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The legal provision of military security of the Republic of Kazakhstan: the comparative legal analysis

This paper is devoted to issues of the legal support for the sphere of military security in the Republic of Kazakhstan. This research examines a signification and role of the legal acts in ensuring military security of the Republic of Kazakhstan. The purpose of this research is to establish the effectiveness, interconnections, pace of development and features of legal acts in the field of military security in strengthening the country's security. In the conducting and studying of this research, various methods of analysis among them were the analytical, historical, comparative and comparative-legal methods. After a comprehensive study of the Constitution of the Republic of Kazakhstan, as well as military doctrines of the country, the author formulated the conclusion that these documents play an important role in ensuring military security and regulating the sphere of military service. At the same time, due to the current unstable geopolitical, economic and other circumstances, the author proposes to continue working on issues of legal support in this direction to prevent possible conflicts in the future, and also to protect the national interests of the Republic of Kazakhstan.

Keywords: Republic of Kazakhstan, national security, military security, legal acts, military doctrine Republic of Kazakhstan, legislation, legal support.

Introduction

The comprehensive development of any state in equal relationships with countries in the international arena and the safe well-being of citizens in this country directly depends on many areas that must be fulfilled by the state. As it is known, when the Soviet Union collapsed and countries gained sovereignty, the Republic of Kazakhstan immediately formed its legal system, institutions of public administration, ensured human and civil rights, determined the directions of its foreign policy, and took independent steps in the field of protection against external threats.

Having gained its sovereignty and becoming a member of the United Nations and other international organizations, Kazakhstan faced new problems in foreign policy, defense and national security. Since the dissolution of the existing Warsaw Pact Organization, NATO's role has changed. At this point, there is a need to actively intervene in the European security system by diversifying military ties in interests of our country. Besides, the Republic of Kazakhstan, having renounced nuclear weapons, received guarantees of reliability and territorial integrity of its border territory [1; 24]. Among ten principles of the Helsinki Final

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Act, the principles of territorial integrity of states and the inviolability of borders stand out. These principles, together with the principles of non-violence, are of particular importance for international relations. [2].

One of the basic objectives for Kazakhstan was to ensure security of the country, which has just gained state independence, to be precise, the national security. Of course, not everything was formed at once in the first years of our independence. However, if the country wants to embark on the path of sustainable development, it should first solve the problems of military security, which is an integral part of national security.

In this direction, we note that the following below mentioned legal documents have become and developed the legal acts in the field of the military security. First of all, according to paragraph 2 of the Declaration on State Sovereignty of the Kazakh Soviet Socialist Republic, it has been established that this Republic undertakes obligations to preserve, protect and strengthen its national statehood. This provision emphasizes the importance of measures aimed at ensuring the sovereignty and identity of the republic [3]. However, despite the adoption of a declaration of sovereignty, the settlement of the military sphere may take some time for the young state. On the one side, the collapse of the Soviet Union, which just yesterday had a great impact on the world as a political and military side, on the other hand, this was news not only for Kazakhstan, but also for the post-Soviet republics, which were previously centrally controlled and gained independence. However, for our country, we need to quickly come to our senses, ensure the security of the state by communicating with the world community, and have a clear legal basis for further development.

This was later reflected in Article 16 of the Law on the State Independence of the Republic of Kazakhstan. This Article played a key role in the development of the first legislative act relating to ensuring the military security of our country. It points out that the Republic of Kazakhstan has the right to create its own armed forces in order to protect its independence and territorial integrity, that the Republic independently defines the order and conditions of the military service of its citizens, and resolves issues of the deployment of troops, equipment and weapons in its territory [4].

In accordance with the law, military security is defined as a state of defence of the vital interests of the individual and citizen, as well as of society and the state. This state is aimed at preventing internal and external threats associated with the use or intention to use military force [5].

Although Kazakhstan became independent more than thirty years ago and military and national security issues have been the subject of study by many military experts and jurists, systematic research in this area remains relevant. Discussions concerning the legal regulation of military security are still necessary to further develop and strengthen these aspects. This is due to the new world order, economic, political and military activities and conditions taking place abroad, ecological disasters, man-made disasters demand a re-examination of the directions of development of the states, the effectiveness of foreign relations, a level of the security of their citizens and degree of the military well-being.

Currently, the Republic of Kazakhstan has developed and enacted a number of legislative acts regulating military service, the legal status of servicemen and their social protection. These laws also cover the organisation of military service in the context of ensuring national security, including aspects relating to military security. Nevertheless, there is currently a number of important issues concerning inter-state relations. These issues include the obligations that states and collective, regional or international organisations have to fulfil under inter-state agreements. In addition, rethinking the views of scientists, improving legislation and ensuring that legal norms in the military sphere comply with the Constitution of the country, as well as studying complaints of interest to the state, have become pressing issues of our time. The main aim of this study is to analyze and reveal their role in ensuring national security, continuity in the regulation of military security by analyzing from a new perspective all the legislative acts adopted during the years of independence and up to the present time to ensure the military security of the Republic of Kazakhstan, which is part of the national security.

Methods and materials

In order to differentiate the guiding legal acts in the area of the military security in the Republic of Kazakhstan the comparative legal methods have been used. In the course of the research, the analytical method was used for a detailed study of the fundamental documents. This concerns, in particular, the Constitution of the Republic of Kazakhstan and the Declaration of Independence. Attention was also paid to the national security legislation in the field of military security and the Military Doctrines of the country. The historical and the comparable legal maintenance of consideration and in the study of the legislation before and after gaining independence have been conducted in the study of the legal support of the military industry

of the Republic of Kazakhstan. The research examined the laws, doctrines, agreements, acts of the international organization aligned with the military service, military security as the scientific papers and research by the foreign and domestic scientists.

Results

Currently, the issues of national security of our state are becoming more and more relevant. The existing problems in the world, including conflicts between states, cataclysms, the natural disaster and increased mirror migration of the foreign nationals, some peculiarities of military service of the countries, cause necessity to revise and differentiate the issues of the national military security, the legislation in this area, and entered into bilateral agreements.

The end of the 20th century was full of historical news for the world. The Soviet Union, we had been in power for 70 years, disintegrated, and the countries that were part of it began to gain their independence and develop as states that have chosen their own development path of a new nature.

The disintegration of the USSR, which was once a unified state, created a number of issues: what will be the unified defense space, will the former military remain, or will the young states form their own military? The well-known scientist K.S. Serikbayev mentions in his work the fact that there are many opinions [6; 45].

As is known, the Republic of Kazakhstan also had to define its own development strategy and choose the path of development. Kazakhstan, which once had a stockpile of nuclear weapons, became famous as a country that followed the path of peaceful life, democratic and legal state in its development to enter into the international relations and establish the equal relationships with other states. Of course, in addition to establishing relations and forming a branch of state power, the main objectiveis to intensify the border and provide the country's security. Under the former Soviet Union, the formation of independent power structures that were controlled from the center, establishment of legal order in the country, prevention of possible external threats, including the legal regulation of the military sphere which guards the armed forces of Kazakhstan from the internal and external threats, were urgent measures.

Understanding the importance of the current situation, the head of state takes a number of important measures aimed at ensuring the national interests of the country, including military security. The decree of the President of the Republic of Kazakhstan dated May 7, 1992 "About formation of the Armed forces of the Republic of Kazakhstan" laid the legal basis for the military reform in Kazakhstan and work on the organization of the armed forces of the state [7].

Then, the Military Doctrines of the Republic of Kazakhstan were adopted in 1993, 2000, 2011 and 2017. This document is a set of key principles concerning the military security of the state. It covers the use of the Armed Forces and other military formations to prevent wars and conflicts. It also addresses the obligations of the Republic of Kazakhstan under international agreements and the defence of national interests. The legal principle of the Military Doctrine is, primarily, the Constitution of the Republic of Kazakhstan, the international treaties to ensure the laws, military security and other normative acts of the Republic of Kazakhstan, to which the Republic of Kazakhstan is a party. Legal documents in the area of military security in our state, the ongoing reforms should increase the country's military potential, contribute to increasing and developing the level of protection of the national interests and ensuring the military security of the Republic of Kazakhstan.

The Republic of Kazakhstans accession to the international treaties and documents in the area of security corresponds to the main directions of military policy and military reforms pursued by the state [8; 30]. Its main purposes and objectives are directly related to a concept of the foreign policy of the Republic of Kazakhstan for 2020–2030 [9] and the provisions of the Military Doctrine, of the Republic of Kazakhstan [10].

Discussion

Based on a generally established concept, military security is the protection of the national interest of any state and avoidance of external or internal treats. Many researchers support this definition. In particular, Buzan B. argues that military security is about protecting the national interests of a state. He also emphasizes the importance of preventing military aggression as a key aspect of this security [11].

Although, the basic definition of military security is the same or similar, and the concept itself has a different place in different legal acts in different countries. For instance, the meaning of military security is established in the law of the Republic of Kazakhstan on national security as Type I, i.e. the national security in

the Republic of Kazakhstan, except as defined by the military doctrine of the Russian Federation. This concept is indicated in many legal documents, but the ultimate goal is to ensure the military security of the state, as well as the fact that the country's military doctrine is based on state policy and the Constitution, the laws of the Republic of Kazakhstan and international treaties. The direct mention of this concept of military security in the law, in our opinion, is of great importance.

An important condition for military security is the conclusion of agreements with international organizations and neighboring states for mutual assistance, friendly relations and corporation. As part of this important measure, today our state primarily resolves issues in the border area of neighboring states and concludes agreements on operations, the Collective Security Agreement (May 15, 1992). The military cooperation agreement is the main guarantee of our military security in the future. To be specific, the Republic of Kazakhstan first signed the treaty of friendship, corporation and mutual assistance which the Russian federation dated October 7, 1992, an agreement or non-proof freshen of the nuclear weapons and elimination I was consequences of the emergencies with the United States of America on December 13, 1993, the treaty on the military corporation, which the Russian Federation on March 28, 1994 and many other agreements related to military security, such as the agreement on non-proliferation of nuclear weapons, strengthening of confidence in the military sphere in the border area, and sign it agreements and memoranda.

In 2014, the First President of the Republic of Kazakhstan in his message to the people of Kazakhstan "Kazakhstan's path 2050: a single and common interest, a single feature" stated that the country's national security and its participation in solving global and unique problems are the main objectives of the entire country [12].

The legitimacy of these documents, all the provisions in the field of military security in force on the territory of the country, is the proper result of the implementation of the main objectives on the way to creating the basic principles specified in the Constitution of the Republic of Kazakhstan: a legal, democratic, secure and secular society.

The main purpose of any state is to counter a military threat on its territory. For this purpose, the state must have an appropriate state body to organize, manage and develop the affairs of such a direction. To this and, on July 13, 1992, the president of the country signed the decree "On organization of estate security committee of the Republic Kazakhstan". The functional responsibilities, of the special service are clearly defined here.

Taking into account the new objectives and instructor of the committee, which had to deal with military Security issues in the early years of independence, the Military Intelligence Department, the General Department of Border Troops, the General Department of Government Communications, and their subordinate troops were created. Normative acts were brought into compliance which the requirements of the Law and the duties assigned to the NCS.

The Ministry of Defence of the Republic of Kazakhstan was developed by the Presidential Decree dated May 07, 1992. This structure is the body directly regulating and responsible for the military sphere, military security issues in the country.

It is known that the Republic of Kazakhstan has formed its own military policy, carried out military reform in the field of military security, adopted military doctrine, and contentious to develop [13; 61].

We fully agree with Zh.H. Akhmetov's opinion on work in the sphere of ensuring Kazakhstan's military security, which states that "despite the significant objective and subjective difficulties of the process of creation and military reform of the Armed Forces, other troops and military formations, which is taking place within the state building and search for ways to develop the country, we are able to manage these processes sufficiently and maintain their combat readiness" [14; 6].

The main document forming a significant direction in insuring security in the country within the state defence is a military doctrine of the Republic of Kazakhstan. The military doctrine is to prevent wars and treats, conflicts to ensure the military security of the state, the application of the military structure in the country, the Armed forces of the Republic of Kazakhstan other troops and military formations to fulfil the international organizations and national interests of the Republic Kazakhstan.

The Republic of Kazakhstan has already adopted several military doctrine to ensure military security. Over time, relations between states, the geopolitical situation, the new piece development, and measures to ensure military security have changed.

The opinions of scientists about the first military doctrine in Kazakhstan differ. Scientist A. Kusmanuly notes that the military doctrine in 1993 was not successful, i.e. it was a format based on the previous Soviet

approach. It also could not form the economic, political, scientific, technical, social and the military strategic system [15; 56].

The author's view expressed above is mostly correct, but we can partially agree with it. After all, Military Doctrine in 1993, during the formation of our country as an independent state, has its impact on formation of the system for ensuring of the military security. As it is known, the Military Doctrine in 2000 was adopted on the basis of the first Military Doctrine, and is in the nature of continuity. There are several factors that lead to the adoption of this doctrine: concretization of national interests in the life of the state, including in the military sphere, based on changes that arose on the way to the formation of a legal and democratic state.

In this regard, Bakaev L. emphasizes that the military doctrine of the Republic of Kazakhstan is oriented towards defensive strategies, strictly complying with the UN Charter and international legislation [16; 45]. This means that the military doctrine adapts in accordance with the country's development and changes in the global environment. Thus, it continues to evolve in response to new challenges and threats.

To this end, our state is clarifying key aspects of the National Security Strategy and the Military Doctrine. It is also developing a number of legal acts that regulate joint actions with allied states to ensure military security in the border area of the Republic of Kazakhstan. In addition, emphasis is placed on organizing the country's defense in the event of threats and ensuring collective military security.

Scientist G. Dubovtsev substantiates his point of view, considering this doctrinal position as an important step in ensuring the military security of the state. He emphasizes that this provision is the basis for strengthening the country's external security. Moreover, the new normative act opens up prospects for improving the military organization at the state level [17; 105].

In this direction, M.A. Samatov compares the adopted Military Doctrines and notes that their structure changes with each new document adopted. Specifically, the military doctrine of 2007 had a separate "International military corporation" section, while in the subsequent military doctrine of 2011 the side section was included in the "Basic Rules" section, in the Military Doctrine of 2017 the "International military corporation" section was expanding the participation of the Republic of Kazakhstan in ensuring of the international security" included in the section [18; 17].

Based on the military reforms made in the country, a military organisation and real community have been developed, and included the Armed Forces, military structures, traps and bodies. Here the Armed forces are the only provider of military security in the country. The peace time includes the country's military administration bodies, special forces, the rear, military schools and the military institutions. Time of the war includes the internal security troops of the Ministry of Internal Affairs, border troops of the National Security Committee. National Guard, territorial and civil defence structures. Thus, it can be concluded that provisions of the Military Doctrine cover the basic duties of the above-mentioned institutions and bodies to ensure the military security [19; 33].

Conclusions

The military policy of the state and military security of the state are interrelated concepts in the peaceful life of the country. Based on the military doctrine, military policy of the Republic of Kazakhstan is targeted to develop the system of the international relationships where the value of the military force is minimized. Conflicts will be resolved between states, social groups and peoples using the diplomatic and political, economic, informational, legal and other non-military means [20]. The basic directions adopted in the country in the new military doctrine in the Republic of Kazakhstan do not set any state as an enemy. The Republic of Kazakhstan strengthens its security in foreign policy and the military sphere. Kazakhstan is based on the principles of creating friendly peaceful relations with neighboring countries, their further development, formation of joint activities and establishment of partnerships [21; 40].

Nevertheless, if we are talking exclusively about disputes, the inappropriate documents relating to the military security of the Republic of Kazakhstan clearly outline the objectives aimed at achieving a peace agreement. These documents emphasize the need for peaceful resolution of international conflicts and the renunciation of violence or the use of force. In addition, they stress the importance of optimizing the country's external military organization to prevent and deter military aggressions. Therefore, the above and unspoken principles must be observed in all legal acts adopted in the field of military security in the contractual and interstate relations.

Points of the military doctrine adopted in the country that the Republic of Kazakhstan does not regard any state as its adversary, in the military and political spheres, the military security of the Republic of Ka-

zakhstan pursues a policy focused on establishing mutual corporation and friendly neighbourly relations which other states, and in the event of international disputes, to peaceful resolve them.

It is stated that this will be resolved so as not to be the first to use military force in existing conflicts, in order to strengthen the military organization of the country and to take effective measures to prevent the suppression of military threats to the Republic of Kazakhstan.

These principles, as it is known, should be the basic principles that must be observed in any legal acts, agreements in relations adopted in the area of the military security.

To date, the Republic of Kazakhstan has implemented some important measures in the military security. The agreements have been concluded with neighbouring countries to establish borders, consolidated the foundation of our country, peaceful coexistence and accession to the international legal documents.

In order to ensure military security, the Republic of Kazakhstan has resolved the issues of legal security in the legislative framework regulating its Armed Forces, military equipment and management.

However, these steps were taken in connection with the current unstable geopolitical, economic and other situations, the emergence of unexpected military conflicts between certain states, the prevention and avoidance of potential conflicts, the desire to preserve the strategic importance of the country and protect the national interests of the Republic of Kazakhstan. Thus, it is necessary to continue to address the issues of legal support in the specified direction.

Thus, the scientific approaches and justifications studied and discussed above give us reason to conclude that the Republic of Kazakhstan today in the field of its military security should constantly improve and develop the solution of issues of legal support for the country's military security by observing national interests, establishing peaceful relations with neighbors and concluding treaties to ensure collective security for the peaceful existence of citizens in the country. After all, only a clear military policy, clear legal regulation and ensuring national security, including military, can guarantee the preservation of sovereignty and the safe peaceful life of our country.

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Р.Б. Ботагарин

Қазақстан Республикасының әскери қауіпсіздігін құқықтық қамтамасыз ету: салыстырмалы-құқықтық талдау

Мақала Қазақстан Республикасындағы әскери қауіпсіздік саласын құқықтық қамтамасыз ету мәселелерін қарастыруға арналған. Зерттеу барысында Қазақстан Республикасы өз тәуелсіздігін алған сәттен бастап бүгінге дейін қабылданған мемлекеттің ұлттық қауіпсіздігінің бір бөлігі болып табылатын әскери қауіпсіздікті реттеуге байланысты және әскери саланы басқаруда басшылыққа алынатын құқықтық актілердің маңызы мен рөлі қарастырылды. Зерттеудің мақсаты әскери қауіпсіздік саласындағы құқықтық актілердің ел қауіпсіздігін нығайтудағы тиімділігін, өзара байланыстарын, қалыптасуын және ерекшеліктерін анықтау. Зерттеу жұмыстарын жүргізу, зерделеу кезінде талдау әдісі, тарихи және компаративтік яғни салыстырмалы-құқықтық әдістері қолданылды. Автор бұл зерттеуді жүргізу кезінде еліміздің әскери қауіпсіздігін құқықтық реттеуде және құқықтық қамтамасыз етуде басшылыққа алынатын Қазақстан Республикасының Конституциясына, әр жылдары қабылданған Қазақстан Республикасының Әскери доктриналарына, өзге де қауіпсіздік саласындағы заңнамаларға жүргізілген терең ғылыми ізденіс нәтижесінде бұл құжаттар әскери қауіпсіздік саласында, әскери қызмет саласын реттеуде маңызды құжат деген қорытындыға келді. Сонымен қатар, қазіргі тұрақсыз геосаяси, экономикалық және тағы басқа да жағдайларға байланысты, кейбір мемлекеттер арасында күтілмеген әскери қақтығыстардың орын алуы, ел үшін стратегиялық маңызы бар негізді құрайтын, болашақта ықтимал дау жанжалдардың алдын алу, болдырмау, әркез Қазақстан Республикасы ұлттық мүдделерін қорғап қалу үшін әлі де аталған бағытта құқықтық қамтамасыз ету сұрақтарын жалғастырып отыруы керек деген ұсыныс жасалды.

Кілт сөздер: Қазақстан Республикасы, ұлттық қауіпсіздік, әскери қауіпсіздік, құқықтық актілер, әскери доктрина, заңнама, құқықтық қамтамасыз ету.

Р.Б. Ботагарин

Правовое обеспечение военной безопасности Республики Казахстан: сравнительно-правовой анализ

Статья посвящена рассмотрению вопросов правового обеспечения военной безопасности в Республике Казахстан. В ходе исследования изучены значение и роль правовых актов, связанных с регулированием военной безопасности, являющихся частью национальной безопасности государства, принятых с момента обретения Республикой Казахстан Независимости. Целью исследования является определение эффективности, взаимосвязей, темпов развития и особенностей правовых актов в области военной безопасности в укреплении безопасности страны. В ходе исследовательской работы применялись следующие методы: анализ, исторический, компаративный, то есть сравнительно-правовые методы. В результате всестороннего изучения Конституции Республики Казахстан, военных доктрин Республики Казахстан, принятых в разные года, и иных законодательных актов в области

безопасности, руководствующихся правовым регулированием и правовым обеспечением военной безопасности страны при проведении данного исследования, автор пришел к выводу, что эти документы являются важными в области военной безопасности, в регулировании сферы воинской службы. Вместе с тем, в связи с нынешними нестабильными геополитическими, экономическими и другими обстоятельствами, возникновением между некоторыми государствами непредвиденных военных конфликтов, автор предлагает продолжить работу касательно вопросов правового обеспечения в данном направлении для предотвращения возможных конфликтов в будущем, а также защиты национальных интересов Республики Казахстан.

Ключевые слова: Республика Казахстан, национальная безопасность, военная безопасность, правовые акты, военная доктрина, законодательство, правовое обеспечение.

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The Institute of the Commissioner for Human Rights: history, modernity, prospects

The article is devoted to the study of topical issues of functioning of the institution of the Ombudsman for Human Rights in the context of its historical development from the moment of its creation to the modern period. The scientific research reveals historical prerequisites for the emergence and peculiarities of the formation of the institution of the Ombudsman in the territory of Kazakhstan. Its role and essence from the position of different points of view of scientists is revealed. The author conducts a detailed analysis of the modern period of activity of the Ombudsman, paying special attention to the transformation of the institution and strengthening of its significant positions in the legal field of our statehood. The purpose of this article is a historical study of the development of the institution of the Commissioner for Human Rights in the Republic of Kazakhstan and foreign countries, its modern interpretation and prospects for its further development. To reveal the purpose of scientific research, various methods of scientific cognition were used, mainly: historical, comparative-legal, empirical. As a result of the study, the author identified the main stages of development of the institution of the Commissioner for the Protection of Human Rights. Positive trends in the development of the institution of the Ombudsman are outlined. Recommendations aimed at rationalization of the national legislation of the Republic of Kazakhstan, with the purpose of further prospects of strengthening the effectiveness of the Commissioner for Human Rights and its human rights functions are given.

Keywords: history of ombudsman development, human rights protection, Commissioner for Human Rights, ombudsman institution, defender, state, transformation of the ombudsman.

Introduction

The establishment concept of the institution about the Commissioner for Human Rights emerged in the late 20th century and has undergone a prolonged evolutionary process. The historical transformation of this institution has been directly tied to societal development and its social needs. Notably, one of the primary needs of contemporary society is recognized as the protection of human rights and freedoms by the state, along with protection from unlawful actions and decisions by government bodies. State policy in democratic countries is focused on ensuring human rights protection, and this remains a priority direction in national development.

According to Article 1 from the Constitution of the Republic of Kazakhstan, “the highest values are human life, rights and freedoms” [1]. Accordingly, the state assumes the constitutional responsibility to create conditions, guarantees, and mechanisms for human rights protection. The state's system for protecting human rights includes institutional guarantees based primarily on state bodies and various human rights institutions at international, national, and regional levels. A significant role among these human rights institutions belongs to the institution of the Commissioner for Human Rights (Ombudsman) whose key functions underpin the strengthening of democracy, the rule of law, quality governance, and the protection and restoration of violated human rights from encroachments by government bodies and their officials.

The relevance of this research is due to the need for a comprehensive legal examination of the contemporary interpretation of the institution of the Commissioner for Human Rights through a historical lens, considering positive international experience and legal challenges related to its adaptation in the future development of the Republic of Kazakhstan.

The purpose of this article is to explore the historical development of the Commissioner for Human Rights in the Republic of Kazakhstan and foreign countries, its current interpretation, and the prospects for its further evolution. To achieve this goal, the following objectives were set:

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- to identify the historical prerequisites for establishing the institution of the Ombudsman in Kazakhstan and other foreign countries;
- to determine the historical stages of its development in Kazakhstan and globally;
- based on an analysis of foreign legislation and international acts, to develop practical recommendations for improving national legislation in the Republic of Kazakhstan regulating the legal status of the Ombudsman.

The analysis of foreign and domestic legal literature in the field of research of the institute of the defender of human rights showed the presence of monographs, periodicals, special literature, dissertations and abstracts devoted to the topic of research. Among them are the works of: A.S. Avtonomov, V.V. Boytsova, Zh.D. Bussurmanov, M.S. Bashimov, G. Zhangaliyeva, B.A. Zhetpisbayev, E.N. Mukhitdinov, A.B. Uzakbayeva, G.S. Kaliyeva, G.B. Karzhassova, S.S. Karzhaubayev, A.O. Shakirov and others.

However, the presence of research in this area does not diminish the importance and relevance of the issues under consideration. Since, in our opinion, the realities of the current stage of modernization of the ombudsman's institution in the Republic of Kazakhstan have not been sufficiently studied and require a greater degree of scientific understanding for further popularization of the use of this mechanism in the field of human rights protection.

Methods and Materials

In conducting this comprehensive scientific study, the author employed general and specific methods of scientific inquiry, including historical, comparative legal, formal legal, empirical, and other approaches.

The historical method allowed for an examination of the historical stages and periods of the Ombudsman's establishment and development in the context of global experience and within Kazakhstan. This method enabled a comparative analysis over time, demonstrating changes and continuity, as well as the influence of these changes on existing legislation, thereby explaining the underlying reasons for the institution’s establishment. Comparative legal analysis and formal legal methods enabled a parallel examination of contemporary models of the Ombudsman institution around the world with the one currently functioning in Kazakhstan. Empirical and statistical methods were applied in analyzing the practical experience and statistical data from the reports of the Ombudsman to summarize specific results on the effectiveness of the national human rights defender's activities.

The legal framework of the study includes the Constitution of the Republic of Kazakhstan, constitutional laws, legislative acts, presidential decrees of the Republic of Kazakhstan, subordinate regulatory acts, legislative acts of foreign countries, and international acts that regulate the peculiarities of the legal status of ombudsmen and human rights organizations. The empirical foundation of the study consists of materials and information contained in the annual reports of the Commissioner for Human Rights in the Republic of Kazakhstan.

Results

The results of the study on the genesis and evolution of the Ombudsman institution in foreign countries highlight the following stages of its development: 1) The creation of the Ombudsman as an independent parliamentary oversight body; 2) The expansion of the number and types of Ombudsmen in global practice; 3) The diversification of the Ombudsman’s functions and activities to address issues ranging from providing assistance in legal disputes to resolving systemic issues and proposing changes to legislation and practices; 4) The formation of Ombudsman communities and associations at national and regional levels; 5) The adaptation of the Ombudsman’s scope and activities according to the specifics of each sector.

The author concluded that the institution was initially intended to focus on identifying government administrative failures rather than on protecting citizens’ rights. As society evolved towards a more liberal order, the realization of constitutional principles balancing power between the monarchy and parliament enabled the Ombudsman to assume the role of a rights protector and mediator. This office became a crucial tool and bridge between individuals and the state.

Despite its relatively short history in Kazakhstan, the institution has its brief past and a progressive present. A review of available academic and monographic literature on the history of the Commissioner’s development in Kazakhstan has led the author to conclude that the primary reasons for establishing the Ombudsman included the enhancement of alternative rights protection mechanisms based on gratuity, accessibility, and independence from bureaucracy and influence by government bodies.

The formation of the Ombudsman institution in Kazakhstan, from its inception to the present, has undergone five main stages. The initial stage marked the inception of the idea of establishing the Commissioner's institution, which laid the foundation for the core principles and tenets of the Ombudsman's activity (1993–1996). The second stage involved coordination and organizational efforts to prepare and develop the regulatory legal framework (1997–2000). The third stage saw the adoption of the Presidential Decree establishing the office of the Commissioner for Human Rights (2001–2002). The fourth, and longest, stage was dedicated to finding Kazakhstan's model for the institution, improving the regulatory framework, addressing legal inconsistencies, eliminating shortcomings in the Commissioner's enforcement practices, and aligning standards with international requirements, culminating in constitutional status recognition (2003–2021). Now, a new stage has commenced, characterized by transformations, updates, and the introduction of new competencies in the Commissioner's activities, marking a shift in human rights mechanisms through constitutional reforms and the adoption of the Constitutional Law "On the Commissioner for Human Rights" in 2022 [2].

For the further development of legislation regulating the status of the Ombudsman, we propose the following: First, in Article 2 of the Constitutional Law "On the Commissioner for Human Rights" [2] it is suggested to add one of the most significant principles of the Ombudsman's activities, namely "gratuitousness", as stated in para. 15 of the "Venice Principles" [3], which indicates the free provision of services by the Ombudsman, i.e., upon the appeal of any physical, legal person, or non-governmental organization, they should have free access to the Ombudsman and the ability to file a complaint without charge, for example, in the Law of the Kyrgyz Republic "On the Ombudsman (Akyikatchy) of the Kyrgyz Republic", Articles 10 and 11, para. 12 directly refer to the gratuitousness of the services provided, stating that an application or complaint addressed to the state official bears no cost [4]. Polish legislation also stipulates in Article 10 that complaints filed to the Commissioner are free of charge, and no fees are required for their submission [5]. This provision is absent in the laws of the Republic of Kazakhstan, which, in our opinion, might mislead or discourage potential complainants.

Secondly, the current constitutional law does not clearly specify the range of subjects eligible to approach the Ombudsman. Since para. 13 of the "Venice Principles" states that the Ombudsman should respond to "all general interest issues and public services, provided whether by the state, municipalities, state bodies, or private organizations" [3], it would be reasonable, in our view, to amend Article 1 of the constitutional law with such provisions. We believe that clarifying the range of entities will contribute to a better understanding of the sphere of the Ombudsman's activity.

Thus, the presented results contain specific proposals for improving the status of the Ombudsman, previously unpublished and aimed at modernizing the national legal framework governing the activities of the Commissioner for Human Rights in the Republic of Kazakhstan.

Discussion

The institution of the Commissioner for Human Rights (Ombudsman) worldwide emerged as a tool to combat ineffective governance and has since become one of the distinctive features of a modern democratic state. In legal literature, the legal nature and essence of the people's defender institution are explained from various perspectives. Foreign scholar Martin U. in his research notes that the primary role of the Ombudsman lies in investigating violations by the administrative justice system and monitoring the fulfillment of duties by government representatives in relation to the public [6; 17]. Renowned Russian scholar N.Yu. Khamaneva emphasizes that the Ombudsman plays a crucial role among the bodies tasked with overseeing administrative functions and preventing potential abuses of power by state officials [7; 89]. D.E. Feoktistov offers an interesting view, suggesting that the essence of the institution be explained through both classical and contemporary interpretations. According to Feoktistov, the classical concept reveals the Ombudsman's affiliation with parliament and the exercise of indirect parliamentary oversight, focusing on enhancing government accountability and ensuring the protection of rights [8; 15]. The modern interpretation broadens the Ombudsman's appointment authority beyond parliament to include senior officials, adding greater scope for addressing rights violations and monitoring compliance.

The similarities among scholars' viewpoints establish a scientific concept highlighting the Ombudsman's key role in protecting and restoring violated rights from encroachments by state authorities, utilizing all legally prescribed functions and tools.

To understand contemporary trends in the development of the institution of the Commissioner for Human Rights, it is essential to analyze the historical foundation of its formation. Some researchers suggest that

the origins of rights protection institutions similar to the Ombudsman date back to ancient societies. For example, in the Roman Empire, comparable positions included prosecutors, censors, and tribunes. In Ancient Greece, there were officials known as archons-eponyms, while in ancient China, a position called the Censorate was established. In the Ottoman Empire, “muhatasibs” held responsibilities analogous to those of the modern Ombudsman [9; 22].

The prototype of the modern Ombudsman is considered the classical model that took shape in medieval Europe, shaped by unique needs due to revolutions, reforms, and political changes in various countries.

In 1809 Swedish King Charles IX, in response to a deteriorating political climate and the unchecked authority of officials, voluntarily relinquished some of his privileges and established Europe’s first Ombudsman institution, known as the Parliamentary Ombudsman. The King empowered the Ombudsman to oversee law enforcement by administrative structures and to review complaints from Swedish citizens against government actions.

The King empowers him to supervise the execution of laws by administrative structures, as well as to consider complaints from Swedish citizens about the actions of the authorities. However, it is important to note that scholars studying the formation of the ombudsman institution disagree on the factors that prompted its creation. For example, Professor A. Sungurov argues in his research that when the King of Sweden appointed the ombudsman, his main concern was not the protection of human rights, but rather improving the efficiency of executive officials. Since with the help of complaints and reports from citizens, it became possible to evaluate their professional activities [10; 28]. We share and agree with the opinion of N. Yu Khamaneva, who suggests that an important factor in the establishment of the ombudsman position was the liberalization of social conditions in the early 19th century, which contributed to the introduction of constitutional principles in Sweden. These principles were aimed at creating a balance of power between the monarchy and parliament, and the ombudsman served as one of the mechanisms for achieving this balance [11; 158].

After the break of century the institution continued to develop, spreading to other Nordic countries like Finland (1919), Norway (1952), Denmark (1953), and Iceland (1988), adopting tasks and powers similar to those of the Swedish model. Consequently, the Scandinavian countries are recognized as pioneers in establishing the modern Ombudsman institution. Among non-European countries, New Zealand was the first to adopt this institution in 1962, followed by Poland in 1987 as the first socialist country. In the United States, the Ombudsman Committee was established by the American Bar Association in 1967, with the first Ombudsman elected in 1969. In Germany, a military Ombudsman was instituted in 1957, while in Canada and the United Kingdom, the Ombudsman institution was legislated simultaneously in 1967. In France, the Médiateur law was adopted in 1973.

The Ombudsman role also gained popularity in post-authoritarian and post-colonial countries, such as Spain with its “Justice Trustee” in 1975 and the “Defender of the People of Spain” in 1981, and in Argentina with its “People’s Defender” in 1994. In Asian countries, Pakistan established the “Wafaqi Mohtasib” in 1983, Japan introduced the role in 1981, Taiwan implemented the “Control Yuan” in 1992, and South Korea introduced its Ombudsman in 1994. Georgia was the first among CIS countries to establish this institution in 1996.

Thus, it can be confidently stated that although the concept originated in Sweden and became a part of the evolutionary progress of effective human rights protection mechanisms, it has transcended national borders and taken root in many countries, symbolizing a unique structural addition to liberal democracy. The Republic of Kazakhstan was no exception, establishing the office of the Commissioner for Human Rights in 2002.

The historical prerequisites for the establishment of the current institution of the Commissioner in Kazakhstan, as suggested by E.N. Mukhitdinov, were shaped by the demands of the era when Kazakhstan gained independence after the collapse of the Soviet Union and the emergence of new independent CIS countries. The evolving relationships between society and the state required a compromise and new tools of mutual understanding, leading to the establishment of a human rights institution that would serve as a link between government bodies and individuals [12; 16]. From a scientific perspective, A.B. Uzakbayeva, who studied the formation of the Commissioner’s office in Kazakhstan and Russia, argued that its creation was driven by the reorganization and restructuring of government mechanisms during “Perestroika” to find optimal ways for interaction and distribution of authority among branches of government [13; 9]. M.S. Bashimov holds a similar view, emphasizing that the institution’s establishment expanded and strengthened mechanisms for protecting citizens from bureaucratic excesses [14; 28]. We agree with the

point of view of the Russian scientist N.Yu. Khamaneva, who considers the emergence of the ombudsman institution in the world to be a consequence of mistrust of the authorities, the constant interference and influence of the authorities on the social processes of society [15; 115].

The historical development of the Commissioner for Human Rights in the Republic of Kazakhstan began with the ratification of the Paris Principles in 1993, recognized as international standards that outline the fundamental principles national human rights institutions should follow [16]. Although the Paris Principles do not carry legal obligations, they serve as a roadmap for national institutions to maintain fundamental international standards, ensuring trust both domestically and internationally.

The following period was marked by significant political and social changes, culminating in the constitutional recognition of human rights as the state's highest value [17; 29]. The official institutionalization of the Commissioner for Human Rights in Kazakhstan occurred in 2002 with the adoption of the “Regulation on the Commissioner for Human Rights” [18]. However, Kazakhstani researcher M.S. Bashimov conducted a detailed analysis of this Regulation and noted that regulating the status of the Ombudsman through a regulation rather than a law raises concerns regarding adherence to international standards [14; 10]. International frameworks recommend that the legal status of the Ombudsman institution is clearly defined either in the Constitution or in legislation adopted by legislative bodies.

Despite existing inconsistencies, the activities of the Kazakh Ombudsman were regulated by this regulation for an extended period. As society's need for effective rights protection mechanisms grew, it became necessary to further strengthen the Ombudsman’s position. Following extensive discussions and negotiations, on April 20, 2019, the “Principles on the Protection and Strengthening of the Ombudsman Institution” (Venice Principles) were adopted at the plenary session of the 130th meeting of the European Commission for Democracy through Law [3]. Unlike the Paris Principles of 1993, the Venice Principles provide a specific focus and set out fundamental standards, principles, and norms that the Ombudsman institution should adhere to in various contexts. In our view, the adoption of the Venice Principles provided a strong impetus for further development of the Ombudsman institution.

The subsequent rationalization of the Ombudsman’s institution in Kazakhstan was marked by the adoption of the law “On the Commissioner for Human Rights” on December 29, 2021 [19], which acted as a “transitional” law and was in force for less than a year. Later, within the framework of democratic transformations, the head of state made an important decision to conduct a national referendum, a key task of which was addressing urgent social issues and identifying a new path for the “New Kazakhstan”. On June 5, 2022, the referendum took place, with a majority voting in favor of amendments to the state’s primary act. One significant issue on the referendum aimed at elevating the constitutional status and role of the Commissioner for Human Rights in Kazakhstan. Thus, a new constitutional provision, Article 83-1 [1], was introduced to regulate the nature, guarantees, and immunities of the national Ombudsman. The head of state, adhering to principles of aligning national legislation with international standards, subsequently decided to strengthen the legislative framework by adopting a separate constitutional law “On the Commissioner for Human Rights” on November 5, 2022 [2].

With this updated legislative base, the Ombudsman's powers have been substantially expanded. First, the Ombudsman now has the right to appeal to the Constitutional Court on matters regarding the compliance of regulatory legal acts with the Constitution, which significantly enhances the operational potential of the Commissioner for Human Rights. Second, the process of enhancing the Ombudsman’s status has focused on strengthening fundamental immunities, offering protection from both criminal and administrative liability, except in cases of detention at the scene of a crime or the commission of serious or especially grave offenses. Third, provisions exempting the Ombudsman from the obligation to testify underline the inviolability of this position. Fourth, legislative measures have been taken to define accountability for any interference or obstruction in fulfilling the Ombudsman's lawful duties. Fifth, the Ombudsman has been granted legislative initiative, allowing the submission of proposals to relevant state bodies for the development of draft laws in the field of human rights protection. A crucial innovation is the appointment of the Ombudsman’s representatives in every region, city of republican significance, and the capital, aimed at strengthening citizens’ legal protections across these territories.

In our view, this initiative has enhanced the Ombudsman's ability to fulfill duties effectively and expanded citizens’ opportunities to defend their rights.

The 2022 constitutional reform and transformation of the Commissioner for Human Rights have yielded positive results. Measurable indicators of the Commissioner’s activity and effectiveness include quantitative (numerical) data on the resolution of complaints and citizen appeals, as reflected in the annual report.

The published report for 2023 notes a record number of requests, in our opinion, this is explained by the establishment of regional representatives in the regions, cities of republican significance and the capital. Thus, the quantitative and qualitative indicators for 2022 and 2023 are as follows: Total requests received 2023 — 5776, 2022 — 3948; Explanations given 2023 — 4057, 2022 — 2801; Sent to competent authorities 2023 — 814, 2022 — 475; Applicants' demands and requests were satisfied 2023 — 902, 2022 — 321 requests, a significant increase in the number of requests and positive decisions is observed in dynamics. Regarding the essence of citizens' appeals, in 2023 and 2022 the key provisions remain unchanged and are as follows: the leading position in the number of appeals is occupied by complaints: against the actions of investigative bodies — 2023 (12630), 2022 (1152); disagreement with the court decision — 2023 (1149), 2022 (689); the rights of convicts — 2023 (838), 2022 (204); torture and cruel treatment — 2023 (165), 2022 (447); Next come appeals regarding the social rights and freedoms of citizens: the right to social security — 2023 (153), 2022 (104); the right to adequate housing — 2023 (121), 2022 (116); the rights of persons with disabilities — 2023 (120), 2022 (27); the right to health protection — 2023 (47), 2022 (212); the right to work — 2023 (288), 2022 (284); the rights of minors — 2023 (92), 2022 (79); women's rights — 2023 (11), 2022 (0); education — 2023 (38), 2022 (13); freedom of religion — 2023 (12), 2022 (18) [20].

Based on the statistical data of the report, we can come to the conclusion about the growing demand for a human rights institute, despite its insignificant popularity among Kazakhstanis, since not everyone understands the specifics of the institute's activities. In this regard, in the era of popularization of the use of digital technologies and opportunities for disseminating information, we consider it extremely important to regularly conduct explanatory work and disseminate information about the possibilities for citizens to seek help from a national, regional or specialized ombudsman. However, despite the positive trends in improving the status of the Commissioner and updating the legislative framework, there are still conflicts and gaps that require attention and elaboration. Proposals for further improvement of the legislative framework regulating the activities of the ombudsman are reflected in the results of the study.

Conclusions

In conclusion, it is essential to recognize that the evolution of the Commissioner for Human Rights is ongoing and represents a shift in the quality and extent of response to societal needs. Historically, the Ombudsman position, initially established as a personal supervisory role, has evolved into a distinct institution focused on protecting and restoring violated human rights against state arbitrariness and abuse of power. It is critically important to ensure that this continuous development remains aligned with the core purpose of the Ombudsman.

Through the historical analysis of the institution's development in the Republic of Kazakhstan, five main stages of its formation were identified. The first three stages, spanning from 1993 to 2002, laid the groundwork for the inception, preparation, and adoption of the institution's legislative foundation. The fourth stage (2003–2021) was characterized by the search for a unique model that incorporated positive international practices, while adapting to Kazakhstan's own national, cultural, and historical traditions. Since 2022, a modern phase of institutional modernization has begun, strengthening the legal foundation, enhancing the Commissioner's status, updating competencies, and expanding the organization.

Each stage has contributed to positive development trends within the institution, fostering new opportunities for its improvement.

Analyzing the research findings, it is evident that further development of the Commissioner for Human Rights requires enhancements in national legislation to align with international standards. To achieve these goals, it may be feasible to supplement Articles 1 and 2 of the Constitutional Law of the Republic of Kazakhstan "On the Commissioner for Human Rights" with clarifications that specify the gratuity of the Ombudsman's services and define the participants within the legal relationships governed by the law, as outlined below:

1) Article 1: "The Commissioner for Human Rights in the Republic of Kazakhstan is an official who occupies a responsible state position established by the Constitution of the Republic of Kazakhstan to ensure state guarantees for the protection of human and civil rights and freedoms, as well as their observance and respect by state bodies, local governments, officials, and private organizations".

2) Article 2: "The Commissioner for Human Rights in the Republic of Kazakhstan, in the course of their activities, adheres to the principles of legality, justice, impartiality, objectivity, transparency, gratuity, openness, and other principles enshrined in the Constitution of the Republic of Kazakhstan".

To enhance the productivity of the Ombudsman's activities, it is vital to develop a monitoring system for citizens’ rights observance and complaints processing at the national and regional levels; to ensure greater transparency and accessibility of the Ombudsman’s work for citizens, including through various informational resources and public consultations on human rights protection issues; and to continuously enhance the qualifications of Ombudsman staff and expand cooperation with governmental, non-governmental structures, and public organizations.

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В.С. Исабекова

Адам құқықтары жөніндегі Уәкіл институты: тарихы, қазіргі заманы, перспективасы

Мақала адам құқықтары жөніндегі Уәкіл институтының құрылғанынан бастап қазіргі кезеңге дейінгі тарихи дамуы тұрғысынан жұмыс істеуінің өзекті мәселелерін зерттеуге арналған. Ғылыми зерттеуде Қазақстан аумағында омбудсмен институтының пайда болуының тарихи алғышарттары мен қалыптасу ерекшеліктері қарастырылған. Ғалымдардың әртүрлі көзқарастары тұрғысынан оның рөлі мен мәні ашылған. Автор мемлекеттің құқықтық саласы тұрғысынан институтты трансформациялауға және оның маңызды ұстанымдарын нығайтуға ерекше назар аудара отырып, омбудсмен қызметінің қазіргі кезеңіне егжей-тегжейлі талдау жүргізеді. Мақаланың мақсаты — ҚР және шет елдердегі адам құқықтары жөніндегі Уәкіл институтының дамуын тарихи зерттеу, оны заманауи түсіндіру және оны одан әрі дамыту перспективаларын анықтау. Ғылыми зерттеудің мақсатын ашу үшін ғылыми танымның әртүрлі: тарихи, салыстырмалы-құқықтық, эмпирикалық әдістері қолданылды. Зерттеу нәтижесінде автор адам құқықтарын қорғау жөніндегі Уәкіл институтын дамытудың негізгі кезеңдерін анықтады. Омбудсмен институтының дамуындағы оң үрдістер көрсетілген. Адам құқықтары жөніндегі Уәкіл қызметінің және оның құқық қорғау функцияларының тиімділігін одан әрі күшейту мақсатында Қазақстан Республикасының ұлттық заңнамасын ұтымды етуге бағытталған ұсынымдар берілді.

Кілт сөздер: омбудсменнің даму тарихы, адам құқықтарын қорғау, Адам құқықтары жөніндегі уәкіл, омбудсмен институты, қорғаушы, мемлекет, омбудсмен трансформациясы.

В.С. Исабекова

Институт Уполномоченного по правам человека: история, современность, перспективы

Статья посвящена исследованию актуальных вопросов функционирования института Уполномоченного по правам человека в контексте его исторического развития с момента создания до современного периода. В научном исследовании раскрываются исторические предпосылки возникновения и особенности формирования института омбудсмена на территории Казахстана. Раскрываются его роль и сущность с позиции разных точек зрения ученых. Автор проводит подробный анализ современного периода деятельности омбудсмена, уделяя особое внимание трансформации института и укрепления его значимых позиций в правовом поле нашего государства. Целью данной статьи является историческое исследование развития института Уполномоченного по правам человека в Республике Казахстан и зарубежных странах, его современное трактование и перспективы его дальнейшего развития. Для раскрытия цели научного исследования использовались различные методы научного познания, преимущественно исторический, сравнительно-правовой, эмпирический. В результате исследования автором выявлены основные этапы развития института Уполномоченного по защите прав человека. Обозначены положительные тенденции в развитии института омбудсмена. Даны рекомендации, направленные на рационализацию национального законодательства Республики Казахстан, с целью дальнейших перспектив усиления эффективности деятельности Уполномоченного по правам человека и его правозащитных функций.

Ключевые слова: история развития омбудсмена, защита прав человека, Уполномоченный по правам человека, институт омбудсмена, защитник, государство, трансформация омбудсмена.

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Актуальные проблемы законодательного обеспечения защиты прав предпринимателей при осуществлении государственного контроля и надзора в Республике Казахстан

В статье приведены некоторые актуальные теоретические и практические проблемы институтов государственного контроля и надзора в сфере предпринимательства. Цель обусловлена тем, что институт предпринимательской деятельности находится в состоянии постоянного развития, в связи с чем в законодательных актах возникает большое количество противоречий. Основными целями научной работы являются теоретические вопросы понятия, признаков и принципов реализации государственного контроля и надзора, а также практика осуществления деятельности государственных органов в указанной сфере, сравнительно-правовой анализ применения данного правового института в Республике Казахстан и в мире. На основании результатов исследования следует констатировать, что для действенного стимулирования государственных органов Республики Казахстан требуется осуществить комплексную модернизацию и цифровизацию их контрольных и надзорных функций. Применение инновационных цифровых технологий в процедурах идентификации и оценки предпринимательских рисков при учреждении коммерческой деятельности, а также в мониторинговых процессах, базирующихся на цифровых данных, предоставляемых самими хозяйствующими субъектами, позволит существенно повысить уровень транспарентности и результативности государственного управления в экономической сфере. В статье рассмотрены актуальные теоретические и практические проблемы институтов государственного контроля и надзора в Республике Казахстан, с акцентом на регулирование предпринимательской деятельности. Отмечены недостатки правового регулирования, включая избыточность требований, отсутствие четкого определения понятий и механизмов реализации, что создает административное давление на бизнес и риски коррупции. Рекомендуется внедрение цифровых технологий для оценки рисков, мониторинга и повышения прозрачности управления. В работе предложены унифицированные подходы к регламентации процедур контроля и надзора, что позволит усилить защиту прав предпринимателей, укрепить законность и снизить административные барьеры. Подчеркивается значимость совершенствования нормативно-правовой базы и развития современных методов правоприменения для формирования конкурентоспособной экономической среды и устойчивого государственного управления.

Ключевые слова: государственный контроль и надзор, предпринимательская деятельность, проверки, некоммерческие организации, финансовая поддержка, нарушение закона, производственный процесс.

Введение

Конституция Республики Казахстан, принятая на республиканском референдуме 30 августа 1995 года, провозглашает права и человека во втором разделе «Человек и гражданин». Пункт 4 статьи 26 Конституции определяет свободу предпринимательской деятельности как «каждый имеет право на свободу предпринимательской деятельности, свободное использование своего имущества для любой законной предпринимательской деятельности» [1].

Анализируя мнение С.А. Авакьяна, следует отметить, что право на свободу предпринимательской деятельности является одним из основных элементов в правовой системе рыночной экономики. Данное право, основанное на самостоятельном усмотрении лица и профессиональной активности, составляет первостепенную роль в обеспечении экономического развития и реализации принципов свободного рынка. В исследуемом контексте подчеркивается

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необходимость укрепления и защиты права на предпринимательскую свободу как фундаментального фактора, способствующего динамичному росту экономики и повышению благосостояния общества.

Право на свободу предпринимательской деятельности, основанное на автономном усмотрении субъекта и его трудовой активности, способствует реализации принципов свободного рынка и конкуренции. Рассматриваемое право обеспечивает юридические гарантии для осуществления предпринимательской инициативы, стимулирует экономический рост и инновационное развитие.

В данном контексте подчеркивается ведущая роль этого права в формировании эффективной правовой системы, поддерживающей экономическую динамику и защищающей интересы участников хозяйственных отношений. Таким образом, укрепление института свободы предпринимательства является приоритетной задачей для совершенствования национального законодательства и обеспечения стабильности рыночнойэкономики [2; 752].

Правовое регулирование предпосылок экономических отношений на уровне Конституции государства не является обычным и общепризнанным. Конституции иностранных государств показывают достаточно различные виды, которые, разумеется, приобретают одни общие черты [3; 18].

Изучение мнения мыслителя Абая относительно свободы предпринимательской деятельности позволяет заключить, что рынок является механизмом, существенно влияющим на развитие ремесла и дифференциацию труда, а также гарантирующим свободу предпринимательской активности.

По мнению Абая, миссия каждого предпринимателя состоит в способности творить и направлять часть полученной прибыли на благотворительные нужды. Исследуемое положение отражает фундаментальные принципы, актуальные для современных субъектов предпринимательства, и подчёркивает важность баланса между личной выгодой и социальной ответственностью [4; 3].

К основным функциям государства относятся государственный контроль и надзор, целью которых является выполнение функций и задач по реализации политики государства. В научной литературе имеется разная трактовка понятий «контроль» и «надзор». Некоторые авторы считают, что понятия тождественны друг другу, другие — различают. К примеру, есть точка зрения рассмотрения контроля как одной из функций управления социумом.

Надзорная составляющая является суженным контролем**,** при котором объем вмешательства ограничивается проверкой законности осуществляемой деятельности. В отличие от контроля, включающего оценку целесообразности, надзор фокусируется исключительно на правовых аспектах [5].

Существует мнение о том, что контроль — это форма осуществления и гарантирования законности, деятельность которой базируется на встревании в деятельность каких-либо органов или организаций методом требования об устранении нарушений законности в определенные сроки и способы, а также устранение обстоятельств, которые порождают данные нарушения [6].

Выделяется другое определение контроля как проверки системы внутреннего характера и рассмотрения соответствия принципов деятельности государственных органов определенным принципам, которые основываются на деятельности политических институтов, а также базовых началах государственной политики и ценностях общества [7; 373].

Материалы и методы исследования

Первое законодательное закрепление институтов государственного контроля и надзора за предпринимательской деятельностью было в Законе Республике Казахстан от 31 января 2006 года № 124–III «О частном предпринимательстве», где лишь одной нормой регулировалась деятельность институтов государственного контроля и надзора. Статья 33 Закона РК «Государственный контроль и надзор за деятельностью субъектов частного предпринимательства», где были определены лишь две формы осуществления государственного контроля и надзора:

1) проверка, порядок организации и проведения которой определяется Законом РК «О государственном контроле и надзоре в Республике Казахстан». Данная редакция от 2014 года, когда действовал Закон «О государственном контроле и надзоре»;

2) иных форм контроля и надзора, носящих предупредительно-профилактический характер, порядок организации и проведения, которых определяется законами Республики Казахстан [8].

Необходимо отметить, что названные выше работы были написаны до принятия Специального закона Республики Казахстан «О государственном контроле и надзоре» от 2011 года [9]. Вышеперечисленные научные труды рассматривали вопросы соотношения понятий

государственного контроля и надзора, научную основу таких институтов, как прокуратура, Парламент, Счетный комитет, Конституционный совет. Автор рассматриваемого нами труда «Государственный контроль в Республике Казахстан: конституционно-правовые проблемы», предметом диссертационного исследования определяет институт государственного контроля в качестве конституционно-правового явления [10; 6].

Следует подчеркнуть, что в условиях отсутствия систематизированных исследований в сфере государственного контроля и надзора за предпринимательской деятельностью необходимо провести детальный анализ современных правовых механизмов рассматриваемых институтов в рамках Предпринимательского кодекса Республики Казахстан 2015 года, консолидировавший положения Закона «О государственном контроле и надзоре» редакции 2011 года.

Исходя из мнения Б.А. Тайториной, следует сделать вывод, что принятие специального законодательства в 2011 году существенно способствовало совершенствованию нормативно-правовой базы, необходимой для эффективного государственного управления. Главное значение в осуществлении функций государственного контроля имеет результативность, которая достигается посредством профессионального подхода, основанного на использовании соответствующих навыков и компетенций. На основании вышесказанного, высокая эффективность деятельности контрольно-надзорных органов обеспечивается при условии непрерывного повышения квалификации и совершенствования правового регулирования, что отражает важность развития специализированного законодательства для оптимизации государственного контроля и надзора [10; 129].

Изучение положений прежнего Закона «О государственном контроле и надзоре» демонстрирует необходимость детального рассмотрения развития правового регулирования в данной области в Республике Казахстан. Основной Закон страны, обладая высшей юридической силой, служит базой для формирования национальной правовой системы и устанавливает фундаментальные принципы регулирования общественных отношений. В свете рассматриваемого вопроса законодательство о государственном контроле и надзоре следует согласовывать с конституционными нормами, обеспечивая эффективность, прозрачность и законность государственного управления.

В соответствии с Законом РК «О правовых актах», правовое регулирование осуществлено через кодифицированные акты, охватывающие 18 групп важнейших общественных отношений. Рассматриваемые группы включают бюджетные, гражданские, экологические, трудовые и иные сферы, обеспечивая системность и последовательность правового регулирования. Подобное структурирование законодательства способствует эффективному функционированию механизма государственного контроля и надзора, укрепляет принципы законности и верховенства права. Признание приоритета Конституции и специализированных кодексов гарантирует единообразие правоприменения и стабильность правовой системы Республики Казахстан, что является необходимым условием для устойчивого развития государства и общества [11].

Среди нормативных документов, регулирующих сферу государственного надзора, выделяется Закон от 22 декабря 2003 года «О государственной правовой статистике и специальных учетах», устанавливающий основы юридической статистики и специальных учетных процедур. Рассматриваемый нормативный акт способствует эффективному функционированию государственных органов через систематизацию правовой информации, обеспечивая прозрачность и законность в деятельности государственных институтов. Законодательство в данной области играет основную роль в обеспечении правопорядка, повышении эффективности государственного управления и укреплении доверия общества к государственным институтам, что, в конечном итоге, способствует развитию правового государства [12]. Закон разработан для устранения недостатков в законодательстве, связанных с правовой статистикой, специальными учётами, а также справочной и архивной деятельностью. Согласно пункту 6 статьи 6 данного Закона, Специализированный комитет Генеральной Прокуратуры осуществляет мониторинг и контроль проверок государственных органов, наделённых надзорными и контрольными полномочиями. Однако на сегодняшний день Комитет регистрирует акты о назначении проверок только по двум видам статистического учёта, что приводит к использованию лишь двух методов правового контроля исполнения законодательства. Недостаточная охваченность статистическим учётом проверочных мероприятий свидетельствует о потенциальных рисках в сфере обеспечения законности и требует внимания законодателя. Поэтому необходимо совершенствование нормативной базы и механизмов государственного контроля для расширения охвата и повышения эффективности правоприменения, что будет способствовать укреплению законности и правопорядка в стране.

О поддержке и стимулировании деятельности хозяйствующих субъектов, регламентированной в Приказе и.о. Генерального Прокурора Республики Казахстан от 25 декабря 2020 года № 162 «Об утверждении Правил регистрации актов о назначении, дополнительных актов о продлении сроков проверки и профилактического контроля и надзора с посещением субъекта (объекта) контроля и надзора, уведомлений о приостановлении, возобновлении, продлении сроков проверки и профилактического контроля и надзора с посещением субъекта (объекта) контроля и надзора, изменении состава участников и представлении информационных учетных документов о проверке и профилактическом контроле и надзоре с посещением субъекта (объекта) контроля и надзора и их результатах» [13].

В соответствии с Приказом и.о. Генерального Прокурора Республики Казахстан от 25 декабря 2020 года № 162**,** установлены ограничения и запреты для государственных органов, обладающих правом осуществления надзорной и контрольной деятельности, в отношении проведения проверок деятельности государственных учреждений. Данный Нормативный акт регулирует процедуру осуществления контрольных мероприятий, устанавливая чёткие правовые рамки для предотвращения необоснованного вмешательства в деятельность государственных учреждений. Решение способствует обеспечению принципов законности и правопорядка, гарантируя независимость государственных учреждений в пределах компетенции. Следовательно, законодательство усиливает правовые механизмы защиты государственных учреждений от избыточного контроля, ограничивая полномочия контролирующих органов в соответствии с установленными нормами.

На основании проведенного анализа следует заключить, что недостаточный охват правовым регулированием и статистическим учетом действий проверяющих государственных органов препятствует эффективной работе Комитета по правовой статистике в сфере сбора и анализа данных. Изучаемое направление ограничивает применение современных методов аналитики, моделирования и прогнозирования, необходимых для оптимизации государственного управления. Принятие 31 января 2006 года Закона Республики Казахстан «О частном предпринимательстве», в частности восьмой главы, отметилось как важный шаг в нормативно-правовом регулировании, впервые на законодательном уровне систематизировавшим виды государственного контроля и надзора. Данный законодательный акт установил задачи государственного контроля, определил общие принципы организации и проведения проверок субъектов предпринимательства.

Дополнительный момент отметился в регламентации права и обязанности должностных лиц государственных органов и частных предпринимателей. Следовательно, совершенствование правовой базы и усиление контроля над деятельностью государственных органов являются необходимыми условиями для повышения эффективности системы правовой статистики и улучшения качества государственного надзора.

Такое нормативное закрепление способствует совершенствованию правовой базы государственного контроля, обеспечивая прозрачность и законность в отношениях между государством и бизнесом. Интеграция правовой статистики и специальных учётов является необходимой для повышения эффективности государственного управления и внедрения современных аналитических инструментов [8].

Законодательство установило, что задачами государственного контроля в сфере частного предпринимательства являются обеспечение общественной безопасности, защита имущественных прав, охрана окружающей среды и поддержание экономической стабильности. В дополнении предусмотрены меры по предотвращению мошеннических практик, сохранению природных и энергетических ресурсов и повышению конкурентоспособности национальной продукции. Следовательно, эффективный государственный контроль и надзор способствуют укреплению правового государства, защите интересов общества и развитию устойчивой экономики [8]. Указ Президента РК от 7 сентября 1999 года № 205 предусмотрел, что государственные контрольные и надзорные функции осуществляются исключительно государственными органами, запрещая передачу организациям, не обладающим статусом государственного органа.

Рассматриваемые правовые положения подчёркивают значимость эксклюзивного исполнения контрольных и надзорных функций государственными органами для защиты общественных интересов и обеспечения национальной безопасности. Такая нормативная база усиливает способность государства эффективно контролировать частное предпринимательство, способствуя законной предпринимательской деятельности и формированию безопасной и конкурентоспособной экономической среды в Республике Казахстан [14].

Следует обратить внимание на сферу действия анализируемых нами законов. В них речь идет о защите прав предпринимательского сообщества. Исходя изданного факта, считаем, что необходимо согласиться с мнением Ю.С. Бережного о том, что не нужно исключать из сферы действия проведение налогового, валютного, бюджетного контроля, банковского и страхового надзора, а также других видов специального государственного контроля за деятельностью юридических лиц и индивидуальных предпринимателей [15; 61].

Для того чтобы детально разобрать сферу деятельности государственного контроля и надзора в предпринимательской деятельности, вначале стоит упомянуть о принципах, на которых таковая деятельность базируется.

Принципы государственного контроля имеют разное обозначение у отдельных исследователей. К примеру, первая трактовка определяет принципы государственного контроля как положения, которые помогают выделить важнейшие аспекты в различных сферах применения, которые имеют закрепление в нормах на законодательном уровне или же прямо вытекают из таковых. Другой подход рассматривает принципы государственного контроля как совокупность политических, правовых и организационных элементов, которые определяют эффективность данной деятельности [16].

На данном этапе формирования современной юриспруденции существует деление принципов осуществления государственного контроля и надзора на две группы: специальные и общие.

Эффективное функционирование системы государственного контроля и надзора в сфере предпринимательской деятельности основывается на ряде фундаментальных принципов. К числу важных относится равенство всех субъектов перед законом, обеспечивающее недискриминационный подход в правоприменительной практике. Справедливость и объективность действий контролирующих органов гарантируют беспристрастность и законность процедур надзора. Законность и соблюдение прав и свобод физических и юридических лиц отражают верховенство права и правовую защищенность участников экономических отношений.

Прозрачность деятельности государственных органов достигается посредством гласности, что повышает доверие со стороны общества. Презумпция невиновности подконтрольных субъектов служит гарантией защиты от необоснованных обвинений и санкций. Приоритет и обязательность судебных решений для органов контроля укрепляют принцип разделения властей и обеспечивают правовую определенность.

Независимость контролирующих органов способствует объективности и исключает возможность неправомерного влияния на деятельность. Ограничение вмешательства в предпринимательскую деятельность строго в соответствии с законодательными целями и задачами предотвращает превышение полномочий и защищает интересы бизнеса. Участие гражданского общества через институт общественного контроля усиливает демократические основы управления и повышает эффективность надзорных функций.

Единообразие правовых требований обеспечивает стабильность и предсказуемость регуляторной среды, что является важным для субъектов предпринимательства. Баланс между публичными и частными интересами необходим для гармоничного развития экономики и общества в целом. Ответственность органов контроля за возможные нарушения при исполнении своих обязанностей подчеркивает необходимость соблюдения правовых норм и повышает качество надзорной деятельности. Обеспечение доступности нормативных актов для подконтрольных субъектов способствует осведомленности и добровольному соблюдению законодательства.

На основании вышесказанного соблюдение указанных принципов является критически важным для совершенствования системы государственного контроля и надзора, а также для обеспечения устойчивого развития предпринимательской деятельности в Республике Казахстан.

Рассмотрев принципы, на которых базируется деятельность государственного контроля в целом, стоит теперь отметить те специальные принципы, на которых осуществляется государственный контроль в сфере предпринимательской деятельности. Некоторые авторы относят к ним следующие принципы: недопустимость проведения несколькими государственными органами контроля и надзора в отношении одного субъекта; осуществление государственного контроля без взимания платы за проведение таковой проверки с субъектов, то есть на бесплатной основе; презумпция добросовестности субъекта, над которым осуществляется государственный контроль; недопустимость требования с субъектов разрешений, постановлений или же других специальных документов, выданных центральными органами или же органами местного самоуправления, кроме случаев, предусмотренных законодательством [17].

Правовые нормы, которые закрепляют понятие и регулирование государственного контроля и надзора предпринимательской деятельности Республики Казахстан, изложены в Предпринимательском кодексе Республики Казахстан [18].

На основании вышесказанного, изучение законодательства и правоприменительной деятельности государственных органов Республики Казахстан и зарубежных стран по осуществлению государственного контроля и надзора в сфере предпринимательства позволило определить основные элементы научного исследования, выполнить стоящие перед авторами задачи теоретического и практического характера.

В теоретическом контексте изучения заданной темы были раскрыты различные подходы, существующие в юридической литературе, на понятия «государственный контроль» и «государственный надзор», а также определена авторская позиция по данному вопросу.

Сформулированы также общие и специальные принципы, на которых базируется деятельность государственного контроля и надзора.

Результаты

На основании рассмотренных законодательных актов и научных публикаций мы выявили общие характеристики понятий «контроль» и «надзор» в правовой системе Казахстана. Общие черты государственных функций заключаются в следующем:

1. Оба направления являются функциями государства, направленными на обеспечение законности и правопорядка в обществе.
2. Контроль и надзор проводятся государственными органами или организациями, наделёнными соответствующими полномочиями.
3. Оба процесса осуществляются путём проведения проверок, что позволяет оценить соответствие деятельности объектов установленным нормативным требованиям.
4. В ходе проверок изучаются наборы параметров объекта и деятельности, что способствует выявлению отклонений от нормативных стандартов.
5. Проверочные мероприятия исходят из заранее установленных целевых параметров проверяемого объекта и деятельности, определённых законодательством.
6. По результатам осуществления контроля и надзора принимаются определённые управленческие решения в отношении проверяемого объекта для устранения выявленных нарушений.

На основании вышесказанного, контроль и надзор, являясь важными государственными функциями, имеют общие признаки, связанные с целями обеспечения правопорядка и законности. Осуществление государственными органами посредством проверок, основанных на заранее установленных параметрах, и последующее принятие управленческих действий способствуют эффективному функционированию правовой системы Республики Казахстан.

Важное различие между контролем и надзором заключается в наличии или отсутствии отношений подчиненности между субъектом контроля и объектом проверки. Контроль предполагает обязательную подчиненность проверяемого лица контролирующему органу, основанную на административных полномочиях или правах собственности. Надзор, напротив, осуществляется при условии независимости проверяемого от надзорного органа, что подчеркивает наблюдательный и ограничивающий характер.

Принципиальные отличия между контролем и надзором можно сформулировать по следующим пунктам:

1. Контроль обладаетболее широким функциональным спектром по сравнению с надзором, так как включает не только проверку соблюдения законодательства, но и контроль исполнения распоряжений в силу подчиненности объекта. Надзор ограничивается проверкой соответствия деятельности правовым нормам без возможности непосредственного вмешательства.
2. В процессе осуществления контроля допускается прямое оперативное вмешательство в деятельность проверяемого субъекта, что позволяет контролирующим органам непосредственно влиять на процессы для обеспечения нормативного соответствия. Надзор не предусматривает такого вмешательства и ограничивается наблюдением и фиксацией нарушений.
3. Контроль направлен на выявление соответствия деятельности законодательству, а также на оценку ее целесообразности и эффективности. Надзор имеет целью исключительно обнаружение правовых нарушений в деятельности подконтрольных объектов, не затрагивая аспектов рациональности и эффективности их деятельности.

4. Контроль характеризуется плановым характером и может проводиться непрерывно или выборочно в рамках текущего контроля. Надзор осуществляется только выборочно и не должен быть постоянным, чтобы не создавать препятствий в деятельности проверяемыхсубъектов.

5. По результатам контрольных мероприятий применяются как как прямые, так и косвенные меры воздействия на объект проверки. В случае надзора возможны лишь косвенные меры. Для осуществления прямого воздействия субъект контроля обладает административными полномочиями или правами собственника, что подчеркивает различия в юридическом статусе контрольных и надзорных органов.

Следовательно, контроль и надзор, несмотря на общую направленность на обеспечение законности и правопорядка, существенно различаются по юридическому статусу, объему полномочий и методам воздействия на проверяемые объекты. Понимание различий важно для эффективного правоприменения и совершенствования системы государственного управления.

Также на данном этапе нашего исследования мы рассмотрели вопросы соотношения понятий «контроль» и «надзор». Проблема соотношения понятий «контроль» и «надзор» стала одним из остро обсуждаемых вопросов среди научной, законодательной среды Казахстана.

В свою очередь, считаем целесообразным сделать следующие выводы. В первую очередь, необходимо отметить тот факт, что различия между рассматриваемыми нами институтами, безусловно, есть.

Проведенный анализ позволяет установить, что основное различие между контрольными и надзорными функциями государственных органов в законодательстве Республики Казахстан заключается в объёме и характере проверяемых аспектов деятельности субъектов. Контроль предполагает проверку не только законности, но и целесообразности действий проверяемого субъекта, что подтверждается определением: это деятельность органа контроля и надзора по проверке и наблюдению на предмет соответствия деятельности проверяемых субъектов требованиям, установленным законодательством Республики Казахстан, в ходе которой реализуются меры правоограничительного характера без оперативного реагирования.

В отличие от контроля, надзор ограничивается проверкой только законности, то есть наблюдением за соблюдением требований законодательства без оценки целесообразности действий субъекта. На основании вышесказанного разграничение институтов контроля и надзора по признаку проверки целесообразности и законности нашло подтверждение в правовой системе Республики Казахстан.

Данное разграничение имеет важное значение для правоприменительной практики, поскольку позволяет чётко определить пределы полномочий контролирующих и надзорных органов. Исследуемый вопрос способствует обеспечению законности, защите прав и свобод физических и юридических лиц, а также установлению баланса между необходимостью государственного вмешательства и принципом невмешательства в деятельность субъектов предпринимательства.

Далее рассмотрим второй признак отличия, применение мер правоограничительного характера без оперативного реагирования (при контрольной деятельности), а при надзорной деятельности (применение мер правоограничительного характера, в том числе оперативного реагирования с применением мер административного взыскания). По нашему мнению, именно исследуемые признаки контроля и надзора должны найти место при разграничении рассматриваемых понятий по законодательству других стран.

Также подтверждением нашего мнения по разграничению понятий «контроль» «надзор» является закрепление в статье 138 сферы деятельности субъектов предпринимательства, в которых осуществляется контроль, статья 139 сферы деятельности субъектов предпринимательства, в которых осуществляется надзор. Соответственно определены по отдельности контролирующие и надзирающие органы. Из приведенного перечня субъектов следует определить 116 контролирующих органов и 22 надзирающих [18].

Надзирающие — все органы, осуществляющие проверки субъектов предпринимательства — СЭС, МЧС, имеющие полномочия наложить запрет, например, на реализацию продукции, осуществление процессов (меры оперативного воздействия). Контроль — это когда, например, министерство проверяет региональное подразделение, которое находится в организационном взаимодействии.

Обсуждение

В настоящее время государственное регулирование предпринимательской деятельности испытывает серьёзные затруднения. Органы государственного контроля и надзора зачастую сосредоточены на обнаружении правонарушений и применении санкций, что отодвигает на задний план превентивные меры и предупреждение нарушений. Избыточность и противоречивость нормативных требований, многие из которых являются невыполнимыми или устаревшими, создаёт правовую неопределённость и усиливает административное давление на предпринимателей. Кроме того, недостаточное применение систем оценки рисков ограничивает эффективность государственного надзора. Наблюдаемые факторы указывают на необходимость совершенствования нормативно-правовой базы и внедрения современных методов управления рисками для повышения эффективности государственного контроля.

Как показывает практика, государственными органами зачастую не исполняются положения статьи 130 ПК РК. Государственным органам запрещается принимать подзаконные нормативные правовые акты по вопросам порядка проведения проверок субъектов предпринимательства, за исключением нормативных правовых актов, предусмотренных пунктами 2 и 3 статьи 141, пунктом 1 статьи 143 Предпринимательского кодекса, то есть исключения, которые должны быть установлены законами РК [18].

На самом деле, как показывает анализ миграционного, лесного, ветеринарного законодательства, существуют подзаконные акты, определяющие порядок организации проведения государственного контроля, что противоречит и нарушает нормы действующего законодательства.

Действующий проверочный лист, утвержденный уполномоченным органом, а именно Приказом министра национальной экономики Республики Казахстан от 31 октября 2018 года № 49 «Об утверждении критериев оценки степени риска и проверочных листов в области поддержки и защиты субъектов частного предпринимательства» [19], к сожалению, не содержит в себе требований, по соблюдению данной нормы Предпринимательского кодекса РК, то есть принятие порядков на уровне закона. Нам кажется, что данный вопрос необходимо предусмотреть. Появлением такого вида контроля, каксоблюдение норм статей 130 и 140 ПК РК, данный пробел был бы решен.

Вторая проблема, которая существует в настоящее время по вопросам государственного контроля и надзора, ч. 3 ст.141 ПК РК определены случаи, при которых профилактический контроль с посещением субъекта и объекта контроля осуществляется без применения общего порядка проведения такого контроля.

В частности, посещение связано с контролем соответствия заявителя квалификационным или разрешительным требованиям до выдачи разрешения и (или) приложения к разрешению в случаях, предусмотренных Законом Республики Казахстан «О разрешениях и уведомлениях». Необходимо пояснить данную норму. Предприниматель хочет получить лицензию, есть необходимость осмотра объекта квалификационным требованиям, то возможен профилактический контроль с посещением. Однако такое посещение следует сделать так называемыми сопутствующими разрешительными документами. Для государственных органов исключается необходимость обращения в прокуратуру о заполнении соответствующих предписаний и т.д., то есть пройти без данной процедуры невозможно.

Следовательно, предприниматель поставлен в очень сложное положение, тогда, когда ему важно получить лицензию, субьект не имеет возможности получить, и даже в случае начальной работы работать без нее, нет согласовательной процедуры. В конечном итоге, получится так, что наступают риски, прокуратура выдает разрешение на сопутствующие разрешительные документы пройти профилактический контроль. В качестве примера необходимо привести следующее. Министерство сельского хозяйства выдает лицензию на лекарственные препараты, то есть согласующие процедуры других организаций, которые не подпадают под исключения ст. 141 ПК РК, что приводит к тому, что издержки бизнеса излишние, необходимость прикрытия данной деятельности или же какие-то коррупционные составляющие.

Суть третьей проблемы состоит в том, что практически не работают нормы статей 135, 136 ПК РК. В настоящее время, согласно ПК РК, государственный надзор осуществляется в 17 сферах деятельности субъектов предпринимательства и, по нашему мнению, все сферы должны в отраслевых законах отразить порядок проведения государственного надзора, как это сделано в ПК РК. Порядок проведения государственного надзора приведен в банковском, в трудовом и законодательстве о торговом мореплавании. К примеру, лесное, ветеринарное, энергозаконодательство не определяют

порядок проведения надзора, а это ведь меры оперативного реагирования без возбуждения дела. Мы предполагаем, что в отраслевых законах есть такая мера, как приостановить деятельность субъекта предпринимательства в случае нарушения тех или иных требований закона. В данном случае никакого прописанного порядка нет, соответственно последствия выражаются как в форме юридического, неюридического, экономического и финансового характера. Опять же предоставляется возможность коррупционным проявлениям.

Следующая проблема связана с проверочными листами и деятельностью уполномоченного органа по вопросу защиты прав предпринимателей, то есть Министерством национальной экономики. С точки зрения понятия и назначения надзора целесообразно исключение процедуры осуществления надзора по аналогии осуществления профилактического контроля с посещением. Проблема в том, что сегодня государственный надзор предлагается проводить так же, как и профилактический контроль с посещением (регистрировать, составлять систему оценки рисков, делать предписания и т.д.). На наш взгляд, существует другой тип надзора, у него нет последствий наложения административного взыскания. Всвязи с данным случаем существует предположение, что нужно лучше уточнить, конкретизировать, поставить в более точные рамки надзор в ПК РК и обеспечить неукоснительное соблюдение государственными органами, находящимися в сфере государственного надзора. Следует подчеркнуть, что в отраслевых законах следует закрепить специфику проведения надзора в той или иной сфере [20].

Выводы

Вышеизложенное дает основание утверждать, что в казахстанском законодательстве необходимо закрепить определение понятия «проверка».

Проверкой, по нашему мнению, считается «деятельность органов государственного контроля и надзора по оценке степени риска, анализу, прогнозированию, выявлению, пресечению и профилактике исполнения обязательных требований». Нами предлагается закрепить именно такое понятие термина «проверка» в Предпринимательском кодексе РК. В уточнении также нуждаются понятия «контроль» и «надзор» [21; 80–84].

Согласно статьям 134 и 135 ПК РК, «государственным контролем является деятельность органа контроля и надзора по проверке и наблюдению на предмет соответствия деятельности проверяемых субъектов требованиям, установленным законодательством Республики Казахстан, в ходе осуществления и по результатам которого применяются меры правоограничительного характера без оперативного реагирования» [18].

«Государственным надзором является деятельность органа контроля и надзора по проверке, профилактике и наблюдению за соблюдением субъектами надзора требований законодательства Республики Казахстан с правом применения мер оперативного реагирования в ходе ее осуществления, по результатам котором применяются административные взыскания».

Данные формулировки страдают неполнотой. В частности, к контрольным и надзорным мероприятиям отнесены только проверка, наблюдение и соответствие деятельности проверяемых субъектов требованиям. А в понятии «государственный надзор» называются мероприятия по проверке, профилактике и наблюдению за соблюдением субъектами надзора требований.

Как показывает изучение зарубежного законодательства, требования органов контроля и надзора являются «обязательными». Наш Кодекс оставил только термин «требования», на наш взгляд, данный термин значится как «обязательный». Отсутствие четкого и ясного определения понятия «проверка» в казахстанском законе приводит к существенным проблемам при осуществлении государственного контроля и надзора, ибо не устанавливает границы. По нашему мнению, вся сущность контрольной и надзорной деятельности государства заключается в проведении мероприятий по проверке деятельности субъектов предпринимательства. Закрепление понятия «проверка» способствовало более правильному проведению мероприятий по контролю и надзору [21;80–84].

Анализ современных проблем государственного контроля и надзора в Республике Казахстан свидетельствует о необходимости системных изменений в законодательной и административной практике. Законодательное регулирование, представленное в Предпринимательском кодексе 2015 года и ряде предшествующих актов, таких как Закон РК от 31 января 2006 года № 124–III «О частном предпринимательстве» и Закон РК от 22 декабря 2003 года № 510–II «О государственной правовой статистике и специальных учетах», формирует основу для эффективного взаимодействия между го-

сударственными органами и предпринимателями. Однако сохраняются первостепенные вызовы: избыточность нормативных требований, отсутствие четких определений понятий «контроль» и «надзор», а также недостаточное использование цифровых технологий.

Основные различия между контролем и надзором состоят в целях и методах применения. Контроль охватывает как оценку законности, так и целесообразности действий проверяемых субъектов, включая использование мер административного принуждения. Надзор ограничивается проверкой соответствия деятельности требованиям законодательства. Например, в Казахстане функционирует 116 контролирующих органов и 22 надзирающих, что подчеркивает структурную сложность системы.

Отсутствие единых критериев и четких процедур проведения проверок, таких как профилактический контроль с посещением, приводит к правовой неопределенности, что увеличивает административное давление на предпринимателей и создает риски коррупции. Введение цифровых инструментов для мониторинга и оценки рисков, на основе данных, предоставленных самими субъектами, может повысить прозрачность и эффективность государственного управления.

С научной точки зрения важно интегрировать принципы гласности, равенства, презумпции добросовестности, независимости контролирующих органов, а также обеспечить строгую юридическую регламентацию процедур контроля и надзора. Совершенствование правовой базы и унификация подходов к управлению создадут условия для устойчивого экономического развития и укрепления доверия к государственным институтам.

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Қазақстан Республикасындағы мемлекеттік бақылау мен қадағалауды жүзеге асыру кезінде кәсіпкерлердің құқықтарын қорғауды заңнамалық қамтамасыз етудің өзекті мәселелері

Мақалада кәсіпкерлік саласындағы мемлекеттік бақылау және қадағалау институттарының кейбір өзекті теориялық және практикалық мәселелері келтірілген. Мақсаты кәсіпкерлік қызмет институтының тұрақты даму жағдайын жетілдіру, себебі осыған байланысты заңнамалық актілерде көптеген қайшылықтар туындайды. Ғылыми жұмыстың негізгі мақсаты мемлекеттік бақылау мен қадағалауды іске асыру тұжырымдамасы, олардың белгілері мен қағидаттарының теориялық мәселелері, сондай-ақ аталған салада мемлекеттік органдардың қызметін жүзеге асыру практикасы, осы құқықтық институттың Қазақстан Республикасында және әлемде қолданылуын салыстырмалы-құқықтық талдау. Зерттеу нәтижелері негізінде Қазақстан Республикасының мемлекеттік органдарын пәрменді ынталандыру үшін олардың бақылау және қадағалау функцияларын кешенді жаңғыртуды және цифрландыруды жүзеге асыру талап етілетінін атап өткен жөн. Коммерциялық қызметті құру кезінде кәсіпкерлік тәуекелдерді сәйкестендіру және бағалау рәсімдерінде, сондай-ақ шаруашылық жүргізуші субъектілердің өздері ұсынатын цифрлық деректерге негізделген мониторингтік процестерде инновациялық цифрлық технологияларды қолдану экономикалық саладағы мемлекеттік басқарудың ашықтығы мен нәтижелілік деңгейін едәуір арттыруға мүмкіндік береді. Мақалада кәсіпкерлік қызметті реттеуге баса назар аудара отырып, Қазақстан Республикасындағы мемлекеттік бақылау және қадағалау институттарының өзекті теориялық және практикалық мәселелері қарастырылды. Құқықтық реттеудің кемшіліктері, оның ішінде талаптардың артықтығы, іске асыру тұжырымдамалары мен тетіктерінің нақты анықтамасының болмауы атап өтілді, бұл бизнеске және сыбайлас жемқорлық тәуекелдеріне әкімшілік қысым жасайды. Тәуекелдерді бағалау, бақылау және басқарудың ашықтығын арттыру үшін цифрлық технологияларды енгізу ұсынылады. Жұмыста кәсіпкерлердің құқықтарын қорғауды күшейтуге, заңдылықты нығайтуға және әкімшілік кедергілерді азайтуға мүмкіндік беретін бақылау және қадағалау рәсімдерін реттеудің бірыңғай тәсілдері ұсынылған. Бәсекеге қабілетті экономикалық ортаны және тұрақты мемлекеттік басқаруды қалыптастыру үшін нормативтік-құқықтық базаны жетілдірудің және құқық қолданудың заманауи әдістерін дамытудың маңыздылығы атап өтілген.

Кілт сөздер: мемлекеттік бақылау және қадағалау, кәсіпкерлік қызмет, тексерулер, коммерциялық емес ұйымдар, қаржылық қолдау, заңды бұзу, өндірістік процесс.

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Current issues of legislative support for the protection of the rights of entrepreneurs in the implementation of state control and supervision in the Republic of Kazakhstan

The article presents some current theoretical and practical problems of institutions of state control and supervision in the field of entrepreneurship. The goal is due to the fact that the institute of entrepreneurial activity is in a state of constant development, in connection with which a large number of contradictions arise in legislative acts. The main objectives of the scientific work are theoretical issues of the concept, signs and principles of the implementation of state control and supervision, as well as the practice of carrying out the activities of state bodies in this area, comparative legal analysis of the application of this legal institution in the Republic of Kazakhstan and in the world. Based on the results of the study, it should be stated that in order to effectively stimulate the state bodies of the Republic of Kazakhstan, it is necessary to carry out a comprehensive modernization and digitalization of their control and supervisory functions. The use of innovative digital technologies in the procedures for identifying and assessing entrepreneurial risks in the establishment of commercial activities, as well as in monitoring processes based on digital data provided by business entities themselves, will significantly increase the level of transparency and effectiveness of public administration in the economic sphere. The article examines the current theoretical and practical problems of the institutions of state control and supervision in the Republic of Kazakhstan, with an emphasis on the regulation of entrepreneurial activity. Shortcomings of legal regulation are noted, including redundancy of requirements, lack of a clear definition of concepts and implementation mechanisms, which creates administrative pressure on business and risks of corruption. It is recommended to introduce digital technologies to assess risks, monitor and increase management transparency. The paper proposes unified approaches to the regulation of control and supervision procedures, which will strengthen the protection of the rights of entrepreneurs, strengthen the rule of law and reduce administrative barriers. The importance of improving the regulatory framework and the development of modern methods of law enforcement for the formation of a competitive economic environment and sustainable public administration is emphasized.

Keywords: state control and supervision, business activities, inspections, non-profit organizations, financial support, violation of the law, production process.

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Conflict of interest prevention as a method of fighting corruption

The article discusses the issues of legal regulation of conflict of interest prevention as the most effective way to prevent corruption. The main goal of the scientific article is to develop a set of effective recommendations for preventing conflicts of interest that may arise when entering the civil service and resolving conflicts of interest in the performance of the civil service as a preventive tool for preventing violations of Public Service Ethics and bribery. The methodological basis of the study is such general and individual research methods as the method of dialectics, formal-logical, comparative-legal and control method. As a result of the article, it was established that Kazakhstan's legislation contains only the initial norms for the Prevention of conflicts of interest in the Civil Service and does not form a complete mechanism for conflicts of interest in the public sector. In conclusion, based on the analysis of foreign experience, the effectiveness of the settlement of conflicts of interest in the civil service was proved and the adoption of the law "on conflicts of interest" was proposed. As a novelty of the scientific article, a critical analysis of the legislative coverage and law enforcement practice of preventing conflicts of interest in the civil service with a systematic approach was carried out.

Keywords: interest, conflict, public service, ethics, image of public service, transformation of public service, honesty, integrity.

Introduction

In addition to being one of the anti-corruption action mechanisms, the Institute for the Prevention of Conflict of Interests in Public Service is an important part of raising the public service to a higher level. During the analysis of the conflict of interest issues, we noticed that it reveals its dual nature. On the one hand, it is aimed at preventing corruption; on the other hand, it raises the professional ethics of civil servants and allows them to perform their official duties properly.

In order to maintain integrity in entering, performing and exiting public service, determining the current situation of preventing possible conflicts of interest and preparing effective recommendations, the normative legal basis of the conflict of interest institution is studied and analyzed, its strengths and weaknesses are determined. At the same time, an overview of the international experience of Estonia, Georgia, the Kyrgyz Republic and the OECD countries is made, theoretical researches of domestic and foreign scientists are considered.

It should be noted that due attention has not been paid to conducting research on entering, performing, and exiting public service, maintaining etiquette and integrity, and preventing conflicts of interest. As proof of this, it can be said that there are not enough scientific works of Kazakh and foreign scientists on the conflict of interests. This, in turn, hinders the implementation of a mechanism that includes scientifically based methods and methods of ensuring the effective development of the state system through honest service to the society and the state.

Prevention of conflict of interest is directly related to integrity in entering and performing public service. In this direction, the main conceptual basis for a citizen's ability to resist corruption should be the development and dissemination of the ideology of common sense in society. It is clear that it is necessary to introduce new standards and new models of corruption-free life into social relations by changing the basic concept of life or human thinking. There are quite a few scientific researches of Kazakh scientists on the formation and development of the ideology of integrity in society, on maintaining loyalty to public service, action against money laundering and on conflict of interests.

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In general, we noticed that almost all Kazakhstani scientists focused on explaining the problem of conflict of interest in public service, its avoidance and prevention, as well as on the practice of law enforcement. That is why, in our research, we believe it is necessary to make a comprehensive search for the prevention, avoidance and regulation of conflicts of interest in public service.

Materials and methods

The aim of the research work was to consider the effective legislative changes to prevent it, proving the possibility of the conflict of interests arising in holding public office and leading to corruption, as well as bribery. To achieve this purpose, the following tasks were set: 1) the impact of prevention of conflicts of interest in public service on the spread of the ideology of common sense in the public sector; 2) study of the practice of preventing conflicts of interest in the Republic of Kazakhstan; 3) identification of effective methods of prevention of conflicts of interest in the public sector in foreign practice; 4) development of legislative recommendations for the prevention of conflicts of interest that can be used in national legislation.

In the analysis of the quantitative and qualitative indicators of the research, policy analysis, cost-benefit analysis, stakeholder analysis, scenario forecasting, comparative-legal analysis, SWOT analysis, case study, existing government functional and systematic analysis of programs, plans and normative acts are carried out.

The content analysis was carried out to the texts of the concept of the anti-corruption policy of the Republic of Kazakhstan for 2022–2026, the concept of the new model of the public service of the Republic of Kazakhstan, the concept of the development of public administration in the Republic of Kazakhstan until 2030, and the Constitution of the Republic of Kazakhstan, the law on public service related to the prevention of conflicts of interest in public service, the norms of the anti-corruption law, as well as the existing normative legal acts of foreign countries, theoretical works of domestic and foreign scientists. In order to identify shortcomings in the practice of preventing conflicts of interest in the public service, monitoring of employment and performance of the public service (observation method) was executed.

Unfortunately, the absence of a conflict of interest prevention mechanism leads to real corruption and the ability to measure the resulting costs is limited. We believe that such a limitation is due to the fact that the state does not pay attention to the prevention of conflicts of interest in public service and, as a result, does not register relevant research (facts).

Results

It is well known that one of the situations that pose a threat to our country's state and national security is corruption. Corruption reduces the efficiency of public administration and diminishes the country’s image attractiveness, thereby hindering the political, social, and economic development of the state. It is also important to note that the forms of corrupt activities change and evolve every year. Modern forms of corruption include lobbying for private interests, network-based corruption, embezzlement of budget funds through nepotism, and securing high-level government positions through favoritism.

Domestic scientists B.Zh. Aitimov, Ye.Sh. Dusipov and D.N. Bekezhanov in their work entitled “Legal Instruments for Building Integrity”, gives an overview of the Kazakh legislation on the formation of integrity, connecting the need for forming integrity with the strengthening of the fight against corruption in society [1; 111]. If we look at the scientific work, the legal basis for the formation of integrity in the country is generally formed, but it offers several ways of its implementation. Among them, we think that some opinions related to the formation of the ideology of integrity in the society and its development in the public service can be used to increase the effectiveness of the prevention of conflicts of interest in the public service.

The mentioned authors consider corruption as a major threat to both state and national security, arguing that it not only reduces the efficiency of public administration but also destroys the country's image attractiveness, thus hindering the overall political and economic development of the state. They also note that, in line with the development of science and technology, forms of corrupt activities evolve, highlighting new types such as lobbying for private interests, bribery networks, and fraudulent appropriation of budget funds. Furthermore, they argue that the methods of combating corruption must change conceptually, emphasizing that the foundation of such a concept should be the formation and development of an ideology of integrity within society. By altering the core principles of human thought or life, they propose introducing new life standards into social relations, promoting a model of a corruption-free life. Introducing the term “society of integrity” into the realm of social sciences, they believe that such a society would establish zero tolerance for

corrupt actions. This would become an internal conviction for each citizen, forming the basis of their thinking and influencing their behavior and lifestyle.

Analyzing the legislative foundations for the development of the ideology of integrity in our country, the authors conclude that the most effective tool for preventing corruption in society and public service is the ideology of integrity. They also outline several directions for further developing this ideology within society. These directions include researching and developing the conceptual foundations of the ideology of integrity, enhancing citizens' legal knowledge, and fostering the understanding and principles of integrity through the family institution.

The works of Professor S.S. Moldabaev on the problems of conflict of interests and formation of integrity in public service can be especially noted. In his first works on conflict of interest, S.S. Moldabaev focused on the concept of "conflict of interests" and the problems in public service when it arises [2; 78–84]. He mentioned corruption, including bribery using kinship, nepotism, and familiarity, as the main problem caused by failure to prevent conflicts of interest.

In his work, professor S.S. Moldabaev focused on the development of the conflict of interests in the law enforcement system, and as a result, he focused on the decrease in judicial justice in the country [3; 2–7]. At the same time, we believe that Professor Moldabaev's theoretical views on the importance of fostering integrity in public service and the role of conflict of interest prevention in its development are worth noting. In this work, Moldabaev states that conflicts of interest are not always directly tied to the employee's material or other personal interests; however, it is clear that such personal interests often become the cause of abuse of authority or even crimes. He points out that conflicts of interest frequently arise due to institutional deficiencies within organizations and the lack of mechanisms to prevent and mitigate the negative consequences of using official powers and opportunities for personal gain. Furthermore, this institutional deficiency leads to manifestations of corruption. Moldabaev concludes that the rapidly changing nature of conflicts and conflicting situations further underscores the relevance of this topic.

In his research, M.D. Nauryzbek examines the policy of receiving gifts as one of the special conditions affecting the emergence of conflicts of interest in public service, and proves that legal prohibition still does not lead to the reduction of giving gifts to the policy of zero gifts. And he expressed his opinions only in this direction [4; 279–285]. In his work, the author analyzes two approaches to the policy of giving and receiving gifts in public service, demonstrating that each has its advantages. The first approach, the zero-gift policy, is presented as a method that fully eliminates the risk of unlawful gifts influencing the decisions of public officials. However, the author also notes that this approach places full control over the official's freedom of action, thereby restricting their autonomy. The second approach, the gift-limitation policy, is characterized as more democratic, allowing public officials greater freedom in decision-making. The author discusses both the advantages and the drawbacks of this policy. In our view, banning gifts or establishing a gift policy is only one means of preventing conflicts of interest in public service and should not be limited to consideration.

Candidate of Law Science, associate professor Zh.U. Tlembaeva conducted a high-level analysis of legislation and law enforcement practice until 2018 [5; 42–48]. In this article, the author notes that in 2017, Kazakhstan ranked 122nd in the Corruption Perceptions Index, improving its score by 2 points to receive a total of 31 points. Author also mentions that this figure is the highest achievement since 2019. According to experts, the prerequisite for attaining positive indicators in the ranking was the implementation of the National Plan and the Anti-Corruption Strategy. According to these documents, Kazakhstan set purposes to improve access to information, enhance the transparency and accountability of government agencies, and refine the process of providing public services. The author believes that such changes were indeed implemented in practice, increasing citizens' trust in government bodies and enabling the effective execution of large-scale national projects. In this article, Zh. Tlembaeva focuses on important documents in the formation of anti-corruption policy, proving that they have served as a fundamental basis for combating corruption. Author mentions documents such as the Presidential decree of the Republic of Kazakhstan dated March 17, 1992, "On Measures to strengthen the fight against organized crime and corruption" the "Kazakhstan — 2050" strategy, the Anti-Corruption Strategy for 2015–2025, and the National Security Strategy of the Republic of Kazakhstan. It should be noted that most of these documents have now lost their force. In accordance with the "100 Concrete Steps" National Plan, she points out that anti-corruption efforts are currently being updated, with the main focus directed as much as possible toward preventing manifestations of corruption. Author emphasizes that due to the formation of a new approach to the phenomenon of corruption, the state's fight against it has begun to be implemented by methods not associated with punishing citizens as before. Com-

prehensive preventive measures such as anti-corruption monitoring, analysis of corruption risks, and the formation of an anti-corruption culture are being considered. Analyzing the concept of "conflict of interests" provided in the Law of the Republic of Kazakhstan "On Anti-Corruption activities" the author indicates that it does not disclose the concept of "personal interest". Here, Zh. Tlembaeva highlights the advantageous aspects of the definition of "conflict of interests" provided in Russian legislation. The significance of the author's work lies in author's consideration of the experience of countries like Norway, Australia, New Zealand, Spain, Italy, the USA and Canada in preventing conflicts of interests after leaving public service. Considering foreign experience, author proposes revealing the procedural aspects to enhance the effectiveness of norms related to the identification and management of "conflict of interests" provided in the Law of the Republic of Kazakhstan "On Anti-Corruption Activities". In this regard, she approves adopting the Russian experience, which obliges each agency to establish a commission related to ensuring that civil servants comply with the requirements of official conduct.

Zh. Tlembaeva contends that conflicts of interest frequently arise not only in public service but also in civil and entrepreneurial sectors. However, she points out that the concept of "conflict of interest" is entirely undefined in the Entrepreneurial code of the Republic of Kazakhstan. To resolve this issue, author deems it necessary to define the concept of conflict of interest according to the specific field of application. However, we believe that the mentioned article does not provide an overview of the normative legal coverage and practice of preventing conflicts of interest in the civil service of the Republic of Kazakhstan. There are no legislative and law-enforcement recommendations regarding the improvement of practice and the formation of mechanisms.

The intensity of the globalization process creates new types of threats to the statehood of Kazakhstan. Corruption is and remains the main threat to state and national security. This reduces the efficiency of state administration, the attractiveness of the image of the country, and thereby inhibits the political and socio-economic development of the state as a whole. In turn, the forms of corruption are changing, such as lobbying, network corruption, and theft of budget funds by deception, etc. New forms of hidden harm are emerging. This can be evidenced by the study of the World Bank on the "Worldwide Governance Indicators, WGI", where Kazakhstan achieved 39.5 % on the "Control of Corruption" indicator. In 2019, this indicator was high and made 43.8 % [6].

In his speech at the inauguration ceremony on November 26, 2022, the President of the Republic of Kazakhstan K. Tokayev said that "every civil servant should do his job honestly" [7]. We believe that this statement says about understanding at the state level that the main force in the prevention of corruption in public service is human values, including honesty. At the same time, in the "National Plan — 100 concrete steps" program adopted at the state level, the main priority is given to the introduction of ethics rules in accordance with the times, the reason for which is that public service is a special trust given by the society and the state [8]. Also, it can be understood that the main meaning of the principle of "the state that listens to the voice of the people" formed in the "Concept of the Development of Public Administration in the Republic of Kazakhstan until 2030" is that a citizen should put the interests of society and the state above their personal interests in public service [9]. In the code of ethics of civil servants adopted in 2022, stating that "Civil service obliges to show loyalty to public interests", "Civil servants are required to follow public policy in their work and consistently implement it, to maintain public trust in public service, the state and its institutions and should seek to strengthen" [10].

If we summarize the above, the public service is a "burden of trust" placed on behalf of the society and the state to the citizen, while performing it, the citizen is required to adhere to high moral values and professional ethics standards. Despite the fact that the development of honesty in entering and performing public service, as well as in leaving public service, is often included in the above-mentioned normative acts and state programs, increasing the reputation of public servants and the positive image of public service, thereby increasing the level of public trust in public service and reforms carried out by state bodies has not lost relevance today. There is a reason for this, the ethical standards and honesty requirements of the citizens in the recruitment of officials have not yet been formed in our country. According to the report prepared jointly by the Agency for Public Service Affairs of the Republic of Kazakhstan and the United Nations Development Program (UNDP), it can be seen that the trust in government structures is decreasing due to the fact that they do not declare about their possible conflict of interest when entering the public service, and the frequent exposure to the conflict of interest in official promotion [11].

First of all, let us focus on the consideration of conflict of interests in international legal documents. There are many definitions of the term "conflict of interests" in recent literature. Having sorted out all the

definitions, we notice that the position is based on a conflict between the official duty and personal interests of the official, where the personal interest of the official may affect the responsible performance of his official duties to a certain extent and lead to damage of the state (public) interest. Such a definition is given in OECD studies [12]. And we think that this definition is a common definition given to "conflict of interest", which allows not confusing the conflict of interest with real manifestations of corruption and other unethical behavior.

Article 7, paragraph 4 of the United Nations Convention against Corruption provides that, each participating state shall, in accordance with the fundamental principles of its domestic legislation, strive to establish, maintain and strengthen systems that promote transparency and prevent conflicts of interest [13]. Therefore, our state has taken the necessary obligations to develop the necessary mechanisms to prevent conflicts of interest, as well as to ensure that the processes of entering and advancing in public service are transparent.

Next, let us look at the foreign practice of preventing conflicts of interest. According to the UK Ministerial Code, Ministers must ensure that no conflict arises or is reasonably likely to arise between their official duties and their personal, financial or other interests. To clarify this, they must submit 2 conflict of interest declarations for publication each year [14].

The French Act on transparency in public life (Act. No. 2013-907 TR transparency in public life) establishes its own regulations to prevent problems of conflict of interest. Article 2 of the Act provides the following definition: conflict of interest — any situation that leads to a conflict of public interests and personal interests may undermine the independent, impartial and fair performance of a certain state function [15].

In Estonia, there are two main documents that guarantee the integrity of citizens who perform public service: 1) Law on "Public Information". According to it, every citizen entering the public service must publish the necessary information; 2) Anti-corruption law. The law establishes rules on procedures for preventing and limiting undue influence on officials [16]. All information on the prevention of corruption and conflicts of interest in Estonia is published on the website of the Ministry of Justice. On this website, any citizen has the opportunity to see information on current work, guidelines on conflict of interest prevention, declaration of interests, survey results, statistical materials and strategies [17].

In order to prevent conflicts of interest, the State of Latvia adopted the Law "On the Prevention of Conflicts of Interest in the Service of Civil Servants" [18]. According to it, as the main mechanism of prevention of conflicts of interests of civil servants, they are obliged to make a "declaration of conflicts of interests". After making the declaration, the Bureau for the Prevention and Combating of Corruption (KNAB) checks the compliance and non-compliance of the officials with the accepted restrictions. This is done by analyzing the decisions made by the officials. The State Revenue Service and KNAB publish on their websites the decisions taken and the administrative measures taken, such as verbal warnings and fines ranging from 10 to 350 euros.

The purpose of the Law "On Conflict of Interest" adopted in the Kyrgyz Republic is to unify and improve legislation on conflict of interest, as well as to introduce mechanisms for timely detection, prevention and regulation of conflict of interest [19]. According to the law, a citizen submits declarations about their personal interests when taking a new position, according to which, the presence of kinship with the employer, as well as with his subordinates, is investigated, and if there is a conflict of interest, they report it. As mechanisms for regulating the conflict of interests, there are such types as exclusion of an official from the performance of the position, elimination of personal interests, restriction of access to information of persons who may have a conflict of interests, refusal of persons to make a certain decision, revision or change of official duties. Legal consequences arise in the event of a conflict of interest.

One of the most important practices in the prevention of conflicts of interest in the public service of our country is the experience of Moldova. Accordingly, the state of Moldova adopted the law "On declaration of property and personal interests" [20]. According to the law, in addition to the category of relatives in the above countries, the conflict of interest also includes a person who lived together in the previous tax year (cohabitant). That is, the subject who must submit the declaration, the person who lived with their in the previous year must also be indicated in the declaration.

Conflict of interest resolution mechanisms are being developed in Canada. For example, in Canada's "Public Service Values and Code of Ethics", the main measure to avoid conflicts of interest is mandatory filling of a confidential report by public servants. The public servant's report shall include information on income and property, receiving gifts and services, information on their jobs, and any other factors that may contribute to a conflict of interest. If there is a clear conflict between personal interests and official duties,

then the public servant may be obliged to give up certain activities that contribute to the conflict of interests, as well as to sell or transfer to trust the property whose ownership causes a conflict.

Discussion

The Law of the Republic of Kazakhstan “On Combating Corruption” [21] does not consider the concept of conflict of interest at all. The laws on public service of the Republic of Kazakhstan and the laws of the Republic of Kazakhstan on anti-corruption, adopted in 2015, include provisions on conflict of interests. According to it, it is considered that “conflict of interest is a conflict between the personal interests of persons holding a responsible state position, persons authorized to perform state functions, persons equal to them, officials and their official powers, in such a case, the personal interests of the said persons prevent them from performing their official duties and (or) accordingly may lead to non-fulfillment”. In accordance with Article 15 of the Law on Anti-Corruption of the Republic of Kazakhstan, in case of conflict of interest, the above-mentioned persons shall: a) take measures to prevent and regulate the conflict of interest; b) must notify their immediate superior or the management of the organization where he works in writing about the conflict of interest that has arisen or may arise, at the time of their awareness.

The immediate head or the head of the organization must take measures to prevent conflicts of interest at the written request of the official in a timely manner. Such measures are similar to the measures provided for by the law of the Kyrgyz Republic, i.e. exemption from performance of official duties, change of official duties and taking other measures.

There are no other regulatory provisions on conflict of interest regulation. Neither administrative responsibility nor criminal liability is provided for actions or inaction in the event of a conflict of interest, failure to take measures to prevent and regulate the conflict of interest, as well as failure to notify about the conflict of interest that has occurred or a situation that may arise. Article 680 of the Code of the Republic of Kazakhstan [22] on administrative offenses provides for the responsibility of the heads of state bodies for failure to take anti-corruption measures. However, according to this norm, responsibility for failure to take measures is considered only for subordinate guilty persons who have committed the crime of corruption. In the event of a conflict of interest prior to the occurrence of corruption, it is not possible to bring responsibility under the provisions of article 680 of the Code of Administrative Offenses of the Republic of Kazakhstan [22] for non-responsibility for actions or inactions.

Disciplinary action is the only form of liability for failure to fulfill obligations to prevent or manage conflicts of interest. According to, article 51 of the Law on Public Service of the Republic of Kazakhstan [23], a public servant, their immediate superior or the head of a state body shall be subject to disciplinary punishment for failure to take measures to prevent and regulate conflict of interests known to them. It is known that one of the most important measures to prevent corruption is the management and prevention of conflicts of interest. It is well known that one of the most effective measures in preventing corruption is the management and avoidance of conflicts of interest. However, it is evident that a concrete practice for preventing conflicts of interest in Kazakhstan has not yet been established. Firstly, according to research, there is a lack of statistical data. Secondly, the identification of close relatives, in-laws, or personal interests that may give rise to a conflict of interest is determined by the civil servant themselves. In other words, such information is not disclosed in advance. Therefore, the ethical and moral character of the civil servant plays a significant role. We believe that a civil servant's adherence to integrity depends on the level of their moral qualities. The absence of effective responsibility for the violation of the requirements related to the prevention of conflict of interest and its avoidance is a noteworthy situation. We believe that at least administrative liability should be considered, which can be applied by the appropriate law enforcement agencies. Because Article 680 of the code of Administrative offenses of the Republic of Kazakhstan stipulates that heads of state bodies are held administratively liable only for failing to eliminate corruption offenses, for not taking measures against culpable individuals, or for taking measures in violation of the law. As we can observe, there is no provision for liability related to the prevention of corruption in this context. Therefore, we understand that the leaders within the public service themselves are not interested in preventing corruption but rather focus on combating it only after it has occurred.

Various activities are being carried out with the competent body, the Agency of Public Service Affairs of the Republic of Kazakhstan (Astana, Kazakhstan), to explain and inform about the prevention of conflict of interests. It should be noted that the Agency, in cooperation with the UN Development Program, has developed a methodological guide containing typical cases of conflict of interest prevention and avoidance. And on the basis of the methodological manual, the Agency of Public Service Affairs of the Republic of

Kazakhstan and its territorial departments conduct trainings and seminars on a regular basis. However, its effectiveness is not evaluated today. There are those who have joined the service and give up their service, and at the same time, there are those who are serving together with their family in the same service.

Also in the scientific literature there are various opinions related to the concept of conflict of interest and its prevention, regulation in case of occurrence.

In his book "Defining Political Corruption", M. Philp argues that public officials inevitably have multiple interests. These interests are connected with various aspects of their personal life, as well as with public interests that they have to fulfill according to their official duties. The concept of "conflict of interest" indicates that some of these interests represent the risk of conflict by distorting the decisions they make or the way they perform their official duties [24, 436–462].

According to some researchers, such as D. Amodio, E. Harmon Jones, and P. Devine, the difficulty in identifying conflicts of interest is that only the official himself knows about the potential conflict of interest, which leads to the problem of asymmetric information. Therefore, in order to successfully solve this problem, officials should recognize the conflicts and try to protect their decisions from undue influence [25, 738–753]. Agreeing with the views of the authors, we would say that not everyone understands that public servants recognize their interests and protect themselves.

Researchers have discovered that people's self-interests change their perception of reality and the phenomenon of "justified reasoning" in which people can justify corrupt behavior to themselves and others [26, 65–83]. In public service, these risks can be acute due to a number of situational influences, and officials often face acute ethical dilemmas. The ambiguity and subtlety of many conflict-of-interest situations can mean that officials justify potential breaches of integrity by characterizing problems in a certain way or emphasizing a lack of clarity about what action to take. Ambiguity thus serves as a "cover" for people who do questionable things.

After summarizing the theoretical considerations, it can be noted that the state-level mechanisms are not considered in the works of foreign and Kazakh scientists related to the prevention, avoidance and regulation of conflict of interests.

Studying the consideration of conflicts of interest in international legal documents, it can be said that the main principles related to the prevention, avoidance and regulation of conflicts of interests have been formed for the states that follow the anti-corruption policy. However, considering the national legislation of individual states, that personalized the main principle of the United Nations Anti-Corruption Convention, which is that "Each participating state shall seek to create, support and strengthen systems that promote transparency and prevent conflicts of interest, in accordance with the basic principles of its domestic legislation", there were found different concepts. The legislation of the post-Soviet countries recognizes only public servants, often high-ranking officials, as subjects of "conflict of interest". In European countries such as Great Britain, France and Canada, the force of conflict of interest legislation applies to all citizens who enter, hold and leave public service. That is, any person involved in the state budget in the public sector (state and quasi-state) should submit relevant documents (declaration, secret report) and be checked. It is clear that the use of such an effective practice in Kazakhstan will bear its own fruit.

The legislation of Kazakhstan contains a sufficient number of effective norms of prevention, avoidance and regulation of conflicts of interest in public service. Article 50 of the Law on Public Service of the Republic of Kazakhstan contains a number of norms that are recognized as situations that cause conflicts of interest. As such cases, being an official, interfering in the activities of other state bodies, organizations (here we should understand quasi-state bodies, any subject of entrepreneurship), solving problems related to satisfying the material interests of one's own official powers (close relatives, relatives), preparing decisions and unlawful support to individuals or legal entities during reception, etc. can be said. In the course of the analysis, Article 50 covers almost all the situations in which conflicts of interest arise. However, in the report of the 4th round of monitoring in accordance with the Istanbul Action Plan on Combating Corruption, such situations were found to be insufficient. Conducting contextual analysis and SWOT-analysis of situations made it possible to determine the strengths and weaknesses of Kazakhstani experience. We would say that as a strong point of our country's experience in preventing, avoiding and regulating conflicts of interests, the situations that may cause conflicts of interests are almost completely provided for in the legislation. However, as a weakness, the mechanisms for ensuring the fulfillment of obligations on the prevention, avoidance and regulation of conflicts of interest have not been formed. As a proof of this, in case of conflicts of interests, resignation from one's position, temporary suspension from the position and revision of official duties rarely occur in practice [27]. We believe that it is possible to implement by analyzing the experiences of the

states of Estonia, Georgia, Moldova and the Kyrgyz Republic related to the prevention, avoidance and regulation of conflict of interest mechanisms in public service and ensuring that officials fulfill their obligations.

At the same time, it can be seen that the lack of necessary theoretical ideas in the science of domestic public service has a negative effect on solving the above problems. Researches of domestic scientists on the conflict of interests are conducted in various directions of this issue. If one scientist studies the prevention, avoidance and regulation of conflict of interests as the main means of forming the ideology of integrity, the next one emphasizes its concept and issues of conflict of interests in the spheres of law enforcement and judicial system.

As a result of the analysis of foreign theoretical ideas, it was revealed that the conflict of interests is being studied from the point of view of legal psychology and ethical sciences. That is, in the research of foreign scientists, the identification of conflict of interests is connected only with the personal characteristics of a person. And it proves that this is a trend in public service. However, in the works of foreign scientists, we can say that there is almost no practical side, offering specific mechanisms related to the prevention of conflict of interests.

In this work, the author explores the experience of foreign countries in public service, highlighting that one of the most effective tools for preventing conflicts of interest is the establishment of a value system within public service. In China, the requirements for serving the people and adhering to laws and regulations are defined by the “Eight Virtues of Integrity and Honor” a formal value system developed by former General Secretary Hu Jintao. This set of moral principles emerged in response to two opposing forces: ongoing reforms and the growing divide and corruption among officials. The Chinese official value system includes principles such as:

– Love the homeland; do not harm it;
– Serve the people; do not betray them;
– Focus on science; do not be ignorant;
– Be diligent; do not be lazy;
– Be kind; help others; do not enrich yourself at their expense;
– Be honest and maintain integrity; do not stray from your principles for profit;
– Follow the law and maintain order; avoid chaos and illegality;
– Live simply; work hard; avoid excess and indulgence.

Despite China’s strict laws, these values have become an integral part of the Chinese way of life, as evidenced by the effectiveness of the ongoing reforms.

In Mongolia, the development of public service involves not only the creation of legal frameworks but also the cultivation of high moral principles among public servants. Serving the Mongolian people and state is considered a civic duty that surpasses personal interests.

In Singapore, the core principles of public service are oriented towards ensuring the country's independence, sovereign authority, security, and prosperity. These principles include incorruptibility, meritocracy, self-respect, and maintaining a high standard of living. This value system is enshrined in Singapore’s “Public Service for the 21st Century” program.

In the United Kingdom, the Civil Service Code is based on the principles of integrity, honesty, objectivity, and impartiality. Public servants are expected to carry out their duties with selflessness, integrity, accountability, and transparency. The seven principles of public service in the UK mirror those found in other nations and are as follows:

1. Selflessness — refraining from actions that provide material or financial benefits to oneself, family, or others, and acting solely in the public interest;
2. Integrity — avoiding any financial or other dependency on external individuals or organizations that could influence official duties;
3. Objectivity — making decisions impartially;
4. Accountability — being responsible for decisions and actions, ensuring they are open to public scrutiny and transparency;
5. Transparency — providing as much information as possible about public decisions and actions;
6. Honesty — disclosing personal interests that may conflict with public duties and taking all measures to resolve potential conflicts in favor of the public.

In combating corruption in the public sector, the importance of criminal law cannot be overstated. The Criminal Code of Kazakhstan includes provisions for bribery, mediation, and the misuse of office. However,

despite these laws, the number of registered criminal cases involving corruption continues to rise. In 2022, 1,588 corruption-related criminal cases were registered, a 12 % increase compared to 2021. An analysis of the prosecuted cases reveals that those involved in corruption often violate their own moral principles. In many cases concerning bribery, officials demanded financial compensation directly for performing their official duties [28]. This indicates a lack of moral values among public servants, as they prioritize personal gain over patriotism, public welfare, and their duty to the state. Therefore, we believe that one of the primary tasks is to establish and foster a system of life values for our citizens and public servants.

Conclusion

The regulation of conflicts of interest as an anti-corruption mechanism has been widely adopted internationally. However, in the Republic of Kazakhstan, both the conceptual understanding of conflicts of interest and the development of effective policies for managing them within the public service are still lacking. This inadequacy often leads to negative consequences arising from conflicts of interest in Kazakhstan's public sector. Firstly, violations of legally mandated restrictions and prohibitions by public officials, along with conflicts between their personal interests and official duties, create potential risks for the commission of corrupt offenses. Secondly, permitting conflicts of interest undermines the established order of public administration when legal mechanisms for exercising state power are supplanted by extralegal means — specifically, material or other personal benefits for the public servant or individuals connected to them through shared interests. Thirdly, if a conflict of interest remains unresolved, a public servant or associated individuals gain unjust advantages over other citizens and legal entities that operate within the law, as well as over other public servants who do not exploit their official powers for personal gain. However, the prevalence of conflict-of-interest situations is largely attributed not only to imperfections in public service legislation but also to weak practices in its implementation within agencies for various reasons.

In the course of the study, public servants put their personal interests above the interests of society and the state, which leads to the violation of public service ethics. Any public servant who uses their official authority to satisfy their personal or relative's financial situation or to enter and advance in public service may not commit corruption at first. However, it may lead to a situation where the morale of the official will decrease and it will lead to a situation that will influence the appearance of bribery by abuse of authority in the future. That is, the analysis identifies and declares the conflict of interests in the citizen's entry into public service, its performance and professional advancement, based on their high moral and ethical values. Accordingly, if the prevention and avoidance of conflicts of interests contribute to the formation of the ideology of rationality, the prevention and avoidance of conflicts of interests and the regulation of them also play a key role in the citizen's rationality.

Studying the experience of conflict of interest prevention, the Kazakh practice lacks mechanisms to ensure the transparency of conflict of interest in comparison with the countries of Moldova, Latvia, and Estonia. It is still time to fully study such advanced practices and introduce not only their theoretical aspects, but also their actual procedural aspects into the experience of our country.

As mentioned above, integrity in the public sector, specifically the open declaration of potential conflicts of interest when entering public service has become one of the most crucial components today. We believe that integrity begins from the very moment a person seeks to enter public service. Every citizen applying for public office should disclose any information that could create a conflict between their personal and public interests. By doing so, they eliminate the potential for violations of ethical norms in the public service through sensitive issues like nepotism, regionalism, and favoritism, as well as preventing the emergence of modern forms of corruption, such as nepotism, lobbying, and oligarchy. At this point, reevaluating, assessing, and analyzing the ethical, legal, and organizational aspects of public service is a pressing issue that requires immediate attention.

Analyzing the Kazakhstan practice of preventing conflict of interest in public service, it is almost completely covered by legislation, however, declaring a conflict of interest, removing an official from office to prevent it, etc. there is a lack of specific experimental mechanisms. At the same time, it is necessary to clarify the purpose of responsibility for failure to fulfill or inadequately fulfill obligations in the prevention of conflicts of interest.

In conclusion, the following legislative recommendations to ensure the prevention of conflicts of interest in public service were formed:

1. It is necessary to adopt the Law on “Conflict of Interest”, which includes the main principles, mechanisms and subjects of the prevention of conflicts of interest in public service, as well as in the quasi-state sec-

tor. For this purpose, it is necessary to study the norms of the law of the same name of Moldova, Latvia, Kyrgyz Republic and gain its positive experience. There are valid reasons to believe that a special law should be adopted. Situations requiring an official to voluntarily recuse themselves in the event of a conflict of interest are stipulated in Article 67 of the Administrative Procedural Code of the Republic of Kazakhstan. However, the mechanism for implementing this procedure in practice is entirely undeveloped. For example, when a conflict of interest arises: In what form should a civil servant's notification of self-recusal be made? Where should it be registered? If the official themselves conceal the conflict of interest, how is its detection carried out? These issues have not been specified.

- Within the framework of the proposed "Conflict of Interest" law, a citizen entering the public service must declare in advance the circumstances in which they may have a conflict of interest. And in the case of cases of concealment, the considered measures should be tightened;

- the law should include procedures for controlling the decision-making processes of public officials. And in order to simplify such processes, we recommend solving it with digitalization methods.

2. It is necessary to widely promote the ideology of integrity in society.

- in order to get rid of such concepts as "easily solving problems through corrupt actions", "combining friendly relations to solve cases", "protectionism at work" firmly established in the public consciousness, it is necessary to develop the conceptual foundations of integrity within the framework of the "Spiritual Revival" public consciousness renewal program;

- the value system of public service should be adopted based on national programs, with continuous efforts to develop and strengthen it. Moreover, such reforms should be accompanied by various educational initiatives aimed at shaping the spiritual value system not only among public servants but also among citizens;

- carrying out large-scale educational work on informing citizens about their rights, which protects them from seeking illegal ways to solve everyday problems.

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Мүдделер қақтығысының алдын алу сыбайлас жемқорлықпен күрестің тәсілі ретінде

Мақалада сыбайлас жемқорлықтың алдын алудың ең тиімді тәсілі ретінде мүдделер қақтығысын болдырмаудың құқықтық реттеу мәселелері қарастырылған. Ғылыми мақаланың басты мақсаты мемлекеттік қызмет әдебін бұзу мен парақорлықты болдырмаудың превентивті құралы ретінде мемлекеттік қызметке орналасуда туындауы мүмкін мүдделер қақтығысының алдын алу мен мемлекеттік қызметті атқаруда туындаған мүдделер қақтығысын реттеудің тиімді ұсынымдар кешенін әзірлеу. Сыбайлас жемқорлыққа қарсы саясат аясында жасалатын іс-шаралар орын алған құқық бұзушылықтардың салдарымен емес, мұндай құбылыстың себептерінің алдын алуға бағытталуы тиіс. Осыған байланысты, мемлекеттік қызметке орналасу мен оны атқаруда мүдделер қақтығысының алдын алудың механизмдерін қалыптастырудың тиімділігі артып келетінін байқаймыз. Зерттеудің әдіснамалық негізін диалектика әдісі, формальды-логикалық, салыстырмалы-құқықтық, бақылау әдісі сияқты жалпы және жеке зерттеу әдістері құрайды. Мемлекеттік қызмет пен жалпы мемлекеттік сектордағы жұмысқа орналасу мен қызмет атқарудың дамуын зерттеуде диалектика әдістері пайдаланылса, заңнамалық нормаларды талдауда формальды-логикалық, шетелдік заңнамалармен салыстыруда салыстырмалы-құқықтық әдістер, сондай-ақ тәжірибені зерттеуде бақылау әдісі қолданылған. Мақаланың нәтижесі ретінде қазақстандық заңнамада мемлекеттік қызметтегі мүдделер қақтығысының алдын алудың тек бастапқы нормалары бар екендігі және мемлекеттік сектордағы мүдделер қақтығысының толық механизмі қалыптаспағаны анықталды. Қорытындысында шетелдік тәжірибелерді талдау негізінде мемлекеттік қызметтегі мүдделер қақтығысын реттеудің тиімділігі дәлелденіп, «Мүдделер қақтығысы туралы» заң қабылдау ұсынылды. Мақаланың жаңалығы ретінде жүйелі тәсілмен мемлекеттік қызметтегі мүдделер қақтығысының алдын алудың заңнамада қамтылуы мен құқық қолдану тәжірибесіне сыни талдау жасалды.

Кілт сөздер: мүдде, қақтығыс, мемлекеттік қызмет, әдеп, мемлекеттік қызметтің имиджі, мемлекеттік қызметті трансформациялау, адалдық, парасаттылық.

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Предотвращение конфликта интересов как один из методов борьбы с коррупцией

В статье рассмотрено правовое регулирование предотвращения конфликта интересов на государственной службе как один из эффективных методов предупреждения коррупции. Целью статьи является разработка комплекса эффективных рекомендаций по предупреждению и урегулированию конфликта интересов, возникающих при поступлении на государственную службу, и при прохождении государственной службы, как превентивного средства предотвращения взяточничества. Методологическую основу исследования составляют такие методы, как метод диалектики, формально-логический, сравнительно-правовой и метод наблюдения. При исследовании развития государственной службы, а также устройства на государственную службу и в период его прохождения был использован метод диалектики. Сделан анализ законодательных норм, регулирующих конфликт интересов, с помощью формально-логического метода. Осуществлен сравнительно-правовой анализ по вопросам урегулирования конфликта интересов. Также при исследовании практики регулирования конфликта интересов на государственной службе использован метод наблюдения. В результате исследования был установлено, что казахстанское законодательство содержит лишь начальные нормы по вопросам предотвращения конфликта интересов на государственной службе и еще не сформирован целостный механизм урегулирования конфликта в государственном секторе в целом. На основе сравнительно-правового анализа зарубежного опыта авторы статьи приходят к выводу, что регулирование конфликта интересов является эффективным методом борьбы с коррупцией, и было предложено принятие Закона РК «О конфликте интересов». Научная новизна статьи заключается в том, что был проведен критический анализ законодательного обеспечения и правоприменительной практики предотвращения конфликта интересов на государственной службе с применением системного подхода.

Ключевые слова: интерес, конфликт, государственная служба, этика, имидж государственной службы, трансформация государственной службы, честность, добропорядочность.

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Peculiarities of subordinate lawmaking in the conditions of digitalization

The problematics of this paper is determined by the increasing role of informatization and digital technologies in the modern legal process. The relevance of the topic under consideration is explained by the insufficient study of legal aspects of informatization and digital technologies in both domestic and international jurisprudence. Digital technologies have deeply entered the everyday life of our society. Digital technologies have greatly simplified and diversified forms of human activity. Lawmaking is no exception. The purpose of this paper is to identify the features and opportunities of information and digital technologies at different stages of the law-making process. The methods of formal logic and SWOT-analysis are used as the main methodological tools. Subordinate lawmaking differs significantly from lawmaking, as it includes more legal and organizational-legal actions carried out with the use of digital technologies. The main purpose of the article is to analyze the peculiarities of subordinate lawmaking in the conditions of digitalization, as well as to study the impact of digital technologies on the improvement of this process. The paper substantiates the necessity of normative formalization of the order of application of digital technologies in lawmaking activities. The novelty of the proposed approaches lies in the systematic study of strengths and weaknesses, as well as the potential of the use of digital technologies in lawmaking, and the analysis of possible threats to the security of institutions of law-making, subordinate lawmaking, legal regulation and law enforcement activity in the context of a new mechanism of lawmaking, corresponding to the modern needs of legal regulation of Kazakhstan.

Keywords: lawmaking, normative legal act, law, mechanism of lawmaking, “electronic government”, “electronic akimat”, gateway of “electronic government”, electronic digital signature, digital document, digital technologies, information system, Internet portal of open normative legal acts, lawmaking relations, by-laws, subjects of lawmaking.

Introduction

The Kazakhstan 2030 strategy emphasizes that a key factor for the country’s further progress is the creation of quality conditions for the formation of an information society. Kazakhstan is actively involved in the implementation of the Information Superhighway project, which aims to accelerate telecommunication links between Europe and such regions as China, Japan and South-East Asia [1]. According to the results of a study conducted by the company “Boston Consulting Group” (BCG), it is noted that by the level of digitalization of the economy Kazakhstan is on the 50th place among 85 states and belongs to the group of countries with developing digital economy [2]. In the translation of Henry Kissinger’s Book “World Order”, published in 2015, the chapter “World Order and digital technologies” is highlighted in the section called “cyberspace of the world community”. It focuses on the role of digital technologies in the process of forming the infor-

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mation space. The author writes that human activity is quantitative and that it "must be quantified and analyzed", and that the processes of Information Technology Development are correct. According to the author, by the beginning of the third decade, the number of devices accessing the internet will increase to fifty billion. "Each site will be connected to the Internet and programmed to communicate with a central server and other network equipment" [3]. According to the politician, this will be a true cultural revolution in relations between states and will have a serious impact on inter-state relations. It should be noted that in recent years there has been a tendency for developing countries to lag behind developed countries in digitalization.

In the current conditions of the next stage of administrative reform, the entire administrative system of the Republic of Kazakhstan is being improved. For the successful implementation of all planned activities, a quality information infrastructure is required. The development of conditions for information security is facilitated by measures that provide for the creation of a list of functions and powers of state bodies and their synchronization. This requires a fundamental change in the functions and powers of government bodies and the creation of effective algorithms of interaction and communication. As the most important function of state bodies, along with the provision of public services, rulemaking remains a priority in the list of functions of sectoral and departmental management bodies. However, for the effective implementation of rule-making it is necessary that the information and communication systems of public authorities function.

The above factors have had a significant impact on the formation of the national legal system and are reflected in the legal policy concept of the Republic of Kazakhstan until 2030. Creation of subordinate legal acts is one of the forms of realization by executive authorities of their managerial competences. However, executive authorities, as a rule, act through officials. Officials of executive power bodies mostly fulfil their functions on their own. This applies to akims of all levels, ministers, chairmen of committees. The exception is the Government [4]. The idea that the opportunities and advantages of modern digital technologies should be used to improve lawmaking activities is a red thread in the Concept.

Materials and methods

In the course of the research we applied dialectical, historical, analytical-synthetic, logical-legal, comparative-legal, systemic, structural-functional, scientific interpretation, methods of combined approach, general and special methods of formal-descriptive, linguistic, systemic, concrete-sociological recognition. Formal-legal methods were used to analyse the legal nature of the category "digital documents". The structural-functional method was used to study the ways of structuring legal information used in the preparation of drafts of subordinate normative legal acts; the SWOT-analysis method was used as a general method in the study of the role of digital technologies in the law-making process. Comparative-legal and systemic methods were used to compare the rules for the development of bylaws of a legal nature.

The methodological and material basis of the study was taken from the information of such domestic and foreign scientists as S.V. Polenina, B.K. Karypov, I.S. Barzilova, G. Kissinger, as well as state programs and conclusions, devoted to the problems of the peculiarities of law-abiding lawmaking in the context of digitalization.

Discussion

The legal and regulatory systems of modern states are very heterogeneous. This is explained by the peculiarities of each country's form of government, the centuries-old traditions of each state, and other factors. However, most legal systems are based on the level of legal force. The subordination of other normative acts follows from the characterisation of the law as a legal act with greater legal force and the requirement of the rule of law. As S.S. Alekseev emphasized, compliance with legal provisions does not mean that they are less restrictive, but that they have the necessary legal force. This means that they have the necessary legal force. The important thing is not that their legal effect is universal, but only that the essential primacy of law places it above all other normative acts [6; 86]. The legal documents of the lower levels are very diverse and have different legal consequences, forming a rather complex hierarchical system. The legal acts of each lower level state agency must comply not only with the law but also with the legal acts of the higher level state agency. For example, the actions of the Ministry of Health must comply not only with the law but also with the normative actions of the President and the Government, as well as the actions of agencies that have inter-ministerial importance due to their powers, such as the actions of the Ministry of Health according to the documents of the Ministry of Health and the documents of the Ministry of Finance.

A.A. Sokolova proposed the concept according to which in the process of law formation there are three stages. The first stage is the determination of objective needs in the legal regulation of social relations and

the possibility of adopting real legal norms. The second stage is the creation of legal norms, i.e. lawmaking itself. The third stage is the socialization of legal norms, i.e. awareness of possible legal consequences by the participants of social communication and potential legal relations [7; 80].

Z.Ch. Chikhiva divides legislation into the following types depending on the importance of the object of legislation: legislation, delegated legislation, subordinate legislation [8; 20].

Legal policy must reflect the changing structure of modern society. Today, industrial society is replaced by post-industrial society. For example, S.V. Polenina stated in his speech: “Post-industrial society is characterized first of all by the innovative nature of productive activity, the dispersion of production and population, the rapid speed of information exchange, diversified activities, the integration of production and consumption, the ecological transformation of the economy, the autonomous political system…” [9; 171].

According to S.V. Fedorchenko, there is a time lag between the effects of “technological overlap”, i.e. the introduction of law enforcement practice and the introduction of extensive information technology developments into everyday life [10; 161]. Namely, it is designed to provide services in electronic form on the basis of automation and optimization of government functions. To ensure the functioning of this structure, in 2016, the unit for integrating e-government services was organized — a legal entity identified by the Government of the Republic of Kazakhstan and assigned the function of methodological support for the development of the e-government architecture and the Architecture of the e-Akimat model. According to the resolution of the Government of the Republic of Kazakhstan, the joint-stock company “Zerde” was identified as the integrator of e-government services [11].

Among other functions, it is entrusted with ensuring the security of “electronic government” information systems. According to paragraph 6 of clause 1 of Article 14 of the Law “On Informatization” of the Republic of Kazakhstan, the functions of the State Technical Services Agency include ensuring the access of “e-Government” to the Internet [12].

The Law of the Republic of Kazakhstan “On electronic documents and electronic digital signatures” defines them as documents in which information is presented in electronic digital form and certified by an electronic digital signature, as well as a set of electronic digital symbols generated by an electronic computer digital signature and confirmation of the authenticity, ownership and immutability of the content of electronic documents [13]. Article 23 provides for the protection of information about the owner of the registration certificate, private and public keys of the electronic digital signature.

The peculiarity of the development of draft regulations and legal documents by competent authorities at one level is that they can be developed and, if necessary, approved by several competent authorities. In this case, they are jointly developed and approved by the parties in the form of common legal documents signed by the head of the competent authority. This practice is widely used in the legislative activities of the Ministry of the Interior and the Ministry of Foreign Affairs when issuing many regulations and instructions on visa policy issues and citizenship documents. The Ministry of Health and the Ministry of Finance use this method to regulate relations to the issue of social welfare allocation and payment to various categories of citizens. For legal acts, the important stage is the coordination stage of the project with interested government agencies and organizations. Agreements on legal acts and regulations are possible. The bill is coordinated with interested government agencies in cases decided by the President. The Government approves the list of government agencies that must coordinate in drafting the regulation. When drafting the regulation, the Internet is actively used. So, for example, about a draft resolution of social significance, an additional press release is published on the Internet resource (website) in Russian, and if necessary, in other languages. The provisions on approval and drafting of legal normative documents determine the procedure for drafting legal normative documents by local executive agencies. The draft legal normative document prepared will be submitted for approval to the concerned government agencies and organizations.

For approval, the derivative type of the draft legal normative document and the draft of the main legal normative document approved will be submitted for approval. The coordination of the drafting legal normative document with the concerned government agencies and organizations is carried out according to their competence, while the interest in approving the draft legal normative document is established on the basis of the thematic issues considered. The draft regulatory text is sent for approval to all relevant national authorities and is accompanied by a cover letter in electronic document format with electronic signature.

The developer of the body at the same time sending the draft regulatory act for approval to the interested government agencies publishes a full set of documentation on the Internet, which includes the draft regulation itself, detailed explanations and additional materials related to the conclusion, execution, modification or termination of international agreements of the RK in both languages — Kazakh and Russian.

The term for coordination in drafting normative legal documents is determined, as a rule, 3, 5 and 10 days.

After reviewing the draft decree (order), the state coordination body will send the developer one of the following response options:

- The head of the state agency approves the project in electronic form using the EDS and the project can also be approved without comments;

- The project can be approved on condition that the existing comments are deleted. At the same time, the coordination body publishes the comments, which must necessarily include a proposal for deletion and be signed by the head of the state coordination body using the EDS. The investor then publishes a revised version of the project and sends it back to the government agencies for approval;

- The project approval can be rejected. In this case, the state coordination body marks the state coordination body's IP CS certificate of the rejection of coordination with the reason for the rejection of coordination and is certified by the EDS of the head of the state coordination body.

In case of comments, a final version of the draft Code, if necessary, is prepared by the Office that prepared the draft Code, and the Office responsible for preparation submits the final version of the draft Code, signed by the First Deputy Secretary of the National Authority or the Administrator's EDS, to the IS GC and resubmits it to the relevant National Authority for approval.

After coordination, the state agency development agency submits the draft resolution to the Prime Minister together with the conclusions of the coordinating state agencies and relevant appendices in hard copy form of electronic documents and in electronic form through the Unified Electronic Document Management System of the state agency. As we can see, the approval procedure established by the Regulation is cumbersome and impractical. This is why we believe that it should be optimized and automated. Law-making activity of local public administration bodies has a number of peculiarities conditioned by the nature and legal nature of the system of local public administration. The main peculiarity of law-making activity of local government bodies stems from the so-called dual nature of the system of local public administration in almost all countries, and consists in the fact that local governance is carried out by local government bodies, as well as by bodies representing the central government. The Republic of Kazakhstan is no exception in this matter. The difficulties of local subordinate lawmaking are caused by the fact that the possibilities of high-speed broadband Internet are not available in our country to all rural administrative-territorial units. Employees of not only aul, but also district akimats often complain about the low speed of the Internet, or even the absence of Internet connection, which does not allow at the appropriate level not only to carry out lawmaking using digital technologies, but also in general to perform the functions of direct management. This is also pointed out by researchers from neighboring countries [14; 211]. At the same time, it is noted that digitalization can be used for feedback between the local public administration body and the population, which can make proposals for the adoption of local legal acts without making long trips to the district center [15; 128]. Although, the program “Digital Kazakhstan” is no longer in force, but work continues to provide remote areas with access to broadband Internet. Digital technologies in law-making, which are a set of algorithms and codes, will help improve law-making activities.

Results

The Law on Access to Information stipulates that the concepts of draft laws and draft legal documents must be published on the Internet portal “Open NPA” so that people and mass associations can participate in discussions [5]. However, the actual operation of this Internet portal shows that peopleэs participation in discussions is very low. There is not much activity from state agencies. We believe that it is necessary to develop effective mechanization of information interaction between drafters of legal documents and the public.

The development of draft legal documents is always based on a large amount of complete and objective data (Big Data). The principle of evidence-based legal policy, set out in the Concept, assumes the application of legal decisions based on the analysis of large databases. These data are usually stored in the databases of executive bodies at the central and local levels. This can be data on economic, statistical, tax, judicial, investigative, administrative and other reports, i.e. information on a very diverse list of issues. In this regard, in the process of developing subordinate laws, great attention should be paid to the security of the collection, storage, processing and analysis of these volumes of information.

The current legislative situation is characterized by an increasing number of laws aimed at introducing advanced digital technologies. However, this is not fully reflected in the law. Therefore, it is necessary to add

provisions to the Law on Legal Documents related to the digitalization of the legislative process and the systematization of the law.

Internal factors of the law-making process include technologies that affect the law-making process. To form this idea, it is necessary to take into account the goals and objectives of a legal act by all means and methods acting at the stage of its preparation and adoption, public opinion, all the reforms that are being carried out in the state [16; 59].

When creating subordinate legal acts, it is necessary to take into account the importance of the public relations regulated and, depending on this, choose the form of subordinate legal acts to regulate these relations, as well as maintain a balance between legal provisions, regulations and subordinate legal provisions. The legislature must adhere to the following principles: Laws regulate the most basic and general issues of the country's life.

The development of subordinate laws of the President, the Government and other executive power bodies is characterized by a number of features. First, there is a correlation with legal regulations. Analysis of the process of coordinating draft legal documents in the current system of executive agencies shows that this procedure is very cumbersome and time-consuming. Despite the fact that the current coordination rules stipulate the use of digital technology in the form of EDS by the head of the coordinating agency, this process must be optimized and automated.

The role of computerization in the process of systematizing subordinate legal documents is increasing. Analysis shows that paragraph 32 of the Government Regulation has inaccuracies in the use of terminology and the replacement of the concepts of “development agency” and “authorized agency”. Thus, according to Article 1, paragraph 34 of the Land Code of the RK, the competent authority is the state body and the officials of the Republic of Kazakhstan who have the right to take legal actions within their competence. According to Article 34, paragraph 1, the competent authority is the state body of the Republic of Kazakhstan and the officials who have the right to take legal actions within their competence. For example, they include the President of the Republic of Kazakhstan, the Government of the Republic of Kazakhstan, central and local executive bodies. The development agency, according to the provisions of Clause 1, Article 1 of the Law, is a state body, representative body and local executive body, which develops legal documents in accordance with its competence. Thus, the development agency is an organization that develops a draft law but does not have the authority to adopt this law. The competent authority is authorized to adopt this legal act, but does not necessarily have to be the one who develops it.

Conclusions

Information and communication technologies have significantly increased the efficiency of all areas of public administration and accelerated the process of management decision-making. As a collective body with executive power, it issues resolutions, which are collective creative acts. This means that before a decree is adopted at a government meeting, its text must undergo several stages of discussion and consensus among government members. Unlike collective bodies, legal acts of individual bodies are often adopted by joint decisions of several central bodies. For example, the Ministries of the Interior and Foreign Affairs, the Minister of Health and the Minister of Labor and Social Protection often issue joint orders.

The principles of the legal system working with legal information form the scope of information regulation, in which the tools and forms of general information law are implemented using elements of all ICT tools. To ensure the security of legal information, it is necessary to centralize legal acts and information, unify the conceptual apparatus and use digital technology to classify laws and other legal acts.

Analysis of the text of legal normative documents of local executive bodies shows that the content of the adopted regulations, provisions, instructions almost always includes the text of the documents of the higher executive bodies that they were adopted during their implementation. Such duplication is detrimental to more detailed legal regulations, taking into account the specifics of a given administrative-territorial unit. Therefore, we believe that there should be legal regulations strictly prohibiting the copying of legal normative content as the main document of local administrative legal normative documents.

The creation of legal documents under administrative agencies requires perfection in the aspect of synthesizing all legal documents regulating the legislative activities of these agencies into a single system. Subordinate legal documents include technical and legal standards and rules to build legal documents of the Government and central executive agencies, which are expressed in many legal normative documents of different types, legal natures and legal areas. It should be noted that the legal framework includes the provisions of the Government approving the rules for drafting legal documents, regulations on registration

and conditions for interaction of central administrative bodies in implementing legal provisions. The system of legal documents itself also differs in drafting rules depending on the subjects of legislative activity — the Government, central administrative bodies and local administrative bodies.

The procedure for harmonizing regulations using digital technology is simpler and less time-consuming. As a rule, harmonization takes place in the case of different ministerial directives. For example, some instructions of the Ministry of Water Resources and Irrigation are coordinated with the Ministry of Energy and the Ministry of Agriculture. The harmonization procedure usually takes place in the form of an exchange of electronic messages through the e-government portal using EDS. However, it should be noted that at the central government level there are no barriers to the use of digital technology due to high-speed Internet. But in remote areas, where high-speed internet access is not always available, coordination in drafting general instructions and orders at the district level is a cumbersome and time-consuming procedure. Perfecting the law-making mechanism of the executive branch is an objective need to have an effective impact on economic, social, cultural and other processes in society.

Creation of subordinate legal acts is one of the forms of realization by executive authorities of their managerial competences. In principle, administrative bodies act through their officials. In most cases, officials of administrative bodies perform their functions independently. This applies to akims of all levels, ministers, chairmen of committees. The exception is the Government. As a collegial body of executive power, it issues resolutions, which are acts of collective creativity. This means that before a decree is adopted at a meeting of the Government, its text goes through several stages of discussion and agreement among the members of the Government. In contrast to collegial bodies, legal acts of single-personal bodies are often approved by joint decisions of several central bodies. For example, the Ministry of Internal Affairs and the Ministry of Foreign Affairs, the Minister of Health and the Minister of Labour and Social Protection often issue joint orders.

The procedure for harmonizing bylaws using digital technologies is much simpler and less time-consuming. As a rule, harmonization takes place in case of adoption of various departmental instructions. For example, some instructions of the Ministry of Water Resources and Irrigation are coordinated with the Ministry of Energy and the Ministry of Agriculture. The procedure of harmonization usually takes place in the form of exchange of electronic messages through the e-government gateway using EDS. However, it should be noted that at the central government level, the use of digital technologies has no obstacles due to the high-speed internet. But in remote areas, where there is not always access to broadband Internet, such coordination in the preparation of joint instructions or orders at the district level is a painful procedure that takes up a lot of working time.

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Н.С. Ахметова, А.И. Бірманова

Цифрландыру жағдайындағы заңға тәуелді құқықшығармашылығының ерекшеліктері

Мақаланың мәселелері қазіргі заманғы құқықшығармашылық процестерінде ақпараттандыру мен цифрлық технологиялардың күшейіп келе жатқан рөліне негізделген. Қарастырылып отырған тақырыптың өзектілігі отандық ғана емес, шетелдік заң ғылымында да ақпараттық-цифрлық технологиялардың құқықтық аспектілерінің жеткіліксіз зерттелуімен түсіндіріледі. Цифрлық технологиялар біздің қоғамның күнделікті өміріне ғана терең сіңіп қойған жоқ. Олар адам қызметінің нысандарын айтарлықтай жеңілдетті және әртараптандырды. Құқықшығармашылық саласы да бұдан қалыс қалмайды. Мақаланың мақсаты құқықшығармашылық процестің түрлі кезеңдерінде ақпараттық-цифрлық технологиялардың ерекшеліктері мен мүмкіндіктерін анықтау. Негізгі әдіснамалық құралдар ретінде формальды логика және SWOT-талдау әдістері пайдаланылды. Заңға тәуелді құқықшығармашылығы заң шығармашылығынан айтарлықтай ерекшеленеді, бұл жерде сандық технологиялардың көмегімен жасауға болатын заңдық және ұйымдық-құқықтық әрекеттер көп. Мақаланың негізгі мазмұны цифрландыру жағдайында заңға тәуелді құқықшығармашылығының ерекшеліктерін, сондай-ақ заңға тәуелді құқықшығармашылығы процесін жетілдіруге сандық технологиялардың әсерін анықтау. Авторлар құқықшығармашылық қызмет процесінде цифрлық технологияларды пайдалану тәртібін нормативтік бекіту қажеттігін негіздеген. Бұл тәсілдердің жаңашылдығы құқықшығармашылығында цифрлық технологияларды пайдаланудың әлеуетін, күшті, әлсіз жақтарын, сондай-ақ қазіргі заманғы Қазақстанның құқықтық реттеу қажеттіліктеріне барабар жаңа заң шығару тетігі шеңберінде құқықтық білім беру, заңға тәуелді нормашығарушылық, құқықтық реттеу және құқық қолдану қызметі институттарының қауіпсіздігіне төнетін ықтимал қатерлерді жүйелі зерттеуден тұрады.

Кілт сөздер: электрондық үкімет, электрондық әкімдік, электрондық үкімет шлюзі, электрондық цифрлық қолтаңба, цифрлық құжат, цифрлық технологиялар, ақпараттық жүйе, ашық нормативтік құқықтық актілердің интернет-порталы, құқықшығармашылық қатынастары, заңға тәуелді актілер, құқықшығармашылық субъектілері, құқықшығармашылық, нормативтік құқықтық акт, құқық, құқықшығармашылық тетігі.

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Особенности подзаконного правотворчества в условиях цифровизации

Проблематика статьи обусловлена усиливающейся ролью информатизации и цифровых технологий в процессах современного правотворчества. Актуальность рассматриваемой темы объясняется недостаточной исследованностью правовых аспектов информационно-цифровых технологий не только в отечественной, но и в зарубежной юридической науке. Цифровые технологии глубоко проникли не только в повседневную жизнь нашего общества, но и значительно упростили и разнообразили формы человеческой деятельности. Не является исключением и сфера правотворчества. Цель статьи — выявление особенностей и возможностей информационно-цифровых технологий на различных этапах правотворческого процесса. В качестве основных методологических инструментов использованы методы формальной логики и SWOT-анализ. Подзаконное правотворчество существенно отличается от законотворчества хотя бы тем, что здесь больше юридических и организационно-правовых действий, которые можно совершать с помощью цифровых технологий. Основное содержание статьи заключается

в выявлении особенностей подзаконного правотворчества в условиях цифровизации, а также влияния цифровых технологий на совершенствование процесса подзаконного правотворчества. Авторами обоснована необходимость нормативного закрепления порядка применения цифровых технологий в процессе правотворческой деятельности. Новизна этих подходов состоит в системном исследовании сильных и слабых сторон, потенциала использования цифровых технологий в правотворчестве, а также возможных угроз безопасности институтов правообразования, подзаконного нормотворчества, правового регулирования и правоприменительной деятельности в рамках нового, адекватного потребностям правового регулирования современного Казахстана правотворческого механизма.

Ключевые слова: электронное правительство, электронный акимат, шлюз электронного правительства, электронная цифровая подпись, цифровой документ, цифровые технологии, информационная система, интернет-портал открытых нормативных правовых актов, правотворческие отношения, подзаконные акты, субъекты правотворчества, правотворчество, нормативный правовой акт, право, механизм правотворчества.

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Использование искусственного интеллекта в законотворчестве: организационные и правовые аспекты

Цель статьи — анализ ключевых правовых и организационных аспектов интеграции искусственного интеллекта (ИИ) в законотворчество и выявление основных вызовов и возможностей. Статья направлена на предоставление рекомендаций для эффективного внедрения ИИ в законодательные процессы, опираясь на международный опыт и специфические проблемы. В рамках исследования применялись следующие методологические подходы: сравнительно-правовой анализ, качественный анализ и социологический метод. Сравнительно-правовой анализ позволил выявить как различия, так и сходства в применении искусственного интеллекта в законотворческих процессах различных юрисдикций. Качественный анализ был использован для глубокого изучения научной литературы и правовых документов, что способствовало выявлению ключевых тенденций и проблем в данной области. Социологический метод применялся для оценки влияния ИИ на уровень вовлеченности граждан и восприятие законодательных процессов. В статье подчёркивается, что, несмотря на то, что ИИ может улучшить эффективность законодательной деятельности, его внедрение вызывает серьёзные опасения, связанные с изменением традиционной роли законодателей и возможной предвзятостью алгоритмов. Дополнительно исследованы технологии обработки естественного языка как организационный инструмент для повышения качества законодательных текстов. В процессе исследования были выявлены ключевые правовые и организационные аспекты интеграции искусственного интеллекта в законотворческие процессы, которые активно развиваются в мире. В работе изучен опыт таких государств, как Китай, Эстония, Италия, Дания и Южно-Африканская Республика, проиллюстрирован плюрализм подходов к внедрению ИИ в законодательную деятельность. При этом автор статьи особо отмечает важность человеческого надзора для обеспечения юридической согласованности и устранения потенциальных рисков, связанных с использованием ИИ в законотворческом процессе.

Ключевые слова: техническая и правовая роль искусственного интеллекта, законотворчество, анализ больших данных, предвзятость и конфиденциальность системы искусственного интеллекта, обработка естественного языка, прогнозирование.

Введение

Актуальность темы исследования заключается в стремительном внедрении искусственного интеллекта (ИИ) в законотворческие процессы, что открывает новые перспективы для модернизации правотворческой деятельности. Технологии ИИ позволяют значительно повысить эффективность и точность правового анализа, что особенно важно в условиях глобальной цифровизации. Однако интеграция ИИ сопряжена с рядом вызовов, такими как непрозрачность алгоритмов и угрозы конфиденциальности данных, что требует внимательного рассмотрения правовых и организационных аспектов.

Основным направлением исследований является аспект внедрения ИИ для повышения эффективности законодательных процедур, начиная от автоматизации анализа нормативно-правовых актов и заканчивая прогнозированием последствий предлагаемых законодательных изменений. Многие авторы подчёркивают, что ИИ способен ускорить процесс анализа больших объёмов правовых данных, минимизируя человеческие ошибки и улучшая качество принимаемых решений. Например, исследование показывает, что автоматизированные системы могут анализировать огромные массивы судебных решений, находить правовые прецеденты и выявлять закономерности, что существенно сокращает время работы юристов и законодателей.

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Однако существует и критическая точка зрения. Некоторые ученые подчеркивают, что использование ИИ в законодательных процессах может нести в себе угрозу из-за возможного отсутствия прозрачности в алгоритмах. ИИ может предвзято интерпретировать данные или принимать решения на основе неполной или некорректной информации. Важным вопросом остаётся и защита персональных данных, которые могут быть использованы ИИ для анализа и прогнозирования.

Обсуждение

В процессе исследования выявлены ключевые правовые и организационные аспекты интеграции искусственного интеллекта в законотворческие процессы, которые активно развиваются в различных странах. Примеры государств, таких как Китай, Эстония, Италия, Дания и Южно-Африканская Республика, иллюстрируют разнообразие подходов к внедрению ИИ в законодательную деятельность.

В Китае ИИ уже используется для анализа и оптимизации судебных решений, с перспективой его дальнейшего применения в законотворчестве. Эстония и Италия внедряют ИИ для анализа законопроектов и предотвращения коллизий с действующим законодательством. В Дании ИИ применяется для решения узкоспециализированных задач в области правотворчества. В Южно-Африканской Республике чат-боты на основе ИИ предоставляют помощь парламентариям в доступе к информации о законодательных процессах.

Европейский союз также демонстрирует активное использование ИИ, где он способствует анализу законодательных документов на нескольких языках и оценке потенциальных последствий новых правовых актов.

Исследование подтвердило, что применение ИИ в законотворчестве позволяет существенно повысить эффективность и точность правового анализа, минимизировать риски принятия некачественных законов и улучшить согласованность между различными нормативными актами. Однако, наряду с очевидными преимуществами, интеграция ИИ сопряжена со значительными вызовами, такими как непрозрачность алгоритмов, их потенциальная предвзятость и угрозы конфиденциальности данных.

Результаты исследования свидетельствуют о том, что интеграция ИИ в законодательные процессы становится неотъемлемой частью современной правотворческой практики, особенно в странах с высоким уровнем технологического развития. Китай и Европейский союз играют ведущую роль в этом процессе, создавая прецеденты для других государств. Их опыт показывает, что применение ИИ может значительно ускорить правовой анализ, улучшить качество законодательства и повысить эффективность государственного управления.

Однако, несмотря на очевидные достижения, исследование подчеркивает необходимость решения вопросов, связанных с прозрачностью и подотчетностью алгоритмов искусственного интеллекта. Проблемы, такие как алгоритмическая предвзятость и угрозы утечки данных, могут подорвать доверие к законодательному процессу и привести к негативным социальным последствиям. Это особенно актуально для стран, находящихся на этапе подготовки к внедрению ИИ в законотворчество, таких как Казахстан, где пока ведутся только обсуждения на законодательном уровне.

Ключевым выводом исследования является то, что успешная интеграция ИИ в законотворчество требует не только технической готовности, но и тщательно продуманной правовой базы, регулирующей его использование. Необходимо обеспечить эффективный контроль за алгоритмами и внедрить механизмы мониторинга для минимизации предвзятости и защиты конфиденциальных данных. Кроме того, важно учитывать культурные и правовые особенности различных стран при разработке и применении ИИ, что требует комплексного подхода и международного сотрудничества.

Правовые и организационные аспекты внедрения искусственного интеллекта

Профессор Университета Вирджинии (США) Эшли Дикс в своей книге «High-Tech International Law» описывает, как законодательство может претерпеть значительные изменения, вступая в новую эру с интеграцией технологий ИИ. Автор подчёркивает неизбежность того, что на начальном этапе государства будут самостоятельно инициировать изменения в области использования ИИ, без содействия других стран. Это обусловлено тем, что модели применения ИИ будут варьироваться в зависимости от национального регулирования [1; 584–600]. Автор приводит в качестве примера китайскую систему законотворчества, отмечая, что Китай, вероятно, окажется в авангарде применения методов машинного обучения и инструментов обработки текста. Например, в судебной ветви власти Китая китайские судьи уже проводят испытания системы, поддерживаемой искусственным интеллектом, которая позволяет анализировать отклонения и сравнивать, насколько проекты судебных решений отличаются от предыдущих прецедентов. Следовательно, этот опыт судебной системы планируется

также использовать в законотворчестве. Стремление Китая к интеграции ИИ и его доступ к большим объёмам данных предполагают, что страна будет активно развивать и использовать инструменты машинного обучения для достижения более эффективного регулирования правовой, экономической и социальной сферы жизнедеятельности граждан, а также для улучшения отношений с международным сообществом [2; 594].

Вместе с тем искусственный интеллект активно применяется в законотворчестве не только в Китае, но и в ряде европейских государств. В Эстонии ИИ используется для прогнозной аналитики в области здравоохранения и разработки образовательной политики [3; 201–205]. Как отмечают профессора Керикмяэ и Пярн-Ли, в Парламенте Эстонии в конце 2023 года была внедрена система анализа законов с использованием ИИ, которая помогает депутатам проверять будущие законодательные акты и выявлять потенциальные конфликты с действующими законами [4; 1–18]. В свою очередь, Парламент Италии внедрил систему искусственного интеллекта, которая осуществляет проверку текстов, анализирует действующее законодательство с учётом новых поправок, а также выявляет коллизии не только между действующими законами, но и между предполагаемыми законопроектами [5]. В Дании, например, использование искусственного интеллекта не является повседневной практикой. Парламент Дании прибегает к использованию ИИ преимущественно в случаях, когда требуется собрать исчерпывающую информацию по специфическим и достаточно сложным вопросам, непосредственно связанным с политическим курсом государства [6; 301–315].

Активное применение систем искусственного интеллекта в парламентской деятельности наблюдается в Южно-Африканской Республике, находящейся на другом континенте. Парламент ЮАР использует так называемые «чат-боты» для оказания помощи своим членам в предоставлении парламентской информации, такой как статус конкретного законопроекта, резолюции, вопросы или процессы надзора. Эти чат-боты активно применяются для обработки естественного языка (NLP) и выполняют более техническую роль в законотворческом процессе ЮАР [7; 255–270].

Более того, ИИ может служить ключевым инструментом при разработке нормативных правовых актов, которые требуют соблюдения международных обязательств государства. Например, для всестороннего анализа таких источников, как документы Совета Безопасности и Генеральной Ассамблеи ООН, международные договоры и *travaux préparatoires*, судебные акты Европейского суда по правам человека, базы данных специализированных агентств, Ежегодник ООН, отчёты по правам человека, новостные сообщения и другие материалы, необходимо обработать большое количество документов. В условиях ограниченных сроков на принятие нормативных актов такой объём работы может представлять значительные трудности. Таким образом, использование ИИ для анализа международных документов представляет собой эффективное средство упрощения их обработки. Это, в свою очередь, может положительно сказаться на национальном законодательстве, позволяя государству разрабатывать законы, которые полностью отражают принятые международные обязательства [8].

Аналогично, в труде Майкла А. Ливермора и Дэниела Н. Рокмора «Law as Data: In Computation, Text, and the Future of Legal Analysis» представлены выводы, отражающие текущее состояние ИИ в осуществлении правовых анализов. Авторы подчёркивают, что в настоящее время юристы сталкиваются с гораздо большим числом законодательных актов, чем это было 50 лет назад, поскольку институт законодательного процесса претерпел значительные изменения и усовершенствования. В связи с этим необходимость применения методов машинного обучения, или, как теперь принято называть, искусственного интеллекта, становится особенно актуальной. Обработка естественного языка (NLP) и машинное обучение могут трансформировать юридические исследования, позволяя быстрее и точнее анализировать большие объёмы правовых документов. Эти технологии помогают выявлять скрытые паттерны и связи, ускоряя исследовательский процесс и улучшая понимание правовой ситуации в конкретной стране или в определённых условиях [7; 255–270].

Вместе с тем модели предсказания, основанные на анализе данных, могут значительно снизить риски в сфере правотворчества. Эти риски минимизируются за счёт применения алгоритмов машинного обучения, которые позволяют прогнозировать последствия различных формулировок и потенциальное принятие законопроекта. Такая предсказательная способность может существенно повысить эффективность законотворческого процесса, предоставляя законодателям новую информацию о конкретных последствиях тех или иных законопроектов [9].

Тем не менее, как подчеркивает Майкл А. Ливермор, использование подобных технологий может сопровождаться проблемами, связанными с непрозрачностью алгоритмов машинного обучения, что, в свою очередь, может увеличить риск усиления существующих предвзятостей в правовой сис-

теме [7; 255–270]. Вместе с тем, проблему прозрачности и подотчётности необходимо урегулировать как в техническом, так и в правовом поле до внедрения системы ИИ в законотворчество. В своей работе «Общество черного ящика» Фрэнк Паскуале указывает, что алгоритмы могут скрывать процесс принятия решений, что представляет собой особую опасность в контексте законодательства [10], где легитимность правовых норм напрямую зависит от общественного доверия. Непрозрачность алгоритмов, управляющих законодательными процессами, может подорвать доверие к законодательным органам [11]. Кроме того, Карен Йеунг в статье «Алгоритмическое регулирование: критическое исследование» подчёркивает необходимость создания надёжных рамок для управления ИИ. Это необходимо для предотвращения таких проблем, как алгоритмическая предвзятость, утечка конфиденциальной информации и утрата человеческого контроля [12; 40]. Более того, применение ИИ в законодательных процессах может варьироваться в зависимости от правовых систем и юрисдикций. В книге «История ИИ и права в 50 статьях» демонстрируется довольно логичное суждение о том, что различные правовые традиции могут по-разному влиять на интеграцию ИИ в законотворчество [13]. Это подчеркивает важность сравнительного анализа для понимания того, какие подходы могут быть наиболее эффективными в различных контекстах.

Вместе с тем, профессор Фрэнк Паскуале предупреждает о возможных рисках увековечения предвзятости и дискриминации в случае, если искусственный интеллект не будет надлежащим образом спроектирован и регулярно контролироваться государственными органами посредством мониторинга [10]. Дополняет его профессор Райан Кало, который подчёркивает необходимость обеспечения ответственного и этичного использования ИИ в законодательном процессе [14; 553–554].

Помимо вопросов предвзятости, возникают также проблемы конфиденциальности данных и их безопасности, поскольку современные системы ИИ часто функционируют на открытых платформах и подвержены риску кибератак [15; 28–36]. Исследователи Вил и Боргезиус предлагают решение для борьбы с алгоритмической предвзятостью и её минимизации в виде постоянного мониторинга и корректировки систем искусственного интеллекта [16; 42]. Поскольку использование ИИ в законотворчестве требует обработки большого объёма конфиденциальных данных, существует необходимость внедрения надёжных мер кибербезопасности и строгих протоколов защиты данных для предотвращения утечек конфиденциальной информации [15; 28–36].

Тем не менее, использование ИИ в любой юрисдикции и правовой системе может значительно повысить уровень вовлеченности и заинтересованности граждан в процесс законотворчества. Исследование, проведённое ОЭСР в 2019 году, показало, что применение инструментов ИИ для вовлечения общественности привело к увеличению числа граждан, участвующих в законотворческом процессе, на 23 % по сравнению с традиционными методами [17]. Опрос Всемирного экономического форума, проведённый в 2020 году, показал, что 78 % государственных чиновников считают, что искусственный интеллект может значительно улучшить качество и эффективность государственных услуг, включая законодательный процесс [18; 18].

Результаты

Опыт Европейского союза в использовании ИИ

Вопросы алгоритмической предвзятости, конфиденциальность данных и необходимость человеческого надзора активно обсуждаются в Европейском парламенте [19]. Так, в марте 2024 года ЕС принял закон об искусственном интеллекте, в котором были разработаны этические принципы для ИИ, как это было изложено в Белой книге Европейской комиссии по искусственному интеллекту. Вместе с тем одной из основных областей, где ИИ был внедрён, является обработка естественного языка (NLP) для анализа документов.

По состоянию на 2024 год алгоритмы обработки естественного языка (NLP) успешно применяются для анализа значительного объёма законодательных документов, политических материалов и общественных консультаций на нескольких языках. Эти технологии позволяют эффективно извлекать информацию, создавать краткие обзоры и выявлять ключевые темы и настроения. Например, Европейская парламентская служба исследований (EPRS) использует инструменты NLP для обработки и анализа более 800 000 документов на 24 официальных языках ЕС, что значительно сокращает время, необходимое для межъязыкового сбора информации [20].

Тем не менее, алгоритмы машинного обучения применяются в законодательном проектировании Европейского союза исключительно в экспериментальном порядке. Исследователь Эшли подчёркивает, что Европейский союз уже в 2017 году использовал искусственный интеллект для создания за-

конодательных текстов, включая предложения по улучшению языковых формулировок, выявление несоответствий и обеспечение соответствия с существующими правовыми нормами. Это представляло собой техническую роль ИИ в законотворческом процессе. Однако к 2023 году Европейский парламент внедрил инструмент, использующий ИИ в качестве правового средства для поддержки разработки законопроектов. Согласно исследованиям Корралеса, данная система использует обработку естественного языка (NLP) и алгоритмы машинного обучения для анализа существующих правовых текстов, выявления потенциальных конфликтов и предложений по улучшению языка законодательных актов. Это нововведение значительно ускорило процесс подготовки законопроектов и способствовало обеспечению большей последовательности и ясности законодательства Европейского союза [21; 111–120].

В начале 2024 года Европейский парламент совместно с Европейской комиссией ввели в действие инструмент на базе искусственного интеллекта под названием «PolicyPredict». Этот инструмент, основанный на анализе больших данных и алгоритмах машинного обучения, предназначен для оценки потенциальных последствий предлагаемых законодательных инициатив. Система прогнозирует экономические, социальные и экологические последствия новых законов, а также предоставляет отчёты, позволяющие предвидеть более широкие эффекты законодательной деятельности [22; 1–22].

Тенденция развития ИИ в казахстанском законотворчестве

С момента развития цифровизации в Казахстане республика сделала значительные шаги для внедрения различных технологий в государственный институт управления. По состоянию на 2024 год Казахстан занимает 28-е (+1) место по индексу «Развитие электронного правительства» и 8-е место по индексу «Онлайн услуги» [23].

Первый этап правового регулирования начался с момента принятия в 2007 году Закона РК «Об информатизации». Действующая система «Правительство для граждан», или же «Электронное правительство «e-Gov», являлась сенсационной по оказанию государственных услуг населению.

Второй этап цифровизации начался с принятия Государственной программы «Цифровой Казахстан», которая предусматривала интеграцию информационной системы «Smart Bridge» [24]. Эта система предназначена для ускоренного обмена данными между различными информационными системами казахстанских организаций, что способствует улучшению функционирования банковских приложений. В настоящее время значительное количество государственных услуг предоставляется через государственную платформу e-Gov mobile, интегрированную в банковские приложения для удобства граждан. Для государства критически важно обеспечить доступ к государственным услугам через системы, уже привычные и удобные для пользователей.

Третий этап предполагает разработку законодательного акта или кодекса, направленного на правовое регулирование общественных отношений, связанных с использованием искусственного интеллекта [25; 61–74]. В то же время в июне 2024 года Правительство утвердило Концепцию развития искусственного интеллекта на 2024–2029 годы [26]. На протяжении последних трёх лет в Казахстане на уровне всех трёх ветвей власти активно обсуждается переход к использованию систем искусственного интеллекта. В частности, в контексте законодательной ветви власти следует отметить, что в период с 2023 по 2024 годы велись обсуждения относительно инициативы по разработке законодательного акта, регулирующего использование искусственного интеллекта [27]. Одновременно рассматривается перспектива создания Цифрового кодекса, который должен включать раздел, посвящённый вопросам искусственного интеллекта. Однако на данный момент конкретные решения по этому вопросу ещё не приняты, это подразумевает собой, что внедрение искусственного интеллекта в Парламенте будет осуществляться лишь после принятия соответствующего законодательства.

Тем не менее уже сегодня в законодательных кругах ведутся активные обсуждения о том, каким образом искусственный интеллект будет интегрирован в работу Парламента в течение ближайших четырёх лет. В рамках обсуждений было отмечено, что депутаты намерены использовать ИИ с целью:

1) проведения правовой экспертизы;

2) разработки прогнозов на основе анализа данных для правовой сферы;

3) автоматизации процесса создания законодательных текстов [28].

В рамках обсуждения потенциала использования искусственного интеллекта в законотворческом процессе парламентарий подчёркивает возможные преимущества его внедрения при разработке будущих законодательных актов. В качестве примера можно привести проект Водного кодекса Республики Казахстан. Первоначальный анализ данного проекта выявил порядка 70 концептуальных заме-

чаний, связанных с отсутствием необходимых подзаконных актов и несоответствием конституционным требованиям. Следует отметить, что традиционный человеческий анализ не смог устранить эти недостатки, поскольку проект Водного кодекса основан на устаревших методах, не учитывает современные требования Конституции, не разграничивает полномочия органов государственной власти и не включает современные механизмы привлечения инвестиций.

Дополнительно, дублирование положений с Экологическим кодексом и неполная структура Водного кодекса создают правовую неопределённость, что усложняет эффективное управление водными ресурсами. Внедрение ИИ в процесс законотворчества может существенно способствовать устранению данных недостатков за счёт проведения более глубокого и системного анализа, улучшения координации между различными законодательными актами, а также разработки более целостных и современных правовых решений [28].

Заключение

Интеграция искусственного интеллекта в законотворческий процесс в 2024 году представляет собой не просто технологическую инновацию, а важнейший фактор, оказывающий значительное влияние на законодательную деятельность как на международном уровне, так и в Республике Казахстан. Использование ИИ в правовом анализе, разработке нормативных актов и обеспечении внутренней логики и согласованности законодательных инициатив становится критически важным, учитывая необходимость обработки многомиллионных массивов документов, требующих тщательного анализа. Современные исследования свидетельствуют о том, что способность ИИ обрабатывать большие объемы правовой информации, выявлять закономерности и прогнозировать возможные последствия законодательных решений позволяет существенно повысить, а в будущем и значительно улучшить, эффективность законотворческой деятельности.

В Республике Казахстан внедрение ИИ в процессы разработки законотворчества открывает новые горизонты для модернизации правовой системы, обеспечивая большую согласованность между правовыми актами и гармонизацию национального законодательства с международными правовыми стандартами и обязательствами. Особого внимания заслуживает способность ИИ быстро и точно выявлять несоответствия, правовые пробелы и потенциальные конфликты в правовых актах, что позволяет законодателям создавать более стабильные, комплексные и гармоничные правовые нормы. Данный аспект приобретает особую значимость в условиях стремительно развивающихся отраслей права, где необходим оперативный анализ и разработка решений на основе обширных данных.

Кроме того, ИИ демонстрирует потенциал эволюции от инструмента технического характера к полноценному элементу правового анализа. С развитием ИИ-систем они начинают вносить новые идеи в интерпретацию правовых норм, предлагать оригинальные и инновационные подходы к законотворчеству, а также играть ключевую роль в создании новых нормативных актов. Однако данное развитие поднимает целый ряд вопросов, касающихся необходимости нахождения оптимального баланса между человеческим суждением и машинным интеллектом в законотворческом процессе.

Профессор права Йельского университета Джек Балкин, отметил, что «искусственный интеллект не просто изменит правоприменительную практику; он трансформирует наше понимание правовой рассудительности». В долгосрочной перспективе развитие и этически обоснованное использование ИИ в законотворческой деятельности будут иметь ключевое значение для правовых систем государств. Казахстан, как и другие страны, осваивая этот новый подход, должен стремиться к поддержанию необходимого баланса между возможностями ИИ и сохранением человеческих аспектов правотворчества, включая демократическое принятие решений и правовой анализ.

Касательно результатов, достигнутых в рамках проделанной научной работы, стоит отметить отсутствие фундаментальных понятий, связанных с внедрением ИИ в систему законодательства. Таким образом, индивидуальной чертой данной работы можно выделить анализ трудов и реального опыта зарубежных коллег в данной сфере, для составления четкого понимания реальной картины развития и расширения правовой возможности ИИ.

Настоящая работа может быть полезна для общего изучения и восприятия общих трендов, а также ознакомления с данной темой.

В условиях осознанного и ответственного внедрения ИИ способен существенно повысить качество, целостность и эффективность законодательства, тем самым содействуя построению более справедливой, устойчивой и эффективной правовой системы.

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А.К. Куттыбаева

Жасанды интеллектіні заң шығаруда қолдану: ұйымдастырушылық және құқықтық аспектілері

Мақаланың мақсаты — жасанды интеллекті (ЖИ) заң шығаруға интеграциялаудың негізгі құқықтық және ұйымдастырушылық аспектілерін талдау және негізгі қиындықтар мен мүмкіндіктерді анықтау. Мақала халықаралық тәжірибеге және нақты проблемаларға сүйене отырып, ЖИ-ді заңнамалық үдерістерге тиімді енгізу бойынша ұсыныстар беруге бағытталған. Зерттеу барысында келесі әдістемелік тәсілдер қолданылды: салыстырмалы құқықтық талдау, сапалық талдау және социологиялық әдіс. Салыстырмалы-құқықтық талдау әртүрлі юрисдикциялардың заңнамалық үдерістерінде жасанды интеллекті пайдаланудағы айырмашылықтарды да, ұқсастықтарды да анықтады. Ғылыми әдебиеттер мен құқықтық құжаттарды терең зерделеу үшін сапалы талдау қолданылды, бұл саладағы негізгі тенденциялар мен мәселелерді анықтауға көмектесті. Азаматтардың қатысуы мен заңнамалық процестерді қабылдау деңгейіне ЖИ әсерін бағалау үшін социологиялық әдіс пайдаланылды. Мақалада ЖИ заңнаманың тиімділігін арттыра алатынымен, ЖИ қабылдау заң шығарушылардың дәстүрлі рөліндегі өзгерістерге және ықтимал алгоритмдік ауытқуларға қатысты елеулі алаңдаушылық тудыратыны атап өтілген. Сонымен қатар, табиғи тілді өңдеу технологиялары заңнамалық мәтіндердің сапасын арттырудың ұйымдастырушылық құралы ретінде зерттелуде. Зерттеу процесі әлемде белсенді дамып келе жатқан жасанды интеллекті заңнамалық процестерге біріктірудің негізгі құқықтық және ұйымдастырушылық аспектілерін анықтады. Жұмыста Қытай, Эстония, Италия, Дания және Оңтүстік Африка Республикасы сияқты мемлекеттердің мысалдары келтірілген, заң шығарушылық қызметте ЖИ-ді енгізу тәсілдерінің плюрализмін суреттейді. Автор мақалада құқықтық бірізділікті қамтамасыз ету және заң шығару процесінде ЖИ-ді қолданумен байланысты ықтимал тәуекелдерді шешу үшін адам қадағалауының маңыздылығын қарастырған.

Кілт сөздер: жасанды интеллектің техникалық және құқықтық рөлі, заң шығару, үлкен деректерді талдау, жасанды интеллект жүйесінің біржақтылығы және құпиялылығы, табиғи тілді өңдеу, болжау.

A.K. Kuttybaeva

Use of artificial intelligence in legislation: organizational and legal aspects

The purpose of the article is to analyze the key legal and organizational aspects of integrating AI into law-making and to identify the main challenges and opportunities. The article aims to provide recommendations for the effective implementation of AI in legislative processes, based on international experience and specific problems. The following methodological approaches were used in the study: comparative legal analysis, qualitative analysis, and sociological method. Comparative legal analysis allowed us to identify both differences and similarities in the use of artificial intelligence (AI) in legislative processes in various jurisdictions. Qualitative analysis was used for an in-depth study of scientific literature and legal documents, which helped to identify key trends and issues in this area. The sociological method was used to assess the impact of AI on the level of citizen engagement and perception of legislative processes. The article emphasizes that although AI can improve the effectiveness of legislative activity, the introduction of AI raises serious concerns related to the change in the traditional role of legislators and possible bias of algorithms. Additionally, natural language processing technologies are explored as an organizational tool for improving the quality of legislative texts. The study identified key legal and organizational aspects of the integration of artificial intelligence (AI) into lawmaking processes that are actively developing in the world. The paper provides examples of such countries as China, Estonia, Italy, Denmark and South Africa, illustrating the pluralism of approaches to the implementation of AI in legislative activity. In this regard, the article covers the importance of human oversight to ensure legal consistency and eliminate potential risks associated with the use of AI in the lawmaking process.

Keywords: technical and legal role of artificial intelligence, lawmaking, big data analysis, bias and confidentiality of the artificial intelligence system, natural language processing (NLP), forecasting.

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Dogmatical Thoughts on Rohingya Case

The campaign of atrocities against Myanmar's Rohingya minority is among the most pressing human rights challenges of our times. The Prosecutor applied for jurisdiction with "Prosecution's request for a ruling on jurisdiction under Article 19(3) of the Statue", which caused considerable controversy among academical, diplomatic circles and even among judges. Judge Brichambaut's critique of "The Request" covers almost all critical legal thinking. Judge Brichambaut considered that the application of Article 19(3) of the RS in the "Request" was neither appropriate nor in accordance with the principle of fairness, inappropriately expanded the prosecutor's power, and did harm to the authority of the ICC. Based on the dogmatic theory, the Article 19(3) of the RS pointed out that the purpose of the clause is to limit the Court's jurisdiction to safeguard national sovereignty. The distinction between "jurisdiction" and "admissibility" essentially is to ensure that the Court earnestly abides by the scope of jurisdiction determined by the RS. The historical interpretation of Article 19(3) of the RS not only clarifies the legality of the ICC's jurisdiction over the situation in Myanmar, but also verifies that the RS is an "organized whole".

Keywords: dogmatic, historical interpretation, legality, jurisdiction, admissibility, Myanmar, admissibility.

Introduction

Since August 2017, approximately 670,000 residents of Rakhine State, Myanmar, have been expelled by the local government to neighboring Bangladesh. The Myanmar government's political actions against the residents of Rakhine State have also been called a "textbook example of ethnic cleansing" [1] by the Human Rights Council. In the face of Myanmar's atrocities that shocked human conscience, the ICC, drawing on the judicial experience of the former Yugoslavia Tribunal and the Rwanda Tribunal, decided to prosecute the Myanmar government for "crimes against humanity" in response to the atrocities committed by Myanmar government. However, one of the difficulties faced by the prosecutor in prosecuting the Rohingya situation is the issue of jurisdiction. Because the atrocities committed by the Burmese government took place in Myanmar, which is not a party to the RS, at the same time due to that the Burmese government has not referred the situation to the ICC, the UNSC has not taken any steps — as it did in 2005 and 2011 by referring the Darfur situation to the ICC and Libya to the ICC. Therefore, how to establish the jurisdiction of the ICC over the situation in Myanmar has become a prerequisite for the ICC to hold relevant persons criminally responsible and achieve the purpose of criminal justice.

ICC Prosecutor Bensouda believes that the court can exercise jurisdiction in accordance with Article 12 (2) of the RS. According to this provision, the harmful results of the situation in Myanmar occurred in Bangladesh, and based on the "cross-border" provision in crimes against humanity — the place where the crossing occurred was Bangladesh — according to the principle of territorial jurisdiction, the ICC can exercise jurisdiction over the situation in Myanmar. Therefore, on April 9, 2018, Prosecutor Ms. Bensouda requested the Court to make a decision that the Court can exercise jurisdiction over the "deportation crime" committed by the Myanmar government. After deliberation, the Pre-Trial Chamber confirmed on September 6, 2018 that the Court had jurisdiction over the Rohingya situation. Although the Pre-Trial Chamber's resolution established the ICC's jurisdiction over Myanmar, a non-State Party, the ruling caused great controversy in the entire judicial community. For example, commentator A. Seiff sharply accused the ICC of having too broad a jurisdiction, and even ICC Judge Brichambaut refused to recognize the legality of the Prosecutor's "Request". Judge Brichambaut said Prosecutor Bensouda's request lacked clarity and that if the court made a

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ruling on the situation in Myanmar without thinking, it would undermine its own authority as the ruling lacked a legal basis.

Methods and materials

This research was carried out within the frame of decisions of the ICC Judges and Chief Prosecutor (Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statue [2] and Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut [3]) and Rome Statute. This study examined the reasons on which the judge's decision based, and believes that the prosecutor's reasons, on which she based to exercise jurisdiction on Myanmar situation, are significant. In addition, this research points out that the purpose of legal doctrine is to interpret the RS as a flesh-and-blood whole, and interpreting individual legal rules out of context and system is likely to distort the original meaning of the legal text.

Results

The Request filed by the Office of the Prosecutor can be divided into three parts. The first part is the main point. In this part, the Prosecutor argues that since up to 670,000 refugees from Rakhine State, Myanmar, have been deported to Palestine, the consequences of the crimes against humanity committed by the Government of Myanmar have occurred in Bangladesh, which is a party to the RS. Therefore, the ICC can establish jurisdiction over the Rohingya situation pursuant to Article 12(2) of the RS. Moreover, due to the special circumstances of the Rohingya situation, the prosecutor can submit a request to the Pre-Trial Chamber to make a ruling on specific issues in accordance with the right granted to the prosecutor by the RS — discretion — when he is unable to confirm it himself. The second part is the prosecutor's specific opinion on the Rohingya situation. In this part, the prosecutor argues whether the Rohingya situation exists and whether it is serious. Secondly, the prosecutor argues in this part that deportation is a kind of behavior that endangers humanity, and the prosecutor cites a large amount of factual evidence and legal evidence to prove that "deportation" is an independent crime, and finally establishes the constituent elements of the crime of deportation. The last part is the prosecutor's application for the court's ruling. Obviously, the entire logic of the Prosecutor's Request is based on Article 19, paragraph 3. Therefore, when the Prosecutor's application of Article 19, paragraph 3, of the RS lacks legitimacy, the entire Request lacks a legal basis, and even the Court's jurisdiction is illegal.

Article 19(3) of the RS gives the Prosecutor and other interested parties the right to question the jurisdiction of the ICC and the admissibility of the situation. Some scholars and judges believe that the Prosecutor's actions are an abuse of Article 19(3), but the Pre-Trial Chamber believes that different people have different understandings of the RS, so the Prosecutor's application of Article 19(3) is not an abuse of discretion. Judge Brichambaut believes that the OTP's interpretation of Article 19(3) of RS in the Request is incorrect, and the ICC has not provided an authoritative interpretation of the application of this provision. Moreover, when applying this provision, the Prosecutor did not follow the provisions on treaty interpretation in the *VCLT*, and therefore the Prosecutor's interpretation of Article 19, paragraph 3 of the RS is inconsistent with the inherent spirit of the RS.

Judge Brichambaut further pointed out that the application condition of Article 19(3) of the RS is "after the case has been established", and the standard for establishing a case is that the Pre-Trial Chamber issues an arrest warrant or a summons for the criminal to appear in court. However, when the Prosecutor applied Article 19(3) of the RS, this standard was not met. There are three main reasons why the applicability of Article 19(3) of the RS is considered to be time-limited. First, according to the title of Article 19 of the RS — "Challenging the Jurisdiction of the Court or the Admissibility of a Case", the right granted by this article can only be exercised when there is a "case". In other words, the application of Article 19 of the RS is under time limitation, that is, only after the case is established can it be applicated. In addition, not only the title, but also other provisions in Article 19 prove this assertion. For example, Article 19 (1) states at the beginning that this provision only applies to the case stage, and Article 19 (2) stipulates that "the objects of the questioning of relevant persons or institutions" is the case, not the situation or anything else. Secondly, according to the provisions on the interpretation of treaties in the *VCLT*, everyone who interprets the specific provisions should be in good faith in the context. Therefore, whether the prosecutor or the ICC interprets Article 19(3) of the RS, it should be interpreted in the context of the RS and the relevant provisions of the Rules of Procedure and Evidence. According to the provisions of Article 19(1), that is, the prosecutor's right to challenge should be exercised after the case is established, the prosecutor obviously did not interpret Article 19(3) of the RS in good faith. For this reason, Judge Brichambaut believes that Article 19(3) of the RS can only be

applied after a "case" has been established. Finally, Judge Brichambaut believes that if the Prosecutor applies Article 19(3) of the RS before a case has been established, this provides a way for the Prosecutor to expand his powers. Because the prosecutor can make hypothetical or abstract requests for jurisdiction to the Pre-Trial Chamber when there is no case or even situation, this not only undermines the authority of the RS, but also causes all cases to be concentrated in the Pre-Trial Chamber, which seriously conflicts with the four-stage preliminary trial procedure established by the ICC itself. In Judge Brichambaut's view, the purpose of establishing the four-stage preliminary hearing procedure is to protect and seal evidence, thereby providing a basis for the Pre-Trial Chamber to determine whether the Court has jurisdiction. However, at this stage, the Pre-Trial Chamber ruled that the prosecutor can apply Article 19(3) before the case is established, which not only makes the four-stage preliminary hearing procedure meaningless, but also does not provide any convincing reasons. In addition, the court's recognition of the prosecutor's abuse of discretion has given legitimacy to the prosecutor's abuse of discretion. Because the court provides advisory opinions to the prosecutor before the case is established, the court's role in restricting the prosecutor's discretion is placed virtually. According to the RS, in order to restrict the prosecutor's discretion, the States Parties set a limit on the review power of the Pre-Trial Chamber, thereby limiting the prosecutor's discretion. Before the case is established, the prosecutor seeks the opinion of the Pre-Trial Chamber, and the opinion of the Pre-Trial Chamber is likely to have final effect, because the Pre-Trial Chamber cannot deny the opinion previously provided in the subsequent review. Since the opinion of the Pre-Trial Chamber has such effect, it can be inferred that the prosecutor's request has two purposes.

The first is to actually request the court to grant him the right to investigate in order to conduct an investigation into the situation in Myanmar; The second is to give the court legal legitimacy to handle the situation. However, the prosecutor's abuse of discretion will greatly undermine the authority of the ICC. The court's authority lies mainly in its compliance with the law, which is specifically manifested in the continuity of precedents. Since knowledge is local, if the Court wants to achieve consistency in its jurisprudence, it needs to reconcile the different understandings of the RS among different States Parties based on their different cultures and coordinate the different opinions into a more consistent essentialist understanding. However, the irresponsible way of issuing opinions by the Pre-Trial Chamber has undoubtedly frustrated the efforts of the ICC. The advisory opinion provided by the Court at the pre-trial stage has, in a sense, recognized the crimes advocated by the prosecutor and put the acts investigated by the prosecutor on trial in advance, which not only violates the principle of "due process", but also violates the principle of "no crime shall be considered legal (no conviction without trial)" in substance.

It can be seen from Judge Brichambaut's dissenting opinion that Judge Brichambaut used systematic interpretation to conduct a comprehensive interpretation of Article 19(3) of the RS, and ultimately concluded that the Prosecutor's interpretation of Article 19(3) of the RS violated the original intention of the provision and lacked a legal and reasonable basis. Though many international law scholars have demonstrated the illegality of Myanmar's "expulsion" and the legitimacy and legality of the ICC's jurisdiction through procedural and substantive aspects such as "the principle of territorial jurisdiction includes not only the place where the act occurs, but also the place where the result occurs", "Myanmar's expulsion constitutes genocide", "the background of the Myanmar government's expulsion", "universal jurisdiction", "the prosecutor's discretion", and "Myanmar's Citizenship Law's discriminatory provisions against Rohingyas", unfortunately no scholar has responded to Judge Brichambaut's criticism of the legal basis of the Request (Article 19, paragraph 3). As mentioned above, the Prosecutor's application of Article 19, paragraph 3, concerns the legality of the entire Request. If the "legality doubts" raised by Judge Brichambaut cannot be resolved, even if there are no problems with the fairness and legality of the entire case, at least the jurisdiction of the Court is illegal, which is a blatant violation of Article 12 of the RS. So, to use the words of Judge Brichambaut, "this issue must be resolved and cannot be avoided or rejected in an arbitrary manner" [4; 138].

Discussion

"The principles of international criminal law depend on domestic criminal law (as long as it is considered that international criminal law is a branch of criminal law), ……Research also needs to start with relevant discussions in the context of domestic criminal law, and then move forward to test the relatively new field of ICL" [5; 61]. Therefore, the origin of the development of international criminal law is subject to the development of criminal law theory.

The "Strafrechtsdogmatik" is composed of two roots, one is "Strafrecht" and the other is "Gogma". The etymological interpretation of the creed is about the principles or rules of beliefs and faiths. It is an un-

changeable ideal in human thought. After the creed was transplanted into the criminal law in the Liszt era, the dogmatic refers to the unshakable part of the criminal law theory. Professor Roxin, a German criminal law scholar, pointed out: "Criminal law dogmatic is a discipline that studies the interpretation, systematization and further development of various legal provisions and academic viewpoints in the field of criminal law" [6; 74]. The main mission of the dogma of criminal law is to develop the system of criminal law theory, "ensure the unity of all kinds of knowledge under one concept"[7; 13], and become a "knowledge whole organized according to various principles"[8; 76]. What's more, "criminal law dogmatic is not satisfied with simply merging various theoretical principles together and discussing them one by one, but strives to put all the knowledge generated in the theory of criminal acts in the "organized whole" in an orderly manner. Through this method, not only the content of the concept can be clarified and the structure of the system can be formed, but also new concepts and new systems have to be explored" [9; 27]. However, the dogmatic of criminal law cannot exceed the scope of the text of criminal law. The development of dogmatic of criminal law must respect the current law. "Through the interpretation and systematization of legal provisions and legal theories" [10; 357] "to form a theoretical system of flesh and blood" [11; 276].

Judge Brichambaut challenged the prosecutor's interpretation of Article 19(3) in the "Request", especially the way she used the systematic interpretation to explain that "the provisions of Article 19(3) can only be applied after the case is established". It is undeniable that Judge Brichambaut's challenge has sufficient normative and legal basis, but it also makes Article 19(3) result in conflict with Article 15(4) and 53(3)(a) concerning the discretion of the prosecutor. Even going further, there are conflicts between paragraphs 1, 2 and 3 of Article 12 of the RS. According to the basic literal understanding of Article 12, paragraphs 1 and 2 stipulate that the Court exercises the jurisdiction over "situation". The third paragraph succeeds the second paragraph, stating that "if the acceptance of a State which is not a party to this Statue is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question". The third paragraph is inherited from the second paragraph, but the prerequisites for the Court to establish jurisdiction are very different. That is, the second paragraph stipulates that the time for the establishment of the Court's jurisdiction is when the "situation" occurs, while the third paragraph stipulates that the time for the establishment of the Court's jurisdiction is after the "crime" (the case is established or the prosecutor initiates a lawsuit). If the "crime" has been determined, it means that the prosecutor has filed a lawsuit. However, if the crime prosecuted by the prosecutor occurred in a non-party to the Statue, and the situation has not been submitted by the Security Council to the Court, so the Court can't exercise jurisdiction under Article 12(1). Then, how can the prosecutor initiate a lawsuit? Bassiouni pointed out: "The situation is an overall factual environment, that is, an environment where criminal acts which should be under the jurisdiction of the court are carried out. The point of the term "situation" varies in different cases, and the understanding of it should be defined by the prosecutor of the ICC depending on the circumstance. At the same time, a Trial Chamber composed of three judges shall have the right to review the term "situation", while the Appeals Chamber shall have the final power of interpretation. ……Because certain situations can only be handed over to the prosecutor of the ICC by the Security Council or a State Party, there is a substantive error in Article 12(3), that is, "suspicious crime" [12; 277]. In order to protect the integrity of the "RS", Bassiouni resorted to historical interpretation and pointed out: "The small delegation group and the chairman of the committee of the whole extended this content together. It's clear that, they are not trying to change the substantial content of the transfer matter, that is, the substantial content of the "situation" [13; 171]. Historical interpretation — exploring the original intent of the legislator — helps to make the law an organic integrity, avoiding the risk of normative conflicts caused by purely literal interpretation and systematic interpretation. This point was clearly expressed in Judge Rutrez's "rejection" [14; 124] of the judgment of the International Military Tribunal for the Far East (IMTFE).

The "RS" was formulated by thousands of representatives from many countries. Time, language, and political constraints will inevitably lead to logical contradictions or errors in the content of the "RS". Therefore, resorting to historical interpretation and exploring the original intent of the legislator has become a reasonable means to explore the purpose of the Statue and the original intent of the norms. In this way, conflicts in the norms themselves can be avoided and resolved, and the RS can become an organic and systematic integrity.

Conclusion

1. Review of the formulation proceeding of Article 19

The predecessor of Article 19 of the RS was Article 34 of the draft RS of the International Law Committee, which only regulated the challenge of the jurisdiction of the court [15; 125]. The defendant and any relevant country may submit challenge before or at the beginning of the trial in accordance with the "Rules of Procedure and Evidence"; But at any stage after the start of the trial, it can only be raised by the defendant. The Committee considers it to be a very important clause, whose purpose is to ensure that the Courts earnestly comply with the scope of jurisdiction established by the RS. It is generally believed that the time when a representative raises challenges in the preparatory committee should be before the trial or the trial has just begun, and it should not be later than this time. Some people believe that the Court should have the power to recommend litigation or review its decision on inadmissibility after a fundamental change in the situation.

Proposals for the draft RS submitted by the Preparatory Committee to the Rome Conference [16]: At each stage of the litigation, the court should determine its jurisdiction over a case, and can determine the admissibility of the case on its own in accordance with the relevant provisions. Those who can challenge the admissibility of the case or the jurisdiction of the Court include the defendant or suspect, the state that could exercise jurisdiction over the very crime, and the country that receives a request for cooperation. The prosecutor can ask the court to make a ruling on issues of jurisdiction or admissibility. All parties to the case, non-parties with jurisdiction over the crime, and victims can submit their opinions to the court. Except in special circumstances, any person or country that has the right to challenge can only challenge the admissibility of a case or the jurisdiction of the Court once. This challenge must be raised before or at the beginning of the trial, and should propose as soon as possible. Before the indictment is confirmed, challenges to the admissibility of a situation or the jurisdiction of the Court shall be submitted to the Pre-Trial Chamber. After the indictment is confirmed, it shall be submitted to the Trial Chamber. The decision about jurisdiction of the ICC or admissibility of the case can be appealed to the Appeals Chamber. The prosecutor may request reconsideration of the ruling at any time on the grounds that the circumstances that led to the inadmissibility of the case no longer exist, or on the grounds that new facts emerge.

By reviewing the formulation process of Article 19 of the RS, we can clearly grasp that the legislators have set up a very wide range of challenge measures to ensure that the Court earnestly abide by the scope of jurisdiction stipulated by the RS. These measures are embodied in the "challenge subject" and "challenge time" respectively. The challenge subject includes the prosecutor, the victim, the state party, and the non-state party (submission of the situation), and the "challenge time" starts before the trial and extends to the entire litigation proceed. It can be seen from this that the legislator's intention to enact Article 19 is to limit the Court's jurisdictional expansion, so it gives the parties a wide range of rights to challenge, not to limit the time horizon for the prosecutor to apply this clause. Therefore, Judge Brichambaut's understanding of Article 19(3) is wrong in the legislative purpose of this article. In other words, the prosecutor's interpretation of Article 19(3) in the "Request" completely complied with the original intent of the legislator and did not go beyond the literal scope of the article. On the contrary, Judge Brichambaut's interpretation of Article 19(3) deviated from the original intention of the legislator.

2. Systematic interpretation of Article 19(3) under the original intention of the legislator

The title of Article 19 of the RS is "challenge to the jurisdiction of the ICC or the admissibility of a case". "Jurisdiction" and "admissibility" are two different concepts. The Court must first establish jurisdiction in every case. Even if the RS does not expressly provide the Court with this power, the Court can automatically determine whether it has jurisdiction over a case. For example, the ICTY believes that this is the inherent jurisdiction of a court or arbitral tribunal, and is an essential part of the exercise of its functions, so it does not need to be clearly stipulated in its constitutional documents [17; 125]. Therefore, in Article 19(1), the English expression of "shall satisfy itself" is "shall satisfy itself" rather than "shall determine". This means that whether the Court has jurisdiction over the received case is an issue that the Court must resolve, but the RS gives the Court discretion as to how to determine it.

Regarding the issue of "admissibility", the Court may make determination in accordance with Article 17 of the RS on its own motion. However, in the RS writes that "the court may, on its own motion, determine...", the RS uses "may" instead of "shall", which means that the court can determine on its own, or in the case when the admissibility is challenged, the decision will be made. The "determine" of the court must be made within the specific provisions of Article 17, which means that if a case is inadmissible, the court cannot exercise jurisdiction. According to this logic, jurisdiction precedes admissibility, so the title of Article 19 only adds the time limit of "case (after prosecution)" before "admissibility". Judge Brichambaut took the "case" before "admissibility" in the title of Article 19 as a starting point, and treated the challenges of the

Court's "jurisdiction" and "admissibility of the case" equally, undoubtedly confusing the two completely different concepts of "jurisdiction" and "admissibility". At the same time, the RS clearly mentions "this Court is in accordance with Article 17" in paragraph 1. Although the Court is its own arbitrator who has right to determine whether the Court has jurisdiction and judge whether the case is admissible, it also emphasizes the "judicial sovereignty" and the "principle of optimistic complementary jurisdiction" which established a line of defense for national sovereignty, and reflects the legislator's original intention of restricting the Court's jurisdiction. But that Judge Brichambaut confuses "jurisdiction" with "admissibility" and essentially removes the limitation of the Court's "complementary jurisdiction", and forms a situation in which the case is "admissible" if the Court has "jurisdiction", which is contrary to the original intention of the legislator. In addition, Article 19 stipulates that "this Court shall have jurisdiction over any situation received." "Any situation" not only includes the situation which the prosecutor is prepared to investigate submitted to it by the State party according to Article 18, or the situation which prosecutor initiates an investigation on its own, also includes the situation submitted by the Security Council to the Court. Therefore, according to Article 13(2) of the RS, the Security Council can only submit to the Court "situations" rather than specific cases. According to Article 31 of the "VCLT", the understanding of norms must be related to the context, so the same concept cannot be given different understandings. It can be seen the term "any case" in Article 19(1), includes not only "cases" but also "situation". Therefore, Judge Brichambaut pointed out in his rejective opinion that "Article 19(1) applies only to the case stage" is unreasonable. Because if the "case" in Article 19(1) is understood as only a specific case prosecuted, it means that the provision of Article 13(2) is wrong.

It can be seen in Article 19(3) "the prosecutor can seek a ruling from the Court regarding a question of jurisdiction or admissibility". In view of the importance of "jurisdiction" and "admissibility" to the ICC, in order to ensure the rapid resolution of challenges, the "Regulations of the Court" authorizes the relevant chambers to formulate their own procedures. Because if the court's jurisdiction and the admissibility of the case are not resolved first, and left to be tried and decided later, once the Chamber's final decision denies the Court's jurisdiction over the case or admissibility of the case, all the Court's efforts will be in vain. Prosecutors learned from the experience of ICTR, KWECC, UNTAET and other international criminal tribunals that lack of funds and efficiency made justice impossible, so the efficiency issue she pointed out in the "Request" is not a jurisprudential basis, but a factual statement of historical experience. Judge Brichambaut's criticism on the prosecutor of "disregarding of justice and focusing on efficiency", although encouraging, ignores the meaning of "efficiency" embodied in Article 19(3).

3. Courts and prosecutors practiced the content of 19(3)

Articles 58 to 62 of the "Rules of Procedure and Evidence" establish procedures for challenging the jurisdiction of criminal courts and the admissibility of cases. Article 58, paragraph 1, stipulates that a request or application to challenge the jurisdiction of the ICC or the admissibility of a case shall be submitted in writing and attached with its basis. In the Request filed on April 9, 2018, the Prosecutor presented investigative reports from numerous international organizations, which stated: Ethnic minorities in Rohingya State have been persecuted for a long time, and the situation has worsened since 2017. Among the persecuted people are not only adult men, but also children and women. Rape, disappearance and other atrocities frequently occur here. The prosecutor made a judgment based on a lot of verifiable evidence that the Myanmar government's expulsion of ethnic minorities in Rohingya State is real.

The Prosecutor may, in accordance with Rule 58(2) of the Rules of Procedure and Evidence, rule on the admissibility of a case at his/her discretion upon receipt of an application or request by the Pre-Trial Chamber. If in doubt, the Prosecutor may refer the issue of jurisdiction and admissibility to the Pre-Trial Chamber and request the Pre-Trial Chamber to make a ruling. At the same time, the Prosecutor shall provide the relevant parties with a summary of the case and materials to ensure that the relevant parties have the right to be informed. According to relevant regulations, after the prosecutor submitted an application on April 9, 2018, the Chamber issued a decision the following month, inviting Bangladesh to provide relevant materials and evidence. In addition, since the situation also involves Myanmar, the Chamber issued another decision to Myanmar on June 21, requiring it to submit its opinions. It can be seen that the prosecutor and the Chamber did not violate the relevant provisions of the Rules of Procedure and Evidence and the RS, and even strictly followed the provisions. However, the Myanmar government refused to cooperate with the ICC. In 2018, it issued a statement through government news that it refused to cooperate with the ICC and also rejected the prosecutor's request. The Pre-Trial Chamber and the Prosecutor fully implemented the procedural rules of the "Evidence" on "challenging jurisdiction of the ICC and admissibility of cases", reflecting the value proposition of the ICC of "fairness, justice" and even "efficiency". Therefore, this article believes that the legal

basis of the Prosecutor's "Request" — Article 19, paragraph 3 — is the Prosecutor's legal and reasonable use of it on the basis of grasping the original intention of the legislators of the provision, and the Prosecutor and the Chamber fully and correctly implemented the procedural rules that should be implemented in Article 19, paragraph 3. In other words, Judge Brichambaut's criticism of the Prosecutor's "Request" was made without grasping the original intention and inherent spirit of the legislator of the provision, and misinterpreted Article 19(3).

Concluding remarks

When looking forward to the future of the ICC, Professor Cassese said passionately: "The rule of law has become a secular religion". The essence of the rule of law lies in human rights, and respect for human rights is the core meaning of the rule of law. International criminal law is the cornerstone of the rule of law in the international criminal field, which is responsible for protecting the peaceful coexistence of people within a certain country and beyond national boundaries in the event of serious violations of human rights and large-scale threats to the peace and security of mankind. It is undeniable that the international community is still an area dominated by sovereign states and full of struggles. As a result of the transfer of sovereignty, the "RS" is inevitably affected and restricted by politics. The "Rohingya Case" caused academic conflicts in the legal field, directly because the "RS" lacks exquisiteness, and there are contradictions in the interpretation of the text; but the fundamental reason is that the rule of law in international criminal law field is still restricted by international politics.

Judge Brichambaut's interpretation of Article 19(3) of the RS and his criticism on the Prosecutor's "Request" directly confronted the reality of contradictions between the rules of the RS, and also provided the orientation of development for the rule of law in international criminal law field — "To form concepts with certain determined content, to further fill in principles, and to specify the relationship between individual or multiple norms and these basic concepts and principles" [18; 17] — that is, under the guidance of "human rights" and "rule of law", use literal interpretation, systematic interpretation, purpose interpretation, historical interpretation and other means to make the "RS" an organized whole.

This article believes that, international criminal law is a branch of criminal law, and embedding the theory or ideas of "dogmatic" into international criminal law is an effective way to solve the contradictions between the "RS" norms. At the same time, dogmatic not only makes the content of the concept clarified and the structure of the system formed, but also contains the impulse to explore new concepts and create new systems, which promotes the leap of form of knowledge of international criminal law from theory of facts and theory of norms to axiology, and makes the discipline of international criminal law more prosperous. The rule of law in international criminal law field has become a culture worldwide. This is not only a reminder and stimulus for the sublimation of national consciousness, but also a realistic need for economic thinking.

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Рохинджа ісі бойынша догматикалық ойлар

Мьянмадағы рохинджа азшылығына қарсы зорлық-зомбылық науқаны біздің замандағы адам құқықтарының ең өзекті мәселелерінің бірі. Прокурор «Статуттың 19-бабының 3-тармағына сәйкес юрисдикция туралы ұйғарым шығару туралы прокурордың сұрауы» арқылы юрисдикцияға жүгінді, бұл академиялық, дипломатиялық ортада және тіпті судьялар арасында айтарлықтай дау тудырды. Судья Бришамбоның «Сұраныс» сыны барлық дерлік сыни құқықтық ойлауды қамтиды. Судья Бришамбо «Сұрау салуда» Статуттың 19-бабының 3-тармағын қолдану орынды да, әділдік принципіне де сәйкес келмейді, прокурордың өкілеттігін орынсыз кеңейтті және ХҚК беделіне нұқсан келтірді деп санады. Догматикалық теорияға сүйене отырып, Статуттың 19(3)-бабында бұл тармақтың мақсаты Соттың ұлттық егемендікті қорғауға арналған юрисдикциясын шектеу екенін атап көрсетті. «Юрисдикция» мен «қабылданушылық» арасындағы айырмашылық, негізінен, Соттың заңмен анықталған юрисдикция көлемін шындап сақтауын қамтамасыз ету. Статуттың 19(3)-бабының тарихи түсіндірмесі Мьянмадағы жағдайға қатысты ХКС юрисдикциясының заңдылығын түсіндіріп қана қоймайды, сонымен бірге Статуттың «ұйымдасқан тұтастық» екенін тексереді.

Кілт сөздер: догматикалық, тарихи түсіндіру, заңдылық, юрисдикция, рұқсат ету, Мьянма.

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Догматические размышления о деле Рохинджа

Кампания зверств против меньшинства рохинджа в Мьянме является одной из самых острых проблем прав человека нашего времени. Прокурор обратился за юрисдикцией с «Запросом обвинения о вынесении решения о юрисдикции в соответствии со статьей 19(3) Статута», что вызвало значительные споры в академических, дипломатических кругах и даже среди судей. Критика судьи Бришамбо «Запроса» охватывает почти все критические правовые мысли. Судья Бришамбо посчитал, что применение статьи 19(3) Статута в «Запросе» не было ни уместным, ни соответствующим принципу справедливости, ненадлежащим образом расширило полномочия прокурора и нанесло ущерб авторитету МУС. Основываясь на догматической теории, статья 19(3) Статута указала, что цель этого положения заключается в ограничении юрисдикции Суда для защиты национального суверенитета. Различие между «юрисдикцией» и «допустимостью», по сути, заключается в том, чтобы гарантировать, что Суд добросовестно придерживается сферы юрисдикции, определенной уставом. Историческое толкование статьи 19(3) Статута не только проясняет законность юрисдикции МУС в отношении ситуации в Мьянме, но и подтверждает, что Статут является «организованным целым».

Ключевые слова: догматический, историческое толкование, законность, юрисдикция, допустимость, Мьянма.

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Методики расследования преступлений: современное состояние, проблемы построения и направление совершенствования

Рассмотрена проблема методического обеспечения стадии предварительного расследования преступлений. Акцентировано внимание на отдельных проблемных аспектах криминалистической характеристики преступлений, дальнейшее развитие которой не способствует самосовершенствованию. Основанные на криминалистической характеристике преступлений современные методики расследования не удовлетворяют потребностям времени по причине несовершенства данной научной категории. По мнению автора, формированию частных методик расследования преступлений должно предшествовать первоначальное выявление, а затем характеристика (описание) материальных элементов, составляющих структуру любого преступного деяния. Такой подход способствует объективному построению информационно-теоретической модели преступления, используемой для целей разработки частной методики расследования. Названы и кратко представлены общие элементы материальной структуры преступлений, определенное сочетание которых составляет структуру расследуемого деяния. Сведения о них могут служить основой для совершенствования методического обеспечения расследования преступлений, а также оптимизации деятельности по расследованию уголовных дел. Автор придерживается мнения о нецелесообразности отказа от криминалистической характеристики преступлений, но считает необходимым её преобразование на основе сформировавшегося учения о материальной структуре преступления. Высказано предложение рассматривать элементы материальной структуры преступлений в неразрывном единстве с их криминалистической характеристикой. Такой подход позволяет говорить о качественно новом понятии, а именно: криминалистической характеристике материальной структуры преступления. Представляя собой информационно-теоретическую модель преступления, криминалистическая характеристика его материальной структуры на объективной основе будет способствовать разработке новых и совершенствованию существующих методик расследования криминальных деяний.

Ключевые слова: криминалистика, преступление, расследование, методика расследования, криминалистическая характеристика, материальная структура преступления.

Введение

Основная функция криминалистической науки состоит в обеспечении практической деятельности в сфере противодействия преступности. Криминалистика разрабатывает и предлагает правоохранительным и, в первую очередь, органам предварительного расследования систему теоретических и прикладных знаний для использования в непосредственной борьбе с реалиями современной преступной деятельности, то есть преступлениями.

Сформировавшись в конце XIX века, криминалистика к настоящему времени существенно изменилась. Её развитие непрерывно и продолжается до сих пор. В то же время эффективность её от-

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дельных теоретических разработок и практических рекомендаций оставляет желать лучшего, что указывает на наличие криминалистических проблем.

Проблемы имеются во всех разделах криминалистической науки: общей теории, криминалистической технике, тактике и методике. В данной статье не представляется возможным рассмотреть весь комплекс научных и практических проблем криминалистики. Мы обратим внимание и проанализируем одну из основных проблем, относящихся к методическому обеспечению расследования преступлений.

Методики расследования преступлений являются научной разработкой, содержащей рекомендации, применимые в деятельности субъектов, осуществляющих предварительное расследование уголовных деяний. Неэффективная или недостаточно разработанная методика либо её отсутствие составляют проблему на этапе расследования и раскрытия преступлений.

Криминалистическая методика, как раздел науки, и её основная часть — методика расследования видов и групп преступлений представляют особый интерес для ученых-криминалистов. Разработке теоретических положений этой части криминалистики и формированию методик расследования преступлений уделили внимание многие российские ученые: Т.В. Аверьянова, И.В. Александров, Е.А. Ануфриева, О.Я. Баев, Р.С. Белкин, В.В. Бугай, А.Н. Васильев, В.Б. Вехов, И.А. Возгрин, Т.С. Волчецкая, А.Ф. Волынский, В К. Гавло, Ю.П. Гармаев, И.Ф. Герасимов, А.Ю. Головин, В.Д. Грабовский, А.И. Дворкин, Л.Я. Драпкин, С.Ю. Журавлев, В.Д. Зеленский, Е.П. Ищенко, В.Н. Карагодин, В.Я. Колдин, И.М. Комаров, А.Н. Колесниченко, В.Е. Корноухов, О.Н. Коршунова, Ю.Г. Корухов, С.Ю. Косарев, А.Ф. Лубин, И.М. Лузгин, Г.М. Меретуков, В.М. Мешков, В.А. Образцов, Е.Р. Россинская, А.Г. Филиппов, Е.Е. Центров, С.Н. Чурилов, А.С. Шаталов, А.В. Шмонин, Н.П. Яблоков и другие.

Не менее значим вклад в развитие криминалистической методики белорусских ученых. Актуальные проблемы данного раздела криминалистики разрабатывали И.И. Басецкий, В.И. Берестень, Г.И. Грамович, В.Л. Григорович, А.Е. Гучок, А.В. Дулов, В.Ф. Ермолович, Г.А. Зорин, Ю.Ф. Каменецкий, Е.И. Климова, А.В. Лапин, И.А. Лапина, Н.А. Легенченко, А.Н. Лепехин, В.М. Логвин, О.В. Маркова, И.А. Мороз, Г.Н. Мухин, А.П. Пацкевич, Н.И. Порубов, С.Ю. Ревтова, А.С. Рубис, В.В. Хилюта, Г.В. Федоров, В.Б. Шабанов, В.П. Шиенок, М.П. Шруб, Г.А. Шумак, А.В. Яскевич и другие. Перечисленные и иные белорусские ученые-криминалисты до настоящего времени продолжают уделять внимание развитию криминалистической методики.

Статистические данные, свидетельствующие о стабильном состоянии, а в отдельных случаях и росте количества преступлений отдельных видов, криминализация новых деяний и обнаружение современных способов их совершения определяют потребность в формировании нетрадиционных и совершенствовании имеющихся методик расследования.

Целью данного исследования является рассмотрение возможностей преобразования криминалистической характеристики преступлений, что позволит совершенствовать методическое обеспечение деятельности по расследованию преступлений.

В качестве объекта исследования выступают методики расследования преступлений в части их построения и определения путей повышения практической эффективности.

Предметом исследования является криминалистическая характеристика преступлений как научно-теоретическая основа для формирования методик расследования преступлений. Акцентируется внимание на необходимости её изменений и дополнений, учитывая материальные элементы, образующие структуру любой преступной системы.

Методы и материалы

Объект и предмет исследования предполагают целесообразным использование системно-структурного методологического подхода. С учетом избранного подхода к исследованию достижение его цели обеспечивалось путем применения метода криминалистического анализа, а равно иных общенаучных и частных методов познания, составивших методологическую основу данной работы. Теоретическая база исследования представлена диссертационными работами А.Н. Колесниченко, С.И. Коновалова, Л.А. Сергеева, монографиями О.Я. Баева, Р.С. Белкина, А.Е. Гучка, В.Ф. Ермоловича, учебниками и учебными пособиями по криминалистике, научными статьями В.П. Бахина, О.В Беспечного, А.И. Бузина, А.В. Бутырской, Л.Г. Дубинина, В.А. Гамзы, Г.К. Захарова, В.Л. Кудрявцева, М.А. Неймарк и других, а также публикациями автора данного исследования.

Результаты

Для построения методик расследования в течение последних пятидесяти лет используются теоретические данные, представляемые наукой в качестве криминалистических характеристик преступлений. Кратко рассмотрим данную научную категорию.

В шестидесятых годах XX века Л.А. Сергеев [1; 4–5], а затем А.Н. Колесниченко вводят в научный оборот понятие «криминалистическая характеристика преступления». При этом А.Н. Колесниченко отметил, что она относится к наиболее существенным положениям, общим для всех частных методик расследования [2; 10]. Идея указанных учёных была подхвачена, позитивно воспринята и развита научным сообществом. К настоящему времени опубликовано значительное количество монографических и иных научных работ, раскрывающих различные аспекты данного понятия. На основе криминалистических характеристик отдельных видов или групп преступлений сформировано множество частных методик их расследования. В среде ученых-криминалистов и практиков сложилось представление, что криминалистическая характеристика преступления, как система теоретических знаний, не только обеспечивает описание вида или группы преступлений с позиции криминалистики, но также с практической стороны способствует построению версий, определению целей и направлений расследования, оптимизации этой деятельности в конкретной следственной ситуации.

За время существования и развития представлений о данной научной категории выявлено значительное количество проблем, разрешение которых в обозримом будущем вызывает сомнение. Вот некоторые из них:

1) отсутствует общая формулировка понятия «криминалистическая характеристика преступления». Изучение и анализ научных публикаций позволяет выделить более сотни определений данному понятию. Каждый исследователь предлагает своё виденье и вариант определения понятия «криминалистическая характеристика преступления»;

2) по-разному трактуется сущность криминалистической характеристики преступлений. В.П. Бахин обратил внимание, что учёные представляют её как «информационную модель типичных признаков», «идеальную модель типичных связей», «вероятную модель события», «систему особенностей вида преступлений» и т.д. [3; 18];

3) имеется различный подход к рассмотрению содержания криминалистической характеристики преступлений. Ученые проявляют единообразие в отношении отдельных видов элементов криминалистической характеристики преступлений, упоминая способ совершения преступления; предмет преступного посягательства; обстановку совершения преступления; механизм следообразования; сведения о личности преступника и потерпевшего. В отношении иных элементов характеристики мнение не совпадает. В содержании криминалистической характеристики отдельных преступлений ученые-криминалисты выделяют такие элементы, которые не имеют криминалистического значения. В качестве её элементов рассматриваются, например, «способ дачи заведомо ложных показаний» [4], «материальный ущерб» [5], «личность организатора» [6] и др.;

4) нет единого мнения о количестве структурных элементов криминалистической характеристики преступлений. О.Я. Баев в криминалистической характеристике выделил восемь элементов [7; 230], В.А. Гамза упоминает семнадцать элементов [8; 7], а С.И. Коновалов в ходе диссертационного исследования увеличивает их количество до девятнадцати [9; 101]. Более двадцати пяти элементов криминалистической характеристики преступлений предлагает к рассмотрению белорусский ученый В.Ф. Ермолович [10; 152–153].

Указанные и иные недостатки криминалистической характеристики преступлений свидетельствуют о её теоретической несостоятельности. В таком виде она не удовлетворяет запросы работников, осуществляющих предварительное расследование.

Проанализировав авторские подходы к формированию содержания криминалистической характеристики преступления, Р.С. Белкин пришел к выводу о её частичном соответствии понятию «криминалистическая». Содержание криминалистической характеристики преступления составляют данные из уголовного права, криминологии и криминалистики [11; 222]. Эта модель составления криминалистической характеристики преступления сложилась на первоначальном этапе её развития и применяется в неизменном виде до настоящего времени.

Р.С. Белкин назвал криминалистическую характеристику иллюзией, «фантомом», наносящим ущерб науке и практике борьбы с преступностью [11; 8, 222]. Ряд исследователей также указали на

проблемы криминалистической характеристики [12], её способность искажать преступную деятельность [13].

В аспекте нашего исследования вызывает интерес мнение ученых, обративших внимание на необходимость выделения наиболее значимых и существенных для расследования признаков преступления, которые «образуют лаконичную завершенную систему» [14; 9]. Такую систему, по нашему мнению, составляют признаки материальных составляющих (элементов) преступления.

Понимание сложности и неразрешимости проблем криминалистической характеристики позволило осознать необходимость поиска иных путей для криминалистического представления преступлений. Высказано предложение осуществлять познание преступлений, основываясь на выделении и криминалистическом анализе совокупности материальных объектов, составляющих преступную систему [15; 9]. Исследование в данном направлении позволило разработать «основы криминалистического учения о материальной структуре преступления» [16].

Новый концептуальный подход к криминалистическому исследованию преступлений не был однозначно воспринят учеными. В.Ф. Ермолович рассматривает структуру преступления в качестве элемента его криминалистической характеристики [17; 42], что снижает инновационный криминалистический подход к пониманию и познанию преступления.

Структурными элементами преступления В.Ф. Ермолович называет «формы общественно опасных действий (бездействия), за совершение которых законодательством предусмотрена уголовная ответственность; формы (виды) объекта и предмета преступления; место, орудия и средства совершения и сокрытия преступления; другие элементы преступления» [10; 128]. При этом ученый не акцентирует внимание на материальных составляющих преступного деяния.

Совсем иначе представлены материальные составляющие преступления в учении, предложенном А.Е. Гучком. Общую типовую структуру преступления образуют такие элементы, как субъект, совершающий преступление; объект преступного посягательства; средство совершения преступления; предмет преступного посягательства и предмет преступления [16; 62]. Кратко рассмотрим эти материальные элементы.

Обсуждение

Связующим звеном и основным элементом любой преступной структуры является человек, то есть субъект совершения преступления. Он может быть множественным, если криминальное деяние совершается в составе группы.

Субъекты совершения преступлений отличаются специфическими и значимыми для расследования признаками. Например, для субъектов совершения коррупционных преступлений (должностных лиц) характерны следующие черты: имеют возможность осуществлять преступную деятельность в ходе выполнения своих должностных функций; наделены специальными должностными полномочиями [18; 186].

Познание субъекта предполагает выявление его личностных качеств и свойств, одновременно учитывая специфику объекта преступного посягательства. Результативность расследования преступлений находится в прямой зависимости от своевременного сбора и рационального использования информации о преступной деятельности субъекта. Общим, что с криминалистической точки зрения объединяет любого субъекта совершения преступления, является то, что он одновременно выступает в качестве элемента, который оставляет следы в окружающей среде и воспринимает на себе следы иных элементов преступной системы.

Анализируя полученную информацию о субъекте совершенного преступного деяния, необходимо учитывать общие данные о нём, содержащиеся в криминалистической характеристике преступления конкретного вида, то есть изучая в ходе практической деятельности элементы материальной структуры преступления, нужно использовать обобщенные сведения о них из криминалистической характеристики. Акцентируется внимание на тех сведениях, которые имеют криминалистическое значение. Эти сведения, по нашему мнению, целесообразно использовать в процессе изучении иных материальных составляющих преступной структуры. Такой подход оправдан и в отношении других материальных элементов преступления.

Объект преступного посягательства иначе рассматривается в учении о материальной структуре преступления, существенно отличаясь от аналогичного уголовно-правового понятия и, соответственно, элемента состава преступления. В уголовном праве объект преступления (преступного посяга-

тельства) является абстрактным понятием, в качестве которого выступают различные общественные отношения. В материальной структуре преступления объект посягательства представляет собой материальную систему, на которую направлены преступные действия субъекта.

Перечень материальных объектов посягательства достаточно широк. В таком качестве рассматривается человек (причинение телесных повреждений, изнасилование и др.), имущество и иные ценности (поджог и др.), жилье и иные объекты собственности (мошенничество и др.), предприятия (рейдерский захват) и т.д.

Данный элемент от иных составляющих преступной структуры отличается тем, что ему в большинстве случаев непосредственно причиняется вред. Субъект деяния закономерно оставляет на нём следы своей преступной деятельности. Например, повреждает входную дверь при квартирной краже со взломом, уничтожает чужой автомобиль путем его поджога и т.д. В приведенных примерах квартира и автомобиль являются объектами посягательства с позиции учения о материальной структуре преступления.

Средства совершения преступления, как понятие учения о материальной структуре, охватывают все предметы и явления материального мира, которые использованы субъектом для воздействия на объект посягательства либо тем или иным способом связаны с ним в процессе совершения криминального деяния. Данный элемент в структуре преступления обеспечивает достижение его результата, то есть цели субъекта. Перечень возможных средств совершения преступлений не ограничен. Их мы разделили на следующие группы: «1) орудия (топор, лом, кирпич и др.); 2) оружие (пистолет, ружье, револьвер, штык-нож и др.); 3) транспортные и иные технические средства, механизмы (автомобиль, мотоцикл, бензопила и др.); 4) документы (организационные, распорядительные, информационно-справочные и др.); 5) вещества (психотропные, взрывчатые, лекарственные и др.); 6) животные (собаки, обезьяны, змеи и др.); 7) предприятия, учреждения, фирмы (лжепредприятие, оффшорная фирма и др.); 8) информация и ее материальные носители (вербально выраженные и воспринятые адресатом деструктивные сведения и др.); 9) компьютерная техника и программное обеспечение (компьютер, нетбук, вредоносная программа и др.)» [19; 29].

В учении о материальной структуре преступления «предмет преступного посягательства» представлен в качестве материального объекта, определяющего цель преступления. Зачастую целью деяния является завладение этим предметом. Предметом посягательства являются материальные ценности, денежные средства, в том числе и криптовалюта любого вида, документы и др. [20; 146]. В качестве такого элемента преступления могут быть запрещенные в гражданском обороте вещи и вещества: холодное и огнестрельное оружие, боеприпасы, взрывчатые и ядовитые вещества, наркотические средства, прекурсоры и др. Развитие информационных технологий повлекло за собой появление нового предмета преступного посягательства — компьютерной информации. Этот элемент в преступной структуре также имеет материальный характер. Данный тезис ранее аргументирован автором [21].

В отличие от теории уголовного права, учение о материальной структуре преступления различает понятия «предмет преступного посягательства» и «предмет преступления».

Наличие предмета преступления в его структуре специфично. Во-первых, этот элемент преступной структуры не определяет целевую направленность криминального деяния. Во-вторых, он не влияет на формирование умысла на завладение предметом, так как субъект деяния уже владеет им. В-третьих, его наличие у субъекта влечет для него уголовную ответственность. В-четвертых, наличие этого элемента в структуре определенных видов преступлений обязательно, что указывает на преступность деяния и влияет на его уголовно-правовую квалификацию.

В качестве примера можно рассмотреть ч. 2 ст. 295 Уголовного кодекса Республики Беларусь «Незаконные действия в отношении огнестрельного оружия, боеприпасов и взрывчатых веществ» (далее — УК) [22]. В указанной части статьи предусмотрены различные способы незаконных действий, в том числе изготовление, приобретение, хранение, перевозка, пересылка или ношение огнестрельного оружия (кроме охотничьего огнестрельного гладкоствольного оружия), боеприпасов (кроме боеприпасов к охотничьему огнестрельному гладкоствольному оружию), взрывчатых веществ, взрывных устройств. Субъект совершает одно или несколько перечисленных действий в собственных интересах, являясь владельцем запрещенных в гражданском обороте вещей. Например, лицо, у которого при задержании будет обнаружено огнестрельное оружие, привлекается к уголовной ответственности по указанной статье УК за незаконное ношение огнестрельного оружия, которое в преступной структуре выполняет функцию предмета преступления. Наличие у субъекта по месту его

жительства огнестрельного оружия, являющегося предметом преступления, влечет для него уголовную ответственность, вне зависимости является ли он его собственником. Следует заметить, что в других ситуациях огнестрельное оружие может являться предметом преступного посягательства, например, в момент реализации умысла субъекта на его хищение либо средством совершения преступления при его использовании для убийства (ст. 139 УК).

Выделение в преступной структуре её материальных составляющих не является самоцелью. Оценивая их значение, ранее мы указали на обязательность криминалистического описания отражательных возможностей каждого элемента и их связей с иными материальными элементами преступной структуры, то есть необходима криминалистическая характеристика выявленных элементов материальной структуры преступления данного вида [20; 145].

Рассмотренные учения о криминалистической характеристике и материальной структуре преступления являются определенными способами его понимания и трактовки. Они воспринимаются учеными как самостоятельные концептуальные основы криминалистического познания преступления. Однако требуется их дальнейшее развитие и совершенствование, как мы считаем, в сочетании друг с другом.

С практической точки зрения полученная в ходе расследования информация о материальных составляющих преступного деяния служит основой для выявления неизвестных или познания менее известных структурных элементах. Данные о структурных элементах криминалистической характеристики преступлений реализуются в практической деятельности по расследованию в качестве ориентирующей информации и могут быть использованы для выдвижения версий.

Понятия «криминалистическая характеристика преступления» и «материальная структура преступления» можно рассмотреть в аспекте проблемы соотношения философских категорий «форма» и «содержание». Считаем, что материальные элементы структуры преступного деяния следует рассматривать в качестве его формы. Криминалистическая характеристика призвана раскрыть содержание элементов образующих форму. Один и тот же элемент, например, объект преступного посягательства, составляющий форму преступлений, может иметь различную характеристику, раскрывающую его содержание. При анализе преступления это позволяет рассматривать его материальную структуру и криминалистическую характеристику в неразрывном единстве. Такой подход к их пониманию может служить условием обеспечения практической результативности данных научных категорий. Их сочетание позволяет говорить о качественно новом понятии — криминалистической характеристике материальной структуры преступления.

Криминалистическая характеристика материальной структуры преступления — это его информационно-теоретическая модель, базирующаяся на совокупности сведений о материальных элементах преступления, знание о которых в условиях конкретной следственной ситуации определяет направление и содержание практической деятельности, систему тактических средств, приемов и методов выявления, расследования и предупреждения преступлений.

Выводы

На основании изложенного материала для обсуждения предлагаются следующие выводы:

1. Криминалистическая характеристика преступлений, как результат анализа и обобщения практики расследования уголовных дел определенного вида или группы преступлений, представляет собой абстрактное понятие.

2. Объективной реальностью совершенного криминального деяния является его материальная структура, элементы которой образуют внутреннее строение преступной системы.

3. Между материальными элементами преступления имеются связи функционального характера, что подтверждается следами, выявляемыми в ходе его расследования.

4. Криминалистическая характеристика содержит сведения о значимых для расследования преступления элементах без указания на взаимосвязь между ними.

5. Материальная структура преступления в сочетании с криминалистической характеристикой его элементов дает наиболее полное представление об информационной модели конкретного преступного деяния.

6. Исследование материальных элементов структуры преступления определяет целевую направленность и обеспечивает достижение результатов следственной деятельности.

7. Знания о материальной структуре и криминалистической характеристике преступления в равной степени должны быть использованы при формировании методик расследования преступлений, то

есть элементы материальной структуры преступлений необходимо рассматривать в неразрывном единстве с их криминалистической характеристикой.

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А.М. Хлус

Қылмысты тергеу әдістері: қазіргі жағдайы, құру мәселелері және жетілдіру бағыттары

Қылмыстарды алдын ала тергеу сатысын әдістемелік қамтамасыз ету мәселесі қарастырылған. Қылмыстардың криминалистикалық сипаттамаларының белгілі бір проблемалық аспектілеріне назар аударылады, олардың одан әрі дамуы өзін-өзі жетілдіруге ықпал етпейді. Қылмыстардың криминалистикалық белгілеріне негізделген қазіргі тергеу әдістемелері осы ғылыми категорияның жетілдірілмеуіне байланысты уақыт талабына сай келмейді. Автордың пікірінше, жеке қылмысты тергеу әдістерін қалыптастыру үшін әуелі кез келген қылмыстық әрекеттің құрылымын құрайтын материалдық элементтерді алдын-ала анықтау, содан кейін сипаттама беру қажет. Бұл тәсіл жеке тергеу әдістемесін әзірлеу мақсатында қолданылатын қылмыстың ақпараттық-теориялық моделін объективті құруға ықпал етеді. Белгілі бір жиынтығы тергелетін әрекеттің құрылымын құрайтын қылмыстардың материалдық құрылымының жалпы элементтері аталып, қысқаша түрде көрсетіледі. Олар туралы мәліметтер қылмыстарды тергеуді әдістемелік қамтамасыз етуді жетілдіру үшін, сондай-ақ қылмыстық істерді тергеудегі қызметті оңтайландыруға негіз бола алады. Автор қылмыстарға криминалистикалық сипаттама беруден бас тарту орынсыз деген пікірде, бірақ оны қылмыстың материалдық құрылымы туралы қалыптасқан ғылыми ілім негізінде түрлендіру қажет деп санайды. Қылмыстың материалдық құрылымының элементтерін олардың криминалистикалық белгілерімен ажырамас бірлікте қарастыру туралы ұсыныс енгізілді. Бұндай тәсіл қылмыстың материалдық құрылымының криминалистикалық сипаттамасы деген сапалы жаңа ұғым туралы айтуға мүмкіндік береді. Қылмыстың ақпараттық-теориялық үлгісін білдіре отырып, оның материалдық құрылымын объективті негізде криминалистикалық сипаттау қылмыстық әрекеттерді тергеудің жаңа әдістерін жасауға және қолданыстағы әдістерді жетілдіруге ықпал етеді.

Кілт сөздер: криминалистика, қылмыс, тергеу, тергеу әдістемесі, криминалистикалық сипаттама, қылмыстың материалдық құрылымы.

A.M. Khlus

Methods of investigation of crime: current state, problems of construction and direction of improvement

The article considers the problem of methodological support for the preliminary investigation stage of crimes. Attention is focused on individual problematic aspects of the forensic characteristics of crimes, the further development of which does not contribute to self-improvement. Modern investigation methods based on the forensic characteristics of crimes do not meet the needs of the time due to the imperfection of this scientific category. According to the author, the formation of private methods of investigating crimes should be preceded by the initial identification and then characterization (description) of the material elements that make up the structure of any criminal act. Such an approach contributes to the objective construction of an information-theoretical model of a crime used for the purposes of developing a private investigation methodology. The general elements of the material structure of crimes are named and briefly presented, a certain combination of which makes up the structure of the act under investigation. Information about them can serve as a basis for improving the methodological support for investigating crimes, as well as optimizing the activities of investigating criminal cases. The author is of the opinion that it is inappropriate to abandon the forensic characteristics of crimes, but considers it necessary to transform it on the basis of the formed doctrine of the material structure of a crime. A proposal has been made to consider the elements of the material structure of crimes in an inseparable unity with their forensic characteristics. This approach allows us to speak of a qualitatively new concept: the forensic characteristics of the material structure of a crime. As an information-theoretical model of a crime, the forensic characteristics of its material structure on an objective basis will contribute to the development of new and improvement of existing methods of investigating criminal acts.

Keywords: criminalistics, crime, investigation, investigation methods, forensic characteristics, material structure of crime.

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Уголовно-правовое значение терминов «беззащитный» и «зависимый от виновного»

Целью написания данной статьи является анализ уголовно-правового значения терминов «беззащитный» и «зависимый от виновного» в уголовном законодательстве Республики Казахстан, выявление проблем их правоприменения и разработка предложений по совершенствованию действующего законодательства. Автором дан обзор неоднозначному толкованию терминов, которые использованы в текстах действующего уголовного законодательства. В ходе написания статьи проведен сравнительный анализ терминов «беззащитный» и «беспомощный», выявлены проблемы при определении понятия «зависимость от виновного». Результаты исследования показали необходимость более четкого законодательного определения терминов «беззащитный» и «зависимый от виновного» для обеспечения единообразного применения уголовного закона и защиты потерпевших. Автором предложены конкретные рекомендации по уточнению законодательных норм и совершенствованию правоприменительной практики.

Ключевые слова: малолетний, беспомощный, беззащитный, лицо, зависимое от виновного, использование материальной или иной зависимости, использование зависимого положения.

Введение

Проводимая в стране правовая реформа повлекла принятие большого количества законов и использование юридически значимых терминов, в том числе в сфере уголовного законодательства.

Примечательно, что все времена законодатель и научное сообщество уделяли повышенное внимание и придавали особое значение терминологии закона. «По степени разработанности юридической терминологии можно судить об уровне юридической культуры и отношения к закону в стране. Лингвистические исследования, по мнению М.Б. Костровой, в области языка закона в целом и в сфере юридической терминологии необходимы, и они должны быть направлены на решение практических задач, возникающих в процессе законодательной деятельности» [1; 77].

Несмотря на значительный прогресс в развитии уголовного законодательства, ряд терминов попрежнему вызывает затруднения в правоприменительной практике. Отсутствие четкого законодательного определения и неоднозначная трактовка таких понятий в научной литературе приводят к различным толкованиям в судебной практике, что, в свою очередь, может повлиять на правильность квалификации уголовных правонарушений и назначение справедливого наказания. Неопределенность в понимании не только затрудняет работу правоохранительных органов, но и может приводить к нарушению прав потерпевших.

Цель исследования — анализ уголовно-правового значения терминов «беззащитный» и «зависимый от виновного» в уголовном законодательстве Республики Казахстан, выявление проблем их правоприменения и разработка предложений по совершенствованию действующего законодательства.

Методы и материалы

При написании статьи использован доктринальный мониторинг, который включает в себя систематический обзор действующего уголовного законодательства. Изучая тексты статей уголовного кодекса Республики Казахстан, были выявлены несоответствия, которые создают основу для последующего анализа.

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Использованы такие методы, как анализ литературы и научных исследований, выраженные в обзоре существующих знаний и опыта в области гармонизации юридической терминологии и аутентичности текстов законов. Анализ литературы позволил определить эффективные подходы, методики, которые можно адаптировать и применить в разработке изменений и дополнений в действующее уголовное законодательство.

Применен метод сравнительного анализа. Он позволил сравнить действующее уголовное и уголовно-процессуальное законодательство, помог в решении проблем несогласованности текстов законов. Для этого проведен анализ юридических текстов статей, что позволило выявить специфические ошибки и несоответствия.

На основе доктринального и сравнительного анализа посредством использования метода стандартизации терминологии предложена единая юридическая терминология. Это обеспечит последовательное использование терминов во всех текстах по уголовному праву.

Результаты

В результате проведенного исследования установлено следующее.

1. Термины «беззащитный» и «зависимый от виновного» нуждаются в более четкой законодательной регламентации. Предлагается уточнить определение этих терминов, разработать критерии их оценки в конкретных правовых ситуациях и внести соответствующие изменения в Уголовный кодекс Республики Казахстан.

2. Предлагается при расследовании уголовных дел дополнительно доказывать «беззащитность», «зависимое от виновного состояние», «использование материаальной или иной зависимости», а также «нахождение в зависимом положении».

Обсуждение

Качество расследования преступлений, обеспечение прав и законных интересов участников процесса, создание для них дополнительных гарантий в ходе судопроизводства напрямую зависят от качества применяемой терминологии. «Употребление в уголовном законе понятных и однозначных терминов делает ясным текст уголовно-правовой нормы, исключает расширительное или иное толкование. По этой причине термины, употребляемые в уголовном законе, должны быть предельно точными и четкими». [2] Понятно, что «чем совершеннее язык права, тем действеннее закон, тем более четко и глубоко он регулирует общественные отношения». [3]

Однако не все так просто. Судебно-следственная практика свидетельствует о наличии в действующем уголовном законодательстве терминов, вызывающих затруднения в правоприменительной практике и неоднозначное их толкование.

Не случайно К.-Ж.К. Токаев отметил, что «законотворческий процесс действительно нуждается в совершенствовании. Здесь немало проблем, требующих открытого, профессионального обсуждения. В конце концов, от качества законодательной системы государства в решающей степени зависит благополучие его граждан. Насколько совершенны наши законы, насколько они понятны гражданам Казахстана? Этот вопрос требует детального осмысления. Бросается в глаза отсутствие в них концептуального видения текущих моментов и перспективных тенденций в развитии государства. Некоторые законы страдают как внутренними противоречиями, так и отсутствием сбалансированности между собой. Одно и то же явление законы могут трактовать по-разному» [4].

Очевидно, что такая ситуация вызывает необходимость ревизии отдельных норм и терминов уголовного законодательства с целью их оценки и правильного понимания.

Так, одним из обстоятельств, отягчающих уголовную ответственность и наказание, выступает совершение уголовного правонарушения «*в отношении малолетнего, другого беззащитного или беспомощного лица либо лица, находящегося в зависимости от виновного*» (п. 7 ч. 1 ст. 54 УК РК).

Сегодня можно констатировать, что среди ученых-юристов и в судебно-следственной практике, уже есть сложившееся понятие и критерий оценки «*малолетнего*» и «*беспомощного состояния потерпевшего*». Однако это «не исключает наличие научно-практических проблем, связанных с «малолетним» и/или «беспомощным состоянием» и они сняты с повестки дня» [5; 13].

Но уголовно-правовые понятия «*беззащитного*» и «*лица, находящегося в зависимости от виновного*» в науке уголовного законодательства Республики Казахстан остались без должного внимания. К сожалению, нет ни одного специально проведенного исследования. Это, несмотря на то, что в Российской Федерации указанные вопросы активно исследуются.

Между тем, очевидно, что используемые в уголовном законе Республики Казахстан термины «*беззащитный*» и «*лицо, находящееся в зависимости от виновного*» представляют интерес как для уголовно-правовой науки, так и для судебно-следственной практики. Рассмотрим их по порядку.

Беззащитный. Надо отметить, что термин «*беззащитный»* в уголовном законодательстве Республики Казахстан признан юридически значимым обстоятельством. «*Беззащитный*», как уже отмечено, выступает обстоятельством, отягчающим уголовную ответственность и наказание. Но, несмотря на то, что термин «беззащитный» существует в уголовном законодательстве Республики Казахстан, никто ранее не рассматривал его как самостоятельную проблему, имеющую уголовно-правовое значение. Возможно, главная причина заключается в том, что «беззащитный» нигде в Уголовном Кодексе РК, кроме как в указанной 54 статье, больше не встречается и не входит в конструкцию ни одного состава преступления и не выступает в качестве квалифицирующего признака.

Поэтому, по мнению С.М. Балашова, «под беззащитным состоянием потерпевшего» следует понимать все те случаи, когда имеет место значимое в уголовно-правовой ситуации неравенство: престарелый или несовершеннолетний возраст потерпевшего, болезнь, сложившаяся к моменту совершения преступления ситуация, если неравенство недостаточно для того, чтоб признать потерпевшего находящимся в состоянии беспомощности»[6; 87].

Л.Л. Кругликов в части касающихся отягчающих обстоятельств (малолетний, беззащитный, беспомощное лицо) отмечает, что «подобная терминологическая пестрота не украшает закон, и потому следовало бы обозначения унифицировать, отдав предпочтение словосочетанию «беспомощное состояние» [7; 120].

В свою очередь В.Б. Хатуев предлагает вообще «исключить признак «*беззащитность*» из Уголовного кодекса как отягчающее обстоятельство»[8; 14].

Совершенно противоположной позиции придерживается Д.В. Давтян. По его мнению, «слова «*беспомощный*» и «*беззащитный*» не выступают абсолютными синонимами, хотя их значения пересекаются в определенной точке, ибо беззащитность может выступать в качестве проявления беспомощности. Ведь «*беспомощность*» в качестве своих проявлений может иметь не только беззащитное состояние, но и другие варианты ограничения способностей потерпевшего, а беззащитность может восприниматься в ином качестве, нежели неспособность защитить себя — в качестве отсутствия защиты извне, в том числе и со стороны других лиц. Возможно, этими соображениями и руководствовался законодатель, указывая в качестве потерпевшего не только беспомощных, но и беззащитных лиц» [9; 160].

Если обратиться к словарям русского языка, то термин «*беззащитный*» рассматривается неоднозначно. Так, если в одном словаре «беззащитный» охарактеризован как «лишенный защиты, не могущий защитить себя» [10; 28], то в других словарях слова «беззащитный» и «беспомощный» воспринимаются как синонимы. Так, в «Словаре современного русского литературного языка» разъясняется, что «беззащитный» есть «не имеющий защиты или не способный постоять за себя; беспомощный, слабый» [11].

В свою очередь «беззащитный» имеет следующие синонимы: «1) уязвимый, 2) открытый, 3) слабый, 4) беспомощный, 5) бессильный, 6) безоружный, 7) незащищенный, 8) бесправный, 9) можно взять голыми руками, 10) лишенный защиты, 11) слабозащищенный, 13) беззаступный, 14) безотпорный, 15) безоборонный, 16) беззастойный, 17) невооружённый, 18) бескровный, 19) неготовый, 20) неприкрытый, 21) ранимый, 22) чувствительный» [12].

Таким образом, практически все приведенные синонимы «*беззащитного»* в науке уголовного права практически характеризуют «*беспомощное состояние потерпевшего*». Это обстоятельство подчеркивает не безосновательность предложения авторов об исключении из уголовного закона термина «беззащитное лицо».

Конечно, именно поэтому возникает необходимость в проведении научных исследований на предмет определения необходимости и целесообразности исключения из уголовного закона Республики Казахстан термина «беззащитное лицо». При этом учитывать и другие состояния, характеризующие потерпевшего в момент совершения преступного посягательства (малолетний и/или престарелый возраст, умственная отсталость, беспомощное состояние и др.». Уверен, что исследования в этом направлении будут еще проводиться.

Лицо, находящееся в зависимости от виновного, в уголовном законодательстве Республики Казахстан, признано юридически значимым обстоятельством. В случаях, указанных в УК РК, оно выступает в качестве отягчающего ответственность и наказание обстоятельство (ст. 54); либо квалифицирующим

обстоятельством преступлений. Например:«доведение до самоубийства, склонение к совершению самоубийства или содействие совершению самоубийства» (ст. 105); «умышленное причинение тяжкого вреда здоровью» (ст. 106); «умышленное причинение средней тяжести вреда здоровью» (ст. 107); «умышленное причинение легкого вреда здоровью» (ст. 108–1); «побои» (ст. 109–1); «истязание» (ст. 110).

Кроме того, *«использование материальной или иной зависимости потерпевшего»* выступает также *как обязательный элемент состава преступления.* Например, «понуждение к половому сношению, мужеложству, лесбиянству или иным действиям сексуального характера» (ст. 123). А также как *квалифицирующий признак* следующих составов преступлений: «принуждение к изъятию или незаконное изъятие органов и тканей человека» (ст. 116); «незаконное лишение свободы» (ст. 126); «торговля людьми» (ст. 128 «Торговля несовершеннолетними» (ст. 135); «провокация преступления» (ст. 412–1).

Наряду с этим, в ст. 308 УК РК «Вовлечение в занятие проституцией, оказание иных услуг сексуального характера» установлена ответственность за «*использование зависимого положения»* потерпевшего. Это же обстоятельство выступает в качестве квалифицирующего признака ст. 134 УК РК «Вовлечение несовершеннолетнего в занятие проституцией, оказание иных услуг сексуального характера».

Приведенные примеры показывают, что законодатель в целях всесторонней защиты интересов «*лица, находящегося в зависимости*» использовал термины «*в отношении лица, находящегося в зависимости от виновного», «с использованием материальной или иной зависимости потерпевшего (потерпевшей)»*, либо вообще «*с использованием зависимого положения*». Объединяющим словом является «зависимость», под которым понимается «подчиненность другим (другому) при отсутствии самостоятельности, свободы» [12; 147].

Применительно к доведению до самоубийства (ст. 105 УК РК) в Комментарии к Уголовному кодексу Республики Казахстан указывается, что «потерпевшими в данном случае выступают лица, находящиеся на иждивении, опекаемые, неработающие супруги, должники и другие» [13; 25].

Авторы Комментария к Уголовному кодексу РФ считают, что традиционно под «*зависимостью от виновного*» понимается «любая разновидность зависимости: материальная, служебная, зависимость детей от родителей, зависимость одного супруга от другого, инвалида от лица, оказывающего ему помощь, и т.д.» [14; 97].

По мнению В.Б. Хатуева, «*под зависимым от виновного состоянием* должно пониматься любое состояние, при котором в результате тех или иных обстоятельств одно лицо подчинено или подвластно другому. Зависимость должна быть жизненно важной для потерпевшего»[15; 42].

Применительно к ст. 110 УК РК «Истязание» в Комментарий к УК РК «под *материальной зависимостью* потерпевшего понимается его нахождение на полном или частичном иждивении (нередко это несовершеннолетние), либо виновный содержит жертву своего преступного деяния, то есть от виновного зависит материальное положение жертвы. *Иная зависимость* может быть вызвана различными отношениями: начальника–подчиненного, тренера–спортсмена, детей–родителей и др.»[13].

В Нормативном постановлении Верховного Суда РК № 7 от 29.12.2012 г. «О практике применения законодательства, устанавливающего ответственность за торговлю людьми» указано, что *материальная зависимость* потерпевшего, например, может быть выражена нахождением его на полном или частичном иждивении виновного, проживанием в жилом помещении виновного. Под *иной зависимостью* необходимо понимать любую нематериальную зависимость потерпевшего от виновного (например, семейные отношения, зависимость подчиненного от руководителя, учащегося от преподавателя).

По ст. 116 УК РК «Принуждение к изъятию или незаконное изъятие органов и тканей человека» указано, что «действия совершаются в отношении материально, по службе или иным образом зависимого от виновного лица. Материальная зависимость жертвы может быть обусловлена полным или частичным иждивением, проживанием на жилплощади виновного или когда от него зависит улучшение или ухудшение материального положения потерпевшего и т.п. Состояние материальной зависимости могут образовывать отношения должника и кредитора, наследника и наследодателя» [13].

По мнению авторов учебника «Уголовное право», «использование материальной зависимости потерпевшего (потерпевшей) применительно к понуждению к действиям сексуального характера предполагает, что последний полностью или частично находился на иждивении виновного (проживал на его площади, получал у него деньги на питание и другие необходимые для жизни нужды). В такой

зависимости могут оказаться несовершеннолетние, престарелые и др. Иная зависимость, по их мнению, — эта любая другая, кроме материальной, разновидность зависимого положения одного человека от другого. Она может определяться служебным или подконтрольным положением потерпевшего от начальника, любого лица, от представителя власти, больного от врача, студента от преподавателя, спортсмена от тренера и т.д.» [16; 108].

В части понуждения к действиям сексуального характера Е.А. Куманяева считает, что «материальная зависимость представляет собой нахождение потерпевшего на иждивении у виновного. Под иной зависимостью понимаются все остальные виды зависимости, при которых потерпевший ограничен в выборе своего поведения: служебная зависимость; зависимость, основанная на родственных или супружеских отношениях, на законе, договоре и т.п.» [17].

Приведенные мнения авторов и положения Нормативного постановления Верховного Суда РК свидетельствуют о многообразии подходов в определении критериев оценки зависимого состояния, материальной и иной зависимости потерпевшего (потерпевшей).

Отсутствие единых критериев оценки, например, «зависимого от виновного положения», в судебно-следственной практике, безусловно, вызывает большие затруднения. Поэтому в каждом конкретном случае необходимо по делу доказывать: находилось ли лицо в зависимом состоянии от виновного? Если да, то, в чем выражалась эта зависимость (материальная, финансовая, духовная, психологическая и др.)? Насколько зависимость была жизненно важной для потерпевшего? Осознавал ли виновное лицо, что потерпевший находится от него в зависимом положении? Учитывало ли виновное лицо зависимое положение потерпевшего при совершении преступления? Совершено ли преступление с использованием зависимого положения?

Иначе любое насильственное преступление, совершенное в семье, в быту, в отношении супруга (супруги), детей, родственников, сожителя (сожительницы), должны всегда рассматриваться как действия, совершенные при отягчающих обстоятельствах в соответствии со ст. 54 УК РК. В указанных видах уголовного правонарушения всегда будет присутствовать зависимость между виновным и потерпевшим [18]. Но ни судебно-следственная практика, ни исследования в области уголовного права не признают подобное решение вопроса.

Поэтому ключевым и определяющим моментом в уголовно-правовой оценке действий виновного выступает, на наш взгляд, *именно «использование им зависимого положения потерпевшего (потерпевшей)»,* которое дает ему очевидный шанс для реализации своего преступного умысла.

Заключение

Таким образом, на основании проведенного анализа нормы уголовного законодательства, предлагается формулировку п. 7 ст. 54 УК РК в части «*а также в отношении малолетнего, другого беззащитного или беспомощного лица либо лица, находящегося в зависимости от виновного*» заменить на «*а также отношении малолетнего, с использованием беззащитного или беспомощного состояния потерпевшего либо состояния зависимости потерпевшего от виновного».*

По каждому уголовному делу «беззащитное» состояние, «зависимость от виновного», «использование материальной и иной зависимости потерпевшего (потерпевшей)» либо «использование зависимого положения» потерпевшего требует отдельного доказывания факта нахождения жертвы преступления в момент совершения преступления в указанном состоянии и осознание виновным использования этого состояния при совершении им преступления.

Необходимо повысить уровень правовой осведомленности судей, следователей и других участников уголовного процесса по вопросам применения терминов «беззащитный» и «зависимый от виновного» в предлагаемой в настоящей статье редакции.

Указанные в рамках данной статьи проблемные вопросы со всей очевидностью доказывают, что практика вменения отягчающего обстоятельства в случаях совершения уголовного правонарушения в отношении лица, находящегося в зависимости от виновного, требует дальнейшего самостоятельного исследования.

Научная статья подготовлена в рамках программно-целевого финансирования по научным и (или) научно-техническим программам на 2024–2027 годы, направленного на реализацию проекта ИРН BR BR 24993217 — «Гармонизация юридической терминологии и лингвистическая аутентичность текстов законов в области уголовного права Республики Казахстан», финансируемого Комитетом науки Министерства науки и высшего образования Республики Казахстан.

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Т.Е. Сарсенбаев

«Қорғансыз» және «кінәліге тәуелді» терминдерінің қылмыстық құқықтық мәні

Мақаланы жазудың мақсаты Қазақстан Республикасының қылмыстық заңнамасындағы «қорғансыз» және «кінәліге тәуелді» терминдерінің қылмыстық-құқықтық мағынасын талдау, оларды қолдану тәжірибесіндегі проблемаларды анықтау және қолданыстағы заңнаманы жетілдіру жөнінде ұсыныстар әзірлеу. Автор қолданыстағы қылмыстық заңнаманың мәтіндерінде қолданылатын терминдердің айқын емес түсіндірілуіне шолу жасаған. Мақаланы жазу барысында «қорғансыз» және «дәрменсіз» терминдеріне салыстырмалы талдау жүргізілді, «кінәліге тәуелділік» ұғымын анықтаудағы проблемалар анықталды. Зерттеу қылмыстық заңның біркелкі қолданылуын және жәбірленушілерді қорғауды қамтамасыз ету үшін «қорғансыз» және «кінәліге тәуелді» терминдерін неғұрлым нақты заңнамалық анықтау қажеттілігін көрсетті. Заңнамалық нормаларды нақтылау және құқық қолдану практикасын жетілдіру бойынша нақты ұсыныстар ұсынылды.

Кілт сөздер: кәмелетке толмаған, дәрменсіз, қорғансыз, кінәліге тәуелді адам, материалдық немесе басқа тәуелділікті пайдалану, тәуелді позицияны пайдалану.

T.E. Sarsenbayev

The criminal legal meaning of the terms “defenseless” and “dependent on the perpetrator”

The objective of this article is to conduct a comprehensive analysis of the criminal law significance of the terms “vulnerable” and “dependent on the offender” within the framework of the criminal legislation of the Republic of Kazakhstan. This study aims to identify issues surrounding their application and to formulate recommendations for the enhancement of the existing legal framework. This article reviews the ambiguous interpretations of these terms as they appear in current criminal law texts. A comparative analysis of the terms “vulnerable” and “helpless” is presented, revealing challenges in defining the concept of “dependency on the offender”. The findings underscore the necessity for clearer legislative definitions of “vulnerable” and “dependent on the offender” to ensure consistent application of criminal law and to better protect victims’ rights. Concrete recommendations for refining legislative norms and improving law enforcement practices are proposed. Funding Statement: This scholarly article has been prepared as part of a targeted program of scientific and/or scientific-technical financing for the years 2024–2027. It supports the implementation of the project IRN BR BR 24993217, titled “Harmonization of Legal Terminology and Linguistic Authenticity of Legal Texts in the Field of Criminal Law of the Republic of Kazakhstan”, funded by the Committee of Science of the Ministry of Science and Higher Education of the Republic of Kazakhstan.

Keywords: minor; helpless; defenseless; person dependent on the perpetrator; use of material or other dependence; use of a dependent position.

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АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ АЗАМАТТЫҚ ІС ЖҮРГІЗУ ҚҰҚЫҒЫ
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Отбасылық кәсіпкерлік әлеуметтік даму факторы ретінде

Мақаланың басты мақсаты отбасылық кәсіпкерлікті қоғам өміріндегі әлеуметтік фактор ретінде қалыптастыра отырып, оның мемлекет дамуындағы алатын рөлін айқындау. Зерттеу жұмысы барысында «отбасылық кәсіпкерлік» ұғымын қалыптастыру мақсатында отбасылық бизнестің әлеуметтік және экономикалық саладағы артықшылықтары мен тәжірибеде кездесетін кемшіліктері анықталды, сонымен қатар тарихи-құқықтық, салыстырмалы-құқықтық, талдау және сипаттау сияқты зерттеу әдістері қолданылды. Авторлар отбасылық кәсіпкерліктің әлеуметтік құбылыс және әлеуметтік даму факторы ретіндегі өзекті мәселелерін қарастырады. Зерттеу барысында ел экономикасын дамыту үрдісінде отбасылық кәсіпкерліктің стратегиялық және тактикалық артықшылықтары, оның құқықтық маңыздылығы жан-жақты талқыланған. Тақырыпты зерттеу барысында отбасылық кәсіпкерліктің әлеуметтік институт ретіндегі ерекшеліктері және отбасының экономикадағы позициясын, отбасылық қарым-қатынастарды, отбасы мүшелерінің өзара мүліктік әрекеттесуінен туындайтын отбасылық сабақтастықты нығайту бойынша маңыздылығы анықталды. Зерттеу тақырыбы бойынша жаңа құқықтық мектеп қалыптасуының себептері, шарттары мен кезеңдері де зерделенген, бұл қазіргі заманғы кәсіпкерлік аясында құқықтық институттың пайда болуына алып келеді. Зерттеу нәтижесі ретінде «отбасылық кәсіпкерлік» институтын заңнамалық тұрғыда бекітудің маңыздылығын ескере отырып, отбасылық кәсіпкерлік субъектілері отбасылық байланыстарды нығайтумен қатар отбасының құндылықтары мен мәдени мұраларына негізделген арнайы ұжымдық мәдениетті құрып, мемлекеттің әлеуметтік және экономикалық салаларын дамытуға айтарлықтай өз үлесін қосады деген қорытынды жасалды.

Кілт сөздер: отбасылық кәсіпкерлік, отбасылық бизнес, отбасылық саясат, отбасы, кәсіпкерлік қызмет, экономика, азаматтық құқық, отбасылық кәсіпорын, отбасылық мәдениет, кәсіпкерлік қызмет субъектілері.

Кіріспе

Отбасылық кәсіпкерлік азаматтардың іскерлік белсенділігін іске асыру саласы ретінде жүйелі ғылыми талдаудың объектісі, өйткені отандық құқықтық ғылымда «отбасылық кәсіпкерлік» санаты және оның заңнамалық бекітілген ұйымдық-құқықтық нысаны жоқ. Мақаланың мақсаты — қазіргі жағдайда отбасылық кәсіпкерлікті әлеуметтік және құқықтық институт ретінде зерттеу.

Отбасылық құқықтық ғылымның міндеттерінің бірі әлі күнге дейін тұжырымдамалық аппаратты қалыптастыру, отбасылық құқық институттарын зерттеу әдістемесін анықтау. В.П. Малаховтың пікірінше, әдістеме таным құралдарының (әдістерінің) реттелген жиынтығы емес, танымдық мәселені

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қою құралы. Сондықтан әдіснаманы (немесе олардың кешенін) таңдау, ең алдымен, тұжырымдалған немесе берілген танымдық мәселенің сипаты мен ауқымына байланысты болып келеді [1].

Зерттеуші ғалым Э.Г. Юдин болса, «ғылым әдіснамасы ғылыми зерттеу кешендерін, оның объектісін, талдау пәнін, зерттеу міндеттерін, оларды шешуге қажетті зерттеу құралдарының жиынтығын сипаттайды, сонымен қатар зерттеу мәселелерін шешу үрдісінде ғалымның іс-әрекеттерінің реттілігі туралы түсінік қалыптастырады», – деп санайды [2; 31].

Жалпы әдіснаманы қарастыратын ғалымдар әдіснаманы «теориялық және тәжірибелік қызметті ұйымдастыру мен құрудың қағидалары мен тәсілдерінің жүйесі және осы жүйе туралы ілім» деп түсініп, ұқсас ұстанымды ұстанады [3; 365].

Біз әдіснаманы «ғылыми таным және әлемді өзгерту әдісі туралы ілім» ретінде түсінуге жақынбыз [4]. Әдіснама белгілі бір мәселені шешу тәсілі ретінде де, шындықты тәжірибелік немесе теориялық игеру әдістерінің жиынтығы ретінде де сипатталатын «әдіс» ұғымымен өзара байланысты.

Бүгінгі таңда құқықтық тәртіп дамыған мемлекеттерде әлемдік экономикалық дағдарыс жағдайындағы әлеуметтік мәселелерді шешуді отбасылық кәсіпкерлікпен байланыстырады, бұл тұрғыдан отбасылық кәсіпкерлікке қоғамның таптарға бөлінуін азайту және экономикалық тұрғыдан мықты орта таптың құрылуы бойынша әлеуметтік жауапкершілік артылады.

Отбасы — ең алғашқы әлеуметтік институттардың бірі, сондай-ақ шаруашылық басқарудың бір нысаны. Отбасылық кәсіпорындардың пайда болуы отбасы мен жеке меншіктің пайда болу кезеңіне сәйкес келеді, ал адамдардың кәсіпкерлік қасиеті оларды жеке «іске», яғни өзге отбасылар мен тұлғалардың қажеттіліктері үшін тауарларды өндіруге итермеледі. Сонымен қатар шаруашылық қызмет субъектілеріндегі маңызды лауазымдар мен рөлдерді, бұл қызмет түрінен алынатын табыстар мен дивиденттерді бөлу отбасы немесе отбасылық топтардың шеңберінде жүзеге асырылды.

Отбасылық кәсіпкерлік әр түрлі отбасылық-тұрмыстық және кәсіпкерлік мәселелерді шешудегі үлкен әлеуетке қарамастан, тиісті деңгейде өз қолданысын таба алмай келеді. Көпшілік жағдайда ол іс жүзінде оны қолданудың тиімділігіне әсер ететін нормативтік-құқықтық реттеуден тыс қалуда. Қазақстан Республикасындағы нормативтік құқықтық актілерде отбасылық кәсіпкерліктің заңнамалық анықтамасы жоқ. Алайда заң әдебиеттерінде отбасылық кәсіпкерліктің тұжырымдамасы мен құқықтық табиғатын анықтауда әр түрлі амал-тәсілдер қалыптасты. Отбасылық кәсіпкерлікті отбасылық және кәсіпкерлік құқық пәнін құрайтын қоғамдық қатынастардың жиынтығы ретінде қарастыруға болады, ол өзара әрекеттесуде және екі құқықтық институттың: отбасы мен шағын кәсіпкерліктің қиылысында орналасқан. Осылайша отбасылық кәсіпкерлік институтын кешенді, салааралық құқықтық реттеу туралы тұжырымдама жасауға болады.

Сондай-ақ, отбасылық кәсіпкерлік субъектілер арасындағы отбасылық, кәсіпкерлік, ұйымдастырушылық және еңбек қатынастарының орын алуын қамтамасыз етеді. Алайда, отбасылық кәсіпкерліктің аясында отбасылық-құқықтық байланыстар болуы керек, олардың негізінде кәсіпкерлік қызмет ұйымдастырылады. Отбасылық кәсіпкерлік дәстүрлі түрде нарықтық экономикасы дамыған елдерде сандық жағынан басым болатын бизнестің ең кең таралған түрі болып саналады. Сонымен қатар отбасылық кәсіпорын бизнесті дамыту үшін бюджетті жұмсайды, қаражат отбасының қажеттіліктерін қанағаттандыруға бағытталады, яғни ол денсаулық, білім, өмір сапасына қайта инвестициялау үшін қолданылады.

Әдістер мен материалдар

Бұл мәселені зерттеудің әдіснамалық негізі отбасы мүшелерінің қатысуымен кәсіпкерлік қызметті жүзеге асырудың әртүрлі нысандарында туындайтын негізгі мәселелерді анықтауға, отбасылық кәсіпкерлік саласындағы азаматтық, отбасылық, ұжымдық және өзге де құқықтық қатынастарды талдауға байланысты мәселелерді зерттеуге мүмкіндік беретін диалектикалық-материалистік, жүйелік әдістер, талдау және синтездеу әдістері пайдаланылды. Жүйелік талдау әдісі отбасылық кәсіпкерлікті кәсіпкерлік қызмет түрі ретінде түсіну туралы жаңа білім алу үшін қолданылды. Отбасылық құқықтың мәселелі саласы құқықтың әр түрлі салаларын ғана емес, сонымен бірге ғылымның әр түрлі салаларын зерттеудің негізі болып саналады. Отбасылық кәсіпкерлік отбасы институтымен тікелей байланысты. Осы құбылысты зерттеудің дұрыс таңдалған әдіснамасы нәтижесінде осы саладағы танымдық ғылыми және тәжірибелік қызметтің нәтижесін анықтайды.

Отбасылық кәсіпкерлік әртүрлі отбасылық-тұрмыстық және кәсіпкерлік мәселелерді шешуде үлкен әлеуетке ие. Қазіргі таңда отбасылық кәсіпкерлік іс жүзінде оны қолданудың тиімділігіне әсер

ететін нормативтік-құқықтық реттеуден тыс қалуда, сондықтан тәжірибеде оны дұрыс пайдаланбауда. Қазақстан Республикасындағы нормативтік құқықтық актілерінде отбасылық кәсіпкерліктің заңнамалық анықтамасы жоқ. Отбасылық кәсіпкерліктің ғылыми-теориялық негіздемесінің болмауы жүйесіздікпен, жекелеген мәселелерді талқылаумен, әртүрлі әдіснамаларды қолданумен сипатталады.

Талқылаулар

Отбасылық кәсіпкерлік құбылысын зерттеу пәнаралық болуы керек, өйткені бұл бизнес тарихи, экономикалық, әлеуметтік, құқықтық сипаттағы көптеген функцияларды орындайды. Тарихи тұрғыдан отбасылық дәстүрлер отбасылық кәсіпкерлікті дамытуда үлкен маңызға ие болды. Отбасылық кәсіпкерліктің негізі сенім мен тәжірибе. Отбасында кәсіпкерліктің құнды тәжірибесін сақтау отбасылық әулетке нарықта қалуға және бәсекелестікке төтеп беруге мүмкіндік берді.

Экономикалық категория ретінде отбасылық бизнесті бірінші кезекте пайда табуға бағытталған коммерциялық қызметтің бір түрі ретінде анықтауға болады. Отбасылық бизнес белгілі бір отбасына немесе бірнеше отбасына тиесілі болуымен сипатталады, олардың мүшелері әулеттік, неке және басқа да бейресми байланыстармен байланысты, аталған кәсіптің иелері мен бенефициарлары болып табылады. Отбасылық кәсіпкерлік — бұл әдетте өзін-өзі жұмыспен қамту және микробизнес немесе шағын бизнес алдында тұрған формат. Осыған байланысты отбасылық бизнесті қолдау — еңбек құқықтық қатынастары шеңберінде өз еңбегін қолдана алмайтын адамдарды және кәсіпкерлер саны бойынша шағын және орта кәсіпкерлік саласының басым бөлігін құрайтын шағын бизнес нысандарын бір мезгілде қолдауға тікелей жол. Отбасылық кәсіпкерліктің экономикалық кешені шет мемлекеттердің тәжірибесінен алынған мысалдармен суреттелген. Көптеген елдерде 1000 жылдан астам жұмыс істеп келе жатқан отбасылық кәсіпорындар бар. Әлемдегі ең көне компаниялар — бұл «отбасылық» компаниялар: жапондық Хоши отбасы (қонақ үй бизнесі), итальяндық Маринелли отбасы (шіркеу қоңырауларын құю) және француздық де Гулен отбасы (шарап жасау) [5].

Отбасылық кәсіпкерлік экономиканың инновациялық әлеуетін дамытуға, қызмет пен өндірістің жаңа түрлерін іздеуге және енгізуге, сондай-ақ сату мен қаржыландыруға ықпал етеді. Отбасылық компаниялар өз қызметін капиталға қолжетімділік шектеулі және экономикаға деген сенім деңгейі төмен дамушы нарықтарда ғана емес, сонымен бірге қалыптасқан нарықтарда да жүргізеді.

Осылайша, отбасылық кәсіпкерліктің осындай экономикалық функцияларын бөліп көрсетуге болады: бизнес қызметінің әртүрлі салаларында бәсекелестік ортаны қалыптастыру; монополияландыру деңгейін төмендету; отбасылардың өзін-өзі жұмыспен қамтуы арқылы еңбек нарығының жай-күйін жақсарту және жергілікті жерлерде жұмыссыздық деңгейін төмендету; өмір сүру деңгейін жақсарту; өзгерістерге жылдам әсер ету салдарынан нарықтық экономикаға бейімделу; неғұрлым теңдестірілген жүйені құруға жәрдемдесу және қызмет көрсету, әсіресе шеткі аудандарда; жергілікті экономиканы жандандыру (ұсынысты кеңейтуден басқа, отбасылық кәсіпорындардың басым бөлігі жергілікті шикізатпен және сол сияқтылармен жұмыс істейді).

Отбасылық кәсіпкерлік құқықтық категория ретінде, әрине, ерекшеліктерге ие. Отбасылық бизнестің негізінде жеке сенім қатынастары жатыр. Құқық тұрғысынан сенімгерлік мәмілелер келісімшарттық міндеттемелерге қарағанда әлдеқайда сенімді және прогрессивті. Осындай қарым-қатынаста қол қою, уәде беру, серіктес туралы ақпарат жинау қажет емес. Тараптардың өзара іс-қимылы сенімге негізделеді, бұл ретте құрылтайшы мен сенімгерлік басқарушы арасындағы міндеттемелер тәрізді тәуекелге емес, туыстық қатынастарға негізделеді.

Құқықтық ғылымда отбасылық кәсіпкерліктің тұжырымдамасы мен құқықтық табиғатын анықтауда әртүрлі тәсілдер қалыптасты.

И.В. Барбашин, Т.А. Федотовская, С.Н. Титов көрсеткендей, «отбасылық кәсіпкерлік шағын кәсіпкерліктің бір түрі ретінде, оның жағдайында отбасы мүшелері мен туыстары өз кәсіпорындарында меншік иелері де, жұмысшылар да бола алады» [6].

Ал белгілі ғалым Н.И. Баранец былай деп көрсеткен: «отбасылық кәсіпкерлік — бұл отбасы мүшелерінің, сондай-ақ олар құрған (сатып алған) кәсіпорынның иелері мен қызметкерлері болып табылатын олардың туыстарының бастамашыл қызметі, оның мақсаты — тауарларды (қызметтерді) өндіруді және сатуды ұйымдастыру арқылы қоғамдық қажеттіліктерді қанағаттандыру, бұл түпкілікті тұтынушының өнімге (қызметке) сұранысының өзгеруін үнемі іздеумен бірге жүреді және шығармашылық тәсілдің, сауатты маркетингтік саясаттың және әртүрлі инновацияларды енгізудің арқасында сұранысты қайта құру арқылы жүзеге асады» [7].

Зерттеуші Э.С. Киренкина өз еңбегінде келесідей баяндайды: «отбасылық кәсіпкерлік — бұл бизнестің серпінді, белсенді элементі, бастамашыл, тәуелсіз қызмет, өзінің мүліктік жауапкершілігімен және өз тәуекелімен азаматтар бірлестіктерімен жүзеге асырылады, онда кем дегенде екі қатысушы — бір отбасының мүшелері болады. Бұл қызмет пайда табу мақсатында өнім өндіруге (қызмет көрсетуге) бағытталған [8].

Сонымен қатар Д.А. Волков отбасылық кәсіпкерлікті отбасының «жалғыз билігін» білдіретін кәсіпорын дамуының мүмкін кезеңдерінің бірі ретінде сипаттайды [9].

Ресейлік ғалымдар З.К. Русакова мен И.В. Лаврентьева өз еңбектерінде былай деп анықтаған: «отбасылық кәсіпкерлік — бұл отбасындағы кәсіпкерлік қызметтің әр алуан түрлерінің бірі (тауарларды отбасы мүшелерінің күшімен өндіру және сату, делдалдық және коммерциялық қызмет, қызмет көрсету), олардың басты мақсаты — танымдық және тәрбиелік міндеттер кешенін шешумен бірге отбасылық кірісті арттыру [10].

Л.А. Гаджимуратованың пікірінше, отбасылық кәсіпкерлік — бұл кейінгі мұрагерлік сабақтастық мақсатында туыстары ұйымдастырған кәсіпкерлік қызмет түрі болып табылады [11].

Ал Т.Н. Савина, Т.В. Щанкин болса, отбасылық кәсіпкерлікті жұмысшылар мен кәсіпорын иелері арасында туыстық байланыстардың болуымен сипатталатын шағын кәсіпкерліктің бір түрі ретінде анықтайды [12].

Зерттеуші И.А. Плотникова көрсеткендей, отбасылық кәсіпкерлік — бұл белгілі бір жолмен туыстар (бір отбасы мүшелері) арасындағы әлеуметтік қатынастар үрдісінде жұмыс істейтін және белгілі бір қоғамның (аймақтың) қажеттіліктерін қанағаттандыратын маңызды әлеуметтік құндылықтар мен тәртіп стандарттарын біріктіретін еңбек және экономикалық қызмет жүйесімен ұйымдастырылған шағын бизнестің әлеуметтік-институционалды түрі [13].

К.С. Шипицынаның пікірінше, отбасылық кәсіпкерлік өзін-өзі жұмыспен қамту және шағын кәсіпкерліктің алдында тұрған форма ретінде қарастырылады [14].

Сондай-ақ, И.Ю. Лепетикованың ойынша, отбасылық кәсіпкерлік — бұл шағын бизнестің ерекше түрі, оның аясында отбасы мүшелері өз кәсіпорындарының иелері мен қызметкерлері ретінде әрекет етеді [15].

А.А. Жук және К.М. Потий өз еңбектерінде келесідей көрсетеді: «отбасылық кәсіпкерлік — бұл меншікке және (немесе) басқаруға қатысатын бір отбасы мүшелері жұмыс істейтін шағын кәсіпкерлік» [16].

Қарастырылып отырған тұжырымдаманы Өзбекстан Республикасының заңнамасында отбасылық кәсіпкерлікті «отбасы мүшелері өз тәуекеліне және өзінің мүліктік жауапкершілігіне кіріс (пайда) алу мақсатында жүзеге асыратын бастамашыл қызмет» ретінде анықтау функционалды маңызды сипатқа ие [17].

Отбасылық кәсіпкерлікті отбасылық және кәсіпкерлік құқық пәнін құрайтын қоғамдық қатынастардың жиынтығы ретінде қарастыруға болады, ол екі құқықтық институттың: отбасы мен шағын кәсіпкерліктің өзара әрекеттесуінде болады. Осылайша, отбасылық кәсіпкерлік институтын кешенді, салааралық реттеу туралы қорытынды жасауға болады.

Нәтижелер

Отбасылық кәсіпкерлікті айқындау кезінде отбасылық кәсіпкерлікті материалдық игіліктерді бірлесіп иеленуден, оның ішінде шаруашылық қоғамдастықтардағы үлестер мен акцияларды бірлесіп иелену, отбасы мүшелеріне жатпайтын өзге тұлғалардың қатысуымен кәсіпкерлік қызметті бірлесіп жүзеге асыру, сондай-ақ отбасы мүшелерінің немесе бөгде адамдардың жалдамалы еңбегін пайдалана отырып, кәсіпкерлік қызметті жүргізу жағдайларынан нақты ажырата білу керек.

Заң ғылымындағы отбасылық кәсіпкерлік деп отбасы мүшелері пайда табу мақсатында емес, мүліктік қажеттіліктерді қанағаттандыруға және отбасының мүдделерін еңсеруді үйлестіруге бағытталған экономикалық және әлеуметтік нәтижелерге қол жеткізу үшін жүзеге асыратын кез келген заңды ұйымдық-құқықтық нысандағы дербес, бастамашыл, жүйелі, өз тәуекеліне және өзінің мүліктік жауапкершілігіне қатысты қызметті түсіну ұсынылады. Отбасылық кәсіпкерлік жеке және ұжымдық, тікелей және делдалдық болып бөлінеді [5].

Отбасылық кәсіпкерлік — бұл жеке отбасы мүшесінің бизнесін ұйымдастыру немесе барлық отбасы мүшелерінің жеке меншігі. Кәсіпкерлік иесінің өндірістік қызметке қажетті материалдық ресурстары мен күрделі жабдықтары болады, сондай-ақ меншік иесі кәсіпорынның қызметін жеке бақылайды.

Отбасылық кәсіпкерлік экономикалық қызмет түрі ретінде және құқықтық реттеу мен мемлекеттік биліктік ықпал ету объектісі ретінде кәсіпкерлік құқық саласының нысанасына енгізіледі, алайда оның негізінде отбасылық құқықтық қарым-қатынастар жатыр. Отбасы деп «туыстық, неке, бала асырап алу және отбасылық құқықтық қатынастардың негізінде жатқан өзге де заңды фактілерден туындайтын жеке мүліктік емес және мүліктік қатынастар саласындағы өзара құқықтар мен міндеттермен байланысты тұлғалар шеңберін» түсіну қажет [7].

Құқықтық доктринада отбасылық кәсіпкерліктің құқықтық сипатын кең мағынада анықтауға қатысты көзқарастар кездеседі. Бұндай тұжырым «басқарудың шығыстық үлгісіне («бизнес отбасы ретінде», «өмір бойы» корпорацияларда жұмыс істеу, белгілі бір отбасы мүшелеріне жұмысқа орналасудағы артықшылықтар және т.б.) қатысты қолданылады.

Кәсіпкерлік құқық доктринасында көрсетілгендей, «егер отбасылық және шағын кәсіпкерліктің арасында нақты айырмашылықтар болмаса, онда жаңа құқықтық категорияларды, конструкцияларды құру, шағын кәсіпкерлік субъектісінен өзгеше отбасылық кәсіпкерлік субъектісінің экономикалық (кәсіпкерлік) қызметінің арнайы құқықтық режимін қалыптастыру қажеттілігі де жоқ» деген көзқарас назар аударуға лайық. Сонымен қатар, «отбасылық кәсіпкерліктің шағын кәсіпкерлікпен салыстырғанда жеке ерекшеліктері бар (капиталды ғана емес, еңбекті де, отбасылық еңбекті де біріктіру нысаны; отбасылық бизнес тек экономикалық қана емес, сонымен бірге отбасылық және әлеуметтік міндеттерді де шеше алады)» деген тұжырымның негізділігін мойындау қажет [10].

Әдебиеттерде кәсіпкерлік қызметті отбасылық кәсіпкерлікке жатқызудың негізгі көрсеткіштері айқындалған: отбасының бизнесті бақылауы (нақты, қатысу үлесі, тиесілі акциялардың пайызы арқылы); қызмет саласы (әдетте, ауыл шаруашылығы өнімдерін өсіру, азық-түлік тауарларын, киім-кешек, аяқ киім өндіру, сауда, мейрамхана бизнесі, құрылыс және реконструкция); ішкі шаруашылық және еңбек қатынастары ұзақ, тұрақты сипатқа ие (тек еңбек шартына (келісімге) ғана емес, сонымен қатар отбасылық, туыстық байланыстарға, топқа жататындарға да негізделген) [12].

Кәсіпкерлік қызметті отбасылық кәсіпкерлік ретінде саралауға және оны сабақтас құқықтық санаттардан ажыратуға мүмкіндік беретін отбасылық кәсіпкерліктің конституциялық, базалық белгілері ретінде: 1) отбасы мүшелері — отбасылық кәсіпорынға қатысушылар арасында қалыптасатын отбасылық құқықтық байланыстарды; 2) отбасылық кәсіпорынның қызметіне жеке еңбек қатысуын атап өткен жөн. Егер шаруа-фермер қожалығы үшін жеке еңбек қатысуы қажет болса, онда отбасылық-құқықтық байланыстар отбасылық кәсіпкерліктің жеке белгісі болуы керек, бұл оны шағын кәсіпкерліктен ерекшелендіреді [18].

Қорытынды

Қазақстан Республикасында отбасылық кәсіпкерлікті ағымдағы дамытудың басты өзекті мәселесі ретінде іс жүзінде бизнестің осы нысанын нормативтік-құқықтық реттеудің болмауын атауға болады. Бұл жағдай бірқатар қиындықтар туғызуы мүмкін. Отбасылық кәсіпорынды отбасылық кәсіпкерлік ретінде тіркеуге болмайды. Сондықтан басқа ұйымдық-құқықтық құрылымдарды қолданып, кәсіпкерлік саласындағы отбасылық қатынастардың мәніне қайшы келетін осындай бизнеске жалпы ережелерді қолдануға тура келеді. Осылайша, отбасы мүшелері жеке кәсіпкерлер ретінде тіркелуге және серіктестер ретінде бизнес жүргізуге, «жұмыс беруші — қызметкер» құрылымын пайдалануға немесе бизнеске үлестік қатысу құқығында заңды тұлғалар үшін көзделген ұйымдық-құқықтық нысандардың бірінің бірлескен кәсіпорны шеңберінде қатынастар құруға мәжбүр.

Отбасылық бизнестің ашылуы мен өмір сүруінің құқықтық негізі болмағандықтан, кәсіпкерліктің бұл түрінің ресми статистикасы жоқ. Сондықтан өз бизнесін отбасы мүшелерінің еңбегіне, кәсіби дағдыларына, шығармашылық қабілеттеріне сүйене отырып құратын кәсіпкерлер санының нақты көрсеткіштерін келтіру мүмкін емес. Алайда, Қазақстан Республикасында отбасылық кәсіпкерлікке толық жатқызуға болатын заңды тұлғалар да кездеседі.

Экономикалық ортаның жоғары тұрақсыздығы мен белгісіздігі, басқарудың барлық деңгейлеріндегі бюрократия мен сыбайлас жемқорлық, жоғары тәуекелдер, несие беру көздерінің қолжетімсіздігі, отбасылық кәсіпкерлікті мемлекеттік қолдаудың болмауы — осы факторлардың барлығы бизнестің табысты дамуына кедергі келтіріп қана қоймайды, сонымен қатар кәсіпкерлердің ізбасарлары үшін ата-аналарынан мұра болып қалған бұл жұмысты жалғастыруға құлшыныстың болмауын, ал ата-аналардың бұл ауыр «ауыртпалықты» балаларға жүктеуге деген ұмтылысының болмауын тудырады.

Қазіргі уақытта өз ісін жолға қойған кәсіпкерлер, сондай-ақ отбасылық кәсіпкерлікпен айналысатындар саны барлық жерде қарқынды даму үстінде. Бұл отбасылық бизнестегі мәмілелер өте сенімді және ілгері екендігіне байланысты. Отбасы мүшелері іскерлік серіктестер болған кезінде кез келген жағдайдағы отбасылық қатынастарға деген сенім отбасылық бизнесте де көрініс табады. Дәл осы жерде барлық мәселелер мен іскерлік сұрақтарды шешуде дәл осындай конструктивтілік байқалады. Осындай қатынастардағы тараптар түпкі мақсатты — отбасының моральдық және материалдық әл-ауқатын айқын көрсетеді.

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Ф. Абугалиева, М. Жаскайрат

Семейное предпринимательство как фактор социального развития

Главной целью статьи является определение роли семейного предпринимательства в развитии государства, формируя его как социальный фактор в жизни общества. В ходе исследовательской

работы были выявлены преимущества и недостатки семейного бизнеса в социальной и экономической сфере с целью формирования понятия «семейное предпринимательство», а также использованы историко-правовые, сравнительно-правовые, аналитические и описательные методы исследования. Авторами рассмотрены актуальные проблемы семейного предпринимательства как социального явления и фактора социального развития. Подробно обсуждены стратегические и тактические преимущества семейного предпринимательства в процессе развития экономики страны, его правовая значимость. В ходе исследования темы были выявлены особенности семейного предпринимательства как социального института и значение семьи по укреплению позиций в экономике, семейных отношений, семейной преемственности, возникающей в результате имущественного взаимодействия членов семьи. По теме исследования изучены также причины, условия и этапы формирования новой правовой школы, что ведет к появлению правового института в рамках современного предпринимательства. В результате исследования сделан вывод о том, что, учитывая важность законодательного закрепления института «семейное предпринимательство», субъекты семейного предпринимательства, наряду с укреплением семейных связей, вносят существенный вклад в развитие социальной и экономической сфер государства, создавая особую коллективную культуру, основанную на ценностях и культурном наследии семьи.

Ключевые слова: семейное предпринимательство, семейный бизнес, семейная политика, семья, предпринимательская деятельность, экономика, гражданское право, семейное предприятие, семейная культура, субъекты предпринимательской деятельности.

F. Abugaliyeva, M. Zhaskairat

Family entrepreneurship as a factor of social development

The main purpose of the article is to determine the role that family entrepreneurship plays in the development of the state, forming it as a social factor in the life of society. In the course of the research work, in order to form the concept of “family entrepreneurship”, the advantages of family business in the social and economic sphere and the disadvantages found in practice were identified. The research used historical-legal, comparative-legal, analytical and descriptive research methods. The article discusses topical issues of family entrepreneurship as a social phenomenon and a factor in social development. This paper discusses in detail the strategic and tactical advantages of family entrepreneurship in the process of developing the country's economy, its legal significance. In the course of the study of the topic, the features of family entrepreneurship as a social institution and the importance of strengthening the position of the family in the economy, family relations, family continuity arising from mutual property interaction of family members were revealed. On the topic of the study, the reasons, conditions and stages of the formation of a new legal school are also considered, which leads to the emergence of a legal institution within the framework of modern entrepreneurship. As a result of the study, it was concluded that, given the importance of legislating the institution of “family entrepreneurship”, family business entities, along with strengthening family ties, make a significant contribution to the development of the social and economic spheres of the state, creating a special collective culture based on the values and cultural heritage of the family.

Keywords: family entrepreneurship, family business, family policy, family, entrepreneurial activity, economics, civil law, family enterprise, family culture, business entities.

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Foreign states as participants in a civil process

As the investment climate in our country improves, the influx of foreign investments into the national economy also increases. In this regard, it is necessary to constantly improve civil procedural legislation involving foreign states. Issues related to improving civil proceedings with the participation of foreign states must be thoroughly assessed and scientifically substantiated, taking into account all possible scenarios. The purpose of the research is to analyze the peculiarities of foreign states as participants in civil proceedings according to civil procedural legislation and to provide legislative proposals for its improvement. The research compares the current norms regulating civil processes involving foreign states with the legislations of Russia, Uzbekistan, and Kyrgyzstan, while also reviewing the works of foreign and domestic scholars on this topic. Civil procedural norms regarding cases involving foreign states were analyzed, and appropriate legislative recommendations were formulated. The relevance of the topic is determined by the recent increase in economic integration with foreign states and the growth of civil relations involving foreign entities in the Republic of Kazakhstan under the conditions of a market economy. As a result of the study, the foundations for foreign states to exercise jurisdictional immunity under the civil procedural legislation of the Republic of Kazakhstan were identified, and it was confirmed that all conditions for limiting judicial immunity are clearly defined. Nevertheless, the role of foreign states as full participants in civil proceedings still requires clarification.

Keywords: Foreign state, foreigner, stateless person, foreign organization, international organization, foreign entities, civil process, foreign legal entity, jurisdictional immunity, judicial immunity.

Introduction

According to the Decree of the President of the Republic of Kazakhstan No. 674, accepted on October 15, 2021, the further specialization of courts is identified as one of the key directions in modernizing the judicial system, as outlined in Section 5 of the Concept of Legal Policy of the Republic of Kazakhstan until 2030. In this regard, to create a favorable climate for the development of international relations and the investment climate, it is necessary to develop a procedural mechanism to regulate the participation of foreign entities in civil court proceedings in the Republic of Kazakhstan. When accepting cases involving foreign entities for consideration and decision-making, the courts of the Republic of Kazakhstan must be guided not only by the norms of the domestic procedural legislation but also by the international conventions and treaties signed by the country, as well as bilateral agreements on legal assistance with other countries. One such international document is the International Covenant on Civil and Political Rights, adopted on December 16, 1966. According to Article 14 of the Covenant, "All persons shall be equal before the courts and tribunals" [1]. Therefore, courts of the states that have ratified this Covenant must provide foreign persons with equal procedural rights and obligations as those granted to their own citizens and organizations.

Such international documents not only require "compliance" with their provisions but also impose international legal obligations on the participating states [2; 129]. In fulfilling these obligations, the participating states consider appropriate legislative changes and establish administrative and organizational resources to ensure the implementation of these provisions. The issues regarding the peculiarities of foreign states as participants in civil court proceedings, which are taken as the subject of this research, are also of great importance in addressing the obligations arising from international legal documents recognized by our country. One such document is the "Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters" (Minsk Convention), ratified by the Supreme Council of the Republic of Kazakhstan in 1994.

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Moreover, Article 474 of the Civil Procedure code of the Republic of Kazakhstan stipulates that “the legal capacity of a foreign organization in procedural matters is determined by the law of the foreign state under which this organization was established”. This means that the personal law of foreign organizations (including foreign states) is considered the law of the state where the organization was created. This situation requires judges to be familiar with the laws of the respective foreign country when dealing with cases involving foreign elements.

In the context of an integrated market economy, the increasing number of civil relations involving foreign entities in the Republic of Kazakhstan necessitates a reassessment of both the theory and practice of handling civil cases with foreign elements. This is related to the rapid development of international relations and the high level of economic activity in the country. In 2023 alone, the country attracted $28 billion in direct foreign investments, marking a record figure, with external trade reaching an unprecedented level of $136 billion [3]. President Kassym-Jomart Tokayev, in his address, emphasized the need to implement at least 15 major projects at the state level, attracting both foreign investors and local business representatives. He instructed to exempt foreign investors in the processing industry from taxes and other obligatory payments for the first three years. Additionally, he highlighted the importance of establishing joint enterprises with large foreign IT companies. To attract further interest from domestic and foreign investors, he also tasked with resolving all legal and financial issues surrounding these projects [3].

Given that foreign persons are involved in various aspects of the country's economy, migration processes and joint entrepreneurship with Kazakhstani citizens and relations involving land, marriage, and other areas, it is clear that such relationships intersect with the civil judicial system. In the first six months of 2024, 90330 cases involving foreign elements were heard in Kazakhstani courts [4]. Consequently, as civil-legal relations (both property-related and non-property-related) become more complicated due to foreign elements, the judicial process also becomes more complex, with foreign elements adding layers of intricacy.

Methods and materials

In the analysis of civil proceedings involving foreign elements, including the participation of foreign states in civil court cases, both analytical and comparative legal methods were used. Specifically, the analytical method was applied to study the civil procedural legislation of the Republic of Kazakhstan, while the comparative legal method was employed to examine the experience of foreign states in involving them in civil court proceedings. The research materials included scientific works by domestic and foreign scholars on the participation of foreign states in civil proceedings, as well as civil procedural law norms, court practices, and case statistics involving foreign parties from Kazakhstan, the Russian Federation, the Kyrgyz Republic, and the Republic of Uzbekistan.

Results

As the investment climate in our country improves, the inflow of funds from foreign states into the national economy is also increasing. In this regard, the constant refinement of civil procedural legislation involving foreign states is a requirement of the times. Therefore, we believe that issues related to the improvement of civil court proceedings involving foreign states should be comprehensively assessed and scientifically substantiated, taking into account all possible circumstances. Chapter 57 of the Civil Procedure Code of the Republic of Kazakhstan is dedicated to procedural matters in cases involving foreign persons. Article 472 of the Civil Procedure code of Kazakhstan recognizes the following as foreign persons entitled to appeal to the courts of Kazakhstan to protect their violated or disputed rights, freedoms, and legal interests:

a) Foreign citizens and stateless persons;

b) Foreign and international organizations.

As can be observed, categories such as foreign states, refugees, and individuals with dual citizenship, who may be parties in civil proceedings, are not explicitly defined in Article 472. In our view, the term “foreign persons” itself is incorrect. Referring to “participants” or “parties involved” in the proceedings solely as “persons” is a flawed concept. A “person” is an individual who has formed through a socialization process, with a recognizable identity and characteristics in society. Therefore, the use of “foreign persons” in the chapter’s title excludes administrative-territorial entities and states, including foreign states, which are recognized as subjects of civil law but are left outside the concept of participants in civil proceedings.

The Civil Procedure Code of Kazakhstan does not define the term “foreign persons”. As a result, this creates barriers for certain categories of civil procedure participants classified as foreign persons from being involved in civil court proceedings as plaintiffs or defendants.

Despite the fact that Chapter 57 of the Civil Procedure Code does not specify the role of foreign states as participants in civil proceedings, it is important to note that Article 43 of the same code names parties as participants in the proceedings. Article 47 of the Civil Procedure Code recognizes the plaintiff and defendant as the parties to civil proceedings. Paragraph 4 of this article states that a state can be either a plaintiff or a defendant [5]. Therefore, the state, as a party in civil proceedings, is vested with equal procedural rights and bears the same procedural obligations as other participants. Based on this, we have grounds to recognize foreign states alongside the Republic of Kazakhstan as participants in civil proceedings.

When examining this issue, various approaches can be seen in the legislation of neighboring countries.

Chapter 45.1 of the Civil Procedure Code of the Russian Federation addresses the procedure for handling cases involving foreign states. According to Paragraph 2 of Article 417.1, civil cases involving foreign states are processed in accordance with the general rules of claim proceedings, taking into account the general provisions outlined in Chapter 43, which discusses the procedure for civil proceedings involving foreign persons, and Chapter 44, which covers the jurisdiction of cases involving foreign persons in the courts of the Russian Federation [6]. Additionally, Article 34 of the Civil Procedure Code of the Russian Federation classifies parties, third parties, prosecutors, persons defending the rights and freedoms of others, and individuals participating in proceedings to provide opinions on specific matters as participants and other persons involved in the proceedings. Article 38 of the same code recognizes the plaintiff and defendant as parties, stating that they hold equal procedural rights and responsibilities.

Article 40 of the Civil Procedure code of the Kyrgyz Republic defines the concept of parties in civil proceedings, stating that citizens, officials, state bodies, local self-government bodies, as well as legal entities are recognized as the plaintiff and defendant in civil proceedings. Paragraph 4 of Article 40 provides that the Kyrgyz Republic and local communities can participate in civil proceedings through their authorized representatives from state or local self-government bodies. Civil cases involving foreign persons are regulated by Chapter 43 of the Civil Procedure Code of the Kyrgyz Republic, which addresses the issue of jurisdictional immunity of foreign states [7].

Article 43 of the Civil Procedure Code of the Republic of Uzbekistan, similar to Russian legislation, recognizes parties, third parties, and their representatives, as well as applicants and other interested persons in special proceedings, prosecutors, state administrative bodies, and individuals defending the rights and legitimate interests of others as participants in the proceedings. However, the Civil Procedure Code of Uzbekistan does not fully define the concept of parties, only mentioning that the plaintiff and defendant are the parties [8].

A comparative legal analysis of the legislation of these countries reveals that the role of foreign states as participants in civil proceedings is not clearly defined. Nevertheless, certain examples from judicial practice demonstrate that civil cases involving foreign states have been adjudicated by courts in these countries. For instance, the Kabanskyi district court of the Republic of Buryatia heard a civil case (No. 2-552/2016) brought by Russian citizen K.Yu. Samokin against the Ministry of Health and Social Development of the Republic of Kazakhstan for compensation for health-related damages, while the Kuzminskyi district court of Moscow heard a case brought by Russian citizen Yu.V. Rysayev against the Embassy of the Republic of Kazakhstan [9; 68–70].

A state, including a foreign state, participates in civil legal relations on an equal footing with other participants. Article 114 of the Civil code of the Republic of Kazakhstan states that unless otherwise stipulated by legislative acts, the provisions governing the participation of legal entities in civil relations shall apply to the state [10]. Thus, we can recognize a foreign state as a full participant in civil legal relations. This implies that the state, including a foreign state, holds the rights and obligations of a legal entity in civil legal relations. In this context, we agree with the opinion of legal scholar M.K. Suleimenov, who states: "In international and domestic relations, the state is recognized as a subject of law. However, like legal entities, the state also possesses legal fiction. In legal relations, the state acts through its governmental bodies. Except for cases where state bodies are considered as legal entities in civil transactions, they are not recognized as subjects of law" [11; 82]. As a full subject of civil legal relations, disputes over various property and non-property rights and interests inevitably arise between the state and other subjects. However, as previously discussed, the procedural status of the state, including foreign states, as a participant in civil proceedings is not clearly defined.

According to the provisions of the civil code of the Republic of Kazakhstan, a state in civil legal relations holds the rights and obligations of a legal entity. Similarly, we can assume that a foreign state possesses the rights and obligations of a foreign organization established under the laws of that state. Consequently, the

procedural capacity of a foreign state in civil proceedings is determined by its domestic law, just as the procedural capacity of a foreign organization is governed by the laws of the country in which it was established, as outlined in Article 474 of the Civil Procedure Code of Kazakhstan. Article 494 of the same code also provides that foreign states are subject to the same rules as legal entities, including foreign legal entities, when participating in civil proceedings.

However, Article 466 of the Civil Procedure code of Kazakhstan stipulates that cases involving foreign persons that fall under the jurisdiction of Kazakh courts require either the "location of the defendant-organization" or the "place of residence of the defendant-citizen" within the territory of Kazakhstan. This implies that only a foreign organization or a foreign citizen can be considered as foreign persons. Moreover, such an "organization" must have a place of residence. This raises the question of whether a "state" can be considered an organization. Many scholars who study state theory regard the state as a "sovereign political-territorial organization" [12; 17]. Or does the term "organization" only refer to associations of individuals with the characteristics of a legal entity? What about foreign organizations that are not recognized as legal entities? How will their status be determined in civil proceedings?

An analysis of the norms of civil procedural law shows that the list of foreign persons as participants in civil proceedings is incomplete. In particular, the role of foreign states as participants in civil proceedings is not clearly defined.

Despite the unclear status of foreign states as participants in civil proceedings, Article 477 of the Civil Procedure Code of the Republic of Kazakhstan addresses the jurisdictional immunity of foreign states. According to this article, foreign states in Kazakhstan are granted immunity from judicial jurisdiction, immunity from claims, and immunity from the enforcement of court decisions, and this is recognized as jurisdictional immunity. Article 484 of the same code specifies the conditions under which foreign states cannot invoke jurisdictional immunity. It states that foreign states cannot invoke jurisdictional immunity if they have violated the jurisdictional immunity of the Republic of Kazakhstan or its property.

Discussion

Before discussing the conduct of civil court proceedings involving foreign states, we must first address their participation in public legal and private legal relations. In his work, domestic scientist M.K. Suleimenov emphasizes that "it is essential to clearly define whether the state is a subject of public legal or private legal relations. In public legal relations, the state is recognized as a sovereign subject with authority powers. In international public legal relations, the state, possessing sovereignty, also enjoys judicial immunity. However, in private legal relations the state does not possess such immunity" [11; 82].

The legal status of foreign states as participants in private legal relations is distinguished by their judicial immunity from the jurisdiction of another country. The fact that a state can participate in civil court proceedings has been discussed in both domestic and international legal scholarship. Russian scholars A.V. Yudin and M.A. Agalarova point out in their work that foreign state can participate in civil proceedings under general rules, but they also enjoy the right to jurisdictional immunity [13; 46].

Other scholars, when considering foreign states as participants in civil proceedings, highlight that their ability to isolate themselves from the jurisdiction of other states is their primary distinguishing feature. They argue that this stems from the principles of sovereignty and equality of states, fundamental in international law [14; 30].

Kazakh scholars also recognize the state, including foreign states, as full participants in civil proceedings [15; 55].

Immunity grants a particular subject of legal relations certain privileges and advantages. As is widely known, immunity derives from the sovereign rights of states and aligns with the Roman law maxim *par in parem non habet imperium* ("equals have no dominion over each other"). Therefore, any judicial action involving a state requires that state's consent, as it would be unreasonable for one state to hold another accountable in its courts without consent or violation of jurisdictional immunity. Some scholars argue that such consent must be outlined in international treaties or provided through diplomatic channels [16; 28-29], while others refer to examples such as the 1992 agreement between Kazakhstan and the U.S. on mutual protection of investments, where both states agreed to waive jurisdictional immunity in case of disputes regarding property [17]. Legal scholar M.K. Suleimenov identifies another basis for a state voluntarily waiving judicial immunity: when such a waiver is stipulated by law or specific civil contracts [18].

Immunity encompasses of two aspects:

1. The immunity a state enjoys when engaging in private legal relations within the territory of another state.

2. The immunity a state grants when allowing private legal relations to be carried out within its own territory.

The first type of immunity concerns a state's right to be exempt from judicial jurisdiction in another state, meaning that, based on Kazakhstan's sovereign rights and international legal norms, Article 477 of the Civil Procedure Code of Kazakhstan allows foreign states to invoke immunity.

The second type of immunity refers to Kazakhstan's right to refrain from exercising its full territorial jurisdiction over a foreign state, except in certain cases.

Kazakh scholar, Professor M.K. Suleimenov explains three types of state immunity as follows:

1. Judicial immunity — the principle that one state is not subject to the jurisdiction of another state's courts. This is encapsulated in the legal formula: "equals have no jurisdiction over one another".

2. Immunity from measures of constraint — meaning that without the consent of the state, no coercive measures can be applied to its property.

3. Immunity from enforcement of judicial decisions — protecting the state from forced execution of a court decision [18].

Furthermore, in civil law, apart from the jurisdictional immunity of the state, there is also mention of general immunity regarding the inviolability of foreign state property [19; 445-446], as well as immunity from the application of foreign law [20; 257].

The following cases do not allow the use of judicial immunity:

- The foreign state's consent to waive immunity;
- The foreign state violating the jurisdictional immunity of Kazakhstan or its property;
- The foreign state's activities falling outside the scope of sovereign authority.

Professor M.K. Suleimenov explains that the rule on whether or not to recognize judicial immunity of foreign states in Kazakhstan or neighboring countries stems from the widespread theory of absolute sovereign power, which was prevalent in the former Soviet Union [18].

Legal literature identifies several forms of immunity:

1. Absolute immunity, where a state enjoys full immunity regardless of the nature of its activities, including both public and private legal matters [21; 81].

2. Functional immunity, which differentiates between a state's public authority functions and its involvement in private legal relations. Proponents of this view argue that a state can only claim judicial immunity when exercising its public functions, but not when engaging in private or commercial activities [22; 68].

In addition, a third type of immunity, limited immunity, is sometimes discussed. Unlike functional immunity, limited immunity doesn't rely on distinguishing between public and private functions but instead specifies particular circumstances where a state cannot claim immunity [20; 257]. Scholars note that the European Convention on State Immunity, adopted by the Council of Europe on May 16, 1972, is a clear example of limited immunity [18]. According to the Convention, several situations where immunity cannot be invoked are outlined, such as when a counterclaim is filed against the primary claim. The current Civil Procedure Code of Kazakhstan similarly limits the immunity of foreign states, allowing counterclaims and claims involving legal facts or relationships, which constitute a violation of the jurisdictional immunity of Kazakhstan and its property.

Another reason for limiting state immunity is when a foreign state engages in commercial activities on Kazakhstan's territory, leading to a dispute. When determining whether the transaction in question relates to the foreign state's sovereign authority, Kazakh courts consider the nature and purpose of the transaction at the heart of the dispute.

The first basis for limiting the judicial immunity of foreign states is the state's waiver of judicial immunity by consenting to the jurisdiction of the courts of the Republic of Kazakhstan. Such consent is only valid in one situation: when there is an agreement between the two states allowing the withdrawal of the waiver of judicial immunity. In all other cases, consent once given cannot be revoked. Additionally, another situation where a foreign state cannot invoke judicial immunity, immunity from provisional measures, or immunity from enforcement of court decisions is when the jurisdiction of the Republic of Kazakhstan and its property is violated.

Furthermore, the civil procedural legislation of the Republic of Kazakhstan outlines the following grounds for the limitation of judicial immunity in private legal relations:

1. Disputes arising from the foreign state's engagement in entrepreneurial activities within the territory of Kazakhstan. In determining whether the transaction conducted by the foreign state was related to the exercise of its sovereign authority, the courts of the Republic of Kazakhstan consider the nature and purpose of the transaction in dispute.
2. Disputes arising from the participation of a foreign state in legal entities established or primarily operating within the territory of Kazakhstan.
3. Disputes related to rights and obligations concerning immovable property.
4. Disputes concerning compensation for damages.
5. Disputes arising from the establishment and enforcement of a foreign state's rights to intellectual property objects.
6. Labor disputes.

Disputes related to the use of sea vessels and inland water vessels.

Conclusion

Analyzing the legislation governing civil proceedings involving foreign states, the following conclusions can be drawn:

1. The main feature of the legal regime of a foreign state as a participant in private legal relations is its immunity from the jurisdiction of the courts of the Republic of Kazakhstan. Jurisdiction stems from the sovereign rights of foreign states and reflects the independence of the legislative, executive, and judicial branches of power. The analysis of the norms of Kazakhstan's civil procedural legislation confirms this point.
2. Despite the fact that the legal grounds for the use and limitation of judicial immunity by foreign states are fully defined in civil procedural law, the role of foreign states as full-fledged participants in civil proceedings remains unclear. As equal participants in civil legal relations, the status of states, including foreign states, as necessary actors in civil proceedings when disputes arise, needs further clarification. Defining the legal position of a state (foreign state) as a participant in such proceedings is especially important when addressing the specifics of limited judicial immunity.
3. The analysis of the norms of the Civil Procedure code of the Republic of Kazakhstan reveals that foreign states are subject to limited judicial immunity. This is evidenced by specific cases where the judicial immunity of foreign states is restricted, particularly when their actions are not related to sovereign governance. Such cases include disputes arising from the foreign state's entrepreneurial activities in Kazakhstan, its participation in legal entities established or headquartered in Kazakhstan, disputes over property rights related to real estate located in Kazakhstan, intellectual property, labor, the use of sea vessels and inland watercraft, and other related matters.

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Шет мемлекеттер азаматтық процестің қатысушысы ретінде

Еліміздің инвестициялық ахуалы жақсарған сайын шет мемлекеттер тарапынан ел экономикасына қаражат салу да артып келеді. Осыған байланысты шет мемлекеттердің қатысуымен жүргізілетін азаматтық процестік заңнаманы ұдайы жетілдіру талап етіледі. Шет мемлекеттердің қатысуымен азаматтық сот өндірісін жетілдіру мәселелері жан-жақты бағалануы және барлық болатын жағдайлар ескеріліп ғылыми негізделуі тиіс. Зерттеудің мақсаты азаматтық процестік заңнамаға сәйкес шет мемлекеттердің іске қатысушы ретіндегі ерекшеліктерін талдау және оны жетілдіруге қажетті заңнамалық ұсыныстар беру. Зерттеу барысында шет мемлекеттің қатысуымен азаматтық процесті жүзеге асырудың қазіргі қалыптасқан нормалары Ресей, Өзбекстан, Қырғызстан заңнамаларымен салыстырып қаралды, сондай-ақ шетелдік және отандық ғалымдардың осы тақырыптағы еңбектеріне шолу жасалды. Шет мемлекеттердің қатысуымен істерді қараудың азаматтық процестік нормалары талданды және тиісті заңнамалық ұсыныстар тұжырымдалды. Тақырыптың өзектілігі соңғы уақыттағы шет мемлекеттермен экономикалық интеграцияның ұлғаюымен, сондай-ақ нарықтық экономика жағдайындағы Қазақстан Республикасында шетелдік тұлғалардың қатысуымен азаматтық қатынастардың артуымен анықталады. Зерттеу нәтижесінде Қазақстан Республикасының азаматтық процестік заңнамасына сәйкес шет мемлекеттер юрисдикциялық иммунитетті пайдалану негіздері анықталды және де соттық иммунитет шектелуінің барлық жағдайлары нақты айқындалғандығына көз жеткізілді. Осыған қарамастан, шет мемлекеттердің азаматтық процестің толыққанды қатысушысы ретіндегі орны нақтылауды талап етеді.

Кілт сөздер: шет мемлекет, шетелдік, азаматтығы жоқ адам, шетелдік ұйым, халықаралық ұйым, шетелдік тұлғалар, азаматтық процесс, шетелдік заңды тұлға, юрисдикциялық иммунитет, соттық иммунитет.

А.К. Муйденова, Б.Ж. Айтимов

Иностранные государства как участники гражданского процесса

Улучшение инвестиционного климата в стране привело к увеличению объема инвестиции в экономику страны со стороны иностранных государств. В связи с этим имеется необходимость

постоянного совершенствования гражданско-процессуального законодательства, регулирующее гражданские судебные процессы с участием иностранных государств. Совершенствование гражданского судопроизводства с участием иностранных государств требует полноценной оценки и научной обоснованности всех обстоятельств. Цель настоящего исследования — проанализировать особенности рассмотрения гражданских дел с участием иностранных государств и дать рекомендации для его совершенствования. В ходе исследования проведен сравнительно-правовой анализ норм, регулирующих гражданский судебный процесс с участием иностранных государств, таких стран как Российская Федерация, Республика Узбекистан, Кыргызская Республика. Осуществлен обзор научных трудов зарубежных и отечественных ученых по данной теме, а также анализ гражданско-процессуальных норм рассмотрения дел с участием иностранных государств, и сделаны выводы для внесения необходимых законодательных предложений. Актуальность темы исследования определяется увеличением экономической интеграции с иностранными государствами, а также частно-правовых гражданских отношений с иностранными лицами в Республике Казахстан в условиях рыночной экономики. В результате исследования определены основания использования юрисдикционного иммунитета иностранными государствами в соответствии с гражданско-процессуальным законодательством Республики Казахстан, а также учтены все обстоятельства ограничения судебного иммунитета иностранных государств при рассмотрении дел с их участием. Однако, несмотря на это, требуется определение правового режима иностранного государства как участника гражданского судебного процесса.

Ключевые слова: иностранное государство, иностранец, лица без гражданства, иностранная организация, международная организация, иностранные лица, гражданский процесс, иностранное юридическое лицо, юрисдикционный иммунитет, судебный иммунитет.

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Alternative ways of resolving corporate disputes in the Republic of Kazakhstan and in the USA. Comparative analysis

The article provides a comparative analysis of the tools of alternative ways of resolving corporate disputes (ADR) in the Republic of Kazakhstan and the USA. The purpose of this study is to identify key differences and similarities in the approaches of the two countries to the use of mediation, arbitration and other ADR mechanisms in the corporate sphere. In this regard, legislative sources, mechanisms and practices of ADR application in both jurisdictions were studied. The main methods considered in the study include an empirical comparison of mediation and arbitration, with an emphasis on the specifics of their regulation and implementation in each country. The results of the study allow us to conclude that the ADR system in the United States is deeply integrated into corporate processes and is widely used to resolve corporate disputes. In Kazakhstan, on the contrary, ADR in the corporate segment is not developing as dynamically as in the States. However, it is successfully advancing through government initiatives and the introduction of international standards. The main conclusions of the study can emphasize the importance of government support and increasing confidence in ADR in Kazakhstan, as well as the success of long-term application of these methods in the United States. A comparative analysis in the study showed that Kazakhstan can extract positive aspects from the American experience to further improve its system of alternative corporate dispute resolution.

Keywords: corporate dispute, alternative method, out-of-court procedure, arbitration, mediation, negotiations, mediation, court, judgment, agreement, business, civil case.

Introduction

The latest trends in the development of corporate legislation in the Republic of Kazakhstan are aimed at strengthening the stability of the listening state, civil society and increasing the attractiveness of the domestic economy as an object of attraction for private domestic and foreign investments. Consequently, any foreign element in the long term tries to implement its culture and customs, including legal ones, into a new environment. In this regard, the dynamics of the growth of corporate disputes, as well as the risk of their occurrence, is becoming a noticeable phenomenon in the Republic of Kazakhstan. For the first time, only in 2015, norms regarding the resolution of corporate disputes were introduced into the Civil Procedure Code of the Republic of Kazakhstan. The legal definition of the term “corporate dispute” is fixed at the legislative level. These innovations are not accidental.

However, as of today, the law enforcement practice for resolving corporate disputes in the light of recent changes to the Civil Procedure Code of the Republic of Kazakhstan has not yet developed, questions regarding the consequences of the application of the procedural law still arise, the concept of corporate dispute itself is also a novelty in Kazakh legislation.

If we turn to the Civil Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC of the Republic of Kazakhstan), in part 1 of Article 27 we will see the legislative definition of “corporate dispute”, which reads:

However, corporate disputes can be regulated not only in court. The popularity of alternative ways to resolve corporate disputes is growing every year. Alternative dispute resolution methods involve out-of-court dispute resolution methods. In the Republic of Kazakhstan, the following main types of alternative ways of resolving corporate disputes can be distinguished:

1) Negotiations;
2) Mediation or intercession;

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3) Arbitration.

Some Kazakhstani civil lawyers distinguish reconciliation and mini-proceedings as separate types of alternative ways to resolve corporate disputes. Nevertheless, we tend to classify the reconciliation procedure as negotiations, and the mini-trial procedure as mediation or intercession.

Kazakhstan is actively studying the foreign experience of developed countries on reconciliation and alternative dispute resolution methods. For example, in an article entitled “The experience of foreign countries in conciliating the parties to a civil dispute: using the example of European countries”, authored by A.B. Shaimenova, the experience of such European countries as Great Britain, France, Spain, Germany and Poland was studied [1]. In turn, we will attempt to analyze the Kazakh and American alternative approaches to corporate dispute resolution.

Methods and materials

A comparative analysis of alternative ways of resolving corporate disputes in the Republic of Kazakhstan and the United States used a comparative legal research method. This study is based on an analysis of the civil jurisdiction of Kazakhstan and the United States in the corporate sector. Case materials from judicial practice were also used. Based on the analysis of judicial practice on corporate disputes, the authors have allowed options for resolving these disputes through alternative settlement. The regulatory framework governing the resolution of corporate disputes in the Republic of Kazakhstan and the United States has been studied. A comparative analysis of the legislation of the two countries allowed us to take a deeper look at the various legal subtleties of alternative ways of resolving corporate disputes.

Discussion

In Kazakhstan, the bulk of civil law disputes, including corporate ones, are resolved through negotiations. It should be noted that Kazakhstani entrepreneurs tend to use conciliation procedures more often. So, the usual clause for our contracts was that in case of disagreement, the parties would try to settle it through negotiations. However, most often this reservation is of a formal nature. In reality, neither the parties to the dispute nor their representatives (lawyers) are ready for qualified negotiations. Traditionally, when a dispute arises, they turn to justice for protection, which is much more expensive, meaning time, money, and emotional stress.

In judicial practice, there are also cases when, in corporate disputes, a mediation agreement is concluded after a decision of the court of first instance. We would like to share a similar case considered in the city of Karaganda.

In 2015, the State judicial system of Kazakhstan resolved 99 % of civil law conflicts in society. This state of affairs is a monopoly on justice [2]. To date, the situation has not changed much. If the settlement of disputes between individuals in court is a completely understandable phenomenon, since society still perceives the court as the only instrument of justice, then corporate disputes should be resolved by more modern methods. To date, the legislation of Kazakhstan regulates several tools for alternative resolution of corporate disputes. The competent and conscientious application of such methods can lead to a more effective result and satisfy all parties to a corporate dispute.

The plaintiff, a non-profit joint-stock company, appealed to the Specialized Interdistrict Economic Court of the Karaganda region with requirements for the defendant to replace goods of inadequate quality within the framework of the guarantee obligation. By the decision of the specialized interdistrict economic Court of the Karaganda region, the plaintiff's claims were denied in full. Disagreeing with the decision of the court of first instance, the plaintiff appealed this decision. In the appeal, the plaintiff requests that the decision of the court of first instance be reversed and a new decision be made to satisfy the plaintiff's claims in full, referring to arguments similar to those indicated in the statement of claim and given in court at the court session. During the consideration of the appeal stage, the parties appealed to the court of appeal with an application for approval of the terms of the mediation agreement and the termination of proceedings in the case, since they reached agreement on the settlement of the dispute in this civil case. Judicial Board, after listening to the opinion of the parties who asked to approve the agreement on the settlement of the dispute by a mediation agreement, checking the content of this Agreement, the conclusion of the prosecutor, considered that the agreement was subject to approval, since its terms did not contradict the law, did not violate the rights and legitimate interests of third parties and terminated the proceedings in this case.

According to paragraph 4) of Article 424 of the CPC of the Republic of Kazakhstan, the decision of the court of first instance is subject to cancellation with termination of proceedings on the grounds provided for

in paragraph 5) of Article 277 of the CPC of the Republic of Kazakhstan. The parties concluded a settlement (mediation) the agreement and it was approved by the court [3].

The comparative analysis was conducted not in order to identify which country uses alternative ways of resolving corporate disputes better or worse, but in order to draw a parallel between two countries with different legal systems and consider the possibility of mutual implementation. Given that Kazakhstan has experience in implementing the norms of common law in its jurisdiction, we believe that the comparative analysis will serve as a theoretical basis for further in-depth study of this issue.

Results

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According to paragraph 1 of paragraphs 1-2) of Article 548 of the Tax Code of the Republic of Kazakhstan, the amount of the state fee paid is subject to refund to the plaintiff in the event of a mediation agreement [4].

Guided by paragraphs 4) of Article 424, paragraph 6) of Article 277, part 1 of Article 180 of the CPC of the Republic of Kazakhstan, paragraph 1 of paragraphs 1-2) of Article 548 of the Tax Code of the Republic of Kazakhstan, the appeals board for civil Cases determined: The decision of the specialized interdistrict economic court of the Karaganda region in this case should be canceled. To approve a written voluntary and equal settlement agreement on the settlement of the corporate dispute on the following conditions: The defendant undertakes, within the framework of the warranty obligation, to replace the goods of inadequate quality, in strict accordance with the technical specification. The delivery dates must be agreed with the plaintiff in advance. The plaintiff considers that he has fulfilled his obligations from the moment the parties sign the act of acceptance and transfer of the goods and the consignment note.

Based on the results of the analysis of this corporate dispute, one conclusion can be drawn. The Court of First Instance did not make enough efforts to resolve this corporate dispute through mediation. It ruled in favor of the defendant. If the plaintiff had not appealed this decision through the appeals board, he would have been left in a procedural loss. It is important to note the efforts of the appeals board, which helped the

parties reach a common consensus and helped resolve this dispute through mediation. The decision of the court of first instance has been overturned. Accordingly, thanks to the highly professional board of appeal, which helped to come to an amicable agreement, none of the parties is considered a loser or a winner.

Using the example of this case, we want to raise the importance of the role of the judge of the first instance in resolving corporate disputes by alternative means. The judge of the first instance must make all his professional and procedural efforts to resolve the corporate dispute. Because the result of resolving a corporate dispute should not be someone's gain or loss, but a solution adjusted for both sides. In this example, we have depersonalized the parties, the judge and the appeals board. However, on the platform of the Judicial Cabinet of the Republic of Kazakhstan https://office.sud.kz / any authorized user can find similar cases on corporate disputes [5].

The following corporate dispute, which we would like to describe, has also reached the court of appeal. This civil case was considered in 2023 by the judicial board for civil cases of the Almaty City Court. The plaintiff of the corporate dispute, Bite Product LLP, filed a claim against the defendants GALANZ bottlers JSC and ADAL SU LLP. The main claim of the plaintiff was to declare illegal an internal local act, namely an order. This order restricted the access of employees of Bite Product LLP to the territory leased by the plaintiff. The plaintiff's statements indicated that the order restricting access to the territory prevented the plaintiff from fully carrying out his activities. By the decision of the court of first instance, the statement of claim was satisfied in full. The court recognized the actions of the defendants — GALANZ bottlers JSC and ADAL SU LLP as illegal, and also ordered to pay the costs of the state fee. Disagreeing with the verdict of the court of first instance, one of the defendants, that is, JSC GALANZ bottlers, files an appeal. In accordance with the arguments of GALANZ bottlers JSC, they have the right to restrict access in order to preserve and protect property and prevent other threats and risks. However, the appellate instance remained in solidarity with the decision of the court of first instance. The decision was left unchanged, thereby the appellate instance confirmed the validity of the plaintiff's primary claims, as well as the violation of their rights to unhindered and free access to the rented premises.

We believe that with the right approach of corporate lawyers on both sides, this dispute could be settled through mediation. Since such categories of cases, on access to rented premises, on the right to unhindered business activity, are suitable for constructive mediation. To begin with, during the negotiations, the parties could openly discuss the reason for issuing an order restricting access to the territory, then the plaintiff of Bite Product LLP could understand and analyze exactly what factors influenced such a decision by the defendants. A mediation process could help both sides agree on reasonable terms of access to the disputed territory. For example, the parties could set certain time limits, jointly purchase additional video surveillance cameras, agree on rules for visiting premises, and establish a watch, taking into account the interests of each of the parties.

In the case of settlement of this dispute by a mediation agreement, the parties could include such basic points as the definition and consolidation of rules of interaction in case of similar situations in the future. At the same time, the resolution of this corporate dispute through mediation would save time and resources, including financial ones. Also, the plaintiff of Bite Product LLP would have avoided losses, and the defendants would have defended their interests without losing in court.

The United States of America (hereinafter referred to as the USA) can be confidently called one of the founders of the Institute of modern corporate law. It should be noted that in addition to regulating disputes between legal entities, this branch of jurisprudence regulates legal relations related to the securities market.

In the United States, corporate disputes are most common in commercial law. It should be noted that in most cases, these disputes are resolved out of court. The out-of-court procedure is a less formal procedure compared to the procedure for resolving corporate disputes in the courts. In turn, non-judicial methods make it possible to significantly relieve the judicial system, while resolving the corporate dispute that has arisen in a short time [6; 9].

U.S. Judge Elizabeth S. Stong of the Eastern District of New York in the article "Investor and Investment Dispute Resolution — some notes on the US experience and international experience with Economic and Commercial Courts" (2022) extensively reviewed the procedure for resolving investor and investment disputes based on US experience and international practice. Prior to her appointment as a judge, Ms. Stong actively prosecuted economic and commercial disputes, including investor and investment disputes, in federal and state courts, as well as in arbitration courts. Judge Elizabeth S. Stong notes that the focus is on the creation of specialized judicial units to handle commercial cases, such as the Commercial Division in New York, as well as the role of federal courts and diverse jurisdictions. The U.S. judicial system also has special-

ized courts for complex financial and commercial disputes. At the same time, the same courts consider alternative dispute resolution procedures, such as mediation, and emphasize the importance of specialization of judges and staff [7; 4].

Corporate disputes in the United States are regulated comprehensively. The package of measures includes such mechanisms as the activities of the legislator to improve corporate law; judicial procedures for resolving corporate disputes; the activities of state administrative bodies to identify and investigate violations of corporate legislation; the activities of self-regulatory organizations; the use of alternative dispute resolution procedures; the formation of public opinion [8; 132]. Consequently, in addition to alternative methods of resolving corporate disputes, government administrative bodies are also authorized to resolve them in the United States. The decisions taken by these bodies are quasi-official in nature.

Arbitration and mediation, familiar to Kazakhstani legislation, are the main alternative tools for resolving corporate disputes in the United States. Arbitration proceedings in the USA have a number of advantages, such as:

• High speed of corporate dispute resolution;

• No need to use complex regulatory rules and standards about evidence;

• Accessibility of the process in the price aspect;

• The opportunity to choose the optimal composition of the court, which will allow the most effective and objective consideration of the case;

• Informal atmosphere of the hearings on the dispute;

• There is no mandatory need for the participation of representatives of the parties” [9].

For example, New York has a Code of Arbitration Proceedings. However, there are elements of general legal proceedings in the arbitration of cases. For example, witnesses to a corporate dispute must take an oath before testifying. Before signing an arbitration clause, the parties to a corporate dispute must understand the consequences of considering the case in an arbitration court. For clarity, we want to give a practical example. The arbitration at the New York Stock Exchange consists of a director and 7 lawyers. As a result, the judges are selected by the parties to the dispute from the proposed list, which includes brokers and other competent specialists in the past who can boast of extensive practical experience in the field of corporate governance. It is noteworthy that there are cases when they are not even lawyers. The procedure for reviewing cases in arbitration in the United States takes place most often at a round table.

There is no uniform legal definition of the term mediation in the United States. Moreover, it has become both more and less widespread in various regions. It is noteworthy that New York belongs to the latter, that is, less widespread. For a clearer understanding of this institution of mediation, you can use Article 2(1) of the Uniform Law on Mediation. According to the specified normative act, mediation is “a process where the mediator provides comprehensive assistance in communication, as well as negotiations between the parties to the dispute to reach a voluntary agreement regarding their conflict” [10].

Thus, a comparative analysis of alternative ways of resolving corporate disputes in the Republic of Kazakhstan and the United States is based on several key aspects: legislative framework, mechanisms and practice of application. Let's take a look at these aspects in more detail.

In Kazakhstan, Alternative Dispute Resolution (ADR) is regulated by the Law on Mediation (2011) and the Law on Arbitration (2016). These laws regulate the basic forms of ADR. Mediation and arbitration are used in corporate disputes related to small and medium-sized businesses. At the same time, the Astana International Arbitration Center (IAC) and the Astana International Financial Center (AIFC) play an important role in the development of ADR.

In the USA, the ADR system is significantly developed. Legal institutions such as mediation, arbitration and judicial mediation (settlement conferences) can be distinguished. The legislative sources for these processes may vary from state to state, but in general, the basis for arbitration in the United States is the Federal Arbitration Act (1925). It is important to note that arbitral awards are legally binding, and in the case of corporate disputes, such processes often become a standard (precedent) for resolving issues between companies, investors and shareholders. If we talk about mediation in the United States, it is used at almost all levels of corporate disputes, from conflicts between shareholders to more complex disputes involving large corporations and international partners. In some states, mediation is mandatory at the stages of the trial. An important feature of mediation in the USA is the participation of professional mediators who have deep knowledge of law and business.

In Kazakhstan, mediation and arbitration continue to gain popularity in legal circles, but there is still a need to increase confidence in these dispute resolution methods among the corporate sector. The Govern-

ment of Kazakhstan is actively working to create favorable conditions for the use of ADR tools, including raising awareness among entrepreneurs and lawyers about the benefits of alternative conflict resolution methods.

In the USA, ADR has long been a standard practice in the corporate environment (since 1925). Moreover, the inclusion of arbitration clauses in corporate contracts has become a common practice. The main reasons for the popularity of ADR in the United States is the ability to avoid lengthy court procedures and maintain confidentiality. It is also important to note the corporate culture in the United States, which respects the resolution of disputes out of court, so as not to damage the reputation of companies. American courts actively support ADR and often require out-of-court procedures before the trial begins. This reduces the burden on the judicial system and helps to resolve disputes faster.

Comparing alternative ways of resolving corporate disputes in Kazakhstan and the United States, it is undoubtedly necessary to take into account the following distinctive factors:

1. Different legal systems. If the USA is a primordial precedent country of the Anglo-Saxon legal system, the source of which is common law, then Kazakhstan belongs to the Romano-German system of law.

2. The history of the formation of corporate law. In the USA, corporate law as a separate institution of civil law arose and was formed much earlier than in Kazakhstan. This, in turn, is of great importance in the formation of alternative ways to resolve corporate disputes.

3. The state structure. The United States is a federal republic that consists of 50 states. There are certain peculiarities in the jurisdiction of each state. Even the procedure for resolving corporate disputes may differ from one state to another. Whereas, according to the Constitution, the Republic of Kazakhstan is a unitary state.

Of course, these factors may raise a logical question: then what is the point of comparing the approaches of alternative ways of resolving corporate disputes in two completely different countries? The following logical answers can be given to this question.

Firstly, in Kazakhstan, the possibilities of implementing some norms of the Anglo-Saxon legal system governing the resolution of corporate disputes are currently being very vigorously discussed. This is confirmed by the quite successful activities of the Astana International Financial Center and its court, operating on the principles of common law.

Secondly, both countries are democratic. The only difference is that the Republic of Kazakhstan is a much younger country compared to the United States.

And finally, both the United States and Kazakhstan are supporters of the dynamic development of alternative ways to resolve corporate disputes. A vivid confirmation of this is the fact that it was in the USA that the institute of mediation first appeared exactly in the understanding that we introduced it into the legislation of Kazakhstan.

However, even in the United States, there are corporate disputes that could not be resolved out of court. One of the most high-profile examples of a protracted corporate dispute in the United States is the multi-year litigation between commercial giants such as Apple and Epic Games. We believe that these companies do not need to be presented. This corporate dispute began in 2020 and continues to this day. The plaintiff is Epic Games, which is the developer of the Fortnite game. Epic Games' main claim is that Apple charges a 30 % commission on every online purchase on the App Store platform. In order to circumvent the commission, Epic Games is introducing an alternative payment system for users. Apple's response was not long in coming. They immediately removed the Fortnite game from the App Store platform. The main argument of Epic Games in the trials was that they accused Apple of unfair monopolistic behavior. According to Epic Games:

1) Apple maliciously uses its dominant position on marketplaces;

2) Aggressively targets and imposes unfavorable conditions on mobile app developers;

3) Suppresses competition.

In relation to this corporate dispute, the judge comes to the following decision (September 2021):

1. Apple was not recognized as a monopolist.

2. Apple should allow mobile app developers to allow alternative payment systems and include links to alternative payment systems.

However, both Apple and Epic Games, having disagreed with the decision of the court of first instance, file an appeal. For the Apple giant, this dispute is of great importance, since further rules of operation, including the procedure for charging a commission on the App Store marketplace, depend on the outcome of this case. As a result, Apple may lose significant revenue from purchases of online products, including gaming applications. This corporate dispute is of great importance in general for the digital content industry and

online stores, since the final outcome of this dispute may form the basis of an American precedent and in the future regulate legal relations between owners of online platforms and developers of mobile applications [10].

Another high-profile, protracted and expensive dispute in the history of the corporate world can be called litigation between two mobile giants Apple and Samsung. The dispute between the main tech companies has become an occasion for discussion and observation not only by IT specialists, but also by corporate lawyers, lawyers, and ordinary fans of these companies. The essence of the dispute lies in patent violations and copyrights related to smartphone technology. We would like to immediately note the fact that the case was settled by a mediation agreement. The plaintiff, Apple, accused Samsung of violating copyrights, namely patents. According to Apple's arguments, the defendant uses the design and interface of Apple smartphones in bad faith. In turn, Samsung claimed a violation of its patent rights. A large-scale process between these two companies began in 2011. Apple has demanded damages for copyright infringement. The whole world was watching this large-scale corporate conflict. In the course of court proceedings, court decisions were rendered in favor of one side, then in favor of the other. According to the initial court decision, Apple was awarded more than $1 billion. However, by another decision, this amount was reduced. As a result, each side of the corporate dispute has incurred significant costs, of course, including reputational ones. After many years of litigation, appeals, and contesting compensation amounts, the parties came to a decision to settle this dispute through mediation. And only in 2018, Apple and Samsung reached a mediation agreement. Of course, the terms of this agreement remained confidential. But most importantly, both sides have renounced their claims against each other [11].

Based on the analysis of the American experience in resolving corporate disputes, the main key positive aspects of mediation can be identified. They are as follows:

1. Reduction of legal costs. In the USA, legal support in court is a very expensive service. Resolving a corporate dispute through mediation significantly reduces court costs.

2. Maintaining business relations between the parties. Any competitors, despite market competition, cooperate on cybersecurity and other production issues. Also, the settlement of a dispute through mediation can significantly increase trust in each other and reduce the intensity of the conflict.

3. Saving time. Meditation has enabled many U.S. companies to settle disputes faster, as opposed to lawsuits that have dragged on for several years.

We consider it is necessary to recall one of the most high-profile and protracted corporate disputes in the Republic of Kazakhstan. This dispute is also notable for the fact that it ended with the signing of a settlement agreement relatively recently: in July 2024. We are talking about a corporate dispute between the Government of Kazakhstan and Moldovan businessmen-investors Anatol Stati and Gabriel Stati. This corporate dispute lasted about 14 years. Among the people, this dispute even has its own name — “The Matter of the Stati”. The essence of the dispute is as follows: in 2010, the Kazakh side accused investors of violating tax legislation, namely, evasion, as well as violation of national conditions for the operation of oil fields. At that time, the subsoil users owned oil and gas assets. The initiators of the litigation were Anatol and Gabriel Stati, who lost control of oil and gas assets and began a protracted series of international arbitration proceedings. The main requirement of the Article is the payment of $500 million by the Kazakh side.

Another feature of this corporate dispute is the fact that it covers the jurisdiction of several countries. By the way, the businessmen themselves are Moldovan citizens, the dispute was considered by the Swedish arbitration court, the defendant's side is the Kazakh Government. In July 2024, the corporate dispute ended with the signing of a peace agreement. The terms of the agreement are non-public and remain confidential. The only known fact is that the terms of the settlement agreement received support from Tristan Oil's creditors. This company has previously participated in the development of Kazakhstan's oil fields. The settlement of this dispute by the international arbitration court and the conclusion of its settlement agreement, of course, strengthened the investment climate in Kazakhstan, as well as attracted the attention of large foreign investors.

However, the Stati themselves claim the opposite fact. To the media and the public, they declare their winnings in this lawsuit. The closed nature of the resolution of this corporate dispute allows the parties to maneuver when making public statements. But the fact remains indisputable that in Kazakhstan, both domestic and international corporate disputes have begun to be resolved by alternative methods, which naturally shows the positive practice of using such international institutions as arbitration and mediation.

Conclusions

Summing up the results of a comparative analysis of alternative ways of resolving corporate disputes in the Republic of Kazakhstan and the United States, we would like to note that both countries demonstrate the importance of such legal instruments as arbitration and mediation. At the same time, the United States has a more developed and complex ADR system, which is deeply integrated into corporate and legal structures and is practically inseparable. Kazakhstan, in turn, is at the stage of active implementation of these methods, especially through the AIFC platforms and other arbitration institutions, which makes ADR a promising direction for the country's corporate sector.

Based on the above, we have come to the following conclusions:

1) Consider the possibility of legislating the binding nature of arbitration clauses in the Republic of Kazakhstan, applying the practice of the United States.

2) To develop in the Republic of Kazakhstan a legislative procedure for the immediate execution of arbitral awards. This proposal can be implemented on the basis of enforcement proceedings by analogy with the norms of the Law of the Republic of Kazakhstan on enforcement proceedings and the status of bailiffs.

3) Create a pool of professional arbitrators specializing in corporate dispute resolution in the Republic of Kazakhstan. Professional arbitrators should first of all aim at the peaceful settlement of a corporate dispute by successfully applying alternative methods.

These proposals will allow for more active use of alternative ways of resolving corporate disputes, which in turn will generate a positive trend as a reduction in the burden on judges in the Republic of Kazakhstan, as well as an increase in the effectiveness of alternative ways of resolving corporate disputes.

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Ш.Т. Байкенжина, Э. Юхневичус

Қазақстан Республикасы мен АҚШ-тағы корпоративтік дауларды шешудің баламалы тәсілдері: салыстырмалы талдау

Мақалада Қазақстан Республикасы мен АҚШ-тағы корпоративтік дауларды шешудің баламалы тәсілдерінің (ADR) құралдарына салыстырмалы талдау жүргізілді. Бұл зерттеудің мақсаты екі елдің медиацияны, төрелікті және корпоративтік саладағы басқа да ADR-тетіктерді қолдану тәсілдеріндегі негізгі айырмашылықтар мен ұқсастықтарды анықтау. Осыған байланысты екі юрисдикцияда да ADR қолданудың заңнамалық көздері, механизмдері мен тәжірибесі зерттелді. Зерттеуде қарастырылған негізгі әдіс ретінде медиация мен арбитражды эмпирикалық салыстыру қолданылды, оларды әр елде реттеу және енгізу ерекшеліктеріне баса назар аударылды. Зерттеу нәтижелері АҚШ-тағы ADR жүйесі корпоративтік процестерге терең енген және корпоративтік дауларды шешу үшін кеңінен қолданылады деген қорытынды жасауға мүмкіндік береді. Қазақстанда, керісінше, ADR корпоративтік сегментте онша серпінді екпін көрсетуде емес. Алайда, Үкіметтің бастамалары мен халықаралық стандарттарды енгізу арқылы оң өзгерістер көрсетуде. Зерттеудің негізгі қорытындылары Қазақстандағы ADR-ге мемлекеттік қолдау мен сенімділікті арттырудың маңыздылығын, сондай-ақ осы әдістерді АҚШ-та ұзақ мерзімді қолданудың табыстылығын атап өтуге болады. Зерттеудегі салыстырмалы талдау Қазақстанның корпоративтік дауларды баламалы шешу жүйесін одан әрі жетілдіру үшін американдық тәжірибеден оң аспектілерді ала алатынын көрсетті.

Кілт сөздер: корпоративтік дау, балама әдіс, соттан тыс тәртіп, төрелік, медиация, келіссөз, сот, шешім, келісім, бизнес, азаматтық іс.

Ш.Т. Байкенжина, Э. Юхневичус

Альтернативные способы разрешения корпоративных споров в Республике Казахстан и США: сравнительный анализ

В статье проведен сравнительный анализ инструментов альтернативных способов разрешения корпоративных споров (ADR) в Республике Казахстан и США. Цель данного исследования — выявление ключевых различий и сходства в подходах двух стран к применению медиации, арбитража и других ADR-механизмов в корпоративной сфере. В этой связи были изучены законодательные источники, механизмы и практика применения ADR в обеих юрисдикциях. Использовалось эмпирическое сравнение медиации и арбитража, с акцентом на особенности их регулирования и внедрения в каждой стране. Результаты исследования позволяют сделать вывод, что система ADR в США глубоко интегрирована в корпоративные процессы и широко применяется для разрешения корпоративных споров. В Казахстане, напротив, ADR в корпоративном сегменте развивается не так динамично. Однако успешно продвигается через правительственные инициативы и внедрение международных стандартов. В качестве основных выводов в исследовании можно отметить важность государственной поддержки и повышения доверия к ADR в Казахстане, а также успешность долгосрочного использования этих методов в США. Авторами отмечено, что Казахстан может извлечь положительные аспекты из американского опыта для дальнейшего совершенствования своей системы альтернативного разрешения корпоративных споров.

Ключевые слова: корпоративный спор, альтернативный метод, внесудебный порядок, арбитраж, медиация, переговоры, посредничество, суд, судебное решение, соглашение, бизнес, гражданское дело.

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The role of the “Actio pauliana” institution in the formation of the mechanism for invalidating debtor transactions within bankruptcy proceedings

The aim of the research is to conduct an in-depth analysis of the historical aspects of the institution of invalidating transactions within bankruptcy proceedings, with a focus on the influence of Roman law on the formation of domestic legislation. The research also includes a comparative analysis of foreign legal norms related to this subject area. The methodological basis of the study encompasses both general and specific methods, such as formal-logical, scientific analysis and synthesis, comparative legal, and historical-legal approaches. The study of the emergence, establishment, and development of the institution of challenging debtor transactions is crucial for understanding its historical and legal nature within bankruptcy proceedings. In this context, the subject of the research includes the challenge of transactions in bankruptcy, based on the ancient Roman legal institution of “Actio Pauliana”, as well as an analysis of the influence of subjective and objective theories on modern legislation. Key elements related to the emergence of the “Actio Pauliana” institution in ancient Roman law, as well as the historical aspects of challenging transactions in the context of bankruptcy, have been examined. Attention is given to the application of the modified “Actio Pauliana” institution in the legislation of various countries. The research concludes that the “Actio Pauliana” was initially based on a strictly subjective theory, but over time, the focus shifted towards objective criteria. In conclusion, it is noted that the modern institution of invalidating transactions in bankruptcy proceedings preserves the foundations of Roman law, integrating both objective and subjective elements into the legislation of different countries.

Keywords: bankruptcy; transaction contestation; invalid transaction; Actio Pauliana; debtor; creditor; objective theory; subjective theory.

Introduction

An individual or legal entity that has anticipated or become aware of its impending bankruptcy takes various actions and enters into transactions with the aim of preserving its assets from creditors and avoiding debt repayment, thereby violating the rights of creditors. Declaring a debtor's transactions invalid in bankruptcy proceedings and returning the assets serve as one of the most effective tools for protecting the rights and legitimate interests of creditors and other interested parties. The origins of this legal institution trace back to ancient Roman times. Historically, the institution of declaring transactions invalid is closely linked to the development and formation of the general insolvency (bankruptcy) institution.

The foundation of the institution for contesting a debtor's transactions in modern bankruptcy proceedings is rooted in concepts established in antiquity. These concepts gradually evolved under the influence of prevailing social conditions and underwent various changes over time. The emergence and development of these concepts demand special attention, both theoretically and practically, as such research can elucidate the state of law during a specific historical period in light of global perspectives and experiences.

In the doctrine of law, two different points of view are distinguished, related to the grounds for recognizing the debtor's transactions as invalid: subjective and objective. In the subjective approach, it is argued that only a transaction made by an unscrupulous debtor and aimed at causing harm to creditors can be recognized as invalid. The objective theory, on the contrary, does not require proof of the dishonest intentions of the participants in the transaction and that their will is aimed at causing harm to the creditors.

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The main task of the objective approach is to prove the existence of strictly defined conditions provided by law, which allow such transactions to be recognized as invalid [1; 49].

Thus, under the subjective approach, it is necessary to prove that the debtor entered into the transaction with the intent to harm creditors, and that the other party knew or should have known about this intent. The objective approach, on the other hand, is based on objective criteria and specific conditions of the transaction, regardless of the parties' intentions. To declare a transaction invalid under the objective approach, it is sufficient to demonstrate that the conditions of the transaction do not align with economic norms and cause harm to creditors. For example, this could occur when a debtor sells their assets at a price below market value.

According to the subjective theory, transactions are deemed invalid when certain subjective factors are present, such as the intent of the parties to enter into a suspicious transaction, the debtor's purpose of causing financial harm to creditors, and the counterparty's awareness of the debtor's intent. In other words, the disputed transaction must have been carried out by a dishonest debtor, and the other party, aware of this, may also be deemed dishonest because they understand the potentially harmful consequences of the transaction [2; 192].

The study of the historical development and establishment of the two aforementioned theories examined their influence on the formation of norms related to the invalidation of a debtor's transaction in bankruptcy proceedings, as well as the "Actio Pauliana" institution in ancient Roman law. A comparative analysis is conducted of the legislation of various countries and domestic legislation concerning the presence and application of these issues in modern legal frameworks.

The aim of this scientific article is to conduct a historical investigation into the emergence and development of the institution of declaring a debtor's transaction invalid in bankruptcy within the legislation of certain foreign countries, to study the specific applications of the "Actio Pauliana" institution in both general and special legislation, and to carry out a comparative analysis with the norms of the current domestic legislation.

Methods and materials

The methodological foundation of the study is based on the laws and categories of materialist dialectics, aid of which is in the understanding of specific legal phenomena, as well as general scientific methods for studying social phenomena and processes, and methods of scientific analysis and synthesis. An analysis of the norms of bankruptcy legislation in several countries was conducted using the formal legal method. Through the comparative legal method, an analysis was carried out on the use of grounds for invalidating a debtor's transactions in bankruptcy in foreign states, and their legal regulation was examined. The historical-legal method was employed to explore the history of the emergence of the Actio Pauliana institution, which traces back to ancient Roman law. The theoretical foundation of the study is based on the works of scholars from the Russian Federation, Germany, and the current legal acts of the United Kingdom, the Netherlands, France, Spain, and Lithuania.

Results

Discussing the history of the emergence of subjective and objective theories mentioned earlier, the legal basis for contesting transactions, according to the subjective theory, is rooted in Roman law. It provided for the possibility of filing a lawsuit as a special means of protecting creditors' rights against the unlawful actions of a debtor.

In other words, the origin of the institution for invalidating debtor transactions in bankruptcy proceedings can be traced back to ancient Roman law, where the doctrine of "Actio Pauliana" existed. This institution was designed to protect creditors from actions aimed at intentionally reducing the debtor's assets, thereby causing harm to creditors. "Actio Pauliana" serves as the historical and theoretical foundation for modern rules on invalidating transactions, and understanding it offers deeper insight into contemporary legal mechanisms. Therefore, within the scope of this research, we have decided to first examine the origins of the "Actio Pauliana" institution and the specifics of its application in modern legislation. This approach, in turn, will allow us to study the evolution of historically established legal norms of this institution and trace their adaptation to current conditions.

According to the term "fraus creditirum" or "deception of creditors", known to Roman lawyers, it meant that the debtor was disposing of the property belonging to him in order to cause harm to the creditors.

In Roman law, special attention was given to the actions of a debtor preceding their insolvency. Insolvent debtors, on the brink of financial collapse, often sought to conceal their assets from creditors in an attempt to avoid complete ruin. Since such actions by the debtor infringed upon the interests of creditors, depriving them of the opportunity to satisfy their claims from the debtor's assets after the initiation of insolvency proceedings, the praetorian edict provided creditors with specific legal remedies (actio Pauliana, interdictum fraudatorium, actio in factum) against the debtor and third parties involved in the fraudulent alienation of assets. The most well-known of these, and the one that has survived in a somewhat modified form, is Actio Pauliana [3; 151].

Roman law, which initially imposed strict personal liability on debtors, gradually eased the position of insolvent debtors by introducing limitations on their personal liability. Along with these changes, a law known as “Actio Pauliana” was introduced, named after the classical jurist Julius Paulus, to compensate for the reduced protection of creditors’ rights [1; 52].

In the 2nd century, a praetor named Paulus issued an edict that allowed creditors to challenge “fraudulent transactions” made by the debtor to the detriment of the creditor, provided that the debtor's counterparty was aware of the fraud. This type of lawsuit became known as actio Pauliana, named after that very praetor [4].

Thus, under the Actio Pauliana claim, transactions between parties aimed at causing harm to the debtor could be declared invalid. It was also necessary to prove that both parties had the same intent (consilium fraudandi) [5; 23].

The primary elements of an Actio Pauliana claim are considered to be:

Objective element (eventus damni): The debtor must have taken actions that cause harm to the creditors, diminishing their assets. This is an objective criterion, demonstrating that the debtor's actions directly impacted the creditors’ ability to satisfy their claims.

Subjective element (consilium fraudis): The debtor must have acted with the intent to harm the creditors. This is the subjective element, requiring proof of the debtor's intent when carrying out the transaction [6].

The purpose of “Actio Pauliana” was to restore the creditors to the position they were in before the debtor infringed upon their rights.

D.V. Savin notes that the application of the “Actio Pauliana” claim in Ancient Rome required the fulfillment of the following conditions, which included both subjective and objective aspects:

1. *Execution of an act that diminishes the debtor's assets.* The debtor engages in actions that lead to the reduction of their assets. This referred to any dishonest actions that could worsen the debtor's financial situation.

2. *Harm to the creditor.* The creditor's inability to fully satisfy their claims as a result of the debtor's diminished assets. If the creditor was unable to recover the debt from the debtor's assets, this was considered harm to the creditor.

3. *Debtor's intent to harm the creditor.* It was assumed that the debtor acted with the intent to harm the creditor if they reduced their assets while being in debt and knowing they could not repay those debts.

4. *Knowledge of the third party about the debtor's dishonest intent.* To file a claim against a third party involved in the transaction or a subsequent purchaser of the assets, it was necessary to prove that this party was aware of the debtor's dishonest intent or acquired the assets without compensation [7; 47].

Thus, in Roman law, the subjective criterion played a significant role in contesting transactions and the actions of the debtor.

Later, in medieval Italian law, known for its strictness, a radically different system for contesting the transactions of an insolvent debtor was applied. This system was based on objective criteria. During the Middle Ages, the notion began to emerge that transactions should be evaluated based on objective criteria, such as the deterioration of the creditor's position, regardless of the debtor's intentions. This approach allowed for more effective identification and prevention of fraudulent activities. The objective theory strengthened the legal protection of creditors, as it enabled them to challenge transactions that objectively worsened their position and reduced the need to prove the debtor's intent.

All actions taken by the debtor on the eve of insolvency were deemed invalid. The Italian medieval statutes varied only in the period allowed for contesting transactions, ranging from 10 days to six months. A similar system was used in medieval German and French insolvency law [7; 49].

The study of the “Actio Pauliana” institution within bankruptcy proceedings has sparked considerable interest among various lawyers and scholars, with differing opinions expressed regarding its effectiveness.

For example, E. Godmé, referring to the history of “Actio Pauliana”, noted that it is an interesting case of the preservation of a twenty-century-old institution [8].

M.V. Telyukina explained “Actio Pauliana” as “a mechanism that allows a debtor to challenge transactions made immediately before or after the initiation of bankruptcy proceedings” [9; 334].

In assessing the effectiveness of “Actio Pauliana”, G.F. Shershenevich pointed out that proving the debtor's intent is practically impossible, and therefore, he regarded this institution as an ineffective means of protecting creditors’ rights [10; 305].

On the other hand, T.P. Shishmareva notes that “Actio Pauliana” is the most effective legal tool for increasing the bankruptcy estate, used to annul unlawul actions (transactions) of the debtor or third parties involving the debtor's assets, thereby eliminating fraudulent activities related to the debtor's property [10; 306].

Francis William Sutton Cumbrae-Stewart, in his dissertation “Actio Pauliana: Its Origin, Development, and Nature”, conducted an in-depth study of the origin and development of the “Actio Pauliana” institution, noting that this mechanism, which originated in Roman law, was designed to protect creditors from fraudulent actions by debtors aimed at concealing assets. Cumbrae-Stewart emphasizes the importance of this legal mechanism within the context of civil law and analyzes its evolution across various European legal systems [11].

The renowned German jurist Helmut Koziol considers “Actio Pauliana” an important legal tool aimed at protecting creditors from fraudulent actions by debtors. He emphasizes that, despite the challenges in proving the debtor's intent, this institution remains a necessary component of the legal system. Helmut Koziol also highlighted the importance of harmonizing legal norms in this area at the European Union level, noting that it requires further improvement and coordination at the international level [12; 132].

Thus, the views of various authors on the application of the “Actio Pauliana” institution in modern law not only highlight its positive aspects, such as the protection of creditors’ rights and the prevention of fraudulent actions by debtors, but also reveal significant challenges, including the difficulty of proving the debtor's intent and the need for harmonization of legal norms at the international level. Despite criticism and difficulties in its application, this institution remains an important and effective tool for protecting the interests of creditors. Its resilience and adaptability underscore the importance and necessity of further improvement and harmonization of legal norms aimed at protecting creditors from fraudulent actions by debtors.

“Actio Pauliana” which originated in Ancient Rome, though in a modified form, continues to exist and is widely applied in the civil or special legislation of most modern countries. It proves its role as an effective means of protecting creditors’ interests and remains a fundamental tool for safeguarding against unlawful actions by debtors [13, 147].

Discussion

Let us consider the features of applying the institution of declaring transactions invalid, as well as the subjective and objective theories in the legislation of certain countries. For instance, in ***Germany***, “Actio Pauliana” has long been used as a tool for annulling legal actions carried out with the intent to cause financial harm to creditors, both in insolvency proceedings and outside of them.

T.P. Shishmareva, in her dissertation, notes that “Actio Pauliana” is traditionally applied in Russia and Germany as a legal means of contesting fraudulent transactions in debtor insolvency procedures.

The application of “Actio Pauliana” is regulated by the “*German Insolvency Code”* (Insolvenzordnung, InsO) [14], and outside of insolvency procedures, by the *“Act on the Avoidance of Legal Acts of a Debtor Outside Insolvency Proceedings”* (Anfchtungsgesetz-AnfG) [15]. In doctrine, contesting legal actions through “Actio Pauliana” is referred to as Paulian contestation (Paulianische Anfechtung). The application of “Actio Pauliana” has been thoroughly studied in legal doctrine.

The grounds for contestation outlined in Section 3 of the “German Insolvency Code” (Insolvenzordnung, InsO) are legally similar in nature to those under the “Act on the Avoidance of Legal Acts of a Debtor Outside Insolvency Proceedings” (Anfechtungsgesetz-AnfG). Both share a common goal– to implement provisions on the liability imposed on a debtor who engages in unlawful actions regarding the disposal of assets. However, contestation under the insolvency proceedings (Insolvenzordnung, InsO) serves the collective interest of all creditors and aims to satisfy their claims proportionally, while contestation under the Anfechtungsgesetz-Anf is applied in favor of an individual creditor.

Currently, the legislative foundation in the field of bankruptcy law in Germany is the “Insolvency Code” (Insolvenzordnung, InsO), which came into force on January 1, 1999. Prior to the adoption of this Code, extensive work was carried out on legislative proposals aimed at fundamentally reforming the previous regulation of insolvency proceedings, which had been in effect since February 10, 1877 (Konkursordnung, KO). Since its enactment, the current regulation has been amended and reformed multiple times. One of the most actively and extensively criticized aspects has been the legal institution of contesting the debtor's legal actions [16; 198].

Presently, Actio Pauliana serves as a legal instrument for contesting transactions (legal actions) in insolvency proceedings in Germany, as noted in the commentary on the Insolvency Code (Insolvenzordnung). The renowned German legal scholar J. Kohler acknowledges that the adoption of Roman law has had a significant impact on the evolution of this institution in German law. He also highlights that Actio Pauliana functions as a legitimate means to annul transactions (legal actions) undertaken by the debtor that have led to a reduction in the insolvency estate [17; 412].

Moreover, scholars note that in Germany, under the “Insolvenzordnung, InsO”, it is also possible to contest the debtor's inaction, indicating that an updated version of the “Actio Pauliana” institution is applied in this country. While the original Roman version allowed for the contestation of actions that resulted in the debtor's assets being removed from their estate without adequate compensation, the updated version permits the contestation of any action that leads to the debtor losing a portion of their assets [3; 151].

According to §129, paragraph 1, and §§130–146 of the “German Insolvency Code”, legal actions (Rechtshandlungen) taken before the commencement of insolvency proceedings that harm creditors are subject to contestation. §129, paragraph 2, of the Code clarifies that inaction (Unterlassung) is also considered equivalent to a legal action. Examples of inaction include missing the statute of limitations or failing to report defects in goods, among others.

Thus, in German law, elements of both theories are utilized to ensure comprehensive protection of creditors’ interests. The “German Insolvency Code” (Insolvenzordnung, InsO) includes provisions that allow for the contestation of transactions based on objective criteria as well as by considering subjective factors.

In the ***United Kingdom***, the annulment of transactions made within a certain period before the onset of bankruptcy has been a part of English law for many years. This practice originated in the Middle Ages and was based on statutes dating back to the 13th century. One of the earliest legislative acts was the Statute of Edward III in 1376, according to which transactions aimed at alienating the debtor's property were declared void. However, this applied only to gratuitous transactions (gifts). Nevertheless, with the adoption of Queen Elizabeth I's Statute in 1571, compensated transactions also began to be declared void [7; 49].

The first significant step in the formation of this institution was the enactment of the “Fraudulent Conveyances Act 1571”. This law, also known as Queen Elizabeth I's Statute, was aimed at preventing fraudulent transfers of property that were considered to infringe upon the rights of creditors. The law provided for the contestation of transactions made with the intent to conceal assets from creditors [18].

This statute remained in force for over 400 years but gradually became outdated. Later, Queen Elizabeth I's Statute was replaced by Section 172 of the Law of Property Act 1925, and subsequently by the provisions of the Insolvency Act 1986.

Thus, the annulment of transactions remained an important part of bankruptcy legislation and, later, in the 19th century, as legislation regulating company liquidations. Today, such provisions hold a significant place in the Insolvency Act 1986 [19; 6].

According to ***Dutch*** legislation, there are numerous provisions aimed at protecting creditors. An action taken by a debtor may be declared void if it was not obligatory for the debtor and even if the debtor knew (or should have known) that this action would harm the creditors [20] (Article 3:45 of the Dutch Civil Code). Any creditor who was negatively affected by this action can demand its annulment. Under Dutch law, for a creditor to annul such an action, it is presumed that the debtor and third parties who contracted with the debtor knew (or should have known) that the action would harm the creditor.

A creditor seeking to annul the harmful action must, in particular, prove the debtor's awareness of the action and, if the action was not based on a gratuitous transaction, the awareness of the parties who performed the action. In practice, this burden of proof is difficult for the creditor to meet. To ease the burden of proof, Dutch law includes presumptions, for example, regarding the parties’ awareness of the harm caused. In such cases, the burden of proof shifts, and the parties must disprove the presumption.

If such a detrimental legal action was taken within one year prior to the filing of the annulment claim, Dutch law presumes that the debtor and the third party knew (or should have known) that this legal action would harm one or more creditors. The debtor or the third party must, therefore, disprove this presumption [21].

The aforementioned criteria are based on subjective factors, and Dutch legislation also provides for objective criteria to annul transactions made by a debtor on the verge of bankruptcy. The objective theory in Dutch law is grounded in a number of specific criteria that allow for the annulment of transactions that harm creditors. These criteria include *gratuitous transactions, mandatory transactions, transactions made on the eve of bankruptcy*, and *general criteria for the deterioration of creditors' positions*.

Scholarly works discuss the lack of balance between these subjective and objective approaches in Dutch legislation, and it is proposed to expand the application of objective criteria to ease the burden of proof for bankruptcy administrators. For instance, it has been suggested to extend the "suspect period", which would allow for the application of objective criteria over a longer period and thereby facilitate the annulment of suspect transactions [22].

In ***Spanish*** civil law, "Actio Pauliana" can be found in Articles 1111 and 1291.3 of the Civil Code (Civil Code, Book Four: Obligations and Contracts) [23]. The part concerning "Actio Pauliana" is outlined in the final section of Article 1111 of the Civil Code (Código Civil), which states that a creditor may file a claim against actions taken by the debtor that cause harm to the creditor. However, this article does not specify the necessary requirements for its application or the consequences thereof. Although the concept of this article has evolved over time, case law identifies two elements of Actio Pauliana: "events damni" and "consilium fraudis". The first refers to the damage caused to the creditor who is unable to recover the debt and serves as the objective element of the claim. The second element refers to the presence of fraud in the creditor's claim and represents the subjective element.

This article is complemented by Article 1291 of the Civil Code, which sets out the grounds for annulling contracts, specifically: "contracts made with the intent to defraud creditors if they (the creditors) have no other means of obtaining what is owed to them". Thus, if any action is taken with the intent to defraud creditors, and the creditor has no other means of recovery, the action may be contested. Here, the subsidiary nature of "Actio Pauliana" is recognized, meaning it applies in the absence of other means of recovery. These two articles are found in Book IV of the Civil Code, which concerns obligations and contracts; however, the first is in Chapter II, which addresses the nature and consequences of obligations, while the second is in Chapter V, which deals with the annulment of contracts. Thus, we can see how this action is connected with the subject of contracts in Spanish legislation.

Therefore, in Spanish civil law, "Actio Pauliana" is an important tool for protecting creditors from fraudulent actions by debtors. It is based on two elements: the objective element–harm to the creditor, and the subjective element — fraud by the debtor.

In ***France***, "Actio Pauliana", originally borrowed from Roman law, was later incorporated into the Napoleonic Code [10; 10], where Article 1167 stated that "creditors may challenge transactions carried out by the debtor that intentionally violate their rights, in their own name".

The contestation of the debtor's transactions was primarily based on an objective approach, within which not only the debtor's subjective bad faith but also other objective circumstances had to be proven [9; 335]. Specifically, if the transaction was carried out by the debtor shortly before the declaration of insolvency (periode suspecte), it was sufficient to prove, first, that it was conducted after the suspension of payments, and second, that the other party was aware of this.

This provision was later carried forward into the French Civil Code (Article 1167), according to which a creditor could challenge the debtor's actions in their own name if these actions were 1) carried out with fraudulent intent; 2) violated the creditor's rights. Thus, in France, it was sufficient to prove that the transaction was conducted with fraudulent intent (bad faith) and violated the creditor's rights. In 2015, a comprehensive reform of contract law was carried out in France, resulting in the repeal of the aforementioned provisions of the French Civil Code (FCC), which were replaced by more detailed provisions in the section concerning creditors' claims. Certain aspects of "Actio Pauliana" were clarified in terms of their content (Articles 1341-1341-3 of the FCC) [24]. Notably, it was explicitly stated that, for "Actio Pauliana" to be successful, it is now necessary to prove the violation of the creditor's rights. Additionally, it was clarified that bad faith on the part of the third party who entered into the contested transaction is also required.

In ***Lithuania***, it is also insufficient to prove the bad faith of the debtor; it is necessary to prove the bad faith of the third party as well. The right of creditors to challenge transactions made by the debtor is enshrined in the 1931 Act on the Right of Creditors to Challenge Actions That Cause Them Harm (Act No. 367 on Challenging Actions). The law provides creditors with the right to challenge transactions concluded between the debtor and third parties in order to protect the rights of creditors. It is important that the third party was aware of the debtor's intent to harm the creditors. Even in that law, a claim under “Actio Pauliana” required proving the bad faith of both the debtor and the third party with respect to the creditor [21]. In Chapter Four of Book Six of the Lithuanian Civil Code, which came into force on July 1, 2001 (Valstybes zinios 2000, No. 74-2262) [25], the institution of “Actio Pauliana” was established alongside other methods of protecting the special rights of creditors. Article 571 of the Civil Code defines the grounds for declaring a contract void. In the current Civil Code, the “Actio Pauliana” institution is given a separate chapter dedicated to the protection of creditors’ interests.

According to D. Vanhara, creditors face certain difficulties when challenging transactions. In cases where the bad faith of the debtor at the time of the transaction has been proven, but the bad faith of the third party has not been established, the rights of creditors remain insufficiently protected. This significantly limits the ability of creditors to defend their interests. Therefore, the author suggests considering the possibility of partially shifting the burden of proof onto the debtor and the third party. It is also proposed to impose sanctions on bad faith debtors and third parties, which would help reduce the number of fraudulent transactions and improve the protection of creditors’ rights [26].

In accordance with the legislation of the ***Russian Federation***, “Actio Pauliana” is also known as a legal instrument for contesting transactions (actions) in insolvency (bankruptcy) proceedings. However, in Russian law, “Actio Pauliana” is not applied as a means of contesting transactions outside of insolvency proceedings. Paragraph 2 of Article 1529, Part 1, Volume X of the Code of Laws of the Russian Empire was recognized in Russian doctrine as an analog of “Actio Pauliana” in Russian legislation [15; 446].

The development of the institution of contesting transactions in Russian law has generally been interconnected with the development of the insolvency (bankruptcy) institution, the history of which is divided into four stages: pre-revolutionary, Soviet, post-Soviet, and contemporary.

E.A. Krutiy, considering “Actio Pauliana” as a type of fraudulent claim, identifies three main stages in the legal regulation of fraudulent acts: the imperial, Soviet, and contemporary stages [26, 27].

The historical features of the development of the institution of invalidity of debtor transactions in Russia and the analysis of various stages of the legal evolution of this institution can be found in the works of A.Kh. Golmsten. In his work, he describes how the institution of invalidity of transactions passed through several significant stages, starting from pre-revolutionary legislation and continuing to the present day [28; 63].

In the *pre-revolutionary period*, the institution of invalidity of transactions had certain features characteristic of old Russian law. Based on traditions and customs, as well as under the influence of Western European legal systems, Russian law gradually developed its own norms on the invalidity of transactions aimed at protecting the interests of creditors.

During the *Soviet period*, with the advent of Soviet power and subsequent changes in the legal system, the approach to the invalidity of transactions also underwent significant changes. During this period, the primary focus was on protecting state interests, which influenced the legal regulation of transactions. Soviet law developed specific mechanisms for controlling and nullifying transactions that could harm state interests.

In the *post-Soviet period*, after the collapse of the USSR and the transition to a market economy, Russia’s legislation on the invalidity of transactions was revised. The new civil legislation of Russia incorporated modern principles and approaches to regulating transactions, borrowed from international law and the experience of Western countries. Particular attention was paid to protecting the rights and interests of individuals and organizations, reflecting trends of globalization and integration into the international legal community.

T.P. Shishmareva notes that in Paragraph 1 of Article 61.2 of the Federal Law of the Russian Federation dated October 26, 2002 “On Insolvency (Bankruptcy)” [29], creditors are given the opportunity, with the help of arbitration managers, to eliminate the adverse consequences of actions taken by an insolvent or bankrupt debtor, and that the basis for this provision was the institution of “Actio Pauliana”.

These stages in the development of the institution of invalidity of debtor transactions illustrate how Russian law has adapted to changing socio-economic conditions and international trends. A.Kh. Golmsten

emphasizes the importance of studying these historical features to understand the current state of legal regulation in Russia.

In the ***Republic of Kazakhstan***, bankruptcy legislation has been repeatedly improved since the country gained independence. The first Law “On Bankruptcy”, dated January 14, 1992, did not include the institution of invalidating debtor transactions. This initial bankruptcy law was in effect for three years and was repealed following the adoption of the Presidential Decree of the Republic of Kazakhstan with the force of law “On Bankruptcy”, dated April 7, 1995. Subsequently, on January 21, 1997, a new Law “On Bankruptcy” was adopted. The 1997 law, for the first time, provided for cases in which debtor transacions could be declared invalid. Article 6 of this law addressed situations involving the return of property and the invalidation of debtor transactions: “if a transaction made by the debtor with individual creditors or other persons after the initiation of bankruptcy proceedings results in the satisfaction of the claims of some creditors before others, it must be declared invalid upon the application of the authorized body, creditors, rehabilitation, or insolvency managers”.

Currently, the Law “On Rehabilitation and Bankruptcy”, adopted on March 7, 2014, is in force in Kazakhstan [30].

In the Republic of Kazakhstan, the invalidation of transactions within the framework of rehabilitation and bankruptcy procedures is carried out on general grounds in accordance with civil legislation and on specific grounds in accordance with the legislation on rehabilitation and bankruptcy. The invalidity of transactions on general grounds is regulated by the Civil Code of the Republic of Kazakhstan dated December 27, 1994 [31] (hereinafter referred to as the Civil Code of the RK). The Civil Code, as a sectoral codified normative legal act, is designed to ensure the legal regulation of property and personal non-property relations throughout the territory of the Republic of Kazakhstan. Accordingly, the Civil Code enshrines the most important legal norms of civil legislation, aimed at regulating almost all social relations falling within the scope of civil law [32; 53].

In accordance with paragraph 4 of Article 158 of the Civil Code of the Republic of Kazakhstan, if one of the parties to a transaction entered into it with the intent to evade the fulfillment of an obligation or liability to a third party or the state, and if the other party knew or should have known about this intent, the interested party (the state) has the right to demand the invalidation of the transaction. A claim for invalidation of a transaction based on such intent is often referred to as “Actio Pauliana” (named after the Roman jurist) [33; 528].

Thus, it is evident from this provision that the “Actio Pauliana” institution has been incorporated into domestic legislation and includes a subjective element. The subjective approach is based on the analysis of the intentions of the parties to the transaction and their awareness of these intentions. It requires proof of the debtor's intent and the third party's awareness of that intent.

A necessary condition for the application of this provision of the Civil Code of the Republic of Kazakhstan is the bad faith behavior of the other party to the transaction (the purchaser of the property). Therefore, if this party did not know and could not have known about the intent of the person alienating the property (the debtor), based on the circumstances of the case, the transaction should not be declared invalid, as this would violate the legitimate interests of the purchaser of the alienated property [33; 528]. Thus, the subjective theory complicates the process of proving, but it ensures a more equitable consideration of cases and allows for the protection of creditors’ rights.

The specific grounds are outlined in the Law of the Republic of Kazakhstan “On Rehabilitation and Bankruptcy” dated March 7, 2014. According to paragraph 1 of Article 7 of this Law, transactions are deemed invalid if they were made by the debtor or an authorized person within three years prior to the initiation of rehabilitation and (or) bankruptcy proceedings, provided that there are grounds stipulated by the civil legislation of the Republic of Kazakhstan and this Law. Paragraph 2 of Article 7 sets out the grounds for declaring a transaction invalid:

1) the price of the transaction made and (or) other conditions differ significantly for the worse for the debtor from the price and (or) other conditions under which similar transactions are made in comparable circumstances;

2) the transaction is out of scope of the debtor’s activities, which are limited by the laws of the Republic of Kazakhstan, constituent documents, or was made in violation of the competence determined by the charter;

3) the property was transferred (also into temporary use) free of charge or at a price that significantly differs for the worse for the debtor from the price of an identical or similar product under comparable economic conditions or without grounds for transfer to the detriment of creditors' interests;

4) if the transaction, completed within six months prior to the initiation of the rehabilitation and (or) bankruptcy proceedings, resulted in preferential satisfaction of claims of some creditors over others;

5) gift contracts for the debtor's property, if such a transaction differs significantly from those concluded a year before the initiation of a rehabilitation or bankruptcy proceeding;

6) the transaction made without the intention to create appropriate legal consequences for such a transaction, to the detriment of creditors' interests.

In her work, M.V. Telyukina, conducting a comparative analysis of the grounds for challenging transactions in bankruptcy in Kazakhstan and Russia, classified the grounds set forth in subparagraphs 1, 2, and 5 of paragraph 2 of Article 7 of the Law of the Republic of Kazakhstan "On Bankruptcy" as objectively suspicious transactions [34].

The aforementioned article includes both objective and subjective grounds. However, the legislation lacks clear definitions related to the practical application of the six aforementioned grounds. The absence of specific legislative explanations regarding subjective and objective grounds for invalidating transactions may cause difficulties in their application. Some grounds in the law may be both subjective and objective, depending on their content and interpretation. For example, when considering subparagraph 1: "the price of the transaction made and (or) other conditions differ significantly for the worse for the debtor from the price and (or) other conditions under which similar transactions are made in comparable circumstances". Here, the objective ground could be a significant deviation of the transaction price from market value, while the subjective ground could be the intention to conceal assets and harm the creditor.

Therefore, we believe it is necessary to establish specific criteria for distinguishing between subjective and objective grounds. This would allow for more effective application of legislative norms in practice, i.e., to standardize them, help creditors better understand their rights and opportunities when challenging a transaction, and increase their chances of satisfying claims. Since this issue requires separate research and falls outside the scope of the current topic, we will not discuss it in detail.

Let's consider an example from practice: the bankruptcy manager of "Kunduz" LLP filed a lawsuit seeking to invalidate a sales contract with "Sting" LLP. The claim argued that the transaction violated legal requirements because the property was sold at a reduced price, which harmed the interests of creditors, including the tax authority. According to the decision of the court of first instance, the bankruptcy manager's claim was denied, with the court stating that the plaintiff had not provided evidence proving that the transaction did not comply with legal requirements. The civil division of the court of appeal upheld the decision of the first instance court without changes. The Prosecutor General of the Republic of Kazakhstan filed a protest, pointing out significant violations of substantive and procedural law in the consideration of the case, arguing that such violations undermine the uniform interpretation and application of legal norms. The civil division of the Supreme Court of the Republic of Kazakhstan, guided by paragraphs 1 and 4 of Article 158 of the Civil Code of the Republic of Kazakhstan and subparagraph 1 of paragraph 2 of Article 7 of the Law of the Republic of Kazakhstan "On Rehabilitation and Bankruptcy", annulled the previous court decisions and sent the case for a new hearing in the appellate court, highlighting the following violations: 1) the court of first instance did not investigate the market value of the property at the time of its alienation; 2) the court did not take into account that the property was sold at a reduced price, which was confirmed by an appraisal report; 3) the transaction violated the interests of creditors, including the tax authority [35].

Thus, from this example, we can conclude that if the norm of the Law "On Bankruptcy" were based solely on objective criteria, it would be sufficient to establish the fact that the property was sold at a price below its market value. However, if subjective criteria were considered, it would be necessary to prove that the debtor understood that the sale at a reduced price would harm creditors, including the tax authority, and that the third party ("Sting" LLP) was aware of this.

Thus, the Actio Pauliana institution, with its long history and deep roots in Roman law, has also been adapted to Kazakhstani legislation and allows for the effective protection of the rights and interests of all interested parties. In the subjective approach, since it is necessary to prove the debtor's intent and the counterparty's awareness of that intent, the process of proving the invalidity of a transaction may be challenging in practice. However, this approach contributes to a more precise and fair consideration of bankruptcy cases, as it takes into account the specific intentions and behavior of the parties. The subjective

and objective theories of transaction invalidity in bankruptcy proceedings offer different methods for challenging the debtor's transactions. The historical development of these theories demonstrates their importance and adaptability to changing legal and economic conditions.

Despite the presence of a normative legal act in the Republic of Kazakhstan that regulates the issues of recognizing transactions as invalid within the framework of rehabilitation and bankruptcy, we assert that this institution is still in the process of formation, and its legal regime is not fully defined by the legislator. Although specific grounds for recognizing a transaction as invalid have been established, the mechanism of theoretical and practical application requires comprehensive research.

Conclusion

In conclusion, it can be stated that the modern institution of challenging debtor transactions in bankruptcy is based on concepts and institutions that were established in Roman law. The bankruptcy legislation of several countries provides for the possibility of challenging debtor actions that were carried out with the intent to harm other creditors. The adoption of Roman law served as a foundation for creating the institution of challenging transactions in bankruptcy for many countries within the Anglo-Saxon and Romano-Germanic legal families.

The legal claim for the protection of rights (Actio Pauliana) serves as a remedy aimed at safeguarding the interests of a creditor whose rights have been violated. Through this claim, actions taken by the debtor and third parties that caused harm to the creditor can be contested.

Initially, in Roman law, the subjective criterion played a significant role in challenging debtor transactions and actions. Later, medieval Italian law relied on the objective criterion for challenging transactions made by an insolvent debtor. Today, Actio Pauliana is used in the legislation of several countries as the primary legal tool for invalidating transactions in bankruptcy, taking into account both objective and subjective criteria.

The history of the institution of invalidating debtor transactions in bankruptcy is deeply rooted and is regulated in the legislation of many countries both on general grounds through civil law and on specific grounds through bankruptcy law. Actio Pauliana, considered as a subjective ground, is found in the Civil Codes of some countries (the Netherlands, France, Spain), while in others, it is also mentioned in the provisions of special bankruptcy legislation (Germany, the United Kingdom, the Russian Federation). However, it can be concluded that the concept of “Actio Pauliana” is consistent across all these countries.

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С.И. Копжасарова, А.А. Нукушева

Банкроттық рәсіміндегі борышкердің мәмілелерін жарамсыз деп тану механизмін қалыптастырудағы «Actio Pauliana» институтының рөлі

Зерттеудің мақсаты — Рим құқығы нормаларының отандық заңнаманы қалыптастырудағы әсеріне баса назар аудара отырып, банкроттық рәсімі шеңберінде мәмілелерді жарамсыз деп тану институтының тарихи аспектілерін терең талдау. Зерттеу аясында аталған тақырыпқа қатысты шетелдік заңнамалардың нормаларына салыстырмалы талдау жүргізілді. Зерттеудің әдіснамалық негізі формальды-логикалық, ғылыми талдау және синтез, салыстырмалы-құқықтық және тарихи-құқықтық тәрізді жалпы және жеке әдістерді қамтиды. Борышкердің мәмілелерін даулау институтының пайда болу, қалыптасу және даму процесін зерттеу оның банкроттық рәсіміндегі тарихи-құқықтық табиғатын түсіну үшін өте маңызды. Осыған орай зерттеу пәні «Actio Pauliana» Ежелгі Рим құқықтық институтына негізделген банкроттықтағы мәмілелерді даулауды, сондай-ақ субъективті және объективті теориялардың қазіргі заңнамаға әсерін талдауды қамтиды. Ежелгі Рим құқығындағы «Actio Pauliana» институтының пайда болуымен байланысты негізгі элементтер, сондай-ақ банкроттық контексіндегі мәмілелерді даулаудың тарихи аспектілері зерттелді. Өзгерген күйіндегі «Actio Pauliana» институтын әр түрлі елдердің заңнамасында қолдану ерекшеліктеріне назар аударылды. Жүргізілген зерттеу барысында авторлар бастапқыда «Actio Pauliana»-ның негізінде қатаң субъективті теория жатқанын, алайда уақыт өте келе объективті критерийлерге назар ауысқандығы туралы тұжырым жасайды. Қорытындысында банкроттық рәсімдерінде мәмілелерді жарамсыз деп танудың қазіргі институты әртүрлі елдердің заңнамасында объективті және субъективті элементтерді біріктіре отырып, Рим құқығының негіздерін сақтайтыны атап өтілді.

Кілт сөздер: банкроттық, мәмілені даулау, жарамсыз мәміле, Actio Pauliana, борышкер, кредитор, объективті теория, субъективті теория.

С.И. Копжасарова, А.А. Нукушева

Роль института «Actio Pauliana» в формировании механизма признания сделок должника недействительными в рамках процедуры банкротства

Цель исследования — углубленный анализ исторических аспектов института признания сделок недействительными в рамках процедуры банкротства, с акцентом на влияние норм римского права на формирование отечественного законодательства. В рамках исследования также проведен сравнительный анализ норм зарубежных законодательств, затрагивающих указанную предметную область. Методологическая основа исследования включает в себя общие и частные методы, такие как формально-логический, научный анализ и синтез, сравнительно-правовой и историко-правовой подходы. Изучение процесса возникновения, становления и развития института оспаривания сделок должника имеет важное значение для понимания его историко-правовой природы в процедуре банкротства. В связи с этим предмет исследования включает оспаривание сделок при банкротстве, основанное на древнеримском правовом институте «Actio Pauliana», а также анализ влияния субъективной и объективной теорий на современное законодательство. Исследованы ключевые элементы, связанные с возникновением института «Actio Pauliana» в древнеримском праве, а также исторические аспекты оспаривания сделок в контексте банкротства. Особое внимание уделено особенностям применения модифицированного института «Actio Pauliana» в законодательстве различных стран. В процессе проведенного исследования авторы приходят к выводу, что изначально в основе «Actio Pauliana» лежала строго субъективная теория, однако со временем акцент сместился в сторону объективных критериев. В заключение отмечено, что современный институт признания сделок недействительными в процедурах банкротства сохраняет основы римского права, интегрируя как объективные, так и субъективные элементы в законодательстве разных стран.

Ключевые слова: банкротство, оспаривание сделки, недействительная сделка, Actio Pauliana, должник, кредитор, объективная теория, субъективная теория.

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The realization of the "Concept of digital transformation, development of the information and communication technologies and cybersecurity industry for 2023–2029" by implementing blockchain in the technologies of the Republic of Kazakhstan and the problems of its legal regulation

In the scientific article, the implementation of the "Concept of digital transformation, development of the information and communication technologies and cybersecurity industry for 2023–2029" was considered, which, according to the authors, is possible through the prism of the introduction of blockchain technologies in the Republic of Kazakhstan. The main focus is on analyzing the current state of the digital infrastructure, identifying potential applications of the blockchain and identifying regulatory issues related to its use. The article begins with an overview of the strategic objectives of the Concept and an assessment of its impact on the economic development of the country. The authors discuss blockchain as an innovative tool capable of ensuring transparency, security and reliability of data in various sectors, including finance, healthcare and public administration. In this aspect, an overview of existing technologies that have already been applied in practice was conducted; accordingly, the Republic of Kazakhstan can adopt them for the future. Special attention is paid to the analysis of the problems faced by Kazakhstan in integrating blockchain technologies into the existing legal system. The authors explore the need to develop new legislative acts, as well as adapt existing regulatory documents to create a favorable legal environment for blockchain. The potential risks and benefits that may arise as a result of the large-scale introduction of blockchain technologies in Kazakhstan are also discussed. In conclusion, the article offers recommendations on improving the legal framework for blockchain, emphasizing the importance of international cooperation and exchange of experience in this area.

Keywords: the concept of improvement, country development, digitalization, digital security, blockchain, personal data protection, information and communication technologies in law, legal regulation.

Introduction

The Concept of digital transformation, development of the information and communication technology industry and cybersecurity for the period 2023–2029, approved by the Government, is a strategic plan for the introduction of digital technologies into all spheres of public life of citizens of the Republic of Kazakhstan [1]. In this context, blockchain technology, as the authors of this scientific article dare to suggest, acts as a potential catalyst for change, bridging existing gaps and providing six main directions.

To begin with, the introduction of blockchain leads to the strengthening of cybersecurity. According to available research, we have come to the conclusion that turning to the proposed innovative technology increases the security of our data due to distinctive properties, including decentralization and encryption. This is naturally important for the protection of infrastructure and personal data.

At the same time, we would like to note that other components are equally important: transparency and observability. Technically, blockchain makes it possible to create systems that increase the transparency of transactions and simplify the tracking process. These indicators are especially useful in the field of public administration and property control.

The third aspect that creates the logical need for this technology is to increase efficiency and reduce costs. The reason for this is that smart contracts based on the blockchain system allow you to automate processes, reduce time and operating costs, and reduce risks that are directly related to the human factor.

The next direction is that the financial sector needs innovation. Blockchain promotes financial innovations such as digital currencies, which can accelerate the transition to electronic payments and thus make fi-

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nancial services more accessible. Many countries are digitizing their national currency — our tenge expects the same.

The use of blockchain to implement the concept of the Republic of Kazakhstan is naturally attractive for investment. The blockchain in our system can stimulate investment flows, create jobs and increase budget revenues, and this, in turn, contributes to economic growth.

Last but not least, it involves the development of human capital. The training of specialists in the field of blockchain technologies improves their qualifications and prepares them for work in the field of high technologies.

Blockchain can be an important mechanism for achieving the goals explicitly stated in the concept, including improving governance, developing the digital economy and strengthening cybersecurity, which will certainly lead to the preservation of personal data. The introduction of blockchain technology requires coordinated actions on the part of the state, business and educational institutions to create the necessary infrastructure and train qualified personnel.

Methods and materials

In the context of the Concept of digital transformation of Kazakhstan, within the framework of scientific work aimed at analyzing the implementation of blockchain technologies and studying legal regulation issues, it is proposed to use the following set of methodological techniques and information sources.

Main methodological approaches: case studies: analysis of specific examples of the use of blockchain in public and private structures; legal analysis: study of current legislation related to blockchain technologies and identification of possible obstacles to the development of law; statistical analysis: assessment of the impact of blockchain on the modernization of the life system.

The sources of information are: the regulatory framework: the main legislative documents, including the conceptual text; scientific work: published articles and research on blockchain and its application in various fields; analytical reports: documents prepared by government agencies, international institutions and research centers related to digital transformation; media: articles in the press and others media reflecting public debate and opinions about blockchain and digital transformation; practical examples: concrete examples of the implementation of blockchain technologies.

The use of the methods outlined by us and the analysis of these materials will allow us to thoroughly study the process of implementing the Concept of digital transformation with an emphasis on blockchain, as well as assess current problems and opportunities for improving the legal framework, which contributes to the support and development of the digital transformation of the Republic of Kazakhstan.

Results

Based on the identified characteristics of the blockchain technology, it was logically revealed that this particular technology is able to play a successful role in the implementation of the "Concept of digital transformation, development of the information and communication technologies and cybersecurity industry for 2023–2029". The positive features inherent in the blockchain are a reliable guarantee for ensuring confidentiality and, at the same time, transparency. This, in turn, is quite attractive and necessary in conditions of frequent leakage of our personal data that we contribute to global networks, and the transparency of blockchain technology is a real way to realize our constitutional rights in all areas that we use daily.

Effective blockchain regulation in Kazakhstan requires an interdisciplinary approach involving technical experts, economists, lawyers and members of the public, including international cooperation, along with an interdisciplinary approach involving academia.

Particular attention should be paid to the legal mechanism governing blockchain technology, which is constantly evolving depending on the dynamics of this innovative new field around the world. Some important information about the current legislation is listed below:

1. Many countries are creating guidelines and standards for blockchain technologies to help entrepreneurs and lawyers understand distributed registries and crypto assets [9].

2. The EU is committed to creating a unified regulatory framework for blockchain to prevent regulatory fragmentation and provide legal certainty for blockchain applications. The Commission has presented a wide range of legislative initiatives on the management of crypto assets, which are expected to stimulate investment and protect consumers and investors.

3. The EU has proposed a pilot market infrastructure regime that would allow trading and transactions in financial instruments in the form of crypto assets, as well as proposals for "freer, fairer and more inclu-

sive” regulation. Using blockchain, it becomes possible to experiment with innovative solutions and deviate from established rules, as regulators and companies seek to apply innovative ideas in blockchain-based models [10].

4. Countries and international organizations cooperate in developing common approaches to blockchain regulation that comply with international standards and prevent litigation.

Legal norms related to blockchain are currently under development, and many countries and regions are involved in the development of reliable legislative systems that can promote innovation and protect the rights and interests of market participants in the development process. Kazakhstan should start learning from its mistakes, as it is gradually moving forward and can make appropriate adjustments in the future.

Discussion

In 2023, the relevant regulatory act approved the strategy for digitalization, ICT development and strengthening cybersecurity for the period 2023–2029. In accordance with the National Plan until 2025 and other strategic documents, the strategy we are putting forward for discussion is aimed at identifying the most effective methods of solving urgent problems in the provision of public services to the population and enterprises, transforming the public administration system and stimulating economic sectors through the integration of digital technologies.

The strategic goal is achieved based on the following key principles:

1. to improve the quality of life of citizens, which is a serious problem, accordingly, the upcoming plans include placing great emphasis on personal comfort. This implies that the services provided and the planned changes will be adapted to the needs and problems of citizens, including even the factor that the transition to public services will gradually be carried out within the framework of applications on the phone;
2. to ensure the openness of government agencies and public participation in decision-making and the use of digital tools for direct communication between subjects and authorities;
3. to strive for concrete changes through systemic innovation and digital technologies;
4. to put the quality of services first by providing citizens and businesses with tools to assess the functioning of public institutions;
5. to adapt to current trends and set goals in accordance with socio-economic priorities;
6. to avoid unnecessary duplication in information systems;
7. to move to more horizontal management structures;
8. to provide data for use by market participants and provide public services by private companies;
9. to protect privacy and personal data, ensure cybersecurity;
10. to provide access to information only to those persons who have the right to it;
11. to protect information from unauthorized modification or destruction;
12. to ensure open access to information, if necessary [2].

The implementation of the identified principles should contribute to the overall development of the country's innovation potential, strengthen the national innovation system and move to a qualitatively new level. This, in turn, will significantly increase the competitiveness of Kazakhstan's economy in the global market.

As a result of the realization of the provisions of the Concept, it is planned to create a Single e-government platform that will ensure the integration of interdepartmental processes and the creation of an integrated infrastructure for the provision of services and the functioning of the public administration system. The document notes that the platform model will allow creating an effective government system focused on solving everyday tasks of citizens, as well as using up-to-date online data to apply artificial intelligence tools in forecasting and decision-making based on artificial intelligence Smart Data Ukimet.

Data processing centers will be established in each region of the country. The 5G mobile communications infrastructure, operating on the principle of “always online” and characterized by low energy consumption, combined with big data analysis and the Internet, will become one of the main elements and driving force of the digital economy. Taking into account urbanization and economic feasibility, the issue of connecting to the Internet the remaining villages with a population of less than 250 people, who are experiencing corresponding difficulties and limitations in connection with proper quality assurance in this area, will be considered.

It is assumed that the ICT sector will be provided with highly qualified specialists, which will achieve a multiplier effect for the transition to a new “smart” level. This will reduce the number of public services

through the reengineering of business processes, the use of artificial intelligence elements, the use of technologies in economic sectors and the transition to the provision of public services taking into account life situations [2].

The Concept includes the following key areas that are of particular interest in this work:

1. The Smart Cities initiative aims to use ICT to improve the quality of life and efficiency of urban functioning. The strategic direction is to create urbanized areas where the resources of urban services and private initiatives cooperate for the sustainable development of the city. Accordingly, it is natural that digital technologies will be integrated into all aspects of urban life, including education, transport, housing and communal services, healthcare and others.

2. In the context of the growth of public Internet addresses (IP) and digital content, it is necessary to develop a “Cyber Shield of Kazakhstan” to protect against hacker attacks. Thus, a Malicious Code Research Center will be created to identify and neutralize cyber attacks.

3. It is important to consider joining the Convention on Data Protection, which will allow investigating violations of citizens’ rights in the field of personal data protection.

Thus, we can note that comprehensive global work is planned. However, such actions, especially when personal data is exposed to open exposure, require competent support. With the advent of blockchain technology, many countries have adopted it as a means to achieve this goal.

Scandals in the financial industry and the global economic crisis that engulfed the country in 2009 led to a loss of confidence in people's ability to protect their personal finances. Satoshi Nakamoto and technical and mathematical experts were looking for new and decentralized approaches to financial transactions that could eliminate the limitations of traditional banking systems and provide direct payments and exchange of values.

Mike Schwartz compared the power of blockchain to the ability to communicate between machines and compared its impact on the world to devices such as the internal combustion engine, telephone, computer and the Internet, which have revolutionized our understanding of how technology works [3; 14].

Blockchain is, in fact, a database similar to a registry, which is decentralized and accessible to many computers on the network. Although it was originally used to protect cryptocurrency transactions, the technology has since been used in various applications. Blockchain can be used in various industries to create long-term data, which means that they cannot be changed after recording, which corresponds to the principle outlined in paragraph 11 above.

The blockchain works on the principle of dividing information into technical blocks, which are then connected in a chain, unlike traditional databases, which still have information in the form of tables. Each of the blocks generated contains programs or prescribed scripts that perform database functions that provide access to the necessary data. The information is loaded into the block and then processed by an encryption algorithm that generates a special hash from the incoming data. A sequence of unrelated blocks is formed by adding a hash to the beginning of the next block, which is a sequence of blocks.

The cyclical nature of this innovative technology, according to its logical chain, has the ability to store copies on multiple computers, and each existing copy requires coordination for complete protection. The data is then distributed among the various nodes of the network in a network distributed across all nodes of the network, which is used to ensure redundancy and accuracy of the data. If a node detects a data change, other nodes will block that change, thereby preserving data integrity.

The blockchain provides security and stability by storing new blocks in both linear and chronological order, with new blocks being stored accordingly. If the data in a block is changed by changing the hash of the data, it will affect its data if the network changes the hash and the data changes its data, but the changes will not be accepted because the hash is not in the correct position in the hash and the changes are not reflected by the network.

With the ability to store undated information and transaction history, this technology allows you to store various types of data, including legal documents and inventory data. Blockchain users can access Bitcoin in real time thanks to its distinctive feature that decentralizes transactions in the chain.

Although blockchains are not completely impenetrable and may contain vulnerabilities in the code, attacks such as “51 %” require control over most of the network and quick actions, which is difficult due to the high hashing speed in networks, for example, in the Bitcoin network, which on April 21, 2023, the hashing speed is 348.1 v a second (18 zeros) [4].

Architecturally, blockchains are divided into several types depending on access to reading and writing data.

Public blockchains are open for reading and possibly writing by all users. Public blockchains are useful for systems where there is no central authority to verify transactions and where full decentralization is required. Private blockchains are controlled by organizations that only allow their members to write data and can restrict or open read access. The consortium's blockchains are managed by a group of nodes belonging to different organizations and serve to exchange information between them. Private and consortium blockchains offer benefits such as reduced verification time and costs, reduced risk of attacks, and increased privacy because read access can be limited. They also allow users to adjust or cancel transactions if errors are found in smart contracts.

The choice of the type of blockchain depends on the required degree of decentralization, as well as time and cost constraints. Hybrid solutions can be used that combine public and private blockchains for various tasks, such as using a private blockchain for internal operations and a public blockchain for customer interaction.

When choosing a blockchain, it is important not to strive for decentralization for the sake of decentralization itself, which implies dispersion around the world. Many business processes are effectively managed using relational databases, and switching to blockchain may be unjustified. Private blockchains provide the benefits of cryptographic auditing and data validation, making data immutable and traceable. Blockchain may be preferable to a database if a company plans to expand its private business and use a public blockchain for additional verification, given the growing demand and volume of transactions [5; 58].

The analysis of blockchain technologies allows you to objectively assess their potential and identify areas in which they can most effectively contribute to innovation and improvement. Despite the significant opportunities, some functions of the blockchain may contradict the interests and practices of market participants. The immutability of the blockchain requires careful control over data entry, since correction will require significant computing resources compared to traditional accounting systems.

Blockchain guarantees confidentiality, integrity and availability of data, while ensuring transparency and traceability of transactions. The distributed nature of the blockchain allows the creation of decentralized ledgers that can contribute to the development of digital trading solutions in the field of intellectual property and other industries. Blockchain also speeds up information processing and transactions, eliminates the need for intermediaries, and increases the security of monetary transactions and supply chain tracking [3; 24].

Blockchain technologies are used in various fields, confirming their value in the context of digital transformation and the development of information and communication technologies for 2023–2029.

Blockchain can play an important role in the development of smart cities, which will require a more efficient allocation of resources. With the help of blockchain, it is possible to ensure that the system remains unchanged, reliable, which makes the use of assets more transparent and reduces operating costs [6; 33]. It can be used for a variety of purposes: creating unique identity cards, supporting local businesses, managing land and housing resources, monitoring resources and the environment, improving transport systems, integrating various intelligent devices, ensuring transport security, etc. This allows for reliable storage of large amounts of data and allows residents to actively participate in city management and influence decisions that affect their immediate environment, from the budget to elections [7; 20].

In the field of public services, blockchain can revolutionize taxation by ensuring the origin, transparency and traceability of a transaction. We believe that this fully meets the current needs of the tax system. Blockchain provides a guarantee to reduce administrative costs, especially in the segment of transaction taxes such as VAT and withholding tax at source. In a broad sense, this can contribute to compliance with tax legislation and transparency of payments by transferring responsibility for tax collection to market participants. However, the problem lies in the digitization of sellers who have not yet switched to digital technologies.

In the field of medicine, blockchain can ensure patient confidentiality when storing and sharing medical data.

Researchers Yue and his co-authors have proposed a medical data gateway (HDG) that accesses a private blockchain cloud to ensure the immutability of medical data. The indicator-based Data Model (ICS) provides a unified approach to storing various medical data, including digital, textual and graphical data. This model can be adapted for other blockchain applications that require the storage of various types of data and provide for the division of data into blocks based on the frequency of access.

Medshare, a system that was created by Xia specialists and his co-authors, provides a blockchain solution for the exchange of medical data between cloud services, which allows you to control access, data origin and auditing. Smart contracts that are included in this system include limited access to data and do not allow abuse.

The blockchain innovations discussed above open up new horizons for improving public services and healthcare within the framework of digital transformation [6; 33].

Voting is a key element of democracy because it gives citizens the opportunity to elect their leaders and form a government, and for the system to be fair, it must be independent and objective. But the old voting methods have drawbacks: they are not always transparent and secure, depend on intermediaries and may face problems such as illegal influence on voters, fake votes and poor control of the process [8; 2067].

In elections, there are often difficulties with organization: from choosing a place to vote to printing ballots and monitoring the integrity of the process. All this ends with the counting of votes and the announcement of the results. Blockchain can help solve these problems. Voters can "send" their vote as a virtual coin to a candidate, and the blockchain will record each such vote. This allows you to quickly summarize the results and guarantees the honesty of the results. In 2018, a test was conducted in West Virginia, where 144 voters from different countries voted through a blockchain application — this was the first project of its kind in the country that allows voting remotely and securely [7; 20].

With the significant advantages of the technology under discussion, there are weaknesses in this system. The lack of centralized control can lead to abuse and a decrease in legal certainty. Blockchain faces scalability and energy consumption issues, and also depends on the quality of external data. The variety of implementations and the need for standardization can make it difficult to widely implement the technology.

You can also pay special attention to the possibilities: by eliminating current weaknesses, blockchain opens up prospects for asset tracking and accelerating digital transformation through smart contracts and new trading platforms [11; 126]. Standardization and the development of common management practices can contribute to the creation of a digital commerce ecosystem.

Nevertheless, there are threats, namely, the rapid development of technology and the lack of international regulation create technological threats. First-timers need to be prepared to respond to security vulnerabilities. Organizations acting as intermediaries may feel threatened because of their position. It is also important to consider the legal acceptability and relevance of the data stored in the blockchain, as well as possible security issues such as 51 percent attacks, phishing, routing attacks and Sybil cyberattacks [3; 25].

Establishing legal regulation of blockchain technologies in the Republic of Kazakhstan, as in any other country, is a difficult task for several reasons.

To begin with, this is a relatively new technology, and many aspects are still being studied. This means that legislation must be flexible enough to adapt to the rapidly changing technological landscape.

However, technical complexity can cause even more difficulties, especially when there is not enough potential staff capable of understanding the technical details of the blockchain. This requires specialized knowledge, which may be lacking for legislators and regulators.

The use of blockchain for cross-border transactions makes it an ideal solution for controlling such transactions within a single jurisdiction. Decentralization, especially in terms of deregulation of the rules and laws governing blockchain technology, is not a viable solution, and various countries are creating their own laws and regulations to regulate blockchain technology, including intellectual property, contract law, taxation and other relevant areas is not a viable solution. We must be aware that there is an inherent problem of merging with existing legislation. In addition, different countries may lack a universal language to address this problem in relation to their respective legal systems.

Conclusions

Blockchain technology is a potential pathway to the digital economy, offering several important benefits such as increasing the legitimacy and security of transactions, reducing costs, facilitating decentralization, and increasing efficiency and transparency.

By 2027, analysts estimate that blockchain will account for up to 10 % of global GDP. Among other advantages, the blockchain is analyzed using various sources of information; one of the key advantages is the reduction of errors related to the human factor, which increases accuracy.

The use of blockchain technology, as we can observe, reduces costs by eliminating the need to involve third parties in the verification, for example, auditors, accountants; taking into account the fact that the func-

tions performed by these specialists are already included in the blockchain program. The very features of the system, including decentralization, distribution of transactions, etc., increase data transmission and security over the network. In addition, the blockchain accelerates transactions by making transfers in a fraction of a second, which is impossible in any bank's applications, and works around the clock. Blockchain is also attractive in that it preserves confidentiality by making transactions visible, but maintaining the confidentiality of personal information; provides security by keeping confirmed transactions unchanged; most codes are open for verification, which ensures transparency; guarantees access, allowing those who do not have bank accounts to participate in the financial system.

With such significant advantages that we have listed, it is impossible not to pay attention to the disadvantages. The system requires significant computing resources; due to the workload of the system, these innovative technologies can be slow and inefficient. Privacy, which we emphasized above, is no less catchy, it can facilitate illegal transactions; and moreover, there is a reasonable risk of government interference in cryptocurrencies.

In general, blockchain provides innovative technical solutions for the financial and other sectors, but, like any field and innovation, requires careful regulation and improvement to eliminate shortcomings.

Therefore, the upcoming research in this area and the development of functioning blockchain technology are an important step towards creating a more efficient, secure and inclusive global economic system. And the subsequent analysis is necessary beyond any doubt, because it is important and relevant to help the Republic of Kazakhstan in the successful implementation of the “Concept of digital transformation, development of the information and communication technology industry and cybersecurity for 2023–2029”.

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Қазақстан Республикасының технологиясына блокчейнді енгізу арқылы «Ақпараттық-коммуникациялық технологиялар мен киберқауіпсіздік саласын дамытудың 2023-2029 жылдарға арналған цифрлық трансформациялау тұжырымдамасын» іске асыру және оны құқықтық реттеу мәселелері

Мақалада «Цифрлық трансформация, ақпараттық-коммуникациялық технологиялар мен киберқауіпсіздік саласын дамытудың 2023-2029 жылдарға арналған тұжырымдамасын» іске асырудың тетіктері қарастырылған. Авторлардың пікірінше, бұл Қазақстан Республикасында блокчейн технологиясын енгізу арқылы мүмкін болады. Цифрлық инфрақұрылымның ағымдағы жай-күйін талдауға, блокчейнді қолданудың әлеуетті салаларын анықтауға және оны пайдалануға байланысты құқықтық реттеу проблемаларын анықтауға басты назар аударылады. Мақала тұжырымдаманың стратегиялық мақсаттарына шолу жасаудан және оның елдің экономикалық дамуына әсерін бағалаудан басталады. Авторлар блокчейнді қаржы, денсаулық сақтау және мемлекеттік басқаруды қоса алғанда, әртүрлі секторлардағы деректердің ашықтығын, қауіпсіздігін және сенімділігін қамтамасыз етуге қабілетті инновациялық құрал ретінде талқылайды. Осы тұрғыда практикада өз орнын тапқан қолданыстағы технологияларға шолу жасалды, тиісінше Қазақстан Республикасы оларды болашаққа қызметке ала алады. Блокчейн технологиясын қолданыстағы құқықтық жүйеге интеграциялау кезінде Қазақстан алдында тұрған сын-тегеуріндерді талдауға ерекше назар аударылады. Авторлар жаңа заңнамалық актілерді әзірлеу қажеттілігін, сондай-ақ блокчейн үшін қолайлы құқықтық орта құру үшін ағымдағы нормативтік құжаттарды бейімдеуді зерттейді. Сондай-ақ, Қазақстанда блокчейн технологиясын кеңінен енгізу нәтижесінде туындауы мүмкін ықтимал тәуекелдер мен артықшылықтар талқыланған. Қорытындылай келе, мақала осы саладағы халықаралық ынтымақтастық пен тәжірибе алмасудың маңыздылығын көрсете отырып, блокчейн технологиясын қолдану үшін құқықтық базаны жетілдіру бойынша ұсыныстар беріледі.

Кілт сөздер: жетілдіру тұжырымдамасы, елді дамыту, цифрландыру, цифрлық қауіпсіздік, блокчейн, дербес деректерді қорғау, құқықтағы ақпараттық-коммуникативтік технологиялар, құқықтық реттеу.

С. Жамбурбаева, Г.А. Ильясова

Реализация «Концепции цифровой трансформации, развития отрасли информационно-коммуникационных технологий и кибербезопасности на 2023–2029 годы» путем внедрения технологии блокчейн в Республике Казахстан и проблемы его правового регламентирования

В статье рассмотрены механизмы реализации «Концепции цифровой трансформации, развития отрасли информационно-коммуникационных технологий и кибербезопасности на 2023–2029 годы». Как полагают авторы, это возможно через призму внедрения блокчейн-технологии в Республике Казахстан. Основное внимание уделено анализу текущего состояния цифровой инфраструктуры, определению потенциальных областей применения блокчейна и выявлению проблем правового регламентирования, связанных с его использованием. Статья начинается с обзора стратегических целей Концепции и оценки ее влияния на экономическое развитие страны. Авторы обсуждают блокчейн как инновационный инструмент, способный обеспечить прозрачность, безопасность и надежность данных в различных секторах, включая финансы, здравоохранение и государственное управление. В этом аспекте был произведен обзор действующих технологий, которые уже нашли свое место в практике, соответственно, Республика Казахстан может взять их на вооружение в будущем. Особое внимание уделено анализу вызовов, с которыми сталкивается Казахстан при интеграции блокчейн-технологии в существующую правовую систему. Авторы исследуют необходимость разработки новых законодательных актов, а также адаптации текущих нормативных документов для создания благоприятной правовой среды для блокчейна. Кроме того, обсуждены потенциальные риски и преимущества, которые могут возникнуть в результате широкомасштабного внедрения блокчейн-технологии в Казахстане. В заключение статьи предложены рекомендации по совершенствованию правовой базы по применению технологии блокчейн, а также подчеркнута важность международного сотрудничества и обмена опытом в этой области.

Ключевые слова: концепция совершенствования, развитие страны, цифровизация, цифровая безопасность, блокчейн, защита персональных данных, информационно-коммуникативные технологии в праве, правовая регламентация.

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МЕРЕЙТОЙ
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Ғалым-цивилист Төлеш Ерденұлы Қаудыров 70 жаста

Халқымызда «Жақсының аты өлмейді, ғалымның хаты өлмейді» деген нақыл сөз бар. Осынау асыл сөздерге лайықты жан — заңгер-ғалым Төлеш Ерденұлы Қаудыров деп айтсақ, артық болмас. Мақаламыздың арқауына айналып отырған ғалымның мерейлі 70 жасқа толуына орай айтулы сәттерде Тәуелсіз республикамызға өлшеусіз еңбек сіңірген дара жан туралы баяндауды жөн санадық. Өйткені, бұндай нағыз ғалымның өмір жолы келешек жас ұрпаққа үлгі-өнеге болары анық.

Төлеш Ерденұлы Қаудыров — заң ғылымдарының докторы, профессор, Қазақстанда, Орта Азия, ТМД елдерінде де танымал ғалым. Қазақстандық өмірбаяндық басылымдардың бірінде ғалымға келесідей сипаттама берген: «Өмір жолы азаматтық құқық ғылымымен және жоғары оқу орындарында оқытушылықпен тығыз байланысты Қазақстан зиялыларының ең жарқын, талантты өкілдерінің бірі. Оның тағдыры, еңбек жолы мен ғылыми ізденістері Отанымыздың кеңестік, содан кейін қазіргі қазақстандық өмір кезеңінің қиындықтары және жетістіктерімен тығыз байланысты».

Төлеш Ерденұлы Қаудыров 1955 жылы 25 қаңтарда Солтүстік Қазақстан облысы Петропавл қаласында дүниеге келді. 1972 жылы Петропавл қаласының орта мектебін үздік аяқтады. Сол жылы С.М. Киров атындағы Қазақ мемлекеттік университетінің заң факультетіне түсіп, 1977 жылы үздік дипломмен бітірді. Жоғары оқу орнын бітіргеннен кейін С.М. Киров атындағы Қазақ мемлекеттік университеті заң факультетінің азаматтық құқық кафедрасына оқытушы ретінде қалдырылды.

1977–1990 жылдар аралығында ол ассистент, аға оқытушы, доцент, С.М. Киров атындағы ҚазМУ заң факультеті деканының орынбасары лауазымдарын атқарды. «Азаматтық құқық», «Шаруашылық құқық» оқу курстары бойынша дәрістер оқыды. Қоғамдық жұмыстарды оқытушылық және ғылыми жұмыстармен бірге қатар алып жүрді.

1987 жылы ақпанда Томск мемлекеттік университетінде (Ресей) КСРО-ға танымал ғалым-цивилист Ю.Г. Басиннің ғылыми жетекшілігімен заң ғылымының кандидаты ғылыми дәрежесін іздену бойынша «Гражданско-правовые оперативные санкции в хозяйственных обязательствах» тақырыбында диссертациясын сәтті қорғады. Диссертациялық жұмысты қорғау кезінде бірінші ресми сын пікір беруші ретінде, кейін Ресей Федерациясының Әділет министрі болған профессор Калмыков Юрий Хамзатович пікірін білдірген. Сондай-ақ диссертацияға пікір білдіргендердің ішінде Ленинград мемлекеттік университетінің азаматтық құқық кафедрасының меңгерушісі, профессор Собчак Анатолий Александрович болды.

Қазақстан Республикасы Тәуелсіздігін алған тұста Т.Е. Қаудыров Қазақстан Республикасы Президентінің Әкімшілігіне жұмысқа қабылданды. 1990-1992 жылдар аралығында ҚР Президентінің

Әкімшілігінің алғашқы құрамында Мемлекеттік-құқықтық бөлімде кеңесші, аға референт лауазымдарында қызмет атқарды. Осы жылдар аралығында еліміз үшін маңызды әрі жауапты міндетті — Қазақстан Республикасының алғашқы заңдарын шаруашылық саласы бойынша сараптамадан өткізу бойынша жауапты жұмыстарды орындады. Сол жылдары жас мемлекет өзінің егемендігін жүзеге асыру үшін қажетті мемлекеттік биліктің және басқарудың жаңа органдарын қалыптастырды. 1992 жылы ҚР Президентімен кездесуден кейін ол Қазақстанның Патенттік жүйесін құруға жолданады. Ол 1992–2002 жылдар аралығында патенттер және лицензиялар, сонымен қатар тауарлық белгілерді және тауар шығарылған жердің атауын тіркеу аясында мемлекеттік басқарудың орталық органы — Қазақстан Республикасының Патенттік ведомствосын құрып, он жыл бойы басқарды.

Т.Е. Қаудыров ҚР-ның «Патент» Заңы (1992, 1999), «Тауар таңбалары, қызмет көрсету таңбалары және тауар шығарылған жерлердің атаулары туралы» ҚР-ның Заңы (1999), «Интегралды микросхемалар топологияларын құқықтық қорғау туралы» Заң (2001), ҚР-ның «Ғылым туралы» Заңы (2011), сонымен қоса интеллектуалдық меншіктің жекелеген объектілері бойынша көптеген заңға бағынышты актілердің жобаларын құрастырушылардың бірі. 1996 жылы ҚР «Авторлық және сабақтас құқықтар туралы» заңының жобасын жасап және оның қабылдануына белсенді қатысты. Ол құрған еліміздің патенттік жүйесі ТМД-да ең үздік аталып, қазірдің өзінде де сәтті қызмет етуде. Сонымен қатар Қазақстанның ДСҰ-на мүшелікке өтуіне қажет деп саналатын маңызды Халықаралық конвенцияларға қосылуына өз үлесін қосқан.

Ғылым, интеллектуалдық құқық және инновация саласындағы аталған заңдардан басқа, профессор Т.Е. Қаудыров ел тағдыры үшін маңызды басқа да құқықтық актілердің жобаларын құруға белсенді қатысты. 1992–1993 жылдары Қазақстан Республикасының 1993 жылы 28 қаңтарында қабылданған алғашқы Конституциясын әзірлеуге қатысып, оның «Қазақстан Республикасының экономикалық дамуы» бөлімі үшін жауапты болды. Мемлекетіміздің Негізгі Заңын қабылдау бойынша қажырлы еңбегі үшін Қазақстан Республикасы Президентінің Құрмет грамотасымен марапатталған.

1993–1995 жылдары Т.Е. Қаудыров ТМД-ның он елінің жұмыс тобының ресми өкіл-мүшесі ретінде Еуразиялық патент конвенциясын (ЕАПК) қабылдауға қатысты. 1995 жылдың қараша айында ҚР Президенті Еуразиялық патент конвенциясын ратификациялау жөнінде Жарлықты бекітті. 1995 жылы қатысушы елдердің өкілдерінің арасында Еуразиялық патент конвенциясының Әкімшілік кеңесінің бірінші төрағасы болып екі жылдық мерзімге сайланды.

1993–1994 жылдары ТМД елдерінің Үлгі Азаматтық Кодексінің жобасын (Лейден қаласы, Голландия) және ҚР-ның Азаматтық Кодексінің (Жалпы бөлімі) жобасын әзірлеуге қатысты. Осы құжаттардың ТМД елдерінің Парламент аралық Ассамблеясы және ҚР Парлементінде қабылдануына үлесін қосты. Т.Е. Қаудыров ТМД-ның танымал жетекші ғалымдарының қатарында «Интеллектуалдық меншік» бөлімін әзірлеуге жауапты болды.

1997-1999 жылдары ҚР-ның Азаматтық кодексінің (Ерекше бөлімі) жобасын әзірлеу бойынша жұмыс тобына қатысып, жеке-дара 77 баптан тұратын V бөлімді («Интеллектуалдық меншік құқығы») жазды. 1999 жылы Т.Е. Қаудыров екінші рет қабылданған ҚР-ның «Патент», «Селекциялық жетістіктер туралы», екінші «Тауарлық белгілер туралы», «Интегралды микросхемалар топологияларын құқықтық қорғау туралы» Заңдарының жобаларын әзірлеу бойынша жұмыс тобын басқарды.

2002 жылы Қазақстан Республикасының 2003 жылы 5 сәуірде қабылданған Кеден кодексінің «Кеден органдарымен интеллектуалдық меншік объектілеріне құқықты қорғау» атты 10-бөліміне ұсыныстар енгізу бойынша талқылауға қатысты. 2005 жылы Қазақ көлік және коммуникация академиясының «Трансқазақстан темір жол магистралінің техника-экономикалық негіздемесін әзірлеу» бойынша жобасына құқықтық кеңесші ретінде қатысса, ал 2006 жылы азаматтық заңнаманы жетілдіру бойынша Қазақстан Республикасы Үкіметінің ведомствоаралық комиссиясының мүшесі болды.

2011-2015 жылдары — ҚР Әділет министрінің бұйрығымен құрылған Қазақстан Республикасының Кәсіпкерлік кодексін әзірлеу жөніндегі жұмыс тобының төрағасы қызметін атқарды.

2002 жылы Алматы қаласында «Гражданско-правовая охрана объектов промышленной собственности в Республике Казахстан» (ғылыми кеңесші з.ғ.д., профессор М.К. Сүлейменов)

тақырыбында докторлық диссертациясын сәтті қорғап, аз зерттелген, бірақ үлкен практикалық маңызы бар құқық салаларының бірін өзектендірді.

2004 жылдың қыркүйегінен 2007 жылдың шілдесіне дейін Т.Е. Қаудыров — «Әділет» Жоғары құқық мектебінің (Алматы қ.) азаматтық құқық және азаматтық процесс кафедрасының меңгерушісі, ғылыми жұмыс жөніндегі проректоры лауазымын атқарды.

2007 жылдың қыркүйегінен 2008 жылдың мамырына дейін Алматы қаласындағы Каспий қоғамдық университетінің «Әділет» Құқықтану академиясының директоры лауазымында болды.

2008 жылдың мамыр-желтоқсан айлары аралығында — Л.Н. Гумилев атындағы Еуразия ұлттық университетінің жеке-құқықтық пәндер кафедрасының профессоры, Халықаралық ынтымақтастық және құқықтық қамтамасыз ету қызметі бөлімінің басшысы болды.

2009 жылғы қаңтардан бастап ҚазГЗУ Азаматтық-құқықтық зерттеулер институтының директоры, азаматтық құқық кафедрасының, Ұлттық құқық жоғары мектебінің меңгерушісі болды.

Ол Қазақстан Республикасы судьялары кадрларын даярлау ісіне де үлесін қосты. Қазақстан Республикасы Жоғарғы Соты басшылығының шақыруы бойынша 2017 жылдың маусымынан 2019 жылдың наурызына дейін ҚР Жоғарғы Соты жанындағы Сот төрелігі академиясының ректоры лауазымында, ал 2019 жылдың наурызынан 2021 жылдың қаңтарына дейін ҚР Жоғары Сот Кеңесінің мүшесі ретінде қызмет атқарды.

Қазіргі уақытта «Maqsut Narikbayev University» АҚ Жеке-құқықтық пәндер департаментінің Emeritus профессоры.

Жоғарыда аталып өткен тәжірибелік, оқытушылық және заңшығармашылық қызметтерін қоса атқара жүріп, ғылыми зерттеумен де белсенді айналысты. Бүгінгі күні оның 100-ге жуық ғылыми жұмыстары жарыққа шыққан, соның ішінде жеке авторлықта «Интеллектуальная собственность в международно-правовых отношениях» (1996), «Гражданско-правовая охрана объектов промышленной собственности в Республике Казахстан» атты монографиясы (2001 ж.) жарық көрді, «Основы патентного права и патентовведения в Республике Казахстан» (2003 ж.) атты оқу құралының жауапты редакторы, «Гражданское право Республики Казахстан» (III бөлім) (2004 ж.) атты оқулықтың Х бөлімінің («Право интеллектуальной собственности»), Гражданский кодекс Республики Казахстан (Особенная часть); Комментарий к Гражданскому кодексу РК (постатейный) (2006 ж.) «Право интеллектуальной собственности» бөлімінің авторы.

«Правовое обеспечение вступления Казахстана во Всемирную Торговую Организацию. Охрана интеллектуальной собственности» (2020) тақырыбы бойынша ҚР Білім және ғылым министрлігі қаржыландырған іргелі зерттеу жобасының жетекшісі болды. Сондай-ақ келесі тақырыптар бойынша ғылыми-зерттеу жұмыстарымен айналысты: «Правовая охрана объектов интеллектуальной собственности в Республике Казахстан», «Правовые проблемы реализации прав интеллектуальной собственности», «Актуальные проблемы теории гражданского права и практики применения гражданского законодательства».

Бүгінде Т.Е. Қаудыровтың ғылыми мектебі қалыптасқан. Ғалымның шәкірттері Қазақстанның әр аймақтарында жоғарғы оқу орындарында, ұйымдарда табысты еңбек етуде. Ғалымның жетекшілігімен азаматтық құқық ғылымы саласы бойынша жиырма кандидаттық диссертациялар мен PhD докторлық диссертациялары сәтті қорғалды. Атап айтқанда, А. Динанов, Ж. Досжанов, Т.Б. Тулегенов, И.К. Елеусизова, Г.А. Ильясова, А. Кайшатаева, У.Е. Кудиярова, У.М. Хамзин, А.Е. Даутбаева-Мухтарова, М. Кадырбекулы, Р.А. Кишкимбаева, Ф.Г. Ибрагимова, А.К. Темирбекова, Н.Е. Сыдыковаға заң ғылымдарының кандидаты ғылыми дәрежесін іздену диссертацияларының ғылыми жетекшісі; Т.К. Канатов, Е.Ж. Хамзин, Р. Молдабаев, З. Ашимова, М. Естемиров, М. Абиловаға PhD докторлық диссертацияларының ғылыми кеңесшісі болды. Сондай-ақ көптеген докторлық және кандидаттық диссертациялардың ресми оппоненті ретінде ғылыми көзқарастарын, пікірлерін білдіру арқылы, Қазақстанда заң ғылымының дамуына өзіндік қомақты үлесін қосып келеді.

Ол қоғамдық жұмыстарға да белсенді араласады. Әр жылдары халықаралық деңгейде ЕврАзЭҚ-ның интеллектуалдық меншік сұрақтары бойынша сарапшы; ҚР Сауда-өнеркәсіп палатасында Халықаралық төрелік соттың төрешісі; Қырғыз Республикасында Жүсіп Баласағын атындағы Қырғыз ұлттық университетіндегі заң ғылымдарының докторы ғылыми атағын беру бойынша Диссертациялық кеңестің мүшесі болды. 2007 жылы қазан айында Париж қаласында инвестициялық дау бойынша Халықаралық трибуналдың жұмысына Қазақстан Республикасы Үкіметінің жағында сарапшы ретінде қатысты.

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Ғалым-цивилист Төлеш Ерденұлы Қаудыров 70 жаста 4 146

Республикалық деңгейде Т.Е. Қаудыров Қазақстан Республикасы Президентінің жанындағы рақымшылық бойынша комиссияның тұрақты мүшесі; Қазақстан Қазақстан Республикасы Жоғары Сот кеңесінің жанындағы Біліктілік комиссиясының мүшесі; Қазақстан Республикасы Әділет министрлігінің Интеллектуалдық меншік саласында кәсіби біліктілік бойынша салалық кеңестің төрағасы; Қазақстан Республикасы Сауда-өндірістік палатасында Халықаралық төреліктің төрешісі; Қазақстан Республикасы Бас Прокуратурасының жанындағы Құқық қорғау органдары академиясының Диссертациялық кеңесінің мүшесі; «Құқық және мемлекет» және «Қарағанды университетінің хабаршысы. Құқық сериясы» журналдарының редакциялық алқасының мүшесі.

Төлеш Ерденұлының ғылымға және құқықшығармашылыққа қосқан адал еңбегі халқының аппақ алғысын иеленіп, үкіметтің, мемлекеттік органдардың, ЖОО, қоғамдық ұйымдардың тарапынан көптеген марапаттармен аталып өтті: Қазақстан Республикасы Президентінің Құрмет Грамотасы; Қазақстан Республикасы Президентінің Алғысхаты және «Алтын қыран» төсбелгісі; «Қазақстан Республикасының Тәуелсіздігіне 10 жыл», Қазақстан Республикасының Конституциясына 10 жыл», «Қазақстан Республикасының Конституциясына 20 жыл» медальдары; В.И. Блинников атындағы Еуразиялық патент ұйымының «Өнертапқыштық және патент қызметін дамытуда қосқан зор үлесі үшін» алтын медалі; Қазақстан Республикасы Әділет министрлігінің «Қазақстан Республикасының патенттік жүйесіне 20 жыл» медалі; «Қазақстан Республикасы әділет органдарының үздігі» төсбелгісі; Қазақстан Республикасы Жоғарғы Сотының «Үш би» төсбелгісі; Қазақстан Республикасы Білім және ғылым министрлігінің «Ғылымды дамытуға сінірген еңбегі үшін» төсбелгісі; «ҚазГЗУ-не 20 жыл», «Maqsut Narikbayev University 30 жыл» медальдары; Халықаралық «АНТИКОНТРФАКТ» қауымдастығының «Контрафактімен күресуде сіңірген еңбегі үшін» медалі.

Барлық қызмет саласының түрлерінде ол өзінің жауапкершілігімен, креативті ойшылдығымен және ұсынылған жұмысқа ғылыми шығармашылық көзқарасымен ерекшеленеді.

Төлеш Ерденұлы Қаудыров — ұлттық цивилистика ғылымының, соның ішінде интеллектуалдық меншік құқығының дамуына қомақты үлес қосқан тұғыры биік, ірі тұлға, ғалым-заңгер. Олай дейтін себебіміз, ғалымның ғылыми жетістіктері елінің игілігіне жарады. Ізденімпаз ғалым үнемі тынбай жұмыс істеуде. Ізденіп еңбек ету, өзінің бойындағы бар білімі мен адамгершілік қасиетін ұрпақ игілігіне жарату — ғалымның өмірде мақсат тұтқан негізі ұстанымы.

Профессор ғылыми ортада да, мемлекеттік билік өкілдерінің арасында да зор құрметке ие тұлға. Ұлағатты Ұстаз және Ғалым Төлеш Ерденұлының өмірлік жолы жастарды парасаттылыққа бағыттайды, білім мен ғылымға деген құштарлықтарын арттырады. Өмірін заң ғылымы мен жоғары құқықтану біліміне, құқықтық мемлекетіміздің дамуына арнаған профессор Төлеш Ерденұлы Қаудыровтың әрбір еңбегі, ғылыми жетістігі келер ұрпаққа мұра.

Қадірлі, Төлеш Ерденұлы, Сізді мерейтойыңызбен құттықтай отырып, зор денсаулық, қажымас қайрат, шығармашылық табыстар, отбасыңызға баянды бақыт тілейміз!

Ғұмырыңыз ұзақ, шығармашылығыңыз мәңгілік болсын!

Ізгі ниетпен, академик Е.А. Бөкетов атындағы Қарағанды университетінің заң факультетінің ұжымы
«Қарағанды университетінің хабаршысы. “Құқық” сериясы» журналының редакциялық алқасы