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## NEW DRAFT OF WATER CODE OF THE REPUBLIC OF KAZAKHSTAN: LEGAL ANALYSIS

For the purposes of implementation of a water-efficient and water-saving state policy, the regulation of water relations over the past decade requires urgent reform. The development of legal and economic science and practice determines the need to include water in economic turnover, thereby stimulating water users to create a closed loop economy. Thus, in the process of enhancement of water legislation, it is required to consider economic, property, environmental and other aspects. Water relations are regulated by both water and civil legislation, and other natural resource legislation. Therefore, the article notes that it is of essence to ensure an optimal ratio of the norms of these branches of legislation.

This document provides an assessment of specific sections of the Water Code that is expected to be adopted in Kazakhstan by 2024. The purpose of the analysis is to uncover key issues that arise in the context of legislative water management. The study tries to identify the weaknesses of the proposed draft law from the authors' point of view. Specific proposals are recommended to eliminate legal conflicts, gaps between the norms of land, water and legislation on subsoil and subsoil use of Kazakhstan.

**Key words:** water, water body, Water Code, legal regulation, water relations.

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### Қазақстан Республикасы су кодексінің жаңа жобасы: құқықтық талдау

Су тиімді және суды үнемдейтін мемлекеттік саясатты іске асыру үшін соңғы он жыл ішінде су қатынастарын реттеу шұғыл реформалауды талап етеді. Заң және экономикалық ғылым мен практиканың дамуы суды экономикалық айналымға қосу қажеттілігін анықтайды, осылайша су пайдаланушыларды айналмалы циклды экономика құруға ынталандырады. Сонымен, су заңнамасын жетілдіру барысында экономикалық, мүліктік, экологиялық және басқа аспектілерді ескеру қажет. Су қатынастары су, азаматтық және басқа да табиғи ресурстар заңнамасымен реттеледі. Сондықтан мақалада заңнаманың осы салалары нормаларының оңтайлы арақатынасын қамтамасыз ету қажет екендігі айтылады.

Мақалада су қатынастарын құқықтық реттеудің негізгі мәселелерін шешуге бағытталған Қазақстан Республикасы Су Кодексі 2024 жылғы жобасының жекелеген ережелеріне талдау ұсынылған. Авторлардың пікірінше мақала заң жобасының кейбір нормаларының кемшіліктерін белгілеуге тырысады. Заңдық қайшылықтарды, жер, су және жер қойнауы және жер қойнауын пайдалану туралы заңнама нормалары арасындағы олқылықтарды жою бойынша нақты ұсыныстар ұсынылады.

**Түйін сөздер:** су, су объектісі, Су кодексі, құқықтық реттеу, су қатынастары.

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### Новый проект водного кодекса Республики Казахстан: правовой анализ

Для реализации водозооэффективной и водосберегающей государственной политики регулирование водных отношений на протяжении последних десяти лет требуют безотлагательного реформирования. Развитие юридической и экономической науки и практики определяет необ-

ходимость включения воды в хозяйственный оборот, тем самым стимулируя водопользователей к созданию экономики замкнутого цикла. Так, в ходе совершенствования водного законодательства необходимо учитывать экономический, имущественный, экологический и другие аспекты. Водные отношения регламентируются и водным, и гражданским законодательством, и другим природоресурсным законодательством. Поэтому в статье отмечается, что необходимо обеспечить оптимальное соотношение норм этих отраслей законодательства.

В статье представлен анализ отдельных положений проекта Водного кодекса Республики Казахстан 2024 года, направленных на решение основных проблем правового регулирования водных отношений. В статье сделана попытка обозначить недостатки некоторых норм законопроекта, по мнению авторов. Рекомендуются конкретные предложения по устранению юридических коллизий, пробелов между нормами земельного, водного и законодательства о недрах и недропользовании РК.

**Ключевые слова:** вода, водный объект, Водный кодекс, правовое регулирование, водные отношения.

## Introduction

The Parliament of Kazakhstan is now evaluating the proposed draft Water Code as part of the ongoing legislative process. The initiative comes from the Ministry of Ecology and Nature Management and then from the newly formed Ministry of Water Resources and Irrigation in the context of the implementation of the State Development Plan until 2025, enshrined in Presidential Decree No. 636 of February 15, 2018 (<https://adilet.zan.kz/rus/docs/U1800000636>), and following the Presidential Decree, the instruction of February 8, 2022 (<https://www.akorda.kz/ru/glava-gosudarstva-provel-rasshirennoe-zasedanie-pravitelstva-respubliki-kazahstan-81311>) to create a new version of the Water Code.

Over the last five to seven years, there has been a growing interest in reforming the legislation governing water resources in Kazakhstan. The Water Code, established in 2003, has undergone changes in more than seventy cases, and over 50% of all articles have been amended. Based on legal principles, such a significant adjustment of existing norms is a sufficient foundation for the advancement and enactment of a new, codified legislative document related to the use and protection of water resources.

## Materials and methods

During the research, the authors employed a combination of empirical and theoretical approaches, including comparative, dialectic, logical and legal methodologies, alongside legal analysis of legislative documents.

The study involved evaluating various resources such as the Constitution of the Republic of Kazakhstan ([https://online.zakon.kz/Document/?doc\\_id=1005029](https://online.zakon.kz/Document/?doc_id=1005029)), the Republic of Kazakhstan's Environmental Code, the 2003 Water Code ([https://online.zakon.kz/Document/?doc\\_](https://online.zakon.kz/Document/?doc_)

[id=35710592&pos=3;-70#pos=3;-70](https://online.zakon.kz/Document/?doc_id=1042116)), and documentation related to the proposed 2024 Water Code draft of the Republic of Kazakhstan ([https://online.zakon.kz/Document/?doc\\_id=1042116](https://online.zakon.kz/Document/?doc_id=1042116)), including its explanatory statement and assessments of the predicted economic, social, legal, and environmental impacts of proposed legislation.

The article analyzes the points of view on this problem of Kazakhstani and foreign scientists – S.B. Baisalov (Байсалов: 1966), S.D. Bekisheva (Бекишева: 2019), S.A. Bogolyubov (Боголюбов: 2022), T.G. Kalinichenko (Калиниченко 2011), A.A. Mukasheva (Мукашева 2020), D.O. Sivakov (Сиваков 2019), S.Zh. Suleimenova (Сулейменова 2012) and others.

### *Establishment and change of water legislation in Kazakhstan*

The stipulations within the Water Code (subsequently referred to as WC) aim to orchestrate an intricate network of water engagements, covering facets from economic and proprietary to ecological, socio-political, and self-governing arenas. With the involvement of water in the market economy, there is a need for appropriate legal registration of all aspects of water relations, based on new socio-economic realities and patterns of social development.

Turning to history, we can't help but note that Professor S.B. Baisalov wrote about the need to codify the water legislation of Kazakhstan in his works for the first time (Байсалов 1966).

Despite the publication of special laws regulating the organization of water use, some laws were contradictory and had a number of shortcomings. All this indicate the urgent need for codification of water legislation, which also needs certain changes and a certain ordering (Байсалов 1966).

The main ideas set forth in the works of S.B. Baisalov as the initiator of the advancement and approval of the codified water law, shaped the foundation for the main provisions of all subsequent

adopted water codes of Kazakhstan. Baisalov's fundamental work of 1996 "Water law of the Kazakh SSR" (Байсалов 1966) is still relevant and is the primary source for substantiating and regulating water relations in modern Kazakhstan.

Kazakhstan's water legislation has transitioned through distinct epochs, tracing from the 1972 Water Code ([http://www.cawater-info.net/bk/water\\_law/pdf/kaz-wat-code-1972.pdf](http://www.cawater-info.net/bk/water_law/pdf/kaz-wat-code-1972.pdf)) during the Kazakh SSR era, advancing to the nation's 1993 (<https://adilet.zan.kz/rus/docs/K930003000>) and then the 2003 Water Codes ([https://online.zakon.kz/Document/?doc\\_id=1042116](https://online.zakon.kz/Document/?doc_id=1042116)).

Exploring theoretical foundations and identifying viable solutions for contemporary challenges in water jurisprudence necessitates an in-depth re-evaluation and scrutiny of the statutes and directives encapsulated in the Water Code of the Republic of Kazakhstan.

The present existing Water Code, adopted on July 9, 2003, contains fundamental innovations regarding a number of water law institutions. First of all, conceptual changes in the legal regime of agricultural waters are highlighted. These changes were connected with the overview of the right of private ownership of agricultural land, with the establishment of new legal parameters for the acquisition, discarding, usage and control of agricultural waters.

An important fundamental objective of legal science and legal policy is to develop a methodologically verified concept of legislation.

It is necessary, first of all, to keep in mind the essential, fundamental shifts in the domain of water relations caused by the patterns of the economy. Water relations, especially now, represent a complex fusion, an interweaving of heterogeneous relations. In a certain sense, modern water relations constitute a significant cross-section of property relations. Their legal expression appears as the process of "penetration" "of the norms and institutions of private law into this sphere, a kind of "citizenship" of water relations.

In this regard, the problem of theoretical explanation and adequate regulatory consolidation of the "boundaries" of the connection of civil law and water law principles in the legal support of modern water relations is faced.

Legislative practice shows that the optimal correlation and interaction of the norms of water and civil legislation is not yet fully ensured.

The Water Code draft of 2024 is aimed at execution of certain directives of the president, as well as bringing them into line with state strategic program documents, with ratified international documents and other legal acts:

1. Treaty on the Management and Utilization of Cross-Border Waterways and International Lakes (Helsinki, March 17, 1992). Kazakhstan's Law of Ratification, October 23, 2000.

2. "Kazakhstan-2050 Strategy: The New Direction of an Established Nation." Speech by President Nursultan Nazarbayev to the Kazakh populace, Astana, December 14, 2012.

3. Presidential Decree of Kazakhstan, May 30, 2013, No. 577, endorsing the blueprint for transitioning to an eco-friendly economy.

4. Presidential Decree of Kazakhstan, February 15, 2018, No. 636, endorsing the National Development Strategy up to 2025 and revoking specific earlier presidential decrees.

5. Announcement from President Kassym-Jomart Tokayev to the Kazakh people, September 1, 2020, "Kazakhstan in the New Reality: Time to Act."

6. Presidential Decree of Kazakhstan, March 6, 2020, No. 280, endorsing the International Policy Framework for 2020-2030.

7. Presidential Decree of Kazakhstan, May 24, 2021, No. 582, endorsing the Legislative Agenda for 2021-2026.

8. Speech by the Kazakh President, September 1, 2021, on "National Unity and Structural Reforms as the Bedrock of National Prosperity."

9. Resolution No. 628 by the Kazakh Government, September 10, 2021, endorsing the National Action Scheme following the President's Address on September 1, 2021, focusing on "National Unity and Structural Reforms as the Cornerstone of Prosperity."

10. Presidential Decree of Kazakhstan, September 13, 2021, No. 659, on executing the President's Address from September 1, 2021, emphasizing "National Unity and Structural Reforms as the Pillars of Prosperity."

11. Presidential Decree of Kazakhstan, October 15, 2021, No. 674, on endorsing the Legal Policy Framework up to 2030.

The materials for the WC draft describe international and foreign experience in solving problematic issues. Nevertheless, several instances of international legislative practices highlighted earlier are inadequately addressed within the provisions of the proposed bill. The referenced global practices from nations (Australia, Israel, Canada, Uzbekistan, China, Russia (Crimea), Germany) concerning water utilization efficiency, precise measurement of water consumption, adoption of top-tier available technologies, research-based management and utilization of water reserves, and the establishment of legal frameworks for groundwater are regrettably

not thoroughly incorporated in the draft of the Water Code.

Water has inimitable, unique features and properties both as an object, an element of the surrounding natural environment, and as an economic object. Consequently, water has special differences and properties as an object of legal influence. That is why, as it was shown, there are relevant branches of water law and legislation designed to regulate the most important sphere of public relations.

The proposed legislation seeks to refine the normative and legal governance of societal relations in the area of conservation and application of Kazakhstan's water resources. This goal is to fortify the legal underpinnings to safeguard the country's aquatic safety, delineate the obligations of the appointed authority responsible for water resource stewardship and deployment, as well as augment the progression and enhancement of water governance and facilities, set benchmarks for efficient water usage, foster a sustainable cycle of water consumption, and implement additional legal reforms.

Moreover, the evaluation of the materials associated with the draft law indicates a thorough preparation to correct the legal shortcomings in Kazakhstan's water law sector.

### Discussion of challenging issues

Scrutinizing diverse opinions in the field of water law from both Kazakhstani and international experts on the imperative to overhaul water laws has exposed an array of deeply rooted challenges concerning the conservation and employment of aquatic environments, as highlighted by Bekisheva S.D., Bogolyubov S.A., Baisalov S.B., Kalinichenko T.G., Mukasheva A.A., Sivakov D.O., Suleimenova S.Zh.

Water resources management and water use problems require immediate attention and effective actions from governmental structures and relevant authorities. Scientific analysis and legal assessment of the following aspects seem to be extremely important:

1) Amendments to the Constitution of the country in 2022 confirmed that water resources belong to the society and people in Kazakhstan. This deduces that within the sphere of civil law, there should be a removal of provisions allowing private entities to assume ownership or control over hydraulic construction entities. Such maneuvers, veiled as the conveyance of ownership rights, might culminate in water resources becoming privately owned.

Water resources management is a strategic task for the state. Hence, it is suggested that all duties

related to water sanitation and supplement be delegated to government entities, sidelining for-profit commercial companies from this domain.

2) It is necessary to clearly define the subject of regulation of water legislation, which will be the foundation for preserving water bodies and ensuring safety on water bodies. It is important to consider issues related to the separation of water use and water management, as well as to study the option of creating a water market as a method of water conservation.

3) It is essential to develop and introduce special legislative acts regulating legal relations in the sphere of drinking water supply, economic water supply, water disposal and ensuring safety of hydraulic facilities, etc.

4) Enhancing the penalties for infractions in the realm of water legislation is imperative, including the establishment of standards that address the violation of the right to access potable water.

5) Emphasizing water resources management as a fundamental priority, it is stressed that the provision of water and sanitation services should be the exclusive remit of governmental entities, thereby ceasing all for-profit ventures in this field.

Referring to the recently approved draft of the Water Code, it seems pertinent to highlight the issues concerning the draft law's consistency with other legal statutes:

1) Object 8 of the Draft Law enumerates various water body types without defining the terms "water body," "water," etc.

Adjustments are required to harmonize specific environmental legislation with the Republic of Kazakhstan's Constitution, addressing legal mismatches and absences within the frameworks that oversee land, water, and subsoil use regulations in the Republic of Kazakhstan.

Additionally, to resolve the present discrepancies and omissions within the existing laws, the authors needed to introduce the idea of "enclosed water bodies" (as Article 42 of the Land Code describes this kind of water body: "1. The right to a terrestrial parcel, unless stipulated otherwise by the legislative texts of the Republic of Kazakhstan, encompasses the topsoil layer within the parcel's borders, enclosed water bodies, vegetation."). Alternatively, the land rights of the Republic of Kazakhstan required adjustment.

Furthermore, the legal status of "groundwater," which the subsoil and subsoil usage legislation classifies as minerals and thus an essential component of the subsoil, remains ambiguous (referring to section 2 of 12<sup>th</sup> Article of the Kazakhstan Code "On Subsoil and Subsoil Use").

Additionally, there is a necessity for a extra precise characterization in the legal definition of water bodies as property items subject to compulsory state registration. It is essential to digitalize all water bodies and hydraulic structures.

2) The clauses of the Draft Law could potentially infringe upon the constitutional right to water ownership in Kazakhstan.

Thus, paragraph 1 of Article 10 provides that water management facilities may be in state or private ownership. According to paragraph. 38) of Part 1 of Article 1 of the Draft Law, water facilities refer to structures and devices intended for water intake, treatment, storage, transportation, distribution and drainage of collector and drainage water.

Thus, water facilities as an object of immovable property that is inseparably connected with a land and water plot cannot be used without a water body, thereby losing its intended purpose. Therefore, according to the inseparability of ownership rights to immovable property, the transfer of ownership rights to a water facility entails the transfer of ownership rights to the land of the water fund and the water body itself.

The conditions outlined in the Preliminary Bill could breach the constitutional entitlements of Kazakh citizens to water resources. It is essential to rectify the conflicts associated with the prospects of individual water rights ownership.

3) Under Article 10, Paragraph 4 of the Initial Water Code, it is stipulated that entitlements concerning aquatic infrastructure must be legally documented in accordance with Kazakhstan's regulations on the official registration of real property rights. This provision implies that water infrastructures are considered real estate (which aligns with our earlier findings). Yet, the legal framework regarding water bodies as real property objects remains unspecified. This raises the question: are water bodies considered real estate? Clarifying this matter is crucial for the proper state registration of both water bodies and water management structures.

4) Article 6 of the Draft Law introduces a novel concept within water legislation, termed as "water security of the Republic of Kazakhstan".

*"Water safety in the Republic of Kazakhstan is a crucial component of the nation's economic and environmental security. It reflects the level of safeguarding the populace and the national economy of the Republic of Kazakhstan against actual and possible dangers stemming from the lack of water and its poor quality, as well as from detrimental water-related impacts due to human and natural activities, water management, and hydraulic engineering constructions.*

2. *The protection of water within the territory of the Republic of Kazakhstan is attained through:*

- *integrated use of surface and underground water resources;*
- *territorial redistribution of water resources;*
- *implementation of water-conserving techniques in industrial sectors and irrigation-based farming;*
- *initiatives to collect and store waters from spring floods;*
- *expansion of the hydraulic monitoring stations to oversee the volume and quality of water resources;*
- *banning the release of unprocessed sewage into aquatic environments;*
- *increasing the quality requirements for return (discharge) water;*
- *implementation of measures to prevent clogging and depletion of water resources;*
- *conservation and restoration of water bodies;*
- *desalination of salt water.*

3. *The water safety of the Republic of Kazakhstan is maintained through legal, administrative, financial, and additional strategies, as outlined in this Code.*" ([https://online.zakon.kz/Document/?doc\\_id=35710592&pos=3;-70#pos=3;-70](https://online.zakon.kz/Document/?doc_id=35710592&pos=3;-70#pos=3;-70))

The form of the definition of "water security" proposed by the developers requires further elaboration in terms of more precise and succinct wording, as well as providing for the introduction of amendments and accompaniments to the national security legislation as an accompanying document.

5) The provisions within the Preliminary Legislation must articulate "water servitude" at the outset of Article 1 as "the authority to engage in constrained, distinct usage of a water asset." Additionally, the author of section 4 of Article 16 mentions that "A private water servitude is established based on the same criteria as a public water servitude and may also be created through a contractual agreement or judicial ruling", yet there are no specified conditions listed for the establishment of a public servitude earlier. The text merely states, "All individuals may utilize public water resources, thereby establishing a public water servitude as a fundamental aspect of the water usage right." This suggests that the general right to water usage encompasses the establishment of a public water servitude.

## Conclusions

In light of the preceding points and based on the significant works by Professor S.B. Baisalov, it becomes crucial to review the prior observations and initiatives to guarantee water security, elevate the standard of legislative drafting in the domain of

water regulation and addressing water management transgressions in Kazakhstan, along with the application of judicial practices in this realm:

- The notions of “water body”, “closed reservoirs” and “water” are anticipated to be counted in in the draft of the WC.

- There is a call to harmonize the statutes pertaining to special natural resources with the Constitution of Kazakhstan, eradicating legal inconsistencies and voids within the Kazakhstani frameworks on land, aquatic resources, and the subsurface along with its use.

- The provisions under consideration could undermine the constitutional land and water ownership rights of the people of Kazakhstan. We assert the need to remove any ambiguities regarding the potential for individual water ownership.

- It is imperative to establish definitive functional standards and differentiations among the varied authoritative entities to actualize state responsibilities: governance of aquatic entities, particularly in relation to their allocation and management, state

oversight, regulatory compliance, and the conservation and restoration of aquatic entities, etc. The rationale behind introducing a new Water Code includes: multiple governmental units (as indicated in section 32) will hold regulatory responsibilities for the preservation and application of water resources, which extends to subterranean water aspects, as mentioned in clause 1 of Article 20; basin water inspections – clause 12) 2 of Article 21; to the competent authority in relation to the environmental protection – subclause 1) subclause 1 of Article 22; to the authority regarding study of mineral resources – subclause 5) subclause 2 of Article 22) may involve duplication of powers and confusion in the implementation of control functions, excesses in the public administration system and regulation.

- Define the parameters for classifying bodies of water: those with exceptional national relevance and typical water bodies, as well as categorizing hydraulic facilities: -infrastructures with utmost strategic significance; -major strategic water control structures; -standard water regulation infrastructures.

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