершенствование судебной системы в целом. Результаты исследования имеют практическую ценность и могут быть интересны правозащитникам, государственным органам, взаимодействующим с предпринимателями, а также субъектам предпринимательской деятельности. Они могут способствовать улучшению бизнес-среды и усилению правовой защиты.

Ключевые слова: предприниматель, предпринимательская деятельность, защита прав предпринимателей, предпринимательское право, судебная защита, суд, бизнес, права и свободы, субъект предпринимательской деятельности.

G.B. Assetova, G.A. Ilyassova

Problems of judicial protection of the rights of entrepreneurs

The article is devoted to the analysis of judicial protection of the rights of entrepreneurs in the Republic of Kazakhstan. The right to judicial protection is one of the fundamental rights enshrined in the Constitution of the Republic of Kazakhstan. Effective judicial protection is important for entities engaged in entrepreneurial activity, since it ensures not only the exercise of the right to protection from illegal actions of state bodies and other entities, but also the stability of entrepreneurial activity in a market economy. The relevance of the research work is associated with the growing criticism from entrepreneurs of long-term litigation, the overload of courts, the problems of execution of judgements, as well as the low level of legal literacy. The purpose of the article is to identify the problems of judicial protection of the rights of entrepreneurs in Kazakhstan and to find ways to solve them. The objectives of the study are the analysis of legal provisions, the study of judicial practice, as well as the development of recommendations for improving the legal environment for entrepreneurial activity. The main issues related to the protection of the rights of entrepreneurs, including the improvement of alternative methods of dispute resolution, the increase in the legal literacy of entrepreneurs and the improvement of the judicial system as a whole are considered in the research. The results of the study have a practical value and may be of interest to human rights defenders, government agencies interacting with entrepreneurs, as well as to subjects of entrepreneurial activity. They can contribute to improving the business environment and strengthening legal protection.

Keywords: entrepreneur, entrepreneurial activity, protection of entrepreneurs' rights, entrepreneurial law, judicial protection, court, business, rights and freedoms, subject of entrepreneurial activity.

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On the possibility of using artificial intelligence technologies in resolving corporate disputes in the Republic of Kazakhstan

The article is devoted to the study of the possibilities of using artificial intelligence in resolving corporate disputes in the Republic of Kazakhstan. The authors analyze the current international acts and program documents regulating the use of artificial intelligence and its development. The study pays special attention to modern approaches to the introduction of digital technologies in judicial and arbitration processes, and also assesses the potential of artificial intelligence to improve the efficiency of courts in resolving corporate disputes. Special attention is paid to the legal and ethical aspects of the use of artificial intelligence and machine learning, including issues of personal data protection, ensuring the impartiality of the court, the rule of law and the trust of the participants in the process. Due to the challenges that have arisen in the implementation of electronic legal proceedings, the authors propose recommendations for adapting artificial intelligence tools to the specifics of the Kazakh legal system. The study examines the possibility of using artificial intelligence tools in resolving corporate disputes simultaneously with court records management and the possibility of predicting the outcome of a case based on decisions made in similar cases.

Keywords: corporate dispute, artificial intelligence, machine learning, confidentiality, contracts, contracts, court, justice, arbitration, corporate relations.

Introduction

Today, artificial intelligence is present in absolutely all spheres of life and science. Today we can confidently state this. Medicine, economics, agro-industry, mechanical engineering, logistics, and IT are only a small part of the areas where artificial intelligence (AI) is widely used. In comparison with other branches of science, appearance of AI in law was faster as it had been expected. There is an absolutely logical explanation for this phenomenon. Humans have taught AI to count, speak, draw, draw, predict, and identify, but AI has still not learned full-fledged critical thinking and data analysis. It is the critical thinking of a lawyer, judge, lawyer, investigator, prosecutor that distinguishes jurisprudence from other fields of activity.

The first international document that legally established the possibility of using artificial intelligence in law, including in justice, is the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and the Realities Surrounding Them [1], which was adopted at the 31st plenary session of the European Commission for the Efficiency of Justice in Strasbourg on December 3, 2018. This Charter is conventionally considered as a logical continuation of the European Convention on Human Rights [2] and the Convention for the Protection of Individuals with regard to Automated Processing of Personal Data [3].

In Kazakhstan, the phenomenon of AI itself, and especially AI in jurisprudence, is at an inchoate stage. At the moment of this study, we have identified a lack of definition of AI in Kazakhstan at the legislative level. Whereas in the Russian Federation, the concept of “artificial intelligence" was legally fixed in 2009 in GOST R 43.0.5–2009 [4].

Today, the possibility of using artificial intelligence tools in both the justice system and the field of lawmaking is widely discussed in legal circles. It is encouraging that the use of AI in law is becoming a trend phenomenon. It should be noted that this trend was set by the state through the adoption of the Concept of Legal Policy until 2030, the Concept of AI for the period up to 2029, the creation of the Artificial Intelli-

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gence Committee under the Ministry of Digital Development, Innovation and Aerospace Industry, the development of a draft Digital Code and related bills.

For the purpose of open discussion and making proposals, the Draft Digital Code of the Republic of Kazakhstan and the Dossier on its draft are publicly available. Only in 2023, by order of the Minister of Digital Development, Innovation and Aerospace Industry of the Republic of Kazakhstan, a working group was established to develop a draft Digital Code and related draft laws [5]. The draft of this document legislatively establishes the concept and definition of the term AI. Since this definition is still not legally fixed, the most appropriate way to call it would be "conditional". Thus, AI will be understood as a hardware and software system capable of generating output data, including forecasts, recommendations, or other solutions, for a given set of human-defined goals. We do not exclude the fact that at the time of publication of this article, the Digital Code of the Republic of Kazakhstan will be adopted and the above definition may undergo certain adjustments.

As for corporate disputes, the legislative definition is fixed in the Civil Procedure Code of the Republic of Kazakhstan (hereinafter — CPC RK) [6]. This definition has been widely disclosed by the legislator. Thus, according to Article 27 of the CPC of the Republic of Kazakhstan, corporate disputes include disputes to which the parties are (Fig.):

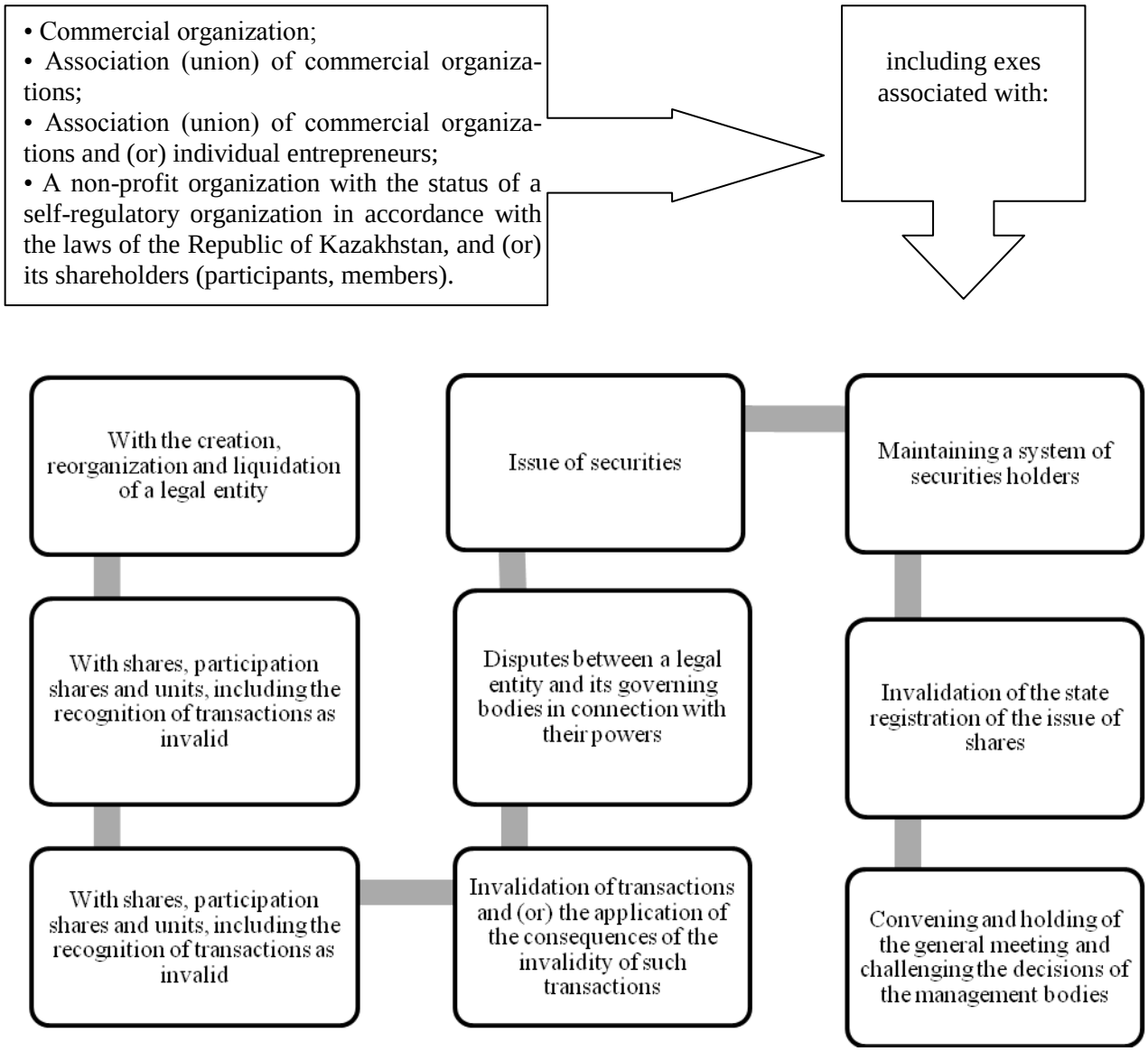

Figure. Parties to a corporate dispute.

Based on this definition, it can be concluded that the category of corporate disputes is quite complex, which requires both highly qualified judges and the competence of corporate lawyers and advocates. Howev-

er, we believe that the time has come to entrust certain aspects of corporate dispute resolution to artificial intelligence and machine learning tools. The legislative regulation of such relations, taking into account the study of international best practices, certainly serves as a priority driver for the use of AI tools.

Methods and materials

The empirical basis of this study is the analysis of existing electronic platforms such as eBay Resolution Center (annually resolves millions of disputes), SmartSettle (uses game theory to reach a compromise between the parties), DocuSign, Contract Express. The doctrinal basis of the research is the works of Jeremy Barnett, Philip Treleaven, B.Zh. Aitimov, G.A. Ilyassova, S.A. Amirtaev, Vladimir K. Andreev, Vasily A. Laptev, Sergey Yu. Chucha, Evan Belford. The European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and the Realities Surrounding Them, the European Convention on Human Rights, the Convention for the Protection of Individuals with regard to Automated Processing of Personal Data, the Concept of Artificial Intelligence Development for 2024–2029 and the Civil Procedure Code of the Republic of Kazakhstan were used as a regulatory analysis. The study describes scientific methods within the framework of a project to ensure accessibility of justice to the population of the Republic of Kazakhstan, using artificial intelligence tools.

Results

In accordance with Part 1 of Article 27 of the CPC RK, corporate disputes are subject to the jurisdiction of specialized interdistrict economic courts. However, if an arbitration clause has been established between the parties to a corporate dispute, then such a dispute is subject to arbitration in accordance with the established clause. The exceptions are corporate disputes that have been declared by the parties or the arbitration court as non-arbitrable. After the COVID-19 pandemic, which quickly taught the Kazakh legal community to send lawsuits, reviews, and petitions online through the judicial office, specialized interdistrict economic courts are in no hurry to fully switch to offline trials. This phenomenon has certain advantages both for the parties to the corporate dispute and for the judicial apparatus. Online participation in court sessions and the possibility of remote document management using an electronic digital signature allows the parties to make optimal use of working hours, save paper resources and avoid the tense situation that may arise in the courtroom.

The subject matter of the corporate dispute is quite extensive. The parties to a corporate dispute can be both legal entities (joint stock company, limited liability company) and individuals (individual entrepreneurs, shareholders, participants, members of the Board of directors, including former ones). Almost any corporate dispute begins with a corporate conflict that has not been resolved at the negotiation stage. Before initiating a corporate dispute in court, the plaintiff typically outlines their claims in a pre-trial statement. It is not uncommon for disputes to be resolved by the parties at the stage of negotiations or pre-trial claims. However, dynamically developing economic relations in the context of globalization have increased the number of corporate disputes both from a transnational perspective and within each independent State. Kazakhstan is no exception to this logical legal phenomenon. In this regard, it is necessary to explore certain areas of analytical and organizational and procedural work of the court staff, in which the possibility of using AI tools can be considered. But before piloting and implementing such innovations, it is necessary to pay great attention to information security, personal data protection and mathematically correct machine learning of AI.

The use of AI in corporate dispute resolution can begin with two procedures simultaneously:

1. Judicial record-keeping on corporate disputes;

2. Establishment of legally significant circumstances in a corporate dispute with the possibility of predicting the outcome of the case based on decisions taken in similar cases.

J. Barnett and P. Treleaven (2017), when studying the use of AI and blockchain technologies, identified several key aspects that helped automate the dispute resolution process. Platforms that handle disputes thanks to AI were considered as examples. The authors noted such systems as eBay Resolution Center (annually resolves millions of disputes), SmartSettle (uses game theory to reach a compromise between the parties) [7; 399]. Another key driver of the use of AI in predicting the outcome of a corporate dispute, processing a large amount of legal information, as well as analyzing legally complex commercial contracts is the LawTech platform (https://law-tech.co.in). This platform has automated legal processes such as:

- Record keeping, document analysis, contract drafting (DocuSign, Contract Express);

- Online Dispute Resolution (ODR) — platforms for online mediation, arbitration or dispute resolution in digital format using AI;

- Blockchain and smart contracts;
- Customer interaction and documentation management (Clio, Practice Panther);
- Platforms that provide access to use cases and training materials (LagalZoom, Rocket Lawer).

In addition to AI, blockchain technologies require legislative regulation in terms of personal data protection, and the adoption of national regulations is necessary at the national level [8; 128].

Discussion

In the process of researching the application and implementation of artificial intelligence in science, the research community has divided into two completely opposite positions. According to the old traditional scientific school, it will never replace natural intelligence, and even worse, it will slow down the progress and development of human capital and its research. However, there are also pragmatic opinions that promote the development of innovative tools, including AI. Of course, it is impossible to transfer justice entirely to artificial intelligence. But AI can become a reliable assistant not only for ordinary citizens who lack certain knowledge of law, but also for professionals in the person of judges, lawyers, and prosecutors. We believe that with proper machine learning and proper system administration, it is able to facilitate routine tasks for the public and for professional lawyers.

As part of the implementation of a scientific project on program-oriented financing entitled "Innovative approaches to ensuring accessibility of justice to the population of the Republic of Kazakhstan using artificial intelligence tools", the research group of the Karaganda University named after Academician E.A. Buketov, together with a partner organization, began training an automated program to predict the initial result. This training program consists of several complex stages consisting of certain algorithms of actions. One of the most difficult and responsible stages is the tagging of judicial acts available in the database according to the specified parameters. Among the categories of judicial acts in civil cases, there are judicial acts of specialized interdistrict economic courts on corporate disputes. The main feature of corporate dispute decisions from other civil cases is the subject matter and the subject of the dispute. According to the results of tagging by the research group, it was revealed that the most common claims in corporate disputes are lawsuits:

- the compulsion to reregister a legal entity, the obligation to provide financial documents;
- recognizing the action of refusing to include issues in the agenda of the general meeting as illegal;
- the obligation to convene and hold a general meeting of the partnership's participants;
- about debt collection;
- on the recognition of the share purchase and sale agreement as invalid;
- on invalidation of the minutes of the decision of the General Meeting;
- on declaring illegal the decision of the General Meeting;
- about the cancellation of the state reregistration.

Based on the results of tagging judicial acts on corporate disputes, the research group came to the following conclusions. The outcome of court decisions on corporate disputes is consistent with the principles of uniform application of legislation. When making decisions on corporate disputes, the courts are guided by the legislation of the Republic of Kazakhstan in the field of corporate relations, ensuring the rule of law. However, for the full completion and launch of the software product, there are certain difficulties regarding access to existing databases of judicial acts. Government support is needed to build the software product, which will help the research group to constantly update and synchronize the database. Of course, we should not forget about the protection of personal data. The software product being developed meets the requirements of depersonalization of data, including information constituting commercial, official and other legally protected information. The main advantage of using AI tools in resolving corporate disputes is the ability to predict the initial outcome at the stage of filing a claim. Thus, the plaintiff or the defendant, describing the situation in the software product, may see their chances of winning similar decisions made earlier. If the chances of winning are low, a certain decision is made accordingly. For a potential plaintiff: do not file a claim due to low chances of winning; file a claim due to high chances of winning; suggest alternative dispute resolution methods to preserve business relations and confidentiality. For a potential defendant: admit the claim due to the low chances of winning; do not admit the claims in full due to the high chances of winning; partially admit the claims; propose alternative ways to resolve the dispute to preserve business relations and confidentiality. Consequently, the parties, having previously assessed their chances and procedural capabilities, will be able to make a well-considered decision that will help maintain business relations with counter-

parties, and in some cases, maintain business, since corporate disputes are usually commercial disputes that arise from entrepreneurial activities.

The use of AI tools in resolving corporate disputes can have a positive effect not only on the parties to the process, but also on the already overloaded judicial corps. The burden on judges is increasing every year. In turn, the high workload forces judge to make boilerplate decisions and not delve into the essence of the dispute. The personnel issue remains problematic. In the country, up to 13 % of judicial positions remain vacant every year. If we take into account other objective reasons for their absence, we discover that 15 % of judges do not administer justice under the existing workload [9].

The Russian Federation has already launched the "My Arbitrator" system (https://my.arbitr.ru), which is a data warehouse. Access to this system is provided not only to employees of the court staff, but also to the parties to the process in a particular case [10; 26]. The system has a database of arbitration decisions on specific corporate disputes. This platform is very convenient for potential participants in the judicial process, which can provide guidance on their position, arguments and other procedural actions.

Conclusion

A long period of consideration of a court case can lead to a feeling of injustice among the participants in the trial. William Gladstone's quote "Justice Delayed is Justice Denied" [11], which he said in 1868, is more relevant than ever to this day. The main barrier to the introduction and application of artificial intelligence tools in justice, including as a pilot in the field of corporate dispute resolution, is limited access to databases, lack of full access to anonymized solutions and other relevant documents for the full training of machine learning algorithms, lack of assistance in testing the implementation of digital services in the practical activities of the court. The support of the state apparatus is of great importance for the joint development of innovative technologies in jurisprudence. Currently, machine learning algorithms for analyzing court documents are under development. However, it is not possible for the research group to fully update the court decisions due to their absence. In this regard, we believe that the state apparatus needs to promote research projects with priority areas. This will provide a great opportunity for the scientific community to implement their ideas and developments. The Concept of Artificial Intelligence Development for 2024–2029 [12] reflects the following gaps in legislation: the scope of artificial intelligence regulation is not defined, there is no regulation of the relationship between artificial intelligence entities, including the competencies of government agencies, as well as the rights, duties and responsibilities of subjects in the field of artificial intelligence; there are no technical regulations and national standards for artificial intelligence products and technologies. These barriers can be solved by joint efforts of the scientific community and the state. Thus, researchers will be able to contribute to the implementation of such strategic documents as the Concept of Digital Transformation, the development of Information and Communication Technologies and Cybersecurity for 2023–2029, the Concept of Legal Policy until 2030, and the Concept of AI for the period up to 2029.

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Қазақстан Республикасында корпоративтік дауларды шешу кезінде жасанды интеллект технологияларын пайдалану мүмкіндігі туралы

Мақала Қазақстан Республикасындағы корпоративтік дауларды шешу кезінде жасанды интеллекті пайдалану мүмкіндіктерін зерттеуге арналған. Авторлар жасанды интеллекті қолдануды және оның дамуын реттейтін қолданыстағы халықаралық актілер мен бағдарламалық құжаттарды талдайды. Зерттеу сот және төрелік процестерге цифрлық технологияларды енгізудің заманауи тәсілдеріне ерекше назар аударады, сондай-ақ корпоративтік дауларды шешу кезінде соттар қызметінің тиімділігін арттыру үшін жасанды интеллект әлеуетін бағалайды. Жасанды интеллект пен машиналық оқытуды қолданудың құқықтық және этикалық аспектілеріне, соның ішінде дербес деректерді қорғау, соттың бейтараптығын, заңның үстемдігін және процеске қатысушылардың сенімін қамтамасыз ету мәселелеріне ерекше назар аударылған. Электрондық сот ісін жүргізуді енгізу бойынша туындаған сын-қатерлерге байланысты авторлар жасанды интеллект құралдарын қазақстандық құқықтық жүйенің ерекшеліктеріне бейімдеу бойынша ұсынымдар ұсынады. Зерттеу корпоративтік дауларды шешуде жасанды интеллект құралдарын сот ісін жүргізумен бір мезгілде пайдалану мүмкіндігін және осыған ұқсас істер бойынша қабылданған шешімдер негізінде істің нәтижесін болжау мүмкіндігін қарастырады.

Кілт сөздер: корпоративтік дау, жасанды интеллект, машиналық оқыту, құпиялылық, шарттар, келісімшарттар, сот, төрелік, сот төрелігі, корпоративтік қатынастар.

Ш.Т. Байкенжина, Л.К. Кусаинова

О возможности использования технологий искусственного интеллекта при разрешении корпоративных споров в Республике Казахстан

Статья посвящена исследованию возможностей применения искусственного интеллекта при разрешении корпоративных споров в Республике Казахстан. Авторы анализируют действующие международные акты и программные документы, регламентирующие применение искусственного интеллекта, а также его развитие. В исследовании особое внимание уделено современным подходам внедрения цифровых технологий в судебные и арбитражные процессы, а также оценен потенциал искусственного интеллекта для повышения эффективности деятельности судов при разрешении корпоративных споров. Особое внимание уделено правовым и этическим аспектам применения искусственного интеллекта и машинного обучения, включая вопросы защиты персональных данных, обеспечения беспристрастности суда, верховенства закона и доверия участников процесса. В связи с возникшими вызовами по внедрению электронного судопроизводства, авторы предлагают рекомендации по адаптации инструментов искусственного интеллекта к особенностям правовой системы Казахстана. В исследовании рассматривается возможность использования инструментов искусственного интеллекта для разрешения корпоративных споров одновременно с судебным делопроизводством и возможностью прогнозирования исхода дела на основе принятых решений по аналогичным делам.

Ключевые слова: корпоративный спор, искусственный интеллект, машинное обучение, конфиденциальность, договоры, контракты, суд, правосудие, арбитраж, корпоративные отношения.

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Влияние цифровых договоров на регулирование подрядных отношений в Республике Казахстан

В статье исследуется влияние цифровых договоров на правовое регулирование строительного подряда в Республике Казахстан. Проведен анализ действующего законодательства в контексте его адаптации к современным цифровым технологиям, включая возможности использования цифровых договоров и электронной цифровой подписи, а также платформ электронного документооборота, таких как «Documentolog». Рассмотрен опыт Сингапура в области цифровизации строительной отрасли на примере системы CORENET и обязательного использования BIM. Автором подчеркивается перспективность внедрения цифровых технологий, таких как цифровые платформы управления строительными проектами, для повышения прозрачности, оптимизации процессов, снижения издержек и минимизации рисков в подрядных отношениях. Отмечено, что цифровые договоры способствуют повышению эффективности сотрудничества между заказчиком и подрядчиком, обеспечивая беспрецедентный уровень контроля. В качестве ключевого решения предлагается создание государственной интегрированной цифровой платформы, охватывающей все этапы строительства, от проектирования до эксплуатации, и закрепление на законодательном уровне понятийного аппарата цифрового строительства, включая «цифровой договор». Внедрение данной платформы, наряду с развитием правовой базы, адаптацией строительных стандартов к цифровым технологиям и повышением цифровой грамотности участников отрасли, позволит обеспечить устойчивое развитие строительной отрасли Казахстана в условиях цифровой трансформации экономики и повысить ее конкурентоспособность.

Ключевые слова: цифровые договоры, подрядные отношения, строительная отрасль, цифровизация, электронный документооборот, информационное моделирование зданий (BIM), смарт-контракты, цифровое строительство, цифровая платформа, электронная цифровая подпись (ЭЦП), нормативное регулирование, автоматизация, строительный кодекс, законодательство Республики Казахстан, управление строительными проектами.

Введение

Цифровизация современного общества оказывает значительное влияние на различные сферы деятельности, включая право и экономику. Одним из ключевых аспектов этой трансформации является внедрение цифровых технологий в управление строительными проектами и регулирование подрядных отношений. Строительная отрасль, являясь одним из крупнейших секторов экономики, характеризуется сложными и многоуровневыми процессами. Использование цифровых договоров представляет собой перспективное направление, способное изменить подход к правовому регулированию строительных отношений.

Согласно ст. 152 Гражданского кодекса Республики Казахстан, письменная форма сделки может быть реализована на бумажном носителе или в электронной форме [1].

После принятия Декларации о государственном суверенитете Казахстана, как и во многих других постсоветских странах, перед республикой встала задача создания самостоятельной правовой системы, способной отвечать новым социально-экономическим реалиям. Тем не менее, в сфере регулирования строительной деятельности в течение почти десятилетия сохранялось применение нормативных актов и технических регламентов, унаследованных из правовой системы Советского Союза [2]. Для юридического сообщества того времени — ученых, судей, практикующих юристов и преподавателей вузов, ключевым источником правовой информации и интерпретации положений оставался Комментарий к Гражданскому кодексу Казахской ССР, изданный в 1991 году [3; 6].

Законодательные органы страны активно разрабатывали новые нормативные акты, направленные на обеспечение прозрачности договорных отношений, повышения качества строительства и за-

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щиты прав участников подрядных договоров. Со временем строительное законодательство Казахстана стало включать не только положения Гражданского кодекса, но и специализированные законы, регулирующие процессы проектирования, строительства и эксплуатации объектов. Особое значение среди таких актов имеет Закон Республики Казахстан «Об архитектурной, градостроительной и строительной деятельности», который стал основополагающим документом в сфере архитектурно-строительного регулирования.

Помимо законодательства, значительную роль играют технические регламенты, направленные на стандартизацию строительных процессов и обеспечение их соответствия современным требованиям. Государственные стандарты (ГОСТ), строительные нормы и правила (СНиП), а также санитарные нормы (СанПиН) формируют основу технического регулирования в строительной отрасли.

В Казахстане развитие строительной отрасли сопровождалось повышенным вниманием к цифровизации. Это обусловлено стремлением к оптимизации процессов, минимизации рисков и повышению прозрачности взаимоотношений между участниками подрядных юридических связей.

Как справедливо отмечает Зорькин В.Д., основные недавние изменения в доктрине договорного права были вызваны появлением виртуального пространства и цифровых институтов. Быстрое внедрение современных цифровых технологий в повседневную жизнь людей привело к формированию принципиально новой правовой реальности, а также к созданию совершенно нового способа производства, что повлекло за собой переход к новой социально-экономической формации и изменения социальных отношений в цифровой сфере и, в конечном итоге, цифровизацию самого права [4; 3].

Несмотря на положительные изменения, текущее законодательство республики Казахстан в области подрядных отношений сталкивается с рядом вызовов. Прежде всего, отсутствуют правовые основания для использования цифровых договоров, а внедрение технологий, таких как информационное моделирование зданий (BIM) или смарт-контракты, осуществляется в медленном темпе.

На данный момент в законодательстве РК отсутствует определение понятий «цифровой договор» или «электронный договор». Однако закон «Об электронном документе и электронной цифровой подписи» (далее — «Закон») предоставляет определение электронного документа, под которым понимается документ, содержащий информацию в электронно-цифровой форме и заверенный с использованием электронной цифровой подписи [5].

Как отмечает Диденко А.А., если документ, согласно нормативным правовым актам или обычаям делового оборота, должен быть заверен печатью, то электронный документ, подписанный усиленной электронной подписью и признаваемый равнозначным бумажному документу с собственноручной подписью, также считается эквивалентным документу, подписанному собственноручно и заверенному печатью [6].

Современные технологии позволяют придать электронным документам юридическую значимость, сопоставимую с бумажными образцами. Достаточно заверить документ электронной цифровой подписью (ЭЦП) уполномоченного лица, и он будет считаться равнозначным традиционному бумажному документу.

Договорные отношения в строительной сфере устанавливаются между заказчиком и подрядчиком, подрядчиком и субподрядчиками, а также между подрядчиками и поставщиками. Таким образом, данная сфера представляет собой высоко договоро-ориентированную деятельность, в рамках которой возрастающий интерес вызывает цифровизация.

В отличие от традиционных договоров, цифровые соглашения обладают возможностью интеграции с передовыми технологиями, включая смарт-контракты. Такое решение обеспечивает автоматизацию исполнения условий соглашения, значительно сокращая влияние человеческого фактора и минимизируя риски, связанные с его участием. При этом, следует отличать цифровой договор от смарт-контрактов.

Смарт-контракт представляет собой алгоритм, предназначенный для автоматизации процесса исполнения контрактов. Проще говоря, это набор правил и последовательность действий для исполнения. Эти правила хранятся для обсуждения условий контракта, далее автоматически проверяются, а затем выполняются условия согласно цифровому протоколу [7].

Смарт-контракты кардинально меняют подход к исполнению договорных обязательств. Благодаря программному коду, они минимизируют влияние человеческого фактора, устраняют риски неисполнения или задержек, а также обеспечивают прозрачность процесса. Ключевая инновация заключается в том, что смарт-контракты исполняются без участия сторон, что делает их особенно вос-

требованными в цифровой экономике, например, при работе с криптовалютами, управлении активами или автоматизации поставок.

В свою очередь, цифровой договор — это соглашение, заключённое в электронном формате и заверенное с использованием электронной цифровой подписи. Он сохраняет традиционную юридическую природу соглашений, но переносит их в электронный формат, обеспечивая удобство и оперативность взаимодействия сторон. Основной целью цифрового договора является упрощение процесса заключения и хранения соглашений, сокращение временных и финансовых затрат, связанных с обменом документами. Однако его исполнение по-прежнему зависит от действий сторон или привлечённых посредников.

Д.А. Турицын справедливо выделяет смарт-контракты как особую разновидность цифровых договоров [8; 120]. При этом важно подчеркнуть, что понятие цифрового договора является более широким, оно охватывает разнообразные формы договорных отношений и механизмы их реализации в цифровой среде, тогда как смарт-контракты представляют лишь одну из возможных форм этого правового инструмента.

По мнению Л.Г. Ефимовой, под электронной формой сделки следует понимать такую форму волеизъявления ее сторон, при которой:

1) воля сторон выражена с помощью электронных либо иных технических средств;

2) сделка оформляется в форме электронного документа (файла или компьютерной программы);

3) в документе с помощью цифрового кода фиксируются все реквизиты сделки, включая ее существенные условия;

4) предусмотрен способ идентификации сторон, выразивших волю на заключение сделки, в том числе путем проверки их электронных подписей;

5) содержание волеизъявления может быть воспроизводимо на материальном носителе в неизменном виде [9; 130]

На сегодняшний день в Казахстане функционируют различные электронные платформы, предназначенные для заключения цифровых договоров. В рамках этих платформ предусмотрены возможности использования различных средств идентификации и подписания документов, включая ЭЦП, подтверждение через SMS, использование технологии EgovQR, а также биометрические данные.

Одной из наиболее востребованных платформ для работы с цифровыми договорами в Казахстане является «Documentolog». Это облачная система электронного документооборота, которая предоставляет организациям и государственным органам удобные инструменты для создания, согласования и подписания документов в цифровом формате.

Платформа поддерживает модель SaaS (программное обеспечение как услуга), что делает её доступной для организаций без необходимости установки дополнительного оборудования. Этот подход стал значительным технологическим прорывом, а также позволил устанавливать программное обеспечение на серверах компании и предоставлять его клиентам как услугу, а не как продукт. Благодаря этому, пользователи могут создавать, редактировать и подписывать документы из любой точки мира, что особенно актуально в условиях удалённой работы [10].

Необходимость модернизации строительной отрасли Казахстана в условиях цифровой трансформации обуславливает актуальность нашей темы. Быстрое развитие цифровых технологий требует адаптации традиционных подходов к регулированию строительной деятельности, обеспечивая их соответствие современным стандартам прозрачности, эффективности и устойчивости.

Целью настоящего исследования является анализ влияния цифровых договоров на регулирование строительных отношений в Республике Казахстан, а также разработка рекомендаций по совершенствованию нормативно-правовой базы с учетом современных вызовов цифровизации. Для достижения данной цели, была поставлена задача изучить международный опыт использования цифровых инструментов, провести анализ существующего законодательства и оценить потенциал внедрения цифровых платформ в строительную отрасль Казахстана.

Методы и материалы

В процессе подготовки данного исследования был применен комплексный подход, включающий различные методологические приемы и аналитические инструменты, направленные на всестороннее изучение правового регулирования цифровых договоров в строительной отрасли. Основу методологической базы составили сравнительно-правовой анализ, системный подход, а также методы интерпретации правовых норм и анализа международного опыта.

Сравнительно-правовой метод позволил выявить различия и общие черты в подходах к регулированию цифровых договоров в Казахстане и других странах. В рамках исследования были изучены нормативно-правовые акты, регламентирующие использование электронных договоров и смарт-контрактов в строительной сфере, а также примеры практической реализации цифровых технологий в странах с развитой цифровой экономикой, таких как Сингапур, США и государства Европейского Союза. Особое внимание уделялось системе CORENET и технологиям информационного моделирования зданий (BIM), которые успешно применяются за рубежом для управления строительными проектами.

Системный подход использовался для изучения взаимосвязей между различными компонентами правового регулирования подрядных отношений. В рамках этого подхода анализировались законодательные и подзаконные акты Республики Казахстан, регулирующие строительную отрасль, включая Гражданский кодекс, Закон «Об архитектурной, градостроительной и строительной деятельности», а также нормативно-правовые акты, регулирующие электронный документооборот и использование электронной цифровой подписи. Это позволило выявить ключевые пробелы и противоречия в правовом регулировании, а также предложить пути их устранения.

Метод анализа правовых норм включал детальное изучение отдельных положений законодательства Республики Казахстан с акцентом на положения, касающиеся письменной формы сделок, электронных документов и договоров подряда. Также проанализировались основные принципы и подходы к цифровизации строительных процессов, заложенные в проекте нового Строительного кодекса Республики Казахстан.

Для интерпретации и оценки собранной информации применялся метод анализа, с помощью которого изучались научные статьи, монографии, отчеты и официальные документы, освещающие вопросы внедрения цифровых технологий в управление строительными проектами. Данный метод обеспечил систематизацию данных и выявление ключевых тенденций и проблем, связанных с использованием цифровых договоров.

Эмпирическая база исследования включала статистические данные, предоставленные государственными органами Казахстана, а также информацию о работе электронных платформ, таких как Documentolog. Были использованы данные о количестве пользователей, задействованных в системах электронного документооборота, и примеры их применения в строительной отрасли. Это позволило сделать выводы о текущем уровне цифровизации подрядных отношений и возможностях их дальнейшего развития.

Результаты

В результате проведенного исследования удалось выявить основные особенности, преимущества и ограничения внедрения цифровых договоров в регулирование строительных отношений в Республике Казахстан. Анализ нормативно-правовой базы показал, что текущее законодательство, несмотря на наличие отдельных положений, касающихся использования электронных документов и цифровых технологий, не обладает достаточной комплексностью для полной интеграции цифровых договоров в строительную отрасль. Это обуславливает необходимость значительных изменений и дополнений в существующие правовые нормы.

Как отмечает В. Рёзель в своей книге «Управление строительством: основы, технологии, практика», в строительном производстве широко применяются методы электронной обработки данных, особенно в экономических и технических сферах. В калькуляции, в подготовительных работах, закупке, измерении и расчётах, а также в процессах управления производством внедряются многочисленные электронные системы, которые улучшают связь между этапами работы [11; 47].

Электронный документооборот в Республике Казахстан регламентируется Приказом Министра культуры и спорта № 236 от 25 августа 2023 года «Об утверждении Правил документирования, управления документацией и использования систем электронного документооборота». Данный нормативный правовой акт устанавливает единые требования к организации документооборота как в государственном, так и в частном секторе. Правила определяют порядок создания, обработки, хранения и учета документации, а также регулируют применение современных систем электронного документооборота, обеспечивая стандартизацию делопроизводства на территории страны [12].

Государственные органы Казахстана в настоящее время активно внедряют систему «Documentolog». Согласно статистике за 2023 год перешли на использование облачной системы управления документами 320 территориальных государственных органов, 69 государственных учре-

ждений (28 центральных, 38 комитетов, 1 управление, 2 департамента Аппарата Президента Республики Казахстан) и 10 местных исполнительных органов. В общей сложности более 24 000 пользователей подключены к системе «Documentolog» [13].

С появлением цифровых договоров регулирование подрядных отношений перешло на новый уровень. Во-первых, это, безусловно, сам процесс заключения договора, который становится более удобным, прозрачным и безопасным. Благодаря электронному документообороту отпала необходимость в физическом обмене бумажными носителями, что позволяет экономить время и ресурсы. Стороны могут подписывать договоры в любое время и в любом месте, имея под рукой лишь компьютер.

Во-вторых, цифровой договор подряда обеспечивает беспрецедентный уровень контроля и прозрачности при исполнении обязательств. Каждый этап заключения и исполнения договора фиксируется в электронном виде, что позволяет отследить историю изменений и исключает возможность подделки документов. Кроме того, использование электронной цифровой подписи (ЭЦП) гарантирует юридическую значимость документа и защищает его от несанкционированного доступа.

В-третьих, цифровые договоры способствуют повышению эффективности сотрудничества между заказчиком и подрядчиком. Автоматизация рутинных операций, таких как согласование документов, ведение отчетности и оплата, позволяет сэкономить время и ресурсы.

Наконец, цифровые договоры могут быть интегрированы в рамках различных платформ.

В данном контексте отмечаем, что в Казахстане продолжаются дискуссии вокруг проекта Строительного кодекса [14]. Данный проект направлен на правовое регулирование и совершенствование механизма реализации подрядных правоотношений. Его внедрение предполагает создание баланса интересов между участниками частных и публичных правоотношений, в том числе между заказчиками и подрядчиками, а также устранение пробелов и недостатков, выявленных в текущей практике подрядной деятельности.

Для дальнейшего развития подрядных отношений в цифровом формате необходимо предпринять целенаправленные меры как в законодательной, так и в организационно-технической сфере. Проведенный анализ показал, что важным шагом является закрепление на законодательном уровне понятий «цифровой договор» и «цифровое строительство». Законодательное определение этих категорий создаст прочную основу для эффективного регулирования подрядных отношений. Как пример, подобный механизм уже реализован в главе 11-1 Гражданского процессуального кодекса Республики Казахстан, где детально регламентированы особенности электронного судопроизводства [15].

На основе вышеуказанных законодательных положений необходимо создание специализированной государственной цифровой платформы для регулирования подрядных отношений. Такая платформа должна быть ориентирована на интеграцию всех участников строительных проектов, включая заказчиков, подрядчиков, субподрядчиков и государственные органы. Если в будущем будет принят строительный кодекс, данные положения могут быть интегрированы в его структуру.

Введение данной платформы позволит установить единые стандарты взаимодействия для всех участников подрядных правоотношений. Это создаст возможность осуществлять мониторинг хода строительства в режиме реального времени, осуществлять надлежащий контроль качества выполняемых работ, а также своевременно выявлять и устранять возникающие недостатки. Кроме того, автоматизация процедур, таких как согласование документации, формирование отчетности и контроль соблюдения технических требований, будет способствовать значительному сокращению временных затрат и минимизации риска ошибок, что, в свою очередь, повысит эффективность строительной деятельности.

При этом отмечаем, что цифровой договор сам по себе не обладает достаточной функциональностью для выполнения всех задач, связанных с цифровизацией подрядных отношений. Скорее, он представляет собой один из ключевых элементов более широкой инфраструктуры — цифровой платформы для управления подрядными процессами. Как мы уже отмечали ранее, цифровой договор является электронным аналогом традиционного бумажного договора, адаптированным для использования в цифровой среде.

В качестве успешного примера цифровизации подрядных отношений можно привести опыт Сингапура, где функционирует система CORENET (Construction and Real Estate Network). Данная система, возглавляемая Министерством национального развития и реализуемая Управлением строительства в сотрудничестве с государственными и частными организациями, обеспечивает полную цифровизацию управления строительными проектами. Система CORENET охватывает следующие ключевые направления:

- Электронное получение разрешений на строительство;
- Управление договорами;
- Мониторинг выполнения строительных работ;
- Подключение всех участников, включая заказчиков, подрядчиков, субподрядчиков и государственные органы [16].

Кроме того, Сингапур стал одной из первых стран, где обязательным элементом строительной отрасли стало использование технологий информационного моделирования зданий (BIM — Building Information Modeling). Внедрение BIM открывает широкие возможности для оптимизации строительных процессов, в частности:

- Автоматизация проектирования, что значительно сокращает временные затраты и повышает точность разработанных проектов;
- Создание цифровой модели здания, доступной для всех участников проекта, включая заказчиков, подрядчиков, инженеров и архитекторов, что обеспечивает единый источник информации и минимизирует недоразумения;
- Предотвращение ошибок и конфликтных ситуаций на этапе планирования, благодаря возможности визуализации и моделирования всех процессов до начала строительства [17].

Внедрение интегрированной системы, охватывающей все этапы жизненного цикла строительства, могло бы существенно повысить эффективность строительной отрасли в Республике Казахстан. Такая система обеспечивала бы контроль за исполнением договорных обязательств на каждом этапе — от проектирования до строительства и ввода объектов в эксплуатацию.

Фиксация всех действий участников строительного процесса в цифровом формате позволила бы минимизировать риски недобросовестного исполнения договоров, а также способствовала бы оперативному разрешению спорных ситуаций. Интеграция такой системы с работой государственных органов упростила бы мониторинг строительной деятельности и обеспечила бы оперативную реакцию уполномоченных органов на выявленные нарушения.

При этом важным аспектом является доступность данной платформы для всех субъектов строительной деятельности, включая крупные строительные компании, малый бизнес, частных застройщиков и государственные структуры. Такой подход обеспечит равные условия для всех участников рынка и будет способствовать прозрачности и эффективности строительной деятельности на территории Республики Казахстан.

Обсуждение

Результаты проведенного исследования демонстрируют высокую актуальность и необходимость внедрения цифровых технологий в правовое регулирование строительных подрядных отношений в Республике Казахстан. В контексте стремительной цифровизации всех сфер общественной жизни, включая право и экономику, использование цифровых договоров и автоматизированных платформ представляет собой не только перспективное направление, но и ключевой инструмент для повышения эффективности и прозрачности подрядных отношений. Однако их успешная интеграция в правовую и экономическую систему страны требует детального анализа и обсуждения.

Одним из главных аспектов обсуждения является отсутствие в казахстанском законодательстве четкого определения понятий «цифровой договор» и «цифровое строительство». Эти категории, будучи фундаментальными для цифровизации отрасли, остаются юридически незафиксированными, что создает правовую неопределенность. Введение этих понятий на законодательном уровне позволит установить единые стандарты для участников строительных подрядных отношений, упростить процессы заключения и исполнения договоров, а также минимизировать риски, связанные с правовыми пробелами.

Не менее важным вопросом является создание интегрированной цифровой платформы для управления подрядными отношениями. Такая платформа, будучи центральным элементом цифровизации строительной отрасли, должна включать инструменты для заключения, исполнения и мониторинга договоров, а также для координации всех участников строительного процесса.

Еще одним аспектом обсуждения является необходимость модернизации нормативной базы в области строительных стандартов и технического регулирования. Включение требований к использованию технологий информационного моделирования зданий (BIM), как это уже сделано в ряде стран, способствует повышению качества проектирования и сокращению рисков на стадии строительства.

Выводы

Исследование подтвердило, что цифровизация подрядных отношений в строительной отрасли Республики Казахстан является не только актуальным, но и необходимым направлением для повышения прозрачности, эффективности и устойчивости всей отрасли. Анализ нормативно-правовой базы, международного опыта и практического применения цифровых технологий в строительных проектах показал, как сильные стороны, так и существующие барьеры, требующие решения.

Первым и наиболее важным выводом является необходимость разработки и внедрения четкой нормативно-правовой базы, регулирующей использование цифровых договоров. В действующем законодательстве Республики Казахстан отсутствует определение таких ключевых понятий, как «цифровой договор» и «смарт-контракт», что создает правовую неопределенность. Для устранения этих пробелов требуется модернизация существующих норм и их дополнение с учетом современных цифровых реалий. Примером может служить опыт стран, таких как Сингапур, где цифровизация подрядных отношений регулируется специальными законами, что значительно облегчает их внедрение и использование.

Вторым важным аспектом является необходимость создания единой интегрированной платформы для управления строительными проектами. Анализ международного опыта показал, что системы, подобные CORENET в Сингапуре, обеспечивают полный цикл управления проектами, включая мониторинг выполнения работ, управление договорами и интеграцию всех участников процесса. В Казахстане внедрение такой платформы могло бы стать ключевым шагом на пути к цифровизации отрасли, однако для этого необходимо значительное финансирование, техническая инфраструктура и стандартизация процессов.

Третьим выводом является высокая значимость внедрения современных технологий, таких как информационное моделирование зданий (BIM) и смарт-контракты. Использование BIM способствует сокращению временных затрат на проектирование и предотвращению ошибок на этапах планирования и строительства, что особенно актуально в условиях крупных инфраструктурных проектов. Смарт-контракты, в свою очередь, позволяют автоматизировать исполнение договорных обязательств, снижая риски невыполнения или задержек. Однако их применение требует правового признания и адаптации к существующим нормативным условиям.

Таким образом, результаты исследования подтверждают, что цифровизация подрядных отношений в строительной отрасли Республики Казахстан является стратегическим приоритетом, способным существенно повысить конкурентоспособность страны на мировом уровне. Однако успешная реализация этой инициативы требует комплексного подхода, включающего совершенствование законодательства, развитие технической инфраструктуры, повышение квалификации специалистов и государственную поддержку участников отрасли. Внедрение цифровых договоров и смарт-контрактов может стать основой для устойчивого и прозрачного развития строительного сектора, отвечающего вызовам цифровой эпохи.

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Цифрлық шарттардың Қазақстан Республикасындағы мердігерлік қатынастарды реттеуге әсері

Мақалада цифрлық шарттардың Қазақстан Республикасындағы құрылыс мердігерлігін құқықтық реттеуге әсері зерттелген. Қолданыстағы заңнамаға цифрлық шарттар мен электрондық цифрлық қолтаңбаны, сондай-ақ «Documentolog» сияқты электрондық құжат айналымы платформаларын пайдалану мүмкіндіктерін қоса алғанда, оны заманауи цифрлық технологияларға бейімдеу контексінде талдау жүргізілді. Сингапурдың құрылыс индустриясын цифрландыру саласындағы тәжірибесі CORENET жүйесі мен BIM-ді міндетті пайдалану мысалында қарастырылды. Автор цифрлық технологияларды, мысалы, құрылыс жобаларын басқарудың цифрлық платформаларын енгізу мердігерлік қатынастардағы ашықтықты, процестерді оңтайландыруды, шығындарды және тәуекелдерді барынша азайтуды арттыру үшін тиімді екенін айтады. Цифрлық шарттарды бақылаудың теңдессіз деңгейін қамтамасыз ете отырып, тапсырыс беруші мен мердігер арасындағы ынтымақтастықтың тиімділігін арттыруға ықпал ететіні атап өтілді. Негізгі шешім ретінде құрылыстың жобалаудан бастап пайдалануға дейінгі барлық кезеңдерін қамтитын мемлекеттік интеграцияланған цифрлық платформа құру және «цифрлық шартты» қоса алғанда, цифрлық құрылыстың тұжырымдамалық аппаратын заңнамалық деңгейде бекіту ұсынылады. Осы платформаны енгізу құқықтық базаны дамытумен, құрылыс стандарттарын цифрлық технологияларға бейімдеумен және сала қатысушыларының цифрлық сауаттылығын арттырумен қатар, экономиканың цифрлық трансформациясы жағдайында Қазақстанның құрылыс саласының тұрақты дамуын қамтамасыз етуге және оның бәсекеге қабілеттілігін арттыруға мүмкіндік береді.

Кілт сөздер: цифрлық шарттар, мердігерлік қатынастар, құрылыс саласы, цифрландыру, электрондық құжат айналымы, ғимараттарды ақпараттық модельдеуі (BIM), смарт-шарттар, цифрлық құрылыс, цифрлық платформа, электрондық цифрлық қолтаңба (ЭЦҚ), нормативтік реттеу, автоматтандыру, құрылыс кодексі, Қазақстан Республикасының заңнамасы, құрылыс жобаларын басқару.

O.T. Alimov

The impact of digital contracts on the regulation of contractual relations in the Republic of Kazakhstan

In the article is examined the impact of digital contracts on the legal regulation of construction contracts in the Republic of Kazakhstan. An analysis of the current legislation was carried out in the context of its adaptation to modern digital realities, including the possibilities of using digital contracts and electronic digital signatures, as well as electronic document management platforms such as "Documentolog". The experience of Singapore in the field of digitalization of the construction industry is considered on the example of the CORENET system and the mandatory use of BIM. The author emphasizes the prospects of implementing digital technologies, such as digital construction project management platforms, to increase transparency, optimize processes, reduce costs and minimize risks in contractual relationships. It is noted that digital contracts contribute to increasing the efficiency of cooperation between the customer and the contractor, providing an unprecedented level of control. As a key solution, it is proposed to create a state integrated digital platform covering all stages of the construction life cycle, from design to operation, and to consolidate the conceptual apparatus of digital construction, including the "digital contract", at the legislative level. The introduction of this platform, along with the development of the legal framework, the adaptation of building standards to digital technologies and increasing the digital literacy of industry participants, will ensure the sustainable development of the construction industry in Kazakhstan in the context of digital transformation of the economy and increase its competitiveness.

Keywords: Digital contracts, contractual relations, construction industry, digitalization, electronic document management, Building Information Modeling (BIM), smart contracts, digital construction, digital platform, electronic digital signature (EDS), regulatory framework, automation, construction code, legislation of the Republic of Kazakhstan, construction project management.

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