

N.S. Akhmetova, N.P. Starozhilova

*Ye.A. Buketov Karaganda State University, Kazakhstan
(E-mail: star-np@mail.ru)*

Factors affecting the lawmaking process

In the article various forms of influence of social, political, economic and legal conditions on the process of lawmaking were considered. The novelty lies in the study of the role of modern factors of legal and socio-economic nature and their mutual influence in the process of lawmaking. It is noted in the introduction that the factors of lawmaking allow combining objective and subjective manifestations of social relations correctly. This improves the quality of legal acts and the effectiveness of legal regulation. The objective factors include the impact of globalization, the emergence of new subjects and objects of social relations. In the main part of the article, various criteria for the classification of lawmaking factors are used and specific examples of the influence of economic, social, political, and legal factors on the development of legislation were considered, for instance, in the field of licensing system, business regulation, and health care system. Some State programs, Messages of the Constitutional Council, lawmaking of the Astana International Financial Center as a special category of lawforming factors were considered. In conclusion, an assessment of the role of program documents in lawmaking was given and proposals for improving the legislation, governing the lawmaking activities of the IFC Astana were formulated.

Key words : lawmaking, lawmaking factors, objective factors, subjective factors, logic of the legal system, subject of legal regulation, method of legal regulation, draft law, concept of law.

Introduction

The success of the lawmaking activity is determined by the correct ratio of objective and subjective conditions. It is necessary to take a comprehensive account of the urgent objective needs of social development in order to effectively reflect act the interests of society in the adopted legal and to timely implement the urgent legal measures. Such a category as factors is important if we want to achieve a high level of compliance of the adopted legal act with the existing social needs. It is also important to ensure the understanding of the role of the social aspects of the right to their influence on the nature of lawmaking with considering of their forms. It should be noted here that in the scientific and legal literature, we use the word «factors» instead of the phrase «forms of manifestation» [1;159]. Their number is so large that there is a need for their classification.

There are three groups of factors:

- a) The factors by which the subject of legal regulation is determined, i.e. those groups of public relations that require legal regulation, since they were not previously included in the sphere of legal regulation, or the nature of their legal regulation must be changed;
- b) The factors on which the position of participants in lawmaking activities depends;
- c) Legal factors.

The factors constituting each group are so diverse that a classification can also be made here. In this regard, S.S. Alekseev calls the informational and cognitive aspect, i.e. those factors that allow one to study, detect and select objects of legal regulation [2; 160]. An important role is played by factors outside the legal system: economic factors, political, social, national, ideological, foreign policy. Thus, in the Address of the President to the people of Kazakhstan dated October 5, 2018, it is noted that one of the main tasks should be the fight against the shadow economy. To this end, legal and organizational measures should be provided to stimulate non-cash payments. In order to increase the transparency of administration, it is necessary to integrate the tax and customs information systems [3]. These are objective factors. The diversity of these factors is due to the diversity of social relations, the emergence of new types of them:

- the emergence of new subjects of public relations. So, at the end of the last century, such subjects as mobile operators, model agencies, real estate agencies, collection bureaus, Internet sites, etc.;
- the emergence of new objects of public relations. Among them are cellular services, modeling services, commercial real estate, government services, and investments;
- the impact of globalization, international law on the formation and development of social relations within a separate state.

Yu.A. Tikhomirov notes, that «objective factors of influence on law, economic, social, political, international are combined with factors of development of the legal system itself» [4; 9]. Objective factors, processes and phenomena that determine the main content of future norms of law are formed at the objective stage of lawmaking. At the subjective stage, the formation and development of public legal consciousness will take place and their subsequent expression in the form of law. The process of law making within the framework of the objective stage goes through two independent stages. At the first stage, the formation, development and disappearance of one or other natural, economic, social conditions of the life of society take place. At the second stage, these conditions are embodied in individual and collective legally significant interests [5; 103].

These factors can be considered as the forces of influence and as the causes that determine the links between the various links of the lawmaking process. In lawmaking activity without taking into account the factors cannot do any in-state body.

Methods and Materials

Analysis of modern scientific literature shows that the main factors determining the formation of law include economic factors, political, social, national, ideological, foreign policy. The correlation of these factors among themselves, their influence on the development of lawmaking shows that in different periods of the state's development, political, foreign political, ideological factors, economic, national and social factors come to the fore. But in lawmaking, not only a clear procedural order is important. An important role is played by the information and cognitive aspect, which helps to study, find out and select the objects of future legislative regulation.

Results

An analysis of the state and development trends of Kazakhstani legislation in recent years also provides grounds for drawing some conclusions. In connection with the strengthening of sovereign rights, factors related to the design of attributes of statehood and the new course in the economic and social fields were of predominant importance. The need for economic reforms contributed to the adoption of a large number of legal acts establishing a new property regime, the status and types of legal entities, banks, stock exchanges, etc., new types of financial-credit and tax relations. Their accelerated preparation often led to the adoption of imperfect legal acts, and led to consequences that could not be taken into account or calculated at the stage of development and adoption of acts.

Discussions

We also can make a classification of all factors depending on influence on nature. It should be noted, first of all, factors not related to the legal system. As we have noted, economic, political, social, psychological and other factors reflect the objective conditions of development and changes in legislation. The need to make changes to the legislation becomes clear as a result of studying the ongoing processes and their trends. Then these factors acquire the value of law forming process, due to their influence, a future object of legal regulation appears. Proper assessment of the new object allows to choose the subject, form and methods of legal regulation. It is impossible to choose correctly the appropriate form of a new legal act without considering all these factors. Due to such law's impact, abovementioned factors become law forming and they can be properly systematized.

Firstly, the so-called natural factors are distinguished — biological, climatic, demographic, geographical, i.e. those that are due to truly objective circumstances. Natural factors also influence the process of lawmaking through a change in the nature of social relations. Their impact on public relations is manifested in two ways:

a) The method of substantiation and formation of the object of legal regulation. For example, on the basis of the Decree of the President of the Republic of Kazakhstan dated February 1, 2010 No. 922 «On the Strategic Development Plan of the Republic of Kazakhstan until 2020» [6] the natural desire of any government to increase the country's population by improving the quality of life led to the adoption of the Code of the Republic of Kazakhstan «On the protection of people's health», etc. The State Program of Health of the Republic of Kazakhstan «Densaulyk» was adopted in the years 2016–2019 [7].

b) The method of making regulatory decisions that are necessary to implement the plans and actions to implement them. Thus, social demographic factors develop into legal factors due to a change in legal regulation.

Secondly, socio-economical, ideological and political factors become the fundamental factors, i.e. have a strong influence on the change and development of the legal system and the state law system. This group of factors includes the following:

- a) the presence of the main economic structures, the form of social organization of society that has developed in this state and the objective laws of its development;
- b) the social structure of the state established on their basis;
- c) the nature and level of relations that have developed between social communities and influencing the nature and level of legal education.

Thirdly, women groups at the form subjective factors, which are often called the «human factor». It is impossible to deny the existence of this factor in all spheres of the life of society, its influence on the process of law formation and the law itself. This includes the activities of all subjects of legislative initiative; opinions and «legal expectations» of citizens who express them through the activities of public councils, in referendums, participating in public associations, the Assembly of Peoples of Kazakhstan; lobbying activities of political parties; the activities of consultants, experts.

If objective factors act from outside the legal system, then within the legal system there are factors of its own internal development. This includes the patterns of development of the structure and functioning of the legal system, and intersystem relations. Ignoring these factors leads to a violation of the logic of the legal system, making it internally contradictory and structurally disordered. For example, it is expressed in the enactment of several laws on specific issues first and only after the adoption of a basic law. There are many legal conflicts. Consequently, there is a need to make changes and additions to private laws in order to bring them in line with the basic law. An example here is the adoption of the Business Code. The Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 noted, «The Civil Code is not able to reflect all the diversity of basic legal relations in the modern economy, and even more so regulate public law relations in the field of entrepreneurship. One of the consequences of this is the recent sharp increase in the number of specialized laws regulating entrepreneurial activity. Some areas of the economy subject to Civil Code, governed mainly by special acts, and not always by laws, particularly by regulations. Business legislation is ripe for updating. We need a new high-quality legislative the act regulating this sphere» [8]. T.E. Kaudyrov notes «current law in its development repeats the stages of development and formation of the Kazakhstani economy» [9; 27]. For example, the Concept provides for further improvement of civil law regulation by: 1) revising the existing provisions, principles, content of specific legal norms; 2) the creation of new, previously unknown norms, and their introduction into an array of civil law.

Legal factors also include procedural factors that act at different stages of the lawmaking process. For example, at the planning stage of the publication of legal acts, their preparation and adoption. This includes the choice of the form of the legal act, its level, the method of preparing the text, methods of its discussion.

During the times of Soviet law, the main lawforming factors were party decisions that predetermined the choice of the moment of preparation and adoption of laws and their content. The practice of state-building of the Republic of Kazakhstan has developed such a form of program documents as the annual Messages of the President-Leader of the Nation to the People of Kazakhstan and the concept (for example, the Concept of Legal Policy, the Concept of Local Government Development). The Concept of Legal Policy of the Republic of Kazakhstan (hereinafter referred to as the Concept) for the period from 2010 to 2020, stated in the Decree of the President of the Republic of Kazakhstan dated August 24, 2009, states: «Further implementation of legal ideas and principles of the Constitution of the Republic of Kazakhstan is necessary, which should be translated into legislative, organizational and other measures of the state» [8]. We believe that, in the near future, state scientists and law theorists will be given adequate assessments of the legal nature and role of these documents in the legal system of Kazakhstan.

The Epistles of President to the people of Kazakhstan from January 27, 2012 «Socio-economic modernization — main direction of development of Kazakhstan» planned development of the Concept of development of local self-government in the Republic of Kazakhstan: «It is important to develop local self-government, to expand citizens' participation in all local development issues» [10]. The concept of development of local self-government approved by the President provides for the adoption of specific measures for the division of responsibilities and powers between the center and the regions, the transfer of rights and the necessary financial and human resources for decision-making from the center to the regions [11]. Through local authorities, society and individuals will have a real opportunity to participate in the decision-making process of local importance. An important role in the development of the local government system is assigned to the institution of election of aul Akim through maslikhat.

All these novelties of the sociopolitical reality, originally laid down in the Concept, then received an adequately reflection in the constitutional and legal legislation on local government.

Another example of the impact of program documents on the development of lawmaking and lawmaking is the Concept of further reforming the permitting system in the Republic of Kazakhstan for 2012–2015 [12]. The result of the implementation of this concept was the adoption of the Law on Permits and Notifications [13].

It should be noted that the effect of factors in time is also not the same. Some factors operate constantly, for example, the nature of the political regime, the choice of the economic course of the government, the social organization of society. There are factors of a temporary nature, which are designed to perform a certain task, to achieve certain intermediate goals. For example, in the 90s, when the process of forming a market economy began in the Republic of Kazakhstan, the transition from a planned economy to market regulation, the Law of the Kazakh SSR «On the Basic Principles of the Foreign Economic Activity of the Kazakh SSR» was adopted on December 15, 1990. Having fulfilled its task, the law was declared invalid in 1993. Since January 1992, foreign currency accounts of exporting enterprises were blocked at External Economical Bank of the USSR, which went bankrupt. This adversely affected the development of export of Kazakhstan and import. To remedy this situation, on January 25, 1992, the President adopted the Decree «On the Organization of Foreign Economic Activity of the Republic of Kazakhstan for a period of stabilization of the economy and carrying out market transformations». The decree stipulated that in order to ensure control over the compliance of business entities with the sale of currency to the state, they are obliged to keep the available foreign currency only in accounts in banks of the Republic of Kazakhstan [14; 17]. Restrictions to legal entities and individuals on participation in foreign exchange transactions through authorized banks were also lifted. Both legal acts have become invalid. But they completed their task. In this example, the fact that the nature of social relations and the way and means of their regulation vary depending on the situation is clearly illustrated. Subsequently, the Law on Currency Regulation was adopted. Now it is difficult for us to imagine that such important relations as the use of foreign exchange earnings because of foreign economic activity are regulated by the issuance of a presidential decree. However, at that time it was a very swift and efficient way for the state to respond to the created adverse conditions. Attention should be paid to the temporal characteristics of the factors. Some of them act constantly, for example, in relation to the structure and orientation of the authorities, to the choice of the economic course of the government, the attitude of the population and the government to the law. Other factors are short-lived. This practice is no exception. For example, in Poland, on October 17, 1992, the Constitutional Law «On Relations between the Legislature and the Executive Authorities of the Republic of Poland, as well as on Local Self-Government» was adopted. In 1992 Georgia adopted the Law on State Power. These laws appeared in order to preserve the stability of the institutions of government before the adoption of new constitutions.

The internal factors of the lawmaking process include those that affect the process of law making itself. Some act at the stage of generation of the idea, the formation of the goals and objectives of a legal act, and subsequently during its preparation and adoption. These include the means and methods of legal support for the reforms being carried out, the action of public opinion, the influence of various political forces, opposition resistance, weak executive discipline of officials, citizens, and insufficient understanding of the purpose and essence of the adopted legal acts. The further improvement of the system of legislation, its branches, regulatory arrays and institutions, which will serve the law «On legal acts».

In the Republic of Kazakhstan on September 1, 2006, at the first joint plenary session of the Chambers of Parliament, the President's program report announced the modernization of public administration based on the principles of corporate governance, transparency and accountability, the creation of a qualitatively new model of public services. The focus is on the interests of the consumer of public services [15; 132]. The Presidential Order of September 11, 2006 approved an Action Plan for the implementation of measures aimed at improving the public administration system, which provided for: 1) improving the structure of public administration; 2) increase in salaries of civil servants (a pilot project was carried out to assess the positions of administrative civil servants using a factor-score system) in order to ensure the competitiveness of the public sector and improve the professionalism of civil servants; 3) in order to ensure the high quality of public services, the State Program for the Formation of «Electronic Government» for 2005–2007 was adopted [16; 38].

An important lawforming factor is also the annual messages and regulatory decisions of the Constitutional Council of the Republic of Kazakhstan. In exercising constitutional control, the legal positions set forth in regulatory decisions, conclusions and recommendations of annual messages indicate

that the Constitutional Council is an active participant in the lawmaking process. Thus, in the Message of the Constitutional Court of the Republic of Kazakhstan «On the state of constitutional legality in the Republic of Kazakhstan» it is noted that a number of decisions of the Constitutional Council serve to equitably determine the relationship between international and national law. For example, in the normative decisions of the CC of April 23, 2003 No. 4 and of May 18, 2006 No. 2, it is noted that «The provision of Article 8 of the Constitution that the Republic of Kazakhstan respects the principles and norms of international law means the desire to take them into account when creating domestic law».

State bodies, including through the adoption of legal acts, carry out decisions of the Constitutional Council. In accordance with these resolutions, amendments and additions were made to legislative acts in the field of human rights protection, in the field of public administration, national security, defense, economics, finance, social security, the judicial system and court proceedings, prosecutorial supervision, the electoral system [17].

The decisions of the Constitutional Council took into account, in particular, the formation of the concepts and content of most of the 59 laws initiated to implement the «Plan of the Nation — 100 concrete steps to implement the five institutional reforms of the Head of State Nursultan Nazarbayev». They are also reflected in the subordinate legal acts adopted on their basis. For example, the Civil Procedural Code and amendments to other procedural codes implemented the legal positions of the Constitutional Council, set out in regulatory decisions of the CC of June 5, 1998 No. 3/2, March 29, 1999 No. 7/2, from November 1, 2000 № 19/2, on 24 January 2007 number 1 on the transition from a five-step justice system to a three-tier. The number of corpus delict increased, in which jurors participate in the courts.

The provisions of the normative resolutions of the Constitutional Council on the right of everyone to freely receive and distribute information in any manner not prohibited by law are taken into account in the Law «On Access to Information» dated November 16, 2015 No. 401-V.

The Law on Entrepreneurial Code contains rules based on the rights and recommendations contained in regulatory acts of the Constitutional Council on equality of business entities, property rights, government regulation and social responsibility of entrepreneurship and other aspects of active economic activity of citizens. The law «On legal acts» was adopted in the framework of the implementation of a regulatory decree of the constitutional Council of March 6, 2013 No. 1, in which it was noted that the Constitution does not limit the subject of legal regulation of a special law solely to the order of development, presentation, discussion, enactment and publication of legislative and other regulatory acts referred to in paragraph 8 of Article 62 Basic Law. It may include other issues of lawmaking and law enforcement activities of state bodies and officials, including the regulation of the development and adoption of legal acts that are not normative.

With the material conditions of society as a whole, the level of economic development of different forms of ownership and the level of people's lives to every legal act, in particular the fundamental, which is the Constitution should the maximum extent reflect and take into account the proportion of the different social and political forces, the degree of political activity of political parties and movements, the state of relations between nations and nationalities. Of great importance is the international position of the country, its relations with other countries and peoples.

With regard to the factors of law making, it makes sense to consider another aspect. Let us start with the fact that part 3.1 of Article 2 of the Constitution of the Republic of Kazakhstan provides that within the city of Astana a special legal regime in the financial sphere can be established in accordance with the constitutional law. On December 7, 2015, Kazakhstan adopted the Constitutional Law «On the International Financial Center «Astana» [18]. In accordance with paragraph 1 of Article 1, the International Financial Center» Astana «is a territory within the city of Astana with precisely marked boundaries defined by the President of the Republic of Kazakhstan, in which there is a special legal regime. The essence and features of the special legal regime of the MFC are disclosed in Article 4 of the Law, from the content of which it follows that in addition to the current law of the Republic of Kazakhstan, enshrined in Article 4 of the Constitution, the current law of the MFC will apply to some part of the state. It includes the aforementioned Constitutional Law, as well as legal acts of the MFC, which can be based on the principles, norms and precedents of the law of England and the United States and (or) the standards of the leading world financial centers adopted by the Center's authorities within the powers granted by this Constitutional Law. The content of article 4 and about the sequence of enumeration of legal acts indicates that:

– firstly, the legal acts of the MFC do not have to be based on the Constitution of the Republic of Kazakhstan;

- secondly, the legal acts of the MFC can be based on the principles, norms and precedents of English law and the standards of leading world financial centers;
- thirdly, the effective law of the Republic of Kazakhstan is applied only to the extent not regulated by the Constitutional Law and the acts of the Center.

The objects of regulation of legal acts adopted by the bodies of MFC civil-law relationship, civil procedure financial relations arising between the participants of the Center and (or) bodies of the Center, and (or) their employees, as well as administrative procedures. In addition, the last part of this article stipulates that the Organs of the Center, in cases expressly provided for by the Constitutional Law on the MFC, may adopt acts regulating relations that are not provided for in part one.

Paragraph 2 of Article 4 provided for a special procedure for the development, coordination with authorities, registration, enactment, publication, modification, additions and termination of acts of the Center, which is determined by the Center.

Since the territory of the MFC «Astana», despite the special steam regime, is part of the territory of the Republic of Kazakhstan, we can say that another kind of law making, another subject of lawmaking, and several other types of legal acts appeared on the territory of our country. We believe that it is necessary to fill the gap that «crept in» into the Constitutional Law on the MFC «Astana»: to supplement Article 4 of the Law with the norm that the Constitution of Kazakhstan, nevertheless, is part of the current law of the MFC.

Conclusions

Taking into account subjective factors in the lawmaking process allows one to anticipate not only future «direct connections» from the rule of law to its implementation, but also to predict feedback from law enforcement to the creation of new legal acts. Taking into account the totality of social interests, motives and needs of all social groups will allow the law to become an effective social regulator. To act received the greatest extent meet the needs of society and to be effective, it is important to accurately determine the advance of its nature, form, internal structure, place and role in the system of other normative regulations. It is also important to ascertain whether the factor, which contributes so or, conversely, prevents such preparation and adoption of regulations of the legal act. The authorized body and body-developer must predict the positive and negative implications of the regulations contained in the received legal act.

Legal factors have a major impact on the process of preparation and formation of law. Among them, first of all, material (economic), political, social, ideological and other factors stand out. On how accurately and comprehensively all of the factors currently existing are taken into account in their preparation and publication, to what extent objectively reflected in them objective reality depends on the level of quality, and hence on the effectiveness of regulatory legal acts.

Therefore, when drafting any legal act of a developer and the authorized body should investigate the presence and nature of the impact of various social factors, which determines need for legal regulation in public relations. The scientific institutes involved in the development of the draft law and another legal act, the scientists of higher educational institutions, the public councils, the practitioners of the economic and social-cultural spheres are involved in this noble work in order to identify and carefully take into account their professional knowledge and life experience. In the formation of legal norms, the diverse interests of social and national entities classes, and society as a whole. During the preparation of the draft legal act, a comparative analysis of the legal norm being prepared is being done not only with similar norms of previous years and the current systems of other states, but also with other regulators of social relations. To perform this task, if necessary, carried out social experiments, during which determined is Busy most appropriate first option considered regulation of social relations; nature of the relationship and interaction between the projected rules with other rules of the legal system. This task is designed to perform the concept of the draft law. Nevertheless, the Law on Legal Acts provides for the development of a concept only on bills initiated by the Government (Article 1, p. 6), but for other subjects of legislative initiative, no such document is provided.

To understand the dynamics of legal conditions, it is necessary to take into account the influence of the totality of factors. The performed analysis allows us to detect the moving ratio of various factors and their multi-vector influence on the development of law. A wide range of factors influencing the right contributes to the effectiveness of self-regulation in the public environment.

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Н.С. Ахметова, Н.П. Старожилова

Заң шығару үрдісіне әсер етуші факторлар

Мақалада әлеуметтік, саяси, экономикалық, заңдық жағдайлардың құқықшығармашылық үрдісіне әсер етуші түрлі формалары қарастырылған. Бұл шарттарды авторлар факторлар ретінде белгілейді. Жаңашылдық құқықтық және әлеуметтік-экономикалық сипаттағы қазіргі заманғы факторлардың рөлін және олардың құқықшығармашылық үрдісіндегі өзара қарым-қатынасын зерттеуден тұрады. Кіріспеде құқықшығармашылық факторларының қоғамдық қатынастардың объективті және субъективті көріністерін дұрыс үйлестіруге мүмкіндік беретіні атап өтілді. Бұл құқықтық актілердің сапасын және құқықтық реттеудің тиімділігін арттырады. Объективті факторларға жаһандандудың әсері, қоғамдық қатынастардың жаңа субъектілері мен объектілерінің пайда болуы жатады. Мақаланың негізгі бөлімінде құқықшығармашылығы факторларын жіктеудің әртүрлі өлшемдері қолданылады және экономикалық, әлеуметтік, саяси, құқықтық факторлардың заңнаманың дамуына әсер етуінің нақты мысалдары қарастырылды. Мысалы, рұқсат беру жүйесі, кәсіпкерлік қызметті реттеу, денсаулық сақтау жүйесі саласында. Құқықтық қалыптастырушы факторлардың ерекше санаты ретінде кейбір мемлекеттік бағдарламалар, Конституциялық кеңестің хабарламалары, «Астана» Халықаралық қаржы орталығының заңдылықтары қарастырылды. Қорытындыда бағдарламалық құжаттардың құқық шығармашылығындағы рөліне баға берілді, «Астана» Халықаралық қаржы орталығының құқық шығармашылық қызметін реттейтін заңнаманы жетілдіру бойынша ұсыныстар да тұжырымдалды.

Кілт сөздер: құқықшығармашылық, құқық құру, құқықшығармашылық факторлар, объективті факторлар, субъективті факторлар, құқықтық жүйенің логикасы, құқықтық реттеу пәні, құқықтық реттеу әдісі, заң жобасы, заң тұжырымдамасы.

Н.С. Ахметова, Н.П. Старожилова

Факторы, влияющие на правотворческий процесс

В статье рассмотрены различные формы влияния социальных, политических, экономических, юридических условий на процесс правотворчества. Новизна заключается в исследовании роли современных факторов правового и социально-экономического характера и их взаимовлияния в процессе правотворчества. Во введении отмечено, что факторы правотворчества позволяют правильно сочетать объективные и субъективные проявления общественных отношений. Это повышает качество правовых актов и эффективность правового регулирования. К объективным факторам относятся глобализации, появление новых субъектов и объектов общественных отношений. В основной части статьи используются различные критерии классификации факторов правотворчества и рассмотрены конкретные примеры влияния экономических, социальных, политических, правовых факторов на развитие законодательства, например, в сфере разрешительной системы, регулирования предпринимательской деятельности, системы здравоохранения. В качестве особой категории правообразующих факторов рассмотрены некоторые Государственные программы, Послания Конституционного совета, правотворчество Международного финансового центра «Астана». В заключение дана оценка роли программных документов в правотворчестве, сформулированы предложения по совершенствованию законодательства, регулирующего правотворческую деятельность МФЦ «Астана».

Ключевые слова: правотворчество, правообразование, факторы правотворчества, объективные факторы, субъективные факторы, логика правовой системы, предмет правового регулирования, метод правового регулирования, законопроект, концепция закона.

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