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1-бөлім

МЕМЛЕКЕТ ЖӘНЕ ҚҰҚЫҚ ТЕОРИЯСЫ МЕН ТАРИХЫ

Section 1

THEORY AND HISTORY OF STATE AND LAW

Раздел 1

ТЕОРИЯ И ИСТОРИЯ ГОСУДАРСТВА И ПРАВА

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PROBLEMS OF LEGAL REGULATION OF INTERCULTURAL COMPETENCE OF A TEACHER ON THE EXAMPLE OF LEGAL EDUCATION

The number of international students is one of the indicators of the international effectiveness of universities. That is why we are working to improve the intercultural competence of teachers and staff of Kazakhstani universities who work (or will work) with foreign students. The insufficient level of the teachers' ICC complicates the educational process, levels the opportunity to take advantage of the intercultural environment for learning, can lead to a deterioration of group interaction and, as a result, to a decrease in the prestige of education in the eyes of foreign students. The focus on the development of a scientific and methodological base for the expansion of the teachers' MCC, thus, confirms the compliance of our project with the growing need to train teachers of the Kazakh higher school to work with a multilingual (and multicultural) audience of foreign students.

The aim of the research is to develop a conceptual, legal and methodological framework for building a sustainable model for expanding the intercultural competence (ICC) of teaching lawyers, with the aim of introducing and improving the ICC for training lawyers-teachers of Kazakhstan higher school to work with a multilingual (and multicultural) audience represented by foreign students. The results of the research will contribute to building more effective models for solving new socio-pedagogical and educational tasks that the expansion of international academic contacts brings, which in the long term will serve to strengthen the competitiveness of higher education in the Republic of Kazakhstan.

The article is based on the materials of a scientific project on the topic: Intercultural competence of a university teacher and its impact on improving the competitiveness of higher education in Kazakhstan.

Key words: the right to education, legal education, foreign and exchange students, competitiveness of Kazakhstan's education, intercultural communicative competence.

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Құқықтық білім беру мысалында оқытушының мәдениаралық құзыреттілігін құқықтық реттеу мәселелері

Шетелдік студенттер саны университеттердің халықаралық тиімділігінің көрсеткіштерінің бірі болып табылады. Сондықтан да біз шетелдік студенттермен жұмыс істейтін қазақстандық университеттердің оқытушылары мен қызметкерлерінің мәдениетаралық құзыреттілігін арттыру үшін жұмыс істейміз. Оқытушылардың мәдениетаралық құзыреттілігі деңгейінің жеткіліксіздігі білім беру процесін қиындатады, оқыту үшін мәдениетаралық ортаның артықшылықтарын пайдалану мүмкіндігін жояды, топтық өзара іс-қимылдың нашарлауына және соның салдарынан шетелдік студенттердің көз алдында білім беру беделінің төмендеуіне әкелуі мүмкін. Оқытушылардың МАҚ кеңейту үшін ғылыми-әдістемелік базаны дамытуға баса назар аударуы, осылайша, біздің жобамыздың шетелдік студенттердің көптілді (және мультимәдени) аудиториясымен жұмыс істеу үшін Қазақстандық жоғары мектебі оқытушыларын даярлауға деген қажеттіліктің өсіп келе жатқанының сәйкестігін растайды.

Зерттеудің мақсаты көп тілді (және көп мәдениетті) аудиториямен жұмыс істеу үшін Қазақстанның жоғары мектебінің заңгер-оқытушыларын даярлау үшін МАҚ енгізу және жетілдіру мақсатында заңгер-оқытушылардың мәдениетаралық құзыреттілігін (МАҚ) кеңейтудің тұрақты моделін құру үшін тұжырымдамалық, құқықтық және әдіснамалық негізді әзірлеу болып табылады. Зерттеу нәтижелері халықаралық академиялық байланыстарды кеңейтуге

алып келетін жаңа әлеуметтік-педагогикалық және білім беру міндеттерін шешу үшін неғұрлым тиімді модельдер құруға ықпал ететін болады, бұл ұзақ мерзімді перспективада Қазақстан Республикасында жоғары білімнің бәсекеге қабілеттілігін нығайтуға қызмет етеді.

Мақала ғылыми жобаның материалдары негізінде жазылған: Университет оқытушысының мәдениаралық құзыреті және оның Қазақстандағы жоғары білімнің бәсекеге қабілеттілігін арттыруға әсері.

Түйін сөздер: білім алу құқығы, заңгерлік білім, шетелдік студенттер мен студенттер алмасуы, қазақстандық білім берудің бәсекеге қабілеттілігі, мәдениетаралық коммуникативтік құзыреттілік.

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Проблемы правового регулирования межкультурной компетентности педагога на примере юридического образования

Количество иностранных студентов является одним из показателей международной эффективности университетов. Именно поэтому мы работаем над повышением межкультурной компетентности преподавателей и сотрудников казахстанских университетов, которые работают (или будут работать) с иностранными студентами. Недостаточный уровень межкультурной компетенции преподавателей усложняет образовательный процесс, нивелирует возможность воспользоваться преимуществами межкультурной среды для обучения, может привести к ухудшению группового взаимодействия и, как следствие, к снижению престижа образования в глазах иностранных студентов. Акцент на развитие научно-методической базы для расширения межкультурной компетенции преподавателей, таким образом, подтверждает соответствие нашего проекта растущей потребности в подготовке преподавателей казахской высшей школы для работы с многоязычной (и мультикультурной) аудиторией иностранных студентов.

Целью исследования является разработка концептуальной, правовой и методологической основы для построения устойчивой модели расширения межкультурной компетенции (МКК) преподавателей-юристов с целью внедрения и совершенствования МКК для подготовки юристов-преподавателей высшей школы Казахстана для работы с многоязычной (и мультикультурной) аудиторией, представленной иностранными студентами. Результаты исследования будут способствовать построению более эффективных моделей для решения новых социально-педагогических и образовательных задач, которые несут с собой расширение международных академических контактов, что в долгосрочной перспективе послужит укреплению конкурентоспособности высшего образования в Республике Казахстан.

Статья написана на основе материалов научного проекта по теме «Межкультурная компетенция вузовского преподавателя и ее влияние на повышение конкурентоспособности высшего образования в Казахстане».

Ключевые слова: право на образование, юридическое образование, иностранные студенты и студенты по обмену, конкурентоспособность казахстанского образования, межкультурная коммуникативная компетентность.

Introduction

The scale of the problem to enhance the ICC of the university teachers and staff is both, cross-national (due to the topicality of internationalizing higher education in Kazakhstan and in other states wishing to open their education for foreign students) and cross-sectional (since effective learning in a multi-cultural environment goes beyond the pure educational sector but reaches out to other spheres such as, administration and business, not to mention social communication and interaction). The last two decades witnessed ”a rise in the popularity of study abroad programmes” worldwide (Tarchi&Surian, 2021: https://www.researchgate.net). Globally, the number of international students has risen from 2 million in 1998 to 5,3 million in 2017 (OECD, 2019: www.oecd-ilibrary.org). The number of international students is among the indicators of the international efficacy of universities in, e.g. Times Higher Education (THE) World University Ranking (https://nacada.ksu.edu).

Internationalization of higher education (HE) is a trend relevant for Kazakhstan where 89 foreigners who demonstrated excellence in studies were enrolled in higher educational programmes in 2019

within the Scholarship programme for education of foreign students at the universities of Kazakhstan. In 2021, the number of foreign students in Kazakhstan who received education grants increased up to 240 scholarships for all the levels of higher and post-graduate education (Scholarship programme in Kazakhstan, 2021). Interest for obtaining education in Kazakhstan increased among the foreign citizens also when it comes to applying for international mobility grants with the placement in Kazakhstan, as well as for governmental and inter-governmental support funding. If in 2019, the number of foreign students was 16 thousand individuals, in 2021 this number increased up to 25 thousand individuals, which make approximately 6.5 per cent of the total number of students in Kazakhstan (Kazakhstan's Independent Agency for Quality Assurance in Education, 2021: https://iqaa.kz).

In 2021 the National project entitled "Quality education "Educated nation"" was adopted by the Government of Kazakhstan, envisioning a set of measures aimed at increasing the international attractiveness of national education (Decree of the Government of Kazakhstan of 12 October 2021: www.adilet.zan.kz). This project inter alia emphasizes that internationalization of higher education is a tendency to remain topical for all the national universities. Among the universities of Kazakhstan our partner universities, al-Farabi Kazakh National University in Almaty and International Kazakh-Turkish University named after Akhmet Yassawi in Turkestan stand out as the universities accommodating 15 per cent of all the Turkic-speaking foreign states.

At the same time, internationalization brings in "multiple diversities in any given classroom or academic program" (Lee, 2017: 85). The growing diversity in higher education requires not only excellent language skills from all the participant of the educational programmes, but also an ability to effectively communicate in an intercultural environment (Tarchi&Surian, 2021: https://www.researchgate.net). Known (in most general terms) as **intercultural communicative competence (**ICC), the said ability is as significant in an intercultural environment as education per se. Research, for example, shows that in the sector of international business and commerce candidates with proven strong IC often have an advantage over other candidate, even though the educational level of the former were lower (Sercu, 2004: 75) (Deardorff, D. 2011: 11).

Mastering IC is significant for all actors in higher education: public authorities, university management and teachers, not to mention the students themselves, because living in a diverse society or mere exposure to another culture does not automatically mean the ability to effectively solve intercultural issues and effectively communicate in an intercultural environment (Deardorff & Jones, 2012: https://sk.sagepub.com).

Current research findings in the area of ICC in higher education conducted by the scholars in Kazakhstan (Amirova et al., 2016: 96, Ignatova et al., 2015: 127) and by the international scholars reveals that conflicts rising in a multi-language and multicultural environment as well as the need to repeat the material for the students who do not master the language of instruction well, impedes the educational process. This proves the urgency for expanding the CII-related research in Kazakhstan since mastering the ICC becomes a significant pedagogical skill for teaching foreign students. ICC deficiency on the part of teachers can lead to poorer group interaction within the classroom (Deardorff&Jones, 2012: https://sk.sagepub.com) or cause an increased drop-out rate as the result of (not always overt) attitudes on the part of the teacher (Otten, 2003: 125). With respect to the university staff, international support officers and academic advisors, insufficient ICC impacts the learning process indirectly, yet significantly by adding to the stress of the advisors, who are not always able to handle difficult intercultural situations (Ali&Johns, 2018: https://nacada.ksu.edu). And this is the crux of ICC, assessing concrete conditions in education and communication, in order to make the best out of the interaction (Goth&Kjelsvik, 2020: 245).

Thus, the call for the enhanced ICC in higher education comes from general societal need in social cohesion and accommodating diversity in education (Riekkinen, 2018: 52). Amidst the conditions of internationalizing higher education in Kazakhstan undertaking measures for enhancing the ICC becomes crucial. Darla Deardorff, the most cited author in the area of ICC, justifies the concept of an "internationally competent faculty" (Deardorff, 2011:8). Nevertheless, in Kazakhstan the situation of ICC competent faculties and advisors is far behind the current research advancements. There is no requirement of special pedagogical training including in ICC neither for the university teachers, nor from the university staff. To compare, in Finland, the university teachers are increasingly encouraged by the universities to obtain special training in university pedagogics, of which a diversity component is a part. Municipalities require for teaching migrant children special ICC education from primary school teachers, who are otherwise obligated by law to hold an M.A. in pedagogics or an equivalent degree. The

demand for increased ICC competence in education is also relevant for Norway where changes were introduced in education curriculums, which nowadays include a stronger diversity component (Rosnes, 2018: 281). The recent law amendments require from the university teachers training in university pedagogics (UiO, Pedagogical Requirements: www.uio.no). Nevertheless, neither Finland nor Norway require ICC training from the other staff in the university, which is in a way odd, since academic advisors who work in international departments of the university deal on a daily basis with foreign students (Charles & Stewart, 1991: 173).

The implementation of research on the project involves the use of an integrated methodology, where each task is performed by the most optimal research method, according to the presented statement "task – method"

Task 1) Based on the conclusions of modern scientific approaches to the MCC, identify strengths and limitations in the national and regional legislation of the Republic of Kazakhstan (RK), program documents and standards higher education, in relation to the place and role of the MCC in the educational process of universities with the participation of foreign students.

Methodology

The composite model of the MCC is taken as a basis: knowledge-skills-attitudes (Griffith et al, 2016: https://onlinelibrary.wiley.com). However, our project is aimed at improving only two (cognitive) elements of the MCC in an attempt to increase the level of specialized knowledge and specific didactic and communication skills and strategies. We do not seek to detract from the importance of the (affective component) attitudes, recognizing that it is the individual characteristics of the teacher, identified using patterns formed as a result of interaction between people in different situations, that are responsible for showing concern, building trust and closeness, sensitivity and respect for the views of students (Hanssen, 2017: 9). However, attitudes as well as personality traits are difficult to assess and measure (Sercu, 2004: 75, Deardorff, 2011: 7, and many others). For this reason, we leave the affective component of the MCC outside the scope of the project At this stage of the development of scientific views on the MCC, the focus of scientists is shifting from studying "them," moving to studying "us," putting more and more effort into understanding how to cope with the learning process in the diversity society (Rosnes, 2018: 276). The current scientific approach highlights the advantages that a multilingual and multicultural environment can bring to the educational process with the participation of competent teachers (Cummins, 2019: 10, Ibrahim, 2016: 75). Thus, we are trying to show the ICC as a two-way process: understanding the peculiarities of the Kazakh teaching tradition and knowing what difficulties foreign students face in the two regions of the Republic of Kazakhstan (we) is combined with studying the basics of the main foreign teaching traditions (those that are most represented by foreign students in the Republic of Kazakhstan) and how to use strengths These traditions are in the multicultural audience in the Republic of Kazakhstan (they).

Task 2)-3) Based on the conclusions obtained by completing task number 1, to conduct a comparative analysis of legislation and policy documents in the field of higher education, as well as educational standards in the Republic of Kazakhstan, on the one hand, and in Finland and Norway, on the other hand. 3) To test the possibility of applying the best practices of Finland and Norway studied during task number 2 in the conditions of the Kazakh higher school.

Methods and approaches. The leading method is comparative law. The choice of jurisdictions for comparative analysis is based on the technique of comparing the (own) national system and the best practices of other states in order to improve national practice. The comparison with the two mentioned Scandinavian countries is due precisely to the presence of effective practices in the field of teaching foreign students, which is reflected in the results of educational activities: Finland places the largest percentage of foreign students in OECD countries (Finland, Statistics on foreign degree students, 2018), and Norway is an example of a country where foreign students leave some of the best reviews about educational exchanges (DIKU, 2019: https://khrono.no).

Task 4) To prepare a package of scientifically based amendments to the current legislation and educational standards of the Republic of Kazakhstan in the field of higher education.

Methods and approaches. The main method is the method of textual analysis of documents and sources, and the development of proposals to consolidate the need to train the MCC of university teachers.

Task 5)-6). To collect up-to-date factual firsthand data on the urgent needs and problems in the educational process in the intercultural environment of universities from the point of view of all participants in this process: foreign students, teachers, em-

ployees of international departments of universities in Almaty and Turkestan.

Methods and approaches. Due to differences in the compositional structure and the number of foreign students in these locations, differences in cultural and educational traditions, the needs may differ significantly. The collection of material is carried out by the method of semi-structured interviews in focus groups among interested actors. The obtained data are analyzed by the method of qualitative discursive analysis of the problems that the participants of the educational process face in cross-cultural situations.

Task 7)-8) Based on the new information received about gaps in regulatory regulation and the locally determined needs of participants in the educational process in the two regions, to develop a training module called "Intercultural competence in higher education: potential and prospects for expansion" and a collection of operational materials for the module. As well as conducting the module "Intercultural competence in higher education: potential and prospects for expansion" with the involvement of invited lecturers from among the above-mentioned collaborators.

Methods and approaches. The specified module can be, with certain modifications, about which we will prepare the appropriate guide, used in various higher education programs that prepare specialists to work in an intercultural environment. In order to provide the most relevant and meeting the real needs of specialists in the workplace content of the module, its development is carried out on the basis of collaborative design (Deketelaere & Kelchtermans, 1996: 75). This method boils down to the active involvement of participants and subjects of the educational process, as well as partners from sectors related to education, who also work in an intercultural environment, in planning the structure and content of the module. Collaborators (teachers, foreign students, employees of International departments of universities, representatives of public authorities and public associations) will be involved at all stages of module development: from drawing up the module program, selecting educational literature, to developing plans for a specific lecture and determining assessment methods. They will be invited to comment and discuss the creation of the module throughout the development process of the latter.

Task 9) To develop a system for assessing progress in the expansion of the ICC after completing the module "Intercultural competence in higher education: potential and prospects for expansion".

Methods and approaches. This task has no less scientific and practical potential than the development of a module on MCC that meets local needs in a collaborative format, because authoritative international scientists in the field of IWC have identified an urgent need to improve the methods of assessment and measurement of IWC: "in professional fields that have adopted an implicit commandment about the need to own a strong IWC, and where employers need effective methods to recognize how successfully hired employees will work in situations of intercultural contact, it is time to take active and systematic Actions to develop an adequate assessment tool for the ICC" (Sercu, 2004: 73-89). Since the affective component of the MCC – personality traits and attitudes – is the most difficult to assess, we will focus on assessing progress in the cognitive components of the MCC, namely in assessing 1. the acquired specialized knowledge and 2. possession of the optimal didactic and communicative strategies of the participants of our training in the form of the MCC training module.

Task 10) To make the results of our research transferable to various higher education programs.

Methods and approaches. Portability is ensured by creating a collection of manuals and explanations containing approximate explanations on how to adapt the results obtained for use in other disciplines and programs. This is achieved by developing a web portal with operational materials (lecture plans, video interviews, handouts, etc.) for conducting studies on the ICC, the content of which, with certain modifications, can be used in other regions of the Republic of Kazakhstan, as well as when teaching other disciplines besides law and when teaching at other levels of education.

4) methods of collecting primary (source) information, its sources and application for solving project tasks, methods of data processing, as well as ensuring their reliability and reproducibility.

The project works with several sets of primary data.

Category 1. Official sources and documents. The team receives this data from open sources, systematizes and stores it on protected sources in text form. The data is processed without the use of software. Data analysis takes place by dividing the data content into analytical categories, according to the above approaches and theoretical principles.

Category 2. New data obtained through interviews in focus groups. The team receives this data from interviews, before which participants are informed about the goals, objectives and methods of research, and sign a consent form. Responses are

recorded in audio format. For processing, the responses are decrypted, encoded. The results are processed using the InVivo data processing program, which allows you to identify common topics from the available interview data and conduct a language analysis of the expressions used by the interview participants. Primary and processed data is stored on secure sources.

The main part

In pursuits of the goal to increase the international competitiveness of Kazakhstan's higher education, the ability of teachers to effectively communicate across the cultures, known as intercultural communicative competence-ICC, becomes a peripheral component across various factors contributing in the process of reaching this goal. Thus, our project aims to design an ICC training for university teachers and staff in direct response to the local needs and demands from our two regions, Almaty and Turkestan, while our self-reflexive methodology and flexible operational materials will furnish a model that is transferable to other programmes across Kazakhstan and, probably also beyond. This will be done through the analysis and systematizing theoretical, legal, and methodological foundations of ICC – which Kazakhstan's scholarship is not as yet substantially equipped with. Our studies meet the call for more qualified university teacher equipped to effectively deal with the new socio-pedagogical tasks which the enhancement of international academic and educational connections of Kazakhstan bring with it vis-à-vis the modern societal challenges related to post-pandemic realities or political and social unrest.

The key tenet of our project is the emphasis on the urgency of strengthening the ICC of the university teachers and staff, as well as the law students who are expected to work in a multicultural environment in the future. This project differs from the significant amount of similar initiatives as it, firstly, aims at elaborating the ICC progress assessment tool. Secondly, it keeps up with the collaborative approach in staff training: research and approbation of results take place in close cooperation with key local actors and stakeholders, those being university teachers, university language teachers, university staff working with foreign and exchange students, and the community representatives (NGOs and foreign and exchange students themselves) in two regions of Kazakhstan. These regions are Almaty City with predominantly Russian-speaking population and Turkestan City the inhabitants of which are Kazakh-speaking. Such collaborative approach allows us to design ICC training model in direct response to the local needs and demands from our study regions in Kazakhstan, while our self-reflexive methodology and flexible operational materials will furnish a model that is transferable to other educational programmes Kazakhstan, as well as those serving teachers and staff working at various levels from professional to adult education.

The project will bring both, short-term and long-term deliverables and changes.

Immediate short-term results are the following:

Better equipping future and acting teachers and the university staff for their modern multilingual classrooms, producing a cohort of professionals who are demonstrably trained in work-relevant ICC.

Positioning al-Farabi University to offer-to-offer ICC study modules that are relevant for local conditions and to offer educational programs, accounting both, the achievements of international scholarship and local needs and realities.

Providing other education programmes with an operational guidebook to replicate the successful aspects of our ICC training while adapting it to their own local contexts, community needs, and workplace demands.

Generating new primary data, meta-data, and research databased on focus-group interviews with the stakeholders.

Producing transferable and flexible materials, freely available to other universities through our project website and directly distributed to study programme leaders across Kazakhstan.

Preparing an analytical report on the strengths, weaknesses and the possibilities for enhancing transferability of our ICC training model for other disciplines than law and in other levels of education.

Devising an elaborate "road map" of various models and support schemes for expanding the teacher ICC in two regions of the Republic of Kazakhstan.

Over the long term, our results will contribute to both social cohesion in Almaty and Turkestan (and throughout Kazakhstan more broadly) and to research-based knowledge on collaborative ICC training design and assessment, in particular via.

Incorporating our methods for working with local partners as model for other collaborative projects, not only in Kazakhstan but abroad.

Using the ICC progress assessment tool by various stakeholders, including students, educators, and employers.

Training university teachers with the topical ICC-related knowledge and skills which will con-

tribute in enhancing the welfare of foreign and exchange students, raise of the efficiency of educational process in a multicultural environment, and possibly deterring the problem of staff burnout and ultimately leading to the rising prestige of Kazakhstan's education in the eyes of foreign students.

Preparation of students, teachers and university staff for effective work in an intercultural audience with the help of the MKK module; we will create a cohort of professionals who have received relevant training in the field of MKK.

An opportunity for partner universities to offer a module that is relevant in the conditions of the Almaty region, and on its basis educational programs that take into account equally both the achievements of international scientific thought and local needs and realities.

The program and methodological support for the module on the ICC for teachers and university staff, as well as students, focused on meeting the local needs for an effective ICC of all participants in the educational process in Almaty and Turkestan in an intercultural environment, covering the problems identified in the legal regulation in the field of education and the ICC.

Obtaining new research data by conducting interviews among all interested actors.

Development of transferable and flexible teaching materials for the MCC module, which will be available free of charge to other universities through the website of our project, which will provide other universities with operational guidance in order to reproduce the most successful aspects of our MCC training, adapting to their own local context and the needs of local communities.

An analytical report on the strengths and weaknesses and on the possibilities of its transferability for teaching other disciplines besides legal ones and, possibly, at other levels of education.

Guidelines for the modification of the MCC training module in relation to various educational programs.

The developed "roadmap", which includes models of support and development of schemes for expanding the MCC of teachers in two regions of the Republic of Kazakhstan.

In the long term, the results of research on the project will contribute to strengthening diversity in the universities of the two regions of the Republic of Kazakhstan (and possibly throughout the Republic of Kazakhstan).

The rooting of the research-based method and practice of collaborative design of modules, programs and courses.

Implementation of the author's assessment tools of the MCC.

Training of higher school teaching staff with the best up-to-date knowledge in the field of MC, which will improve the well-being of foreign students, rationalize the educational process in a multilingual environment, possibly preventing the problem of staff burnout, and thereby contributing to increasing the prestige of Kazakhstani universities among foreign students.

The potential use of verified methods of involving representatives of local communities, in particular, proven methods of involvement in the design of modules, programs and courses in other scientific projects, not only in Kazakhstan, but also abroad.

The use of the ICC assessment tool by various stakeholders, including student educators, teachers, as well as employers. In the latter case, this assessment tool will help to link education more closely with the workplace – not only in universities, but also outside the field of education.

Conclusion

The research will bring both short-term and long-term results and changes.

Immediate short-term results are the following:

Better equipping future and acting teachers and the university staff for their modern multilingual classrooms, producing a cohort of professionals who are demonstrably trained in work-relevant ICC.

Positioning both partner universities in Almaty and in Turkestan to offer to offer ICC study modules that are relevant for local conditions and also to offer educational programs, accounting both, the achievements of international scholarship and local needs and realities.

Providing other education programmes with an operational guidebook to replicate the successful aspects of our ICC training while adapting it to their own local contexts, community needs, and workplace demands.

Generating new primary data, meta-data, and research data based on focus-group interviews with the stakeholders.

Producing transferable and flexible materials, freely available to other universities through our project website and directly distributed to study programme leaders across Kazakhstan.

Preparing an analytical report on the strengths, weaknesses and the possibilities for enhancing transferability of our ICC training model for other disciplines than law and in other levels of education

Devising an elaborate “road map” of various models and support schemes for expanding the teacher ICC in two regions of the Republic of Kazakhstan.

Providing a report on the strengths, weaknesses, possible revisions, and potential applications of the course module.

Developing a report on the deliverable is a report on the possibilities for its transferability in other disciplines than law and in other levels of education.

Developing an ICC progress assessment toolkit.

Over **the long term**, our results will contribute to both social cohesion in Almaty and Turkestan (and throughout Kazakhstan more broadly) and to research-based knowledge on collaborative ICC training design and assessment, in particular via

Incorporating our methods for working with local partners as model for other collaborative projects, not only in Kazakhstan but abroad.

Using the ICC progress assessment tool by various stakeholders, including students, educators, and employers.

Training university teachers with the topical ICC-related knowledge and skills which will contribute in enhancing the welfare of foreign and exchange students, raise of the efficiency of educational process in a multicultural environment, and possibly deterring the problem of staff burnout and ultimately leading to the rising prestige of Kazakhstan’s education in the eyes of the foreign students.

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Литература

Ali, M., & Johns, S. (2018, December). Compassion fatigue and self-care for academic advisors. Academic Advising Today. – 41(4). // https://nacada.ksu.edu/Resources/Academic-Advising-Today/View-Articles/Compassion-Fatigue-and-Self-Care-for-Academic-Advisors.aspx

Амирова Б., Сафаев Н., Мадиева Г., Риверс У., Сейметова Дж. (2016) Межкультурная коммуникация: учебно-методическое пособие / Г. Мадиева, У. Риверс, Дж. Сейметова (ред.). – Алматы: Казак университеті, – 96 с.

Goth, U.S. & Kjelsvik, B. Likeverdighet, fordommer og inkludering: Interkulturell kompetanse i en pedagogisk sammenheng. // https://nla.brage.unit.no/nla-xmlui/handle/11250/2732566

I Hagesæther, G., Innerdal, G. & Kvam, B. (Red.), NLA Høgskolen. Fagutvikling og sjølvforståing på kristen grunn (s. 245–268). Oslo: Cappelen Damm Akademisk. – 2020. https://www.cappelendammundervisning.no/_nla-hogskolen-fagutvikling-og-sjolvforstaing-pa-kristen-grunn-9788202686536

Charles, H., & Stewart, M. A. Academic advising of international students // Journal of Multicultural Counseling & Development. – 1991. – 19(4). – 173–181. https://doi.org/10.1002/j.2161-1912.1991.tb00554.x

Deardorff, D. (2011) Exploring a Framework for Interculturally Competent Teaching in Diverse Classrooms. Internationalization of European Higher Education Handbook. – Berlin: Raabe Academic Publishers, 2011. – Pp. 1-18.

Deardorff, D.& Jones, E. Intercultural competence: An emerging focus in international higher education. The SAGE Handbook of International Higher Education. 2012. // https://sk.sagepub.com/reference/hdbk_interntlhighereducation/n16.xml

Постановление Правительства Казахстана от 12 октября 2021 года № 726 «Об утверждении национального проекта «Качественное образование «Образованная нация»»// https://adilet.zan.kz/rus/docs/P2100000726#z5 .

Deketelaere, A. & Kelchtermans, G. Collaborative Curriculum Development: an encounter of different professional knowledge systems. Teachers and Teaching. – 2:1, 1996. – Pp. 71-85.

DIKU. International Students in Norway Contributors to Quality in Higher Education, https://khrono.no/files/2019/11/12/International_Students_in_Norway.pdf. 2019

Griffith, R. L., Wolfeld, L., Armon, B. K., Rios, J., & Liu, O. L. (2016). Assessing intercultural competence in higher education: Existing research and future directions (Research Report No. RR-16-25). Princeton, NJ: Educational Testing Service // https://onlinelibrary.wiley.com/doi/full/10.1002/ets2.12112

Hanssen, N. B. Preschool staff relationships with children with language difficulties: A comparative study in Belarusian and Norwegian preschools. European Journal of Special Needs Education. – 2017. – 33(3). – Pp. 1–16.

Kazakhstan’s Independent Agency for Quality Assurance in Education, 2021, Higher Education in Kazakhstan // https://iqaa.kz/vysshee-obrazovanie/vysshee-obrazovanie-v-kazakhstane.

Lee, A. Teaching Interculturally: A Framework for Integrating Disciplinary Knowledge and Intercultural Development. Stylus Publishing, Llc. – 2017. – 137 p. ebook

OECD Education at a Glance 2019, at https://doi.org/10.1787/f8d7880d-en// https://www.oecd-ilibrary.org/education/education-at-a-glance-2019_f8d7880d-en, 2019.

Otten, M. Intercultural Learning and Diversity in Higher Education. Journal of Studies in International Education. – 2003. – Pp. 153-165.

Riekkinen, M. International Developments 2016: Economic, Social, and Cultural Life, Including Education and the Media, in the Context of European Minorities and from the Perspective of International Law, European Yearbook of Minority Issues. – 2018. – 1(15). – Pp. 51-89.

Rosnes, E.V. & Rossland, B.L. Interculturally competent teachers in the diverse Norwegian educational setting. Multicultural Education Review. – 2018. – 10 (4). – Pp. 274–291.

Sercu, L. Assessing intercultural competence: A framework for systematic test development in foreign language education and beyond. Intercultural Education. – 2004. – 15(1). – Pp. 73-89.

Tarchi, C. & Surian, A. Promoting intercultural competence in study abroad students. European Journal of Psychology of Education // https://www.researchgate.net/publication/350931174_Promoting_intercultural_competence_in_study_abroad_students, 2021

University of Oslo, Rules for practising the requirement for basic university pedagogical competence at UiO, at: https://www.uio.no/english/about/regulations/personnel/academic/rules-basic-pedagogical-competence.html#toc1

References

Ali, M., & Johns, S. (2018, December). Compassion fatigue and self-care for academic advisors. Academic Advising Today, 41(4). // https://nacada.ksu.edu/Resources/Academic-Advising-Today/View-Articles/Compassion-Fatigue-and-Self-Care-for-Academic-Advisors.aspx

Amirova, B., Safaev, N., Madieva, G., Rivers, U., Seimetova, J. (2016) Mezhkulturnaia kommnikatsiia: uchebno-metodicheskoe posobie/ G. Madieva, U. Rivers, J. Seimetova (Eds.). [Intercultural communication: an educational and methodological guide] – Almaty: Kazak universiteti, 96 p.

Goth, U.S. & Kjelsvik, B. Likeverdighet, fordommer og inkludering: Interkulturell kompetanse i en pedagogisk sammenheng. // https://nla.brage.unit.no/nla-xmlui/handle/11250/2732566

I Hagesæther, G., Innerdal, G. & Kvam, B. (Red.), NLA Høgskolen. Fagutvikling og sjølvforståing på kristen grunn (s. 245–268). Oslo: Cappelen Damm Akademisk. – 2020. https://www.cappelendammundervisning.no/_nla-hogskolen-fagutvikling-og-sjolvforstaing-pa-kristen-grunn-9788202686536

Charles, H., & Stewart, M. A. Academic advising of international students // Journal of Multicultural Counseling & Development, 1991. – 19(4), 173–181. https://doi.org/10.1002/j.2161-1912.1991.tb00554.x

Deardorff, D. (2011) Exploring a Framework for Interculturally Competent Teaching in Diverse Classrooms. Internationalization of European Higher Education Handbook. – Berlin: Raabe Academic Publishers. – 2011– 1-18.

Deardorff, D.& Jones, E. Intercultural competence: An emerging focus in international higher education. The SAGE Handbook of International Higher Education. 2012. // https://sk.sagepub.com/reference/hdbk_interntlhighereducation/n16.xml

Decree of the Government of Kzakhstan of 12 October 2021 No. 726 ”Ob utverzhdenii nacional’nogo proekta “Kachestvennoe obrazovanie “Obrazovannaja nacija.” // https://adilet.zan.kz/rus/docs/P2100000726#z5.

Deketelaere, A. & Kelchtermans, G. Collaborative Curriculum Development: an encounter of different professional knowledge systems. Teachers and Teaching, 2:1, 1996. – 71-85.

DIKU. International Students in Norway Contributors to Quality in Higher Education, https://khrono.no/files/2019/11/12/International_Students_in_Norway.pdf. 2019

Griffith, R. L., Wolfeld, L., Armon, B. K., Rios, J., & Liu, O. L. (2016). Assessing intercultural competence in higher education: Existing research and future directions(Research Report No. RR-16-25). Princeton, NJ: Educational Testing Service // https://onlinelibrary.wiley.com/doi/full/10.1002/ets2.12112

Hanssen, N. B. Preschool staff relationships with children with language difficulties: A comparative study in Belarusian and Norwegian preschools. European Journal of Special Needs Education, 2017. – 33(3), 1–16.

Kazakhstan’s Independent Agency for Quality Assurance in Education, 2021, Higher Education in Kazakhstan // https://iqaa.kz/vysshee-obrazovanie/vysshee-obrazovanie-v-kazakhstane.

Lee, A. Teaching Interculturally: A Framework for Integrating Disciplinary Knowledge and Intercultural Development. Stylus Publishing, Llc. – 2017. – 137 p. ebook

OECD Education at a Glance 2019, at https://doi.org/10.1787/f8d7880d-en// https://www.oecd-ilibrary.org/education/education-at-a-glance-2019_f8d7880d-en, 2019

Otten, M. Intercultural Learning and Diversity in Higher Education. Journal of Studies in International Education. – 2003. -153-165.

Riekkinen, M. International Developments 2016: Economic, Social, and Cultural Life, Including Education and the Media, in the Context of European Minorities and from the Perspective of International Law, European Yearbook of Minority Issues, 2018, 1(15), 51-89.

Rosnes, E.V. & Rossland, B.L. Interculturally competent teachers in the diverse Norwegian educational setting. Multicultural Education Review, 2018.- 10 (4), 274–291.

Sercu, L. Assessing intercultural competence: A framework for systematic test development in foreign language education and beyond. Intercultural Education. – 2004. -15(1). – 73-89.

Tarchi,C. & Surian, A. Promoting intercultural competence in study abroad students. European Journal of Psychology of Education // https://www.researchgate.net/publication/350931174_Promoting_intercultural_competence_in_study_abroad_students, 2021

University of Oslo, Rules for practising the requirement for basic university pedagogical competence at UiO, at: https://www.uio.no/english/about/regulations/personnel/academic/rules-basic-pedagogical-competence.html#toc1

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RESEARCH ON THE CONCEPT "RESTORATION" OF THE TESTORATIVE JUSTICE

Restorative justice, which originated in the 1970s, has been applied to various crime response systems worldwide. The judicial practice of foreign countries has proved that the restorative judicial system has the benign value of complementing the traditional criminal justice system, which has the disadvantages of diluting the interests of victims and the stability of the community, failing to prevent crimes, and not conducive to helping the offender to return to society. Restoration is the precondition of restorative justice, so implantation of restorative justice must correctly understand the leading concept of restoration. This paper conducts inspections on "restoration" from three dimensions. First, in the existential dimension, this paper did research on the etymological interpretation of "restoration of restorative judicial" and its meaning in historical evolution, and proposed that the concept of "restoration" must include efficiency and economic content; secondly, in the normative dimension, this paper explained the two-dimensional structure of the internal time dimension and participation dimension of the concept of "restoration"; finally, in the value dimension, this paper deconstructed the internal oppositional elements of the concept of "restoration", and pointed out the trend of elimination of barriers among the elements inside the concept of "restoration".

Key words: restoration; two-dimensional structure; various elements; deconstruction.

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Қалпына келтіру сот төрелігі шеңберіндегі «қалпына келтіру» ұғымын зерттеу

1970 жылдары пайда болған қалпына келтіру әділеттілігі бүкіл әлемдегі қылмысқа қарсы әрекет етудің әртүрлі жүйелеріне қолданылды. Шет елдердің сот практикасы қалпына келтіретін сот жүйесінің пайдалы құндылығы бар екенін дәлелдеді, дәстүрлі қылмыстық сот төрелігі жүйесін толықтырды, оның кемшіліктері құрбандардың мүдделері мен қоғамның тұрақтылығын бұлыңғырлау, қылмыстардың алдын алу мүмкін еместігі және құқық бұзушының қоғамға оралуына ықпал етпейді. Қалпына келтіру қалпына келтіру әділеттілігінің алғышарты болып табылады, сондықтан қалпына келтіру әділеттілігін енгізу қалпына келтірудің жетекші тұжырымдамасын дұрыс түсінуі керек. Бұл мақалада «қалпына келтіру» тексерулері үш өлшемде жүргізіледі. Біріншіден, экзистенциалды өлшемде бұл мақалада «қалпына келтіретін сот төрелігін қалпына келтіру» этимологиялық түсіндірмесі және оның тарихи эволюциядағы маңызы зерттелді және «қалпына келтіру» ұғымы тиімділік пен экономикалық мазмұнды қамтуы керек деп ұсынылды; екіншіден, нормативтік өлшемде бұл мақала ішкі уақытты өлшеудің екі өлшемді құрылымын және «қалпына келтіру» тұжырымдамасының қатысуын өлшеуді түсіндірді; ақырында, құндылық өлшемінде бұл мақала «қалпына келтіру» тұжырымдамасының ішкі оппозициялық элементтерін деконструкциялады және «қалпына келтіру» тұжырымдамасындағы элементтер арасындағы кедергілерді жою тенденциясын көрсетті.

Түйін сөздер: қалпына келтіру, екі өлшемді құрылым, әртүрлі элементтер, деконструкция.

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Исследование понятия «восстановление» в рамках восстановительного правосудия

Восстановительное правосудие, зародившееся в 1970-х годах, применялось к различным системам реагирования на преступления по всему миру. Судебная практика зарубежных стран доказала, что восстановительная судебная система имеет благотворную ценность, дополняя

традиционную систему уголовного правосудия, недостатки которой заключаются в размывании интересов жертв и стабильности общества, неспособности предотвращать преступления и возвращать правонарушителя в общество. Восстановление является предварительным условием восстановительного правосудия, поэтому необходимо восстановительного правосудия должно правильно понимать ведущую концепцию восстановления и следовать ей. В данной статье проверки на «восстановление» проводятся в трех измерениях. Во-первых, в экзистенциальном измерении в данной статье рассматривается этимологическое толкование «восстановительного правосудия» и его значение в исторической эволюции, и предлагается, чтобы понятие «восстановление» включало в себя действенность и экономическое содержание; во-вторых, в нормативном измерении в этой статье объяснялась двумерная структура измерения внутреннего времени и измерение участия понятия «восстановление». Наконец, в ценностном измерении данная статья деконструировала внутренние оппозиционные элементы понятия «реставрация» и показала тенденцию к снятию барьеров между элементами в понятии «реставрация».

Ключевые слова: реставрация, двумерная структура, различные элементы, деконструкция.

Introduction

«The current criminal justice system is a huge machine, devouring and spitting out a large number of people. These people take turns losing their lives, honor, sense of morality and health. As a result, they leave indelible wounds...» (Fili 2004) From Ferri’s pessimistic statement, we see that the traditional criminal justice system, which is centered on criminal behavior, utilitarian pursues the balance of crime and punishment, and ignores the problem of the offender’s resocialization. The increasing number of crimes, especially recidivists, shows that the traditional criminal justice system is not only unable to prevent crimes effectively, but with the increase in the number of cases, judicial costs have increased year by year, but with little effect... The self-denial nature of the traditional criminal justice system makes legal scholars had to turn their attention from state-based «retributionism» to individual-based «social relationship restoration». As a result, restorative justice, which centers on the victim, emphasizes social participation and re-socialization of the offender, came into being. However, legal scholars have different opinions on the definition of restorative justice, and even the concept of restorative justice has never been uniformly defined. This has caused confusion in the further development of restorative justice in theory and practice. In order to promote the prosperity of legal theory, it is necessary to clarify the «restoration» of restorative justice.

Etymological interpretation of restoration of restorative justice and its meaning in historical evolution

Etymological interpretation of «restoration»

The concept of Restorative Justice, which was considered a utopian concept in the early days, was first proposed by American scholar Barnett in the article «Compensation: A New Paradigm in Criminal Justice». From the perspective of etymology, there are at least two specific elements that constrain each other within the concept of restorative justice: the «restoration» element and the «justice» element. Both of two elements have very rich space for free interpretation, and thus also increasing the difficulty of definition of «restorative justice». The concept of «restorative justice» is a compound word. Xu Zhier pointed out: «In the compound words that restricts the relationship, the restricted is the basic word, expressing the basic characteristics and basic meaning of the whole word» (Zhier 1997) Restorative justice also belongs to this category. Since «restorative justice is produced in contrast to retributive justice», the fundamental meaning of the concept of justice in «restorative justice» will not change, and the change can only take place in concept and operating process of «restorative»-Restore social relations damaged by crime-therefore, the focus of the prejudiced concept of «restorative justice» must be on «restoration». The concept «restoration» in «restorative justice» is the cornerstone of the whole concept, so only by first solving the question of what is «restoration» can we further explore what is «restorative justice».

After the word «Restorative Justice» was introduced into China, there were two translation methods. Because «Restorative justice», which was abstracted by Barnett through mediation experiments on early American victims and perpetrators, is a rational, positive, and reintegrative judicial system. Its goal is to make up the interpersonal and social relationship damaged by crime. Moreover, interpersonal and social relations is abstract concept, and it is difficult to determine and implement the standards of restoration – for example, the ancient motto «it’s hard to restore a broken mirror» provides empirical evidence. Re-

storative justice is committed to the reconstruction of interpersonal and social relations. «It is a kind of transcendence, not a simple restoration. Simple restoration of the relationship does not help, because it is this abnormal relationship that caused the crime» (Xiaoming 2007) Therefore, the most appropriate translation method for «restorative» should be «xiufu».

The meaning of «restoration» in different definitions of restorative justice

In the world, there are few discussions on the concept of «restoration», so this paper tries to summarize the meaning of «restoration» from the definition of the concept of «restorative justice» by different scholars. The concept of «restorative justice» is quite flexible. The most influential definition in the international arena was proposed by Marshall. Marshall pointed out: «Restorative justice is a process in which all parties involved in a specific violation gather to deal with and resolve the current consequences of the violation and its future impact» (Marshall 1999).

Marshall focused the content of restoration on four aspects: related parties, solution and handling, consequence and future impact. We can summarize the following types of information from Marshall's definition:

1. A crime is damage to the individual victim by the offender, or damage to related personnel and order in the community;

2. The status of the victim has been greatly improved, and he can participate in the judicial process throughout the entire process and become the core of the judicial process;

3. Both the community and the victim are indispensable elements in the judicial process, and the progress of restorative justice is controlled by the victim, the community and the offender;

4. Although the victim is the core of the judicial process, the offender and the community are all participants and both enjoy equal status;

5. The offender must take responsibility for the victim and the community, and be forgiven by the victim and the community;

6. Pay attention to the community return of criminals and the restoration of community stability and order.

It can be seen from Marshall's definition of restorative justice that its «restoration» is mainly carried out from three dimensions: offenders, victims, and communities:

1. to restore the personality of the offender;

2. to restore the victim's property, dignity, and mental damage;

3. to restore the stability of community order and legal order. The issuer of the restoration is the criminal, the community, and the country; the method of restoration is to assume responsibility; the content of the restoration includes property, dignity, personality, spirit, legal order, social relation and other damage caused by crime. Therefore, the meaning of Marshall's «restoration» can be understood as «full, gentle, and integrated restoration».

The definition of «Restorative Justice» by Chinese scholars is also relatively flexible, and even the translation method is in debate. However, the normative effect of the law comes from the normative and restrictive nature of the behavior requirements or standards by which the behavior of people is measured, so it must be accurate. Even though «legal language cannot achieve the accuracy of symbolic language» (Zheng 2017), it cannot be independent of general language and flexible like some other academic languages, but the limitations of language itself cannot be a reason for refusing to find a corrective judicial definition. «It doesn't matter what 'restorative justice' is, under what circumstances, in what scope, and in what way» (Larenz 2004: 200), but blindly interprets its philosophy and specific implementation methods based on legal doctrine, thus it falls into the Kant's criticism: «purely rational dogmatic process without first criticizing one's own abilities».

The interpretation of the concept of restorative justice by Chinese scholars is scattered in the aspects of participating subjects, content, characteristics, and concepts. In terms of content and characteristics, Professor Chen Xiaoming pointed out: «Restorative justice is actually a response to crime on the basis of the victim as the center. The victims, offenders, their family members and community representatives are provided an opportunity to directly participate in response to the damage caused by the crime, and the content is more extensive... Restorative justice shifts the judicial purpose from abstract legal interests to specific victim protection; it increases the participation of victims and the attention to interests; it no longer pays attention to punishment but pays attention to responsibility and restoration; it has the characteristics of low operating cost.» (Xiaoming 2007: 12-13)

In terms of idea, Dr. Wu Lizhi believes that the concept of restorative justice mainly focuses on the following four aspects: «First, restoration is the core goal; second, reconciliation and mediation is encouraged; third, victim-oriented; fourth, justice communitization...can be summarized by...resposibility, restoration, and reintegration» (Zhili 2012: 38)

From the perspective of legal history, Dr. Zhiru Jiang pointed out that «love, confession, and tolerance» run through «community justice», «biblical justice» and «restorative justice» (Jiang 2020: 64-65) to supplement the concept of restorative justice. It can be seen that the definition of «restoration» by domestic and foreign scholars mainly focuses on three aspects: education and assistance of offenders; restoration of victims' injuries; and community participation. Therefore, according to the understanding of «restoration» by domestic scholars, «restoration» is «the correction and restoration of social relations involving the community».

Supplement to the meaning of restoration

The overall understanding of restorative justice by domestic and foreign scholars is supported by the following fulcrums: «meeting (the meeting of the offender, the victim, and the affected community), restoration (the offender's restoring the victim, the community and even himself), integration (the offender returns to the community as an active member), participation (the offender, the victim, and community members voluntarily participate in and achieve a meaningful and constructive process), and harmony (the transformation of individuals and the reconstruction of interpersonal relationships).» (Ness 1997) However, apart from professor Chen Xiaoming mentioning of «low operating costs» in the dimension of characteristics, the «efficiency and economy» of restoration is rarely mentioned. This paper believes that the «efficiency» and «economics» of «restoration» have been neglected intentionally or unintentionally by legal scholars. «Because in a certain sense, legislation and the inseparable judicial and law enforcement are an economic activity» (Posner 1992: 3-4), and economic activity is to seek the optimal allocation of social resources, so the judicial system within the framework of market economy must comply with the «principle of efficiency and economy».

This paper believes that the concept of «restoration» should have economic and efficiency content mainly due to the following two reasons. First of all, according to historical materialism, the market economy as the economic foundation determines that the judicial system as a superstructure should maintain the efficiency and economic, which is the principle of market economy; Secondly, the legal doctrine interpretation of legal concepts should be restricted by the original intention of the legislator. As Larenz pointed out: «Although the interpreter takes the purpose determined by the legislator in history as the starting point...In fact, it has surpassed the will of the legislator in history... Although judges can still adapt to the new situation and supplement the law according to the teleological interpretation or the continuation of the law, the legislator's intention to stipulate and the value decisions made for this purpose are still binding norms for the judge» (Larenz 2004: 207) Therefore, we must apply the concept of «restoration» to its historical background to gain insight into its original intent, because legislators or jurists cannot create laws or concepts beyond the historical background-«Law has always been a relatively conservative force in society, not a force for change.» (Li 2004: 7)

In America, «since the Marbury case, the Supreme Court has stepped towards the supremacy of justice... Whether it is President Jefferson, President Jackson or President Lincoln, they are opposed to the supremacy of justice... Even during the Roosevelt New Deal...» (Qiangshigong 2007: 270-277), all of them advocated the restriction of judicial expansion. At the same time, the «popular constitutionalism» of Becker and Erie also criticized the «counter-majoritian difficulty» of the supremacy of justice in the sense of legitimacy, stressed that the legitimacy of justice must be coordinated with democratic ideals. In the second half of the 20th century, popular democracy came, and American justice was subject to the popular democracy and high cost of confrontational judicial models. The reduction of judicial costs and the satisfaction of the public's demands for «judicial economy» are not only «public opinion», but also one kind of political right. At the same time, justice as an economic activity must also pay attention to the issue of efficiency. With the in-depth development of the market economy, the market economy's requirements for judicial «efficiency and economy» have also increased, coupled with the inefficiency of the traditional criminal justice system and the increasingly obvious difficulties of crime prevention, Barnett must consider the «efficiency and economy» content of the concept of «restoration» when he proposed the concept of «restorative justice».

In summary, based on the above analysis of the concept of «restoration» by domestic and foreign scholars, this paper believes that «restoration» should include the factor of «efficiency» in the interpretation of the concept of «restoration», that is, «restoration» is «efficient, community, specific correction and integration of social relations». Then, «restorative justice» should be defined as «restorative justice is a process by which all parties involved in a particular violation gather together to efficiently deal with and resolve the current consequences of the violation and its future impact»

Internal two-demensional structure of restoration

The interpretation of the concept of restorative justice in the legal field, especially the clarification of restoration is carried out at least in terms of scope, concept, method, object, participant, process, etc., there are divergent opinions, but no conclusion. Through the integration and induction of the concept of "restoration", firstly, we can find that "restoration" is a process. It is a continuation of time with time dimension content; secondly, the actions of "restoration" are issued by multiple parties, therefore, it has the content of participation dimension. According to the theoretical discussion of restorative justice and the experience of judicial practice, we can understand that in the time dimension, the content of restoration is a dual-track system, which includes the macro-time content and the micro-time content. In terms of participation, the content of "restorative" is divided into two levels: real part and imaginary part. The real part is the specific participant and way of participation, and the imaginary part is the value contained in the legal mechanism that guarantees participation.

Time connotation of restoration

The time content of the restoration is divided into a macro and micro dual-track structure. At the macro level, «restoration» is the precondition of restorative justice, and the concept of «restoration» runs through the entire restorative justice process. Article 6 of the United Nations «Basic Principles on the Use of Restorative Justice Programs in Criminal Matters» stipulates: «the restorative justice program can be applied at any stage of the criminal justice system, provided that it does not violate the laws of the country» It should be noted that, unlike traditional criminal justice, which aims to achieve «retribution» by imposing penalties on the offender, restoration does not end with the emergence of «restorative results» (Restorative results refer to agreements reached as a result of restorative procedures, which can include countermeasures such as compensation, restitution, and community services). The restoration covers all aspects of the crime, and even extends to the release stage. For example, «family group conferencing» in New Zealand can be conducted either before or after the trial, and it has become part of the police and pre-trial procedures in the United States and Australia. (Steven 2010: 303) In short, the «restoration» of the macro dimension is a ideal that runs through the judicial process.

At the micro level, the time content of restoration is divided into the past-oriented phase content and the future-oriented phase content. In the past-oriented stage, «restoration» aimed to «actively facilitate the offender, the victim, family members of both parties, and community members to jointly explore the cause of the crime» (Steven 2010: 303), and encourage the offender to take responsibility for the victim and the community to make up for the damage; In the future-oriented stage, the contents of restoration include the achievement of the interests of the victims, the maintenance of community order, and the reshaping of the offender's personality so that it can achieve resocialization. From this point of view, the restoration work dilutes the state from the relationship between crime and responsibility and focuses on the logic of «responsibility-restoration». This kind of «decriminalization» restoration work has also achieved good results in practice. «According to empirical investigations, many participants in the round table (a model of restorative justice) have reached an agreement. Numerous research results show that the settlement rate is as high as 80%. If part of the reconciliation is included, the ratio is more than 90%» (Aertsen 2008: 507-525)

The repair method allows a large number of crimes to be resolved in a moderate and effective manner, which not only saves litigation costs, but also prevents endless appeals due to differences in judgments.

The connotation of the time dimension of «restoration» can only be grasped as a whole through the description of the «dual track system». First of all, restoration is an active process rather than just an act. Some scholars have pointed out that «restorative justice focuses on what people do in the future, not what they did in the past» However, if «focusing on the future» is understood as focusing only on the future, it will undoubtedly violate the principle of responsibility. And the dual-track time content of the restoration is carried out at the same time, that is, the concept of «restoration» runs through at the macro level, but at the micro level, the focus of work of restoration changes from the past to the future, as Zehr said: "It is a changing Lens" (Zehr 1990: 133).

The real and imaginary parts of the participating dimensions of restoration

The content of restoration in the participation dimension is divided into real part and imaginary part. The real part is the specific participant and participation method; the imaginary part is the value content embodied by the participant and participation method. The difference in value orientation determines the differences in the participants and

participation methods of the real part. When the value orientation is more specific, there are more participants, and the methods are more equal and informal; on the contrary, the value orientation is more abstract, there are fewer participants, and the methods are more formalized.

Restorative justice requires that all parties involved in a specific violation participate equally and voluntarily in the crime handling process, and the handling results are obtained through negotiation and conversation. Participants include the offenders, the victims, the victims' family and relatives, the community, and other parties related to the violation and social loving people. The restoration mode is divided into three types according to the different amount of participants.

The first is the mediation mode. The mediation mode involves the participation of the victim, the offender and a mediator, and is divided into direct mediation and indirect mediation. Direct mediation refers to the way in which the offender and the victim communicate face-to-face, under the auspices of the mediator, to deal with and solve criminal problems; Indirect mediation is that the offender and the victim do not meet directly, but a middleman conveys the message, which aims to promote the parties to reach agreement on the information exchanged and achieve the effect of social relationship restoration.

However, there are only three participants in this mediation model. Although the procedure is relatively simple and economical, due to the lack of community participation, the damage to the community relationship caused by crime cannot be directly repaired. The absence of the community leads to the lack of social supervision, which is likely to cause the judicial organs to ignore the interests of the victim or the purpose of reshaping the offender's personality and unilaterally pursue the success rate of mediation. As a result, the failure to fully implement social justice may lead to frequent crimes, which is not desirable. And the mediation model aims to reach a reconciliation between the two parties on the results of the crime, and the mediators are mostly non-judicial persons and are «native» (hometown people speak the hometown dialect), and the results of mediation are often only reached a form of fairness between the victim and the offender. This fairness is quite abstract and involves fewer stakeholders, leaving a blank space for the protection of the interests of the community, offenders, and family members of the victim.

The second mode is the family group conferencing mode. «In the family group meeting mode, the victim, the perpetrator, and the family members of both parties are called to participate in the meeting, chaired by the coordinator, then the judicial organs state the facts of the crime, and confesses the offenders, who can also express their opinions on the statements made by the investigative agency, and the victims can also express their own opinions. The conference mainly focuses on crime-related issues, emotional damage, or compensation issues. In the end, all the participants negotiated on the issue of crime and compensation, and when they reached a consensus, the meeting ended» (Jun 2019: 23-29)

Compared with the mediation model, the participants of this model have increased the number of family members of both parties. Because the crime not only damages the victim's personal interests, but also causes mental injury to the victim's family and relatives, especially when the victim dies, the mental injury to the victim's family is permanent. Therefore, the participation of relatives of both parties in the meeting is more conducive to restoring the mental damage to the family members of both parties. However, the family meeting group model lacks the participation of community members like the mediation model, so the dilemma faced by the family group meeting model is similar to that of the mediation model.

The third mode is the round table conference mode. «There are more participants in the round table conference mode than in the family group conference mode. Not only the family, but also their relatives and friends, community members, or social members interested in the case can join in to negotiate a rectify plan. All the members form a circle. First, the offender explains the course of the case, and then the victim or his family members states the harm and impact that he and his family have suffered as a result of the crime. Then every member of the round table expresses the views they want to express, and finally a mediator will summarize and mediate unanimously in response to the victim's request» (Yanfeng 2014: 41-44)

The participants in this mediation model are the most extensive. Although it is slightly more difficult for the participants to reach an agreement than the previous two models, multi-party participation is conducive to satisfying relevant interests in the largest range. The interests of the victim, the interests of the community, the interests of the victims' family members and other specific interests can be reached through negotiation and conversation, not only the criminal justice can be achieved through the way, in which the offender assumes responsibility, but the specific demands of all parties involved can be met, and specific justice can also be achieved.

From this we can draw the conclusion that the content of the restoration in participation dimension-value and participation-is in an inverse relationship. The fewer participants in «restoration/rectify», the more abstract the justice obtained, and the harder it is to take into account the specific interests of the relevant individuals. For example, in the process of restoring the results of criminal violations in traditional criminal justice, the participants are mainly the prosecutorial agencies and courts which represent the country, as well as the criminals, and the victims often appear in court as witnesses. The judiciary imposes penalties equivalent to the «quantity» and «quality» of the criminal act on the offender in order to achieve social justice. This state-based ideal of punishment of retribution abstracts the interests of the victims as a member of the intangible overall interests and marginalizes it, ignoring the interests of the victim, and at the same time, it is difficult to take into account the demands of the community and stakeholders; When there are more participants in the restoration/rectify, the more specific justice is obtained. For example, when the restoration is carried out in a «round table mode», first of all, the victims can realize their expected benefits through negotiation and mediation, including compensation of material damage and mental damage caused by crime; Secondly, the offender rebuilds a healthy personality through the help of the community and caring people, psychological counseling, skills training, and the reconstruction of interpersonal relations; Thirdly, the community proposes and realizes its own interests, and at the same time supervises the criminals' restorative actions, enhances mutual trust with the criminals, and helps them to better return to the community; Finally, social people participate in the restorative process and supervise the restorative behavior of the offender, that can meet the needs of social justice. From victims, offenders, communities to the entire legal order, specific interests or specific justice can almost all be satisfied through restoration. This not only promotes public safety, but also achieves broader social justice.

This paper borrows the coordinate axis in mathematics, and expresses the content of the restoration in time dimension and participating dimension.

Deconstruction of internal elements of restoration

Through the layer-by-layer analysis of the content of the restoration concept, we can see that the various elements in the restoration: «past-future», «punishment-rectify», «victim-state», «abstract justice-concrete justice», «social control-state authority». Over the past ten years since the introduction of restorative justice to China, most scholars have admitted that internal elements of restoration has achieved a balanced and pluralistic trend among opposing elements. «The exploration of various positions that exist at the same time but conflict with each other, and the resolution of the dual opposition, are in line with the so-called deconstruction of modern philosophy.» (Huegli 1991: 134) Therefore, the in-depth process of restoration research is also a process of deconstructing the concept of «restoration», and in this process, dissolving the barriers of opposing elements. Looking at the historical evolution of the concept of «restoration», it can be seen that the controversy over the nature of «restoration» from beginning to end is actually a dispute of opposing positions among a number of basic elements. These basic positions can be attributed to the opposition among «prejudiced emphasis-both emphasis», «state (authority)-society (rights)», and «behaviorism-behavioral humanism».

The resolution of opposition in oddender's dimension

In the past-oriented dimension, traditional criminal justice scholars who adhere to the state (authoritative)/prejudiced emphasis/behaviorist position believe that crime is a violation of rules. The criminal justice system is a system design that appeals to the national judicial organs to impose criminal penalties or security sanctions for illegal and responsible acts. Regarding the issue of crimes, classical criminal law scholars believe that judicial organs impose penalties equivalent to the «quantity» and «quality» of criminal acts on criminals in order to achieve social justice. Restoration (penalties) protects the authority of the country-«Any acts committed in bad faith shall be treated as retributive sanctions (Binding)». The traditional criminal justice system is behaviorist/state (authoritative)/ prejudiced emphasis on punishment in «restoration»; In the future-oriented dimension, classical criminal law scholars are influenced by positivist and believe that the punishment of offenders should be based on the potentiality of offence derived from social factors, through punishment (deprivation of personal freedom of offenders) and correction (implementation of labor education), in order to achieve the purpose of crime prevention and maintenance of national law and order. In its context, first of all, the restoration of criminals is

national (authoritative); secondly, it is punitive, because the «deprivation function and deterrence function of punishment are the prerequisites of the education and correction function» (Mingxuan 2008: 123-124), which is the most important means to remove the criminal’s potentiality of offence. State (authority)/behaviorist/prejudiced emphasis position pointed out:

1. Restoration of restorative justice “due to the adoption of a de-formalized trial mode, the use of extensive discretion... may cause the consequences of infringement of human rights... insufficient legal protection” (Xuemin 2020: 87);

2. Emphasize the leading role of individuals and communities in handling cases – “overly rely on criminals to voluntarily assume and perform responsibilities” (Xiaoming 2006: 59). The lack of national coercive protection may lead to failure to realize responsibility and fail to implement social justice;

3. There is a tension between the damage to the interests of the victims caused by crimes and the damage to the national legal order. The restoration of restorative justice emphasizes the interests of the victims, and weakens the state’s presence in the restoration process, which is not conducive to the protection of the national legal order;

4. The content of restoration is too kind and the effect is weak.

Proponents of restorative justice believe that «crime is a normal phenomenon, not a pathological one» (Zongxian 2010: 289). Therefore, in the past, the proponents of restorative justice shifted the concept of crime from «violation of the rules» to «social conflict». Therefore, in the restoration process, the offender was emphasized to actively assume the responsibility caused by the crime in order to achieve the goal of restoring social relations. They believe that: «pure punishment is ineffective in changing people’s behavior. It not only has disadvantages such as high cost and poor effect, but also destroys the harmonious social relationship» (Xiaoming 2006: 54)

In the future-oriented dimension, they believe that punishment cannot achieve the effect of rectifying the personality of the criminal, because the shortcomings of the freedom penalty that is widely implemented worldwide are mainly infectious, closed, blind, surplus and insufficiency. The closedness of the prison is the root cause of blindness and contagion. During the period of imprisonment, the offender is isolated from the outside world and cannot be informed of changes in the outside world-«Especially in the ever-changing modern society, it forms a strong contrast with the closedness of the prison. This makes it more difficult for criminals to socialize and can easily lead to recidivism» (Xingliang 2001a: 696-698). Therefore, proponents of restorative justice emphasize the social participation of rectify on the basis of «decriminalization». On the one hand, through mediation and negotiation between the offender and the victim, the inner hatred of the victim is smoothed and the victim is prevented from «sympathetic revenge»; On the other hand, through the participation of social forces in the repair process, the trust between each other is enhanced, which is conducive to the return of the criminals to society. From this, it can be concluded that the restoration of restorative justice is social (rights)/humanism/behavioral humanism/both emphasized.

The two positions seem to be tit-for-tat, but through careful analysis, it can be found that the proponents of traditional criminal justice advocate restoring social justice through retribution and elimination of the potentiality of offence of criminals to return to society. Both of them show «social» element of restoration. That is, the punishment of retribution, when punishing the offender, to achieves the goal of restoring social order by imparting justice in the ethical sense of the people to the victim. And through rectify methods to remove the potentiality of offence of criminals, so that they can return to society, thereby restoring social relations. And in judicial practice, traditional criminal justice pays more and more attention to the integration of «social» elements, because «social desire is the characteristic of human beings beyond other animals. According to this natural tendency, humans and their kind live together in a peaceful way, and form a community» (Grotius 2005)

For example, the «community rectify system» and the «criminal reconciliation system» are widely implemented. The opposition between traditional criminal justice and restorative justice is gradually dispelled under the influence of social elements.

The resolution of opposition in dimension of victims

Proponents of traditional criminal justice believe that crime is socially harmful and endangering the legal order of the state, because the state needs to rectify criminals that can be rectified. That is, with criminals and the state as the core, it serves to realize public welfare and maintain public order. Therefore, in the restoration process, the victim is in a relatively unimportant or even neglected position, that leaves space for the protection of the victim’s interests. Proponents of traditional criminal

justice believe that national interests are higher than personal interests and that individuals should be subordinate to the authority of the state. They also believe that excessive emphasis on the specific interests of victims will place a heavy burden on the judicial agencies, because the interests of victims often differ from person to person and cannot be unified. Therefore, the proponents of traditional criminal justice are state (authoritative)/prejudiced emphasized in their attitude towards restoring the interests of victims.

Proponents of restorative justice believe that the core of the restoration process should be around the victim, through various ways to restore and make up for the victim's property loss, mental injury, and psychological problems caused by criminal behavior. In the restoration process, the victim and the offender communicate face-to-face, negotiate their own interests, and actively restore the damage suffered by the victim to eliminate the victim's revenge psychology induced by criminal behavior, and promote people to be more convinced of the justice of the law. According to Tom Taylor: «People are more likely to abide by the law if they think they have been treated fairly by the criminal justice system» (Taylor 2006). Therefore, the restoration of restorative justice also pays attention to the restoration of the national legal order but uses a gentle and indirect way to protect and maintain the legal order. Therefore, the restoration of restorative justice is both emphasized/social (rights).

In the dimension of the victim, the focus of the debate on restoration between the traditional criminal justice and the restorative justice is «who is the core between the victim and the national legal order», that is, whose value is better between «state (authority)/society (right)». The fundamental task of criminal law is to serve public welfare and maintain common order by means of safeguarding legal interests. However, the state-based ideal of retribution abstracts the interests of the victim as a member of the intangible overall interests and marginalizes, ignores it. The true demands of the heart may cause the victim to disagree with the judgment of the judiciary, leading to endless appeals or petitions, and may even go to the road of illegal crimes without results in the appeals or petitions, thereby again damaging the legal order. Restorative justice enhances the importance of the victim in the restoration process to meet the specific demands of the victim. The more respect their dignity and interests, the heavier they will obey the criminal law and legal order. Restorative justice restores and pays attention to the victims' damaged interests so as to establish the victims' inner submission to the national legal order, and indirectly maintains and consolidates the national legal order. The purpose of traditional criminal justice overlaps with the objective result of restorative justice.

The resolution of opposition in dimenson of community

Proponents of traditional criminal justice believe that the content of restoration is mainly to restore the damaged national legal order, so the criminal law does not directly stipulate the content of restoration of community order. Regulations on the interests of the community are scattered in «rectifying offenders through penalties and re-education through labor so that they can return to the community», or «whether it affects the community as the sentencing circumstances for the application of probation, parole, and surveillance». The traditional criminal justice cares a bit about community. In recent years, the «community rectify system», which has an indirect restorative effect on the community, has gradually received attention. The community rectify system aims at the criminals' «sincerely repenting» and «return to society», and emphasizes socialization and the participation of social forces in the execution process. However, the focus of this system is to help criminals return to society, while the restoration of community interests is still indirect. In the community dimension, the restoration of traditional criminal justice is still state (authoritative)/prejudiced emphasized.

For restorative justice, the community, as one of the main participants, participates in the restoration process throughout the whole process, integrates the restoration process into the community, and «cares about the health of the community and restores the harm caused» (Quinn 1998: 178). Because crime not only does damage to victim, but also endangers the order and safety of the community. Therefore, restorative justice will provide criminals with service projects to community. Criminals use unpaid labor to compensate for the losses caused to the community due to the crime. Proponents of restorative justice emphasize that: «the criminals can and must contribute their own strength in this restorative process» (Quinn 1998: 178), and in this way, criminals can restore their relationship with the community; Restorative justice is not only aimed at repairing the damaged interests of the community in the past, but in the future, it requires community members and victims to actively participate in preventive procedures, strengthen the community's crime prevention and control capabilities, and consolidate the peace and security of the community.

At a deeper level, restorative justice changes the community's perception of crime, treating crime as a "natural social phenomenon...society must maintain a certain degree of flexibility...it will inevitably appear to violate social norms» (Xingliang 2006: 54). Restorative justice allows community members to no longer prejudiced view criminals, and to accept criminals with a more tolerant perspective, so that the re-socialization of criminals will also achieve better results. In this logic, the restoration of restorative justice is social (right)/both emphasized in the community dimension.

In the community dimension, the community rectify system indirectly restores the damaged relationship between the offender and the community, because «the task of rectify includes establishing or re-establishing a strong connection between the offender and the community, so that the offender can be reintegrated into social life» (Butler 1991: 22). The traditional criminal justice system puts the community as an important part of its vision. However, compared with restorative justice, it does not directly include the community as the injured party in the restoration process. Restorative justice is more forward-looking. In the restorative process, all the communities related to the infringement are involved. They restore the interests of the community damaged by crimes and eliminate the barriers between individuals and the community. Restorative justice strengthens the role of the community as a bond and restores the community more directly. There is an obvious opposition between the traditional criminal justice and restorative justice, and the reason is that their value trends are different. Because the traditional criminal justice system aims at maintaining the national legal order, while restorative justice aims at restoring social relations. However, «light punishing is a process and a trend» (Xingliang 2001: 665), so the community rectify system applicable to misdemeanors will inevitably expand, and the role of the community will inevitably become more and more important. The opposition between the two will also increase with the degree of judicial civilization improved.

Conclusion: evalusion of the two positions and the position held by this paper

Proponents of traditional judicial believe that "restoration" should focus on punishment, past-oriented, emphasizing social justice and state. This position is undoubtedly prejudiced or incomplete in understanding the concept of "restoration". Limiting the "restoration" to the restoration of the legal order, and not focusing on the reshaping of the offender's personality and the restoration of its social relations with stakeholders will undoubtedly increase the difficulty of re-socialization of the offender. Because the interests of the victims and the community are ignored, it is difficult to alleviate the tension between them and the criminals. Therefore, abstract social justice will dilute or even dissolve in this tension. However, since the heavy penalty thought still has a broad market in China, and people's perception of «crime» is still relatively rudimentary, so the «restoration» of traditional criminal justice is still appropriate.

The ideal of «restoration» of restorative justice is in line with the development trend of the «rule of law» of the world. It not only allows the offender to assume responsibility, protects the interests of the victim and the community, and safeguards social justice, but also reshapes the offender's personality and makes it easy to return to society, that is conducive to the realization of the purpose of crime prevention. Here, the economic and efficiency content of «restoration» must be emphasized again. The judicial system is not a set of principles and rules without background, but a system of knowledge. No matter how we describe and define the restorative justice system in detail, that does not equivalents to foreign successful experience. «The motto 'Books don't say everything, words don't say what they mean' is a universal and unsolvable problem in human society.» Therefore, ignoring the specific national conditions and directly implanting restorative justice into China is undoubtedly a partially understanding of restoration, at least, it ignores the cost of judicial reform and neglects the economic and efficiency connotation of «restoration».

Through a multi-faceted investigation of the concept of «restoration», this paper believes that «restoration» is a two-dimensional four-level compound concept. Therefore, trying to find a simple synonym for «restoration» often fails to obtain satisfactory results. Regardless of whether it is from the time dimension or the participation dimension, it is necessary to look at the other side, adding a large number of attributives, and it is inevitable that it will not be able to fully express its accurate meaning. Therefore, this paper believes that the understanding of «restoration» should not be based on a specific concept, but should be based on the two-dimensional four-level structure of the concept of «restoration». The material cause of «restoration»-internal elements is of course

important, but the form factor-internal structure is more important. Like carbon in chemistry, different combinations will form different substances, such as graphite and diamond.

All in all, for the understanding of the concept of «restoration», the position adopted in this paper is the two-dimensional four-level structural model. If the definition doesn't meet this structural standard, no matter how close to the criteria for «restorationлитерат", it is not enough to define "restoration" in dogmatics. Even if the internal elements fully meet the criteria of «repair», those that do not combine the structure are still not "restoration" from the perspective of criminal law.

Литература

恩里克·菲利.犯罪社会学[M],郭建安[译],中国人民公安大学出版社, 2004, p. 267.

徐智儿.德语词汇学[M].上海外语教育出版社,1997, p. 47.

陈晓明,林勇.修复性司法:构建和谐社会的一种路径[J].福建公安高等专科学校学报, 2007(1), pp.11-12.

Tony F. Marshall. Restorative Justice an Overview, https://www.researchgate.net/publication/251759709_Restorative_Justice_An_Overview.

王瑞山.论社区矫正的恢复性选择与路径创新——以《社区矫正法》的实施为契机[J].犯罪研究, 2020(2), pp.34-35;

陈晓明.论修复性司法[J].法学研究,2006(1),p.53-59;

Dr. Liu Zheng described restorative justice from the perspective of "ideas, goals, values and structure."(刘政博士从"理念、目标、价值和结构" 上对修复性司法进行描述)刘政.惩罚性与恢复性并重的社区矫正制度重塑[J].江西社会科学, 2017(12), pp.193-194.

卡尔·拉伦茨.法学方法论[M].陈爱娥,译.商务印书馆, 2004, p. 201.

阿图尔·考夫曼,温弗里德·哈斯默尔.当代法哲学和法律理论导论[M].郑永流,译.法律出版社,2002, preamble.

陈晓明,林勇.修复性司法:构建和谐社会的一种路径[J].福建公安高等专科学校学报, 2007(1), pp.12-13.

吴立志.恢复性司法基本理念研究[M].中国政法大学出版社, 2012, p.38.

蒋志如,杨炳南.恢复性司法视野中的中国刑事和解之审视[J].内蒙古师范大学学报, 2020(49), pp.64-65.

Van Ness. Achieving Satisfying Justice: Final Report [R]. Ottawa:Canadian Criminal Justice Association, p.1997.

Richard Posner. Economic Analysis of Law, 4th ed., Little Brown and Company, 1992, pp.3-4.

卡尔·拉伦茨.法学方法论[M].陈爱娥,译.商务印书馆, 2004, p.207.

苏力.法治及其本土资源[M].中国政法大学出版社, 2004, p.7.

强世功.立法者的法理学[M].三联书店, 2007, pp. 270-277.

Steven P. Lab. Crime Prevention: Approaches, Practices, and Evaluations, 7th ed. New Providence: Matthew Bender and Company, Inc, 2010, p.303.

Aertsen, Ivo, and Tony Peters. "Mediation and Restorative Justice in Belgium", "European Journal on Criminal Policy and Research", 2008, vol. 6, issue 4, pp. 507-525.

Howard Zehr. Changing Lenses: A New Focus for Crime and Justice. Herald Press, 1990, p.133.

汤君.恢复性司法理念下未成年人社区矫正制度完善进路[J].青少年犯罪问题, 2019(1), pp.23-29.

黄延峰.恢复性司法视域下未成年犯社区矫正研究[J].学术探索, 2014(10), pp. 41-44.

Huegli, P. Luebcke. Philosophielexikon, verlag Rowohlt, 1991, S.134.

高铭暄,赵秉志.刑法总论比较研究[M].北京大学出版社, 2008, pp.123-124.

刘学敏.恢复性正义在少年司法中的运用[J].社会科学辑刊, 2020(5), p. 87.

吴宗宪.西方犯罪学史(第一卷)[M].中国人民公安大学出版社, 2010, p. 289.

陈兴良.本体刑法学[M].商务印书馆, 2001.

Hugo Grotius, The Rights of War and Peace, ed. by Richard Tuck, Indianapolis: Liberty Fund, 2005, Prol.6.

Tom R. Tyler. Why People Obey the Law. Princeton University Press, 2006, p.17.

Thomas Quinn. Restorative Justice: An Interview with Visiting Fellow Thomas Quinn. National Institute of Justice Journal, 1998(3), p.178.

陈兴良.刑法的人性基础[M].中国人民大学出版社.2006, p.354.

克莱门斯·巴特勒斯.矫正导论[M].孙晓雳,等.译.中国人民公安大学出版社,1991, p.22.

References

Artur Kaufman, Winfrid Hasmer.Introduction to Contemporary Legal Philosophy and Legal Theory [M].Zheng Yongliu, translated.Law Press, 2002, preamble.

A. Huegli, P. Luebcke. Philosophielexikon, verlag Rowohlt, 1991, S.134.

Aertsen, Ivo, and Tony Peters. "Mediation and Restorative Justice in Belgium", "European Journal on Criminal Policy and Research", 2008, vol. 6, issue 4, pp.507-525.

Chen Xingliang. Ontology of Criminal Law [M]. Commercial Press, 2001.

Chen Xingliang. The human basis of criminal law [M]. Renmin University of China Press.2006, p.354.

Clements Butler. Introduction to Correction [M]. Sun Xiaoli, et al.translation. People’s Public Security University of China Press, 1991, p.22.

Chen Xiaoming, Lin Yong.Restorative Justice: A path to building a harmonious society [J]. Journal of Fujian Public Security College, 2007(1), Pp.11-12.

Chen Xiaoming.On Restorative Justice [J].Legal Studies, 2006(1), p.53-59;

Carl Larenz. Methodology of law [M].Chen Ai’e, translated.Commercial Press, 2004, p.207.

Carl Larenz. Methodology of law [M].Chen Ai’e, translated.Commercial Press, 2004, p.201.

Chen Xiaoming, Lin Yong. Restorative Justice: A path to building a harmonious society [J].Journal of Fujian Public Security College, 2007(1), Pp.12-13.

Hugo Grotius, The Rights of War and Peace, ed. by Richard Tuck, Indianapolis: Liberty Fund, 2005, Prol.6.

Enrique Fili. Sociology of Crime [M], Guo Jianan [Translated], People’s Public Security University of China Press, 2004, p. 267.

Tony F. Marshall. Restorative Justice an Overview, https://www.researchgate.net/publication/251759709_Restorative_Justice_An_Overview.

Dr. Liu Zheng described restorative justice from the perspective of “ideas, goals, values and structure.”(Dr. Liu Zheng describes restorative justice from the perspective of “concept, goal, value and structure”) Liu Zheng.Reshaping the community correction system with both punitive and restorative [J].Jiangxi Social Sciences, 2017 (12), Pp.193-194.

Jiang Zhiru, Yang Bingnan.An examination of Criminal Reconciliation in China from the perspective of restorative justice [J]. Journal of Inner Mongolia Normal University, 2020 (49), Pp.64-65.

Van Ness. Achieving Satisfying Justice: Final Report [R]. Ottawa:Canadian Criminal Justice Association, p.1997.

Richard Posner. Economic Analysis of Law, 4th ed., Little Brown and Company, 1992,pp.3-4.

Gao Mingxuan, Zhao Bingzhi.Comparative Study on the General Theory of Criminal Law [M].Peking University Press, 2008, Pp.123-124.

Su Li.The rule of law and its local resources [M].China University of Political Science and Law Press, 2004, p.7.

Qiangshigong.The jurisprudence of legislators [M].Sanlian Bookstore, 2007, Pp.270-277.

Howard Zehr. Changing Lenses: A New Focus for Crime and Justice. Herald Press, 1990,p.133.

Huang Yanfeng. Research on community Correction of Juvenile Offenders under the perspective of restorative justice [J]. Academic Exploration, 2014 (10), Pp.41-44.

Tang Jun. The way forward for the improvement of the juvenile community correction system under the concept of restorative justice [J].Juvenile Delinquency Issues, 2019(1), Pp.23-29.

Liu Xuemin.The application of restorative justice in juvenile justice [J]. Journal of Social Sciences, 2020 (5), p.87.

Steven P. Lab. Crime Prevention: Approaches, Practices, and Evaluations, 7th ed. New Providence: Matthew Bender and Company, Inc,2010, p.303.

Tom R. Tyler. Why People Obey the Law. Princeton University Press, 2006, p.17.

Thomas Quinn. Restorative Justice: An Interview with Visiting Fellow Thomas Quinn. National Institute of Justice Journal, 1998(3), p.178.

Wu Zongxian. History of Western Criminology (Volume 1) [M]. People’s Public Security University of China Press, 2010, p.289.

Wang Ruishan. On the restorative choice and path innovation of community correction--Taking the implementation of the “Community Correction Law” as an opportunity [J].Crime Research, 2020 (2), Pp.34-35;

Wu Zhili.Research on the basic concept of restorative justice [M].China University of Political Science and Law Press, 2012, p.38.

Xu Zhier. German vocabulary [M]. Shanghai Foreign Language Education Press, 1997,

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ON THE ROLE OF THE INFORMATION POLICY OF THE STATE IN THE INFORMATION SOCIETY

The research topic is aimed at analyzing the legislation of the Republic of Kazakhstan on the formation and implementation of information policy.

The purpose of the article is to analyze the concept and content of the term "information policy", as well as the presence of this concept in the normative acts regulating the issues of domestic and foreign policy of Kazakhstan. The aim is also to analyze the problems caused by insufficient attention to the issues of modern information policy as an important component of national security.

The scientific and practical significance of the article lies in the fact that it substantiates the need to develop and implement the concept of information policy of Kazakhstan, where special attention should be paid to the issues of interaction between state bodies and the population of Kazakhstan in the conditions of military and emergency.

The research methods used were the method of systematic analysis of regulatory legal acts of Kazakhstan, as well as the method of comparative analysis of legislation and practice of Kazakhstan with issues of domestic and foreign policy of other countries.

The results of the study should include a recommendation on the need to develop a conceptual document on the information impact and interaction of the state with citizens in order to ensure the protection of the national interests of the country.

Key words: information policy; state information policy, national security, public administration.

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Ақпараттық қоғамдағы мемлекеттің ақпараттық саясатының рөлі туралы

Зерттеу тақырыбы ақпараттық саясатты қалыптастыру және іске асыру бойынша Қазақстан Республикасының заңнамасын талдауға бағытталған.

Мақаланың мақсаты – «ақпараттық саясат» терминінің түсінігі мен мазмұнын талдау, сондай-ақ осы Тұжырымдаманың Қазақстанның ішкі және сыртқы саясатының мәселелерін реттейтін нормативтік актілерде болуы. Мақсаты ұлттық қауіпсіздіктің маңызды құрамдас бөлігі ретінде қазіргі заманғы ақпараттық саясат мәселелеріне жеткіліксіз назар аударудан туындаған проблемаларды талдау болып табылады.

Мақаланың ғылыми және практикалық маңыздылығы онда әскери және төтенше жағдай кезінде мемлекеттік органдар мен Қазақстан халқының өзара іс-қимыл мәселелеріне ерекше назар аударылуға тиіс Қазақстанның ақпараттық саясатының тұжырымдамасын әзірлеу және енгізу қажеттігі негізделеді.

Зерттеу әдістері ретінде Қазақстанның Нормативтік құқықтық актілерін жүйелі талдау әдісі, сондай-ақ басқа елдердің ішкі және сыртқы саясаты мәселелерімен Қазақстанның заңнамасы мен практикасын салыстырмалы талдау әдісі қолданылды.

Жүргізілген зерттеу нәтижелері ретінде елдің ұлттық мүдделерін қорғауды қамтамасыз ету мақсатында ақпараттық ықпал ету және мемлекеттің азаматтармен өзара іс-қимылы мәселелері бойынша тұжырымдамалық құжат әзірлеу қажеттігі туралы ұсынымды көрсеткен жөн.

Түйін сөздер: ақпараттық саясат, мемлекеттік ақпараттық саясат, ұлттық қауіпсіздік, мемлекеттік басқару.

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О роли информационной политики государства в информационном обществе

Тема исследования направлена на анализ законодательства Республики Казахстан по формированию и реализации информационной политики. Целью статьи является анализ понятия и содержания термина «информационная политика», а также наличие данного понятия в нормативных актах, регламентирующих вопросы внутренней и внешней политики Казахстана. Целью также является анализ проблем, вызванных недостаточным вниманием к вопросам современной информационной политики как важного составляющего национальной безопасности.

Научная и практическая значимость статьи заключается в том, что в ней обосновывается необходимость разработки и внедрения концепции информационной политики Казахстана, где особое внимание должно быть обращено вопросам взаимодействия государственных органов и населения Казахстана в условиях военного и чрезвычайного положения.

В качестве методов исследования применялся метод системного анализа нормативных правовых актов Казахстана, а также метод сравнительного анализа законодательства и практики Казахстана и вопросов внутренней и внешней политики других стран. В качестве результатов проведенного исследования следует указать рекомендацию о необходимости разработки концептуального документа по вопросам информационного воздействия и взаимодействия государства с гражданами в целях обеспечения защиты национальных интересов страны.

Ключевые слова: информационная политика, государственная информационная политика, национальная безопасность, государственное управление.

Introduction

The information society, in its modern sense, which arose from the middle of the twentieth century, which arose as a result of the symbiosis of the processes of globalization and the rapid development of IT technology, obliged the state resources to be activated.

If at the beginning of the development of active information relations, state institutions were only outside observers, then in the end it was the state that became the main regulator of such relations, which was caused by the need for control and legal regulation. The active introduction of information processes into all spheres of the life of the individual, society and the state has determined the formation of new spheres and functions of state activity. And these are, first of all, efforts to form information and legal relations, information policy of both individual institutions and the entire state or state associations, and as a result, the formation of the information function of the state, which was not so actively expressed in the entire previous history of the development of society and the state.

The processes that led to the formation of the modern information society largely proceeded spontaneously and were caused rather by the development and directions of technology formation and what people directed these technologies to. For example, the Internet has led to the existence of social networks, which in fact have become one of the brightest tools of modern information, and then real military operations, wars. Or, the introduction of smart technologies has led to the functioning of Big-Data and other programs (Bioinformatics, Artificial intelligence, etc. other), which are used both in the field of medicine and in the field of data theft and processing. And everywhere the state is forced only to state and accept the emergence of new directions and try to ensure the possible regulation of such processes in order to protect the interests of the main subjects of such relations. And in the near future, it is necessary to predict further similar development.

On the one hand, modern state institutions face the challenges that information technologies create (consolidation of financial markets and trade, unlimited range of social movements, development of the digital economy), including the emergence of supranational trends that can get out of control at any moment and the danger of liquidation or deactualization of state institutions (https://origin-archive.ifla.org/IV/ifla62/62-liuy3.htm). On the other hand, it is state institutions that actively introduce information technologies in many areas of their activities, both in the process of data analysis, provision of public services, and in the process of interaction with citizens, public institutions, etc. In addition, it becomes one of the customers for the implementation

of information processes in society, for example, IT medicine, E-government, E-medicine, E-court, etc.

And in this direction, the experience of Kazakhstan is quite indicative. The state bodies of the Republic of Kazakhstan have been actively involved in the process of development and implementation of the main institutions of the information society in the consciousness and way of life of citizens since the late 90s and have achieved significant results. So, in 2020, Kazakhstan ranks 29th in the ranking of countries in terms of the level of e-government development (https://nonews.co/directory/lists/countries/e-government).

The state authorities of any country always face strategic tasks of ensuring national security and territorial integrity of the state, protecting the rights and legitimate interests of the Kazakh society, further development of social institutions and ensuring a decent standard of living for every citizen. And it has already happened that in achieving these objectives, a huge role belongs to information policy, which should cover all aspects of the information society and the prospects for its development both at the national level, regional and global.

The situation that is developing in the world and mainly in the immediate geopolitical proximity with Kazakhstan requires the intensification of efforts of state and public institutions of the country.

It is possible to emphasize only a few problems of the modern information policy of the country, which will show the unconditional importance of this direction of domestic and foreign policy.

For example, the direction that the New Kazakhstan has taken on the formation of a "Hearing state" is important, it also imposes a number of obligations on all levels of public administration. The ability to build a dialogue with their own citizens, who have the constitutional right to receive the necessary information (https://www.akorda.kz/ru/addresses/addresses_of_president/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana) and actively participate in the management of the state [3] is taken out as one of the cornerstones of the modern management process of Kazakhstan (https://strategy2050.kz/ru/news/dauren-abaev-spravedlivoe-gosudarstvo-prioritet-politiki-prezidenta/). Which also requires a certain policy of information exchange and interaction of state bodies with their own population. The concept of a "Hearing state" was announced by the Head of State in the Address to the People of Kazakhstan "Constructive public dialogue is the basis of stability and prosperity of Kazakhstan" on September 2, 2019, then the lack of experience in interacting with the population and informing it both at the highest and at the regional level, for example, in extreme situations, the January events of 2022 clearly showed which led to the information isolation of society, whereas the Law of the Republic of Kazakhstan "On National Security" recognizes such actions as a threat to the information security of the country (https://adilet.zan.kz/rus/docs/Z1200000527*).* In fact, complex organizational issues were revealed, and mainly the lack of interaction experience, with which many problems and accusations could have been avoided.

The same problems are highlighted in the process of active external and internal information injections into the information field of Kazakhstan, or about the situation in Kazakhstan, namely calls for inciting ethnic hatred, prospects for territorial integrity, undermining the authority of the President and some political officials, and many others. This is obvious, President of the Republic of Kazakhstan K.K. Tokayev stressed at the St. Petersburg International Economic Forum in June 2022. Today, Kazakhstan is increasingly involved in the process of information influence and counteraction, which has a significant impact on the national interests of the country.

Another important direction of the information society is the readiness of business to digitalize global financial institutions and the ability to safely use and develop such tools. Digital assets are being actively formed in Kazakhstan, the legal basis for the functioning of the "digital tenge" has been created, the digitalization of banking and other financial services is being actively carried out. At the same time, during the current period of military operations in Europe, which affected the economy of Kazakhstan through economic sanctions imposed against the Russian Federation, this direction is being updated and requires more active attention from state and public institutions. This is justified by the presence of a huge block of conditions and obligations that Kazakhstan has assumed in the conditions of the EAEU.

The analysis of the history and main directions of the modern information legislation of Kazakhstan shows a significant backlog and a certain unwillingness to counter modern challenges that are already being actively introduced into the information field of the country and, accordingly, the consciousness of the population. And this is primarily the lack of experience in protecting the interests of the domestic IT market, the formation of conditions for the widespread introduction of available know-how and services, and much more.

Results

The current situation in both the economy and politics constantly poses new challenges. On the one hand, modern society, in which all existing tools of informatization and digitalization are actively and deeply implemented, requires all new technologies both in the field of business, entertainment, education, etc. So it is true that it also requires constant protection from negative infusions, attacks on personal borders, commercial interests, etc. This and much more requires constant forecasting and response from the state, which is predetermined by its essence as the main guarantor of security (Gobbs 1936: 369) and development (Russo 1998).

Accordingly, one of the most important tasks of modern Kazakhstan is the development and intensive implementation of a set of certain actions that should take into account the national interests of Kazakhstan. And the examples given clearly show the relevance and seriousness of this direction of state and public policy.

If we turn to the experience of foreign countries, we should pay attention to the fact that these and many other issues are put at the level of national policy. Thus, the 1996 Green Paper of the European Commission emphasizes that "To solve these problems, we need public policies that can help us take advantage of technological progress and that can ensure equal access to the information society and a fair distribution of the potential for prosperity" (European Comission 2000).

At the same time, the analysis of the current legislation of Kazakhstan showed the absence of an officially recognized concept of "information policy". Whereas it is this term that is quite actively used in certain regulatory legal acts.

It should be emphasized at once that the state bodies responsible for the issues of "development and ensuring the sustainable functioning and security of the unified information space" of the Republic of Kazakhstan, outlining their functionality, use the term "information policy" very carefully. Thus, in the Regulation on the Ministry of Information and Public Development of the Republic of Kazakhstan, this term is used only if the function of approving the methodology for determining the cost of services purchased for the state information policy in the media at the expense of the republican budget is indicated.

If we take a historical and legal perspective of the concept we are analyzing, it should be noted that for the first time it appeared not so long ago. Namely, it was only on December 10, 2002 that the Decree of the President of the Republic of Kazakhstan "On the formation of the Public Council on Mass Media (Information Policy) under the President of the Republic of Kazakhstan" was adopted, which, without giving the concept of information state policy, establishes the functionality of this Public Council as a body assisting the President of the Republic of Kazakhstan on interaction with the media (https://adilet.zan.kz/rus/docs/U020000993_/links). The same concept persists today, when the Law of the Republic of Kazakhstan dated December 30, 2020 formed the republican and regional commissions on state information policy in order to take into account and protect public interests in the conduct of state information policy, as well as meeting the needs of the population in information and is regulated by Chapter 1.2 of the Law of the Republic of Kazakhstan "On Mass Media". And in fact, it was this Law that for the first time used such a concept as "State Information Policy" without disclosing it.

Accordingly, we conclude that information policy continues to be associated only with the activities of the mass media, which in modern conditions is unacceptable and even dangerous.

Information policy in the information society is the most important factor in its development and prosperity. And the correlation of these concepts plays an important social and legal significance.

The concept of "information society" is also a relatively new concept for world history. So, back in the 40s of the last century, A. Clark wrote about the prospect of the development of information services (Clark 1957), and in the 50s, the American economist F. Makhloop started talking about the prospects of the information economy (Machlup 1962). And already in the 70s, based on the analysis of research by Japanese scientists, Americans introduced such a concept as "information society", which later resulted in a certain ideology, and a whole direction of modern economics, which actually covered all spheres of not only economics, but also politics.

For the first time, the concept of the information society was put forward by the Japanese (Masuda 1983), and accordingly, they were the first to promote it, which explains the sharp development of technology and technology in this country. And in the first concept of the 50s, the information society was outlined as a product of universal computerization, which will significantly facilitate production and allow the introduction of new technologies, which as a result will lead to the creation of "an information product that will essentially become the driving force of education and development of society" and this idea in fact, in our opinion, reflects the

whole essence information society in all its further manifestations.

Of course, the Americans and the rest of the world took this concept as a basis, giving it global significance and derived the concept of information society as a concept of post-industrial society, a historical phase of the development of civilization in which the main products of production are information and knowledge. Noting at the same time that the distinctive features are:

- the formation of a single information and communication space as part of the global information infrastructure;
- development of new and high technologies based on the mass use of advanced information technologies;
- creation and development of the information market and meeting the needs of society in information products and services;
- improving the level of education, scientific, technical and cultural exchange by expanding regional, national and international information interaction;
- creation of a system to ensure the rights of citizens and social institutions to freely receive, disseminate and use information, as well as a number of other provisions (Chereshkin 1998:10).

It is these features that have formed the basis of a number of existing international documents. Thus, the Okinawan Charter of the Global Information Society, adopted by the heads of State and Government of the Group of Eight on July 22, 2000, establishes that information and communication technologies are one of the most important factors influencing the formation of society in the twenty-first century and the goal of "IT-stimulated economic and social transformation lies in its ability to contribute to people and society in the use of knowledge and ideas. The information society, as we imagine it, allows people to use their potential more widely and realize their aspirations. To do this, we must ensure that IT serves to achieve the complementary goals of ensuring sustainable economic growth, improving public welfare, stimulating social harmony and fully realizing their potential in strengthening democracy, transparent and responsible governance of international peace and stability. Achieving these goals and solving emerging problems will require the development of effective national and international strategies" (http://old.unesco.kz/ip/countries/okinava_harty_rus.htm).

It is in this direction that states are moving, striving to develop the IT market and technologies that are increasingly being introduced and already predetermine a person's life.

The recognition that Kazakhstan should be actively involved in the process of informatization was started in the late 90s of the last century. Thus, the State Program for the formation of "electronic Government" in the Republic of Kazakhstan for 2005-2007 and the Program adopted on its basis to reduce information inequality in the Republic of Kazakhstan for 2007-2009, approved by the Decree of the Government of the Republic of Kazakhstan dated October 13, 2006 No. 995 laid the foundations of state policy in this area. All subsequent state strategies and conceptual documents are based on the need for a more active and deep immersion in the information field and active development of the information and then digital society.

It should be noted that the State Program "Information Kazakhstan – 2020", adopted on December 4, 2012, emphasizes a number of the most important foundations of the development of informatization, and then digitalization of Kazakhstan. Namely, it is recognized that "the leading role in the formation of the national strategy of information development, consolidation of all segments of society to achieve the goals of information and innovative development, coordination of business, all public institutions and citizens in the implementation of the national strategy is assigned to the state" (https://adilet.zan.kz/rus/docs/U1300000464). In addition, it should be emphasized that the Program notes that "In our country, the main emphasis was placed only on one of the components of the information society – on the formation and development of e-government, which was successfully implemented, as evidenced by high international ratings. However, the task of forming an information society is certainly broader than the development of only electronic government and the telecommunications industry."

The very realization that in Kazakhstan, the basis of information policy was the creation of an Electronic government, which is "a system of information interaction of state bodies among themselves and with individuals and legal entities, based on automation and optimization of state functions, as well as intended for the provision of services in electronic form" (https://online.zakon.kz/Document/?doc_id=33885902&doc_id2=33885902#activate_doc=2&pos=3;-98&pos2=309;-72), where the objects of regulation are "state electronic information resources, software of state bodies, Internet resource of a state body, objects of the information and communication

infrastructure of the "electronic government", including objects of informatization of other persons intended for the formation of state electronic information resources, the implementation of state functions and the provision of public services." Namely, this system is mainly aimed at ensuring the function of state regulation and the provision of public services. Whereas information policy is a broader concept and content.

And again we return to the concept of "information policy", but in a different mode – the state. But at the same time, it should be noted that there are different points of view regarding the content of this concept.

The difference in approaches has developed historically. If initially the term "information policy" was applied more to the issue of informatization of society, the creation of efforts to develop information technologies for increasingly active informing of the population of the country, etc. similar aspects. This allowed us to approach the formation of various concepts and strategies of the state's information policy. And then to the development and use of various propaganda tools, etc.

Further development of society, deeper penetration of technologies into almost all spheres of science and technology, economics and politics led to the need to recognize that information state policy should cover huge areas, for example, management, healthcare, personal and national security, various areas of natural sciences and humanities, education and much more. Accordingly, this requires regulatory regulation, and above all to ensure the ordering and stabilization of certain emerging or already existing social relations. Namely, based on the specifics of information exchange, which includes procedures for creating, processing, transporting, accessing and using information. Accordingly, each of these stages is subject to legal regulation to ensure that their implementation is orderly and the interests of all possible participants in such legal relations are protected. At the same time, it is necessary to take into account the possibility of a huge number of specifics and features in real practice.

Accordingly, information legislation arises, which, together with the national, and then with the ongoing policy of promoting certain national ideas, conducting state or other policy, forms an information policy in a broader sense.

Information relations are a classic "law-state-society" relationship, where law plays the role of a conductor and regulator of relations. Accordingly, the concept of "information policy" should include such processes as: the formation of cultural and educational processes; the formation of information and its dissemination and use in various fields of natural and humanistic science; decision-making processes and structures of government bodies of both the private and public sectors; educational direction; the processes of making financial and other decisions and it is especially desirable to follow the management decisions of the state, since it is the state in the person of state regulatory and management bodies that has a dominant role.

In the domestic reality, information legislation has been developed and is more or less successfully operating, but it is impossible to talk about the existence of an information policy at the proper level. In fact, the information legislation regulates the main issues of ownership of information, issues of information exchange through the media and in some way through the Internet, issues of informatization and digitalization, provision of information state and financial services. However, there is no complete picture as such.

Separate regulatory acts regulate the issues of informing the population, which is particularly emphasized in connection with the construction of a "hearing state", for example, the Administrative Procedural Code of the Republic of Kazakhstan dated June 29, 2020 No. 350-VI (https://adilet.zan.kz/rus/docs/K2000000350) or the Law on Mass Media (https://online.zakon.kz/Document/?doc_id=1013966). A number of NPA regulates general issues of informing certain categories of subjects, for example, the Law of the Republic of Kazakhstan "On the Rights of the Child in the Republic of Kazakhstan" (https://adilet.zan.kz/rus/docs/Z020000345_)or the PEC of the Republic of Kazakhstan (https://adilet.zan.kz/rus/docs/K1400000234). At the same time, such a fragmentary attitude does not give real results.

It should be noted that there were attempts to form an information policy in Kazakhstan, but in a truncated form, namely, the Concept of Information Security of the Republic of Kazakhstan was adopted and successfully operated until 2016, which was "developed in order to ensure the interests of society and the state in the information sphere, as well as the protection of constitutional rights of citizens" and it noted, that "The information security of the country in this document is considered from two interrelated aspects: technical and socio-political. The technical aspect implies ensuring the protection of national information resources, information systems, information and telecommunications infrastructure from unauthorized access, use, disclosure, violation, modification, reading, verification, recording or destruction to ensure the integrity, confidentiality

and availability of information. The socio-political aspect is to protect the national information space and mass media distribution systems from purposeful negative informational and organizational impact that could harm the national interests of the Republic of Kazakhstan" and we consider this approach to be correct" (https://adilet.zan.kz/rus/docs/U1100000174).

Both should pay attention to the goals pursued by this Concept, namely:

1) realization of the constitutional rights of citizens to receive, store and distribute complete, reliable and timely information;

2) equal participation of the Republic of Kazakhstan in world information relations;

3) effective information support of state policy;

4) ensuring the reliability and stability of the operation of critical information systems;

5) uninterrupted functioning and reliable protection of the unified national information space.

Such goals are very correct at the present time of the presence of potential and real threats to the national security of the country and especially the territorial integrity of Kazakhstan.

At the same time, attention should be paid to the development of national and international ideas, cultural values, educational work and promotion of cultural and scientific achievements of Kazakhstan, which should also be covered by the information policy of Kazakhstan. The country should actively promote itself in the information space as a country of democratic values that continues to adhere to the ideas of friendly coexistence of various ethnic groups and peoples.

All subsequent documents in the field of information exchange were fixated on technological aspects. Namely, at the end of 2016, the State Program "Information Kazakhstan – 2020" was adopted, the objectives of which were:

1. Ensuring the effectiveness of the public administration system.

2. Ensuring the availability of information and communication infrastructure.

3. Creating an information environment for the socio-economic and cultural development of society.

4. Development of the domestic information space.

The same direction was continued by the State Program "Digital Kazakhstan", which was planned from 2018 to 2022 and was aimed at "Accelerating the pace of development of the economy of the republic and improving the quality of life of the population through the use of digital technologies in the medium term, as well as creating conditions for the transition of the economy of Kazakhstan to a fundamentally new trajectory of development, ensuring the creation of the digital economy of the future in the long term."

Currently, the Ministry of Digital Development, Innovation and Aerospace Industry of the Republic of Kazakhstan has developed a draft Concept of digital Transformation of Kazakhstan, the purpose of which is to increase the well-being of citizens and promote economic growth based on the introduction of technologies.

That is, in fact, all these documents have a clearly defined focus – the creation of technological and technical efforts for further informatization and digitalization of public activities and the economy of the country.

The issues of spiritual and moral development of Kazakhstan at a certain time were designated by the Program "Rukhani Zhangyru Program", which was developed on the basis of the provisions of the article of the Head of State "Looking into the future: modernization of public consciousness", which was published on April 12, 2017 (https://www.gov.kz/memleket/entities/karaganda-bilim/activities/11204?lang=kk). However, in the light of recent events, this program does not enjoy the proper authority for such documents and does not really cover all areas of spiritual, moral and socio-cultural development of society.

The Government of Kazakhstan has actually redirected the issue of implementing the country's information policy to the sectoral and regional levels through the adoption of the Law of the Republic of Kazakhstan "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on information issues" dated December 30, 2020 No. 394-VI SAM. In fact, each ministry has its own industry information program, which is aimed at publicizing the activities of this department (https://online.zakon.kz/Document/?doc_id=39537340&doc_id2=1013966#pos=1;-8&pos2=127;-98,). at the same time, the analysis of the NPA of ministries and akimats did not reveal a single document that would fix the main directions of information activities of these bodies of the Republic of Kazakhstan, but at the same time each department allocates large financial resources from the republican or regional budgets for the implementation of information policy.

In addition, we agree with the opinion of ISCA expert Tastenov, who notes that "The internal information response is characterized by an insufficient level of efficiency and quality of

official materials provided by state bodies. The untimely response to high-profile events on the part of various state bodies has already become the subject of traditional criticism from a number of media outlets. ... To promote state statements, the expert community, analytical, sociological structures, as well as public opinion leaders, etc. are not widely and universally involved. In general, preventive information campaigns at the regional and republican levels are poorly applied, which should work to prevent and prevent the occurrence of potentially resonant events in society.

Thus, these problems hinder the effective implementation of the state information policy and require measures to eliminate them" (https://isca.kz/ru/analytics-ru/737).

Conclusion

Accordingly, we believe that the modern domestic policy of Kazakhstan needs analysis and development of a strategic document on information policy issues. This document should contain clear directions for the implementation of information policy throughout the country, indicating the areas of work of central and local executive authorities. This document should cover all areas of spiritual, moral and socio-cultural development of society with an emphasis on the possibility of using digital technologies (which is more effective in working with young people and the middle generation), as well as issues of digitalization of the country's economy.

In addition, we believe that it is necessary to develop a protocol for information interaction of state bodies of Kazakhstan in a state of war or emergency. As mentioned earlier, the practice of both lockdown and the practice of emergency in January 2022 showed a complete lack of practice and regulatory legal regulation. Law of the Republic of Kazakhstan dated July 11, 2022 No. 136-VII "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Improving the Procedure for Law Enforcement service, Increasing Legal and Social Protection and Responsibility of Law Enforcement officers, Special State Bodies and Military Personnel, interdepartmental coordination, Independence of internal affairs bodies, strengthening Responsibility for Individual criminal offenses and arms trafficking" did not specify the issue of informing the population during such events, at the same time retaining the reference to art. 41-1. The procedure for suspending the operation of networks and (or) means of communication of the Law of the Republic of Kazakhstan dated July 5, 2004 No. 567-II "On Communications" (https://online.zakon.kz/Document/?doc_id=1036912&doc_id2=1049207#activate_doc=2&pos=300;-76&pos2=1265;-96).

Литература

Yan Quan Liu. The Impact of National Policy on Developing Information Infrastructure Nationwide Issues in P.R. China and the U.S. // https://origin-archive.ifla.org/IV/ifla62/62-liuy3.htm

Рейтинг стран по уровню развития электронного правительства // https://nonews.co/directory/lists/countries/e-government

Послание Главы государства Касым-Жомарта Токаева народу Казахстана «Конструктивный общественный диалог – основа стабильности и процветания Казахстана» // https://www.akorda.kz/ru/addresses/addresses_of_president/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana

Абаев Д. Справедливое государство – приоритет политики Президента // https://strategy2050.kz/ru/news/dauren-abaev-spravedlivoe-gosudarstvo-prioritet-politiki-prezidenta/

Закон РК «О национальной безопасности» от 6 января 2012 года // https://adilet.zan.kz/rus/docs/Z1200000527

Гоббс Т. Левиафан или материя, форма и власть государства церковного и гражданского. – М.: Гос. соц.-экон. изд-во, 1936. – 502 с.

Руссо Ж.Ж. Об общественном договоре. Трактаты / Пер. с фр. – М.: «КАНОН-пресс», «Кучково поле», 1998. – 416 с. (Малая серия «CIVITAS TERRENA: Социальная теория, политика и право» в серии «Публикации Центра Фундаментальной Социологии»)

Green Paper «Towards a European strategy for the security of energy supply», European Commission. – Brussels, 2000. – Pp. 25.

Указ Президента РК «Об образовании Общественного совета по средствам массовой информации (информационной политике) при Президенте Республики Казахстан» от от 27 января 2011 года № 1142 // https://adilet.zan.kz/rus/docs/U020000993_/links

Clark C. The Conditions of Economic Progress. – L., 1957.

Machlup F. The Production and Distribution of Knowledge in the United States. – Princeton, 1962.

Masuda Y. The Information Society as Postindustrial Society. – Wash.: World Future Soc., 1983. – Pp. 29

Черешкин Д.С., Смолян Г.Л. О формировании информационного общества в России // Информ. ресурсы России. – 1998, № 1. – С. 8-13.

Окинавская Хартия глобального информационного общества // http://old.unesco.kz/ip/countries/okinava_harty_rus.htm

Государственная Программа «Информационный Казахстан – 2020» // https://adilet.zan.kz/rus/docs/U1300000464

Закон Республики Казахстан от 24 ноября 2015 года № 418-V «Об информатизации» // https://online.zakon.kz/Document/?doc_id=33885902&doc_id2=33885902#activate_doc=2&pos=3;-98&pos2=309;-72

Административный процедурно-процессуальный кодекс Республики Казахстан от 29 июня 2020 года № 350-V // https://adilet.zan.kz/rus/docs/K2000000350

Закон Республики Казахстан от 23 июля 1999 года № 451-I «О средствах массовой информации» // https://online.zakon.kz/Document/?doc_id=1013966

Закон Республики Казахстан от 8 августа 2002 года N 345 «О правах ребенка в Республике Казахстан» // https://adilet.zan.kz/rus/docs/Z020000345_

Уголовно-исполнительный кодекс Республики Казахстан. Кодекс Республики Казахстан от 5 июля 2014 года № 234-V ЗРК // https://adilet.zan.kz/rus/docs/K1400000234

О Концепции информационной безопасности Республики Казахстан до 2016 года. Указ Президента Республики Казахстан от 14 ноября 2011 года № 174 // https://adilet.zan.kz/rus/docs/U1100000174

Программа «Рухани жаңғыру» – взгляд в будущее // https://www.gov.kz/memleket/entities/karaganda-bilim/activities/11204?lang=kk

Закон РК «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам информации» от 30 декабря 2020 года № 394-VI ЗРК // https://online.zakon.kz/Document/?doc_id=39537340&doc_id2=1013966#pos=1;-8&pos2=127;-98,

Тастенов А. Особенности государственной информационной политики Казахстана // https://isca.kz/ru/analytics-ru/737

Закон Республики Казахстан от 5 июля 2004 года № 567-II «О связи» // https://online.zakon.kz/Document/?doc_id=1036912&doc_id2=1049207#activate_doc=2&pos=300;-76&pos2=1265;-96

2-бөлім

КОНСТИТУЦИЯЛЫҚ ЖӘНЕ ӘКІМШІЛІК ҚҰҚЫҒЫ

Section 2

CONSTITUTIONAL AND ADMISTRATIVE LAW

Раздел 2

КОНСТИТУЦИОННОЕ И АДМИНИСТРАТИВНОЕ ПРАВО

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THE MECHANISM OF LEGAL PROTECTION OF THE ECONOMIC SECURITY OF THE REPUBLIC OF KAZAKHSTAN IN THE CONTEXT OF GLOBAL CHALLENGES OF PRESENT TIME

The relevance of the topic of the article is due to the fact that at the beginning of the XXI century it is technological development that determines the competitiveness of the state, forms the conditions for economic growth, thereby ensuring the economic security of the state.

The main author's idea of this article was the assertion that the active development of the legal framework for ensuring the technological development of the Republic of Kazakhstan gives rise to problems of an institutional and legal nature that require resolution.

The scientific significance of this study lies in the fact that the article offers the author's interpretation of the investigated mechanism in structural terms.

The practical significance lies in the focus on solving specific problems identified in the analysis process.

Methodologically, the study was based on a systematic analysis, on the principle of a step-by-step solution of scientific and practical problems; the author of this article used the following research methods: the method of structuring the elements of complex social objects; method of systematization and analysis of the regulatory framework; methods of analysis and synthesis; design method and deduction method; methods of legal statics and methods of research of ratings.

The main results of the study were the substantiation of the need to improve the mechanism of legal protection of technologies and technological innovations based on the analysis of the legal framework and the institutional structure of the mechanism under study. As a result, conclusions were formulated regarding the improvement of the legal framework for regulation, as well as the creation of a specially authorized government body to ensure the functioning of this mechanism.

The value of the study is that its results are brought to the development of practical results, fused to improve the mechanism of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy.

The practical value of the conclusions and provisions of this article is confirmed by the fact that they can be used: 1) to develop further directions for improving the mechanism for the protection and protection of intellectual property rights in the technological development of the republic; 2) to amend the legislation governing this area of law and economic development of Kazakhstan.

Key words: legal protection, mechanism, technologies, competitiveness, economic security.

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Қазіргі заманның жаһандық сын-қатерлері жағдайында Қазақстан Республикасының экономикалық қауіпсіздігін құқықтық қорғау тетігі

Мақала тақырыбының өзектілігі XXI ғасырдың басында Технологиялық даму мемлекеттің бәсекеге қабілеттілігін анықтайды, экономикалық өсу үшін жағдай жасайды, сол арқылы мемлекеттің экономикалық қауіпсіздігін қамтамасыз етеді.

Осы мақаланың негізгі авторлық идеясы Қазақстан Республикасының технологиялық дамуын қамтамасыз етудің құқықтық негіздерін белсенді дамыту шешуді талап ететін институционалдық-құқықтық сипаттағы проблемаларды туындатады деген тұжырым болды.

Бұл зерттеудің ғылыми маңыздылығы мақалада зерттелетін механизмнің құрылымдық тұрғыдан авторлық түсіндірмесі ұсынылатындығында.

Практикалық маңыздылығы талдау процесінде анықталған нақты мәселелерді шешуге бағытталған.

Әдістемелік жоспарда зерттеу жүйелі талдауға, ғылыми-практикалық мәселелерді кезең-кезеңімен шешу принципіне сүйенді; осы мақаланың авторлары зерттеудің мынадай әдістерін қолданды: күрделі әлеуметтік объектілердің элементтерін құрылымдау әдісі; нормативтік-құқықтық базаны жүйелеу және талдау әдісі; талдау және синтез әдістері; жобалау әдісі және шегеру әдісі; құқықтық статика әдістері және рейтингтік бағалауды зерттеу әдістері.

Зерттеудің негізгі нәтижелері зерттелетін тетіктің құқықтық базасы мен институционалдық құрылымына жүргізілген талдау негізінде технологиялар мен технологиялық жаңалықтарды құқықтық қорғау тетігін жетілдіру қажеттілігінің негіздемесі болды. Нәтижесінде реттеудің құқықтық негіздерін жетілдіруге, сондай-ақ осы тетіктің жұмыс істеуін қамтамасыз ететін мемлекеттік биліктің арнайы уәкілетті органын құруға қатысты тұжырымдар қарастырылды.

Жүргізілген зерттеудің құндылығы оның нәтижелері экономиканың технологиялық бәсекеге қабілеттілігін арттыру жағдайында Қазақстан Республикасының экономикалық қауіпсіздігін құқықтық қорғау тетігін жетілдіруге негізделген практикалық нәтижелерді әзірлеуге жеткізілгендігінде.

Осы баптың тұжырымдары мен ережелерінің практикалық құндылығы олардың: 1) республиканың технологиялық дамуында зияткерлік меншік құқықтарын сақтау мен қорғау тетігін одан әрі жетілдіру бағыттарын әзірлеу үшін; 2) Қазақстанның осы құқық саласы мен экономикалық дамуын реттейтін заңнамаға өзгерістер енгізу үшін пайдаланылуы мүмкін екендігімен расталады.

Түйін сөздер: құқықтық қорғау, механизм, технологиялар, бәсекеге қабілеттілік, экономикалық қауіпсіздік.

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Механизм правовой защиты экономической безопасности Республики Казахстан в условиях глобальных вызовов современности

Актуальность темы статьи связана с тем, что в начале XXI столетия именно технологическое развитие определяет конкурентоспособность государства, формирует условия для экономического роста, обеспечивая тем самым экономическую безопасность государства.

Основной авторской идеей данной статьи явилось утверждение о том, что активное развитие правовых основ обеспечения технологического развития Республики Казахстан порождает проблемы институционально-правового характера, требующие разрешения.

Научная значимость данного исследования состоит в том, что в статье предложена авторская интерпретация исследуемого механизма в структурном плане.

Практическая значимость состоит в направленности на решение конкретных проблем, выявленных в процессе анализа.

В методологическом плане исследование опиралось на системный анализ, на принцип поэтапного решения научно-практических проблем; автором данной стати использовались следующие методы исследования: метод структурирования элементов сложных социальных объектов; метод систематизации и анализа нормативно-правовой базы; методы анализа и синтеза; метода проектирования и метод дедукции; методы правовой статики и методы исследования рейтинговых оценок.

Основным результатом исследования стало обоснование необходимости совершенствования механизма правовой защиты технологий и технологических новшеств на основе проведенного анализа правовой базы и институциональной структуры исследуемого механизма. В результате сформулированы выводы, касающиеся совершенствования правовых основ регулирования, а также создания специально уполномоченного органа государственной власти, обеспечивающего функционирование данного механизма.

Ценность проведенного исследования состоит в том, что его результаты доведены до разработки практических результатов, наплавленных на совершенствование механизма правовой защиты экономической безопасности Республики Казахстан в условиях повышения технологической конкурентоспособности экономики.

Практическая ценность выводов и положений данной статьи подтверждается тем, что они могут быть использованы: 1) для разработки дальнейших направлений совершенствования механизма охраны и защиты прав интеллектуальной собственности в технологическом развитии республики; 2) для внесения изменений в законодательство, регулирующее данную сферу права и экономического развития Казахстана.

Ключевые слова: правовая защита, механизм, технологии, конкурентоспособность, экономическая безопасность.

Introduction

At the beginning of the 21st century, technological development forms the basis of post-industrial transformations determining the competitiveness of national economies in world markets. The technological aspect of economic growth becomes a security factor, because only technologies determine the pace of socio-economic development and, thus, ensure economic sovereignty, creating conditions for the implementation of strategic tasks of socio-economic development.

The indisputability of this fact determines the content of the "Third Modernization of the Republic of Kazakhstan", the main priority of this modernization is the accelerated technological modernization of the economy.

In this regard, the main goal of the state policy of industrialization of the Republic of Kazakhstan is the creation of a technologically advanced industry, the transformation and digitalization of fixed assets of existing enterprises focused on the creation of medium-, high-tech products with subsequent entry into global markets (Approval of the State program of industrial and innovative development of the Republic of Kazakhstan for 2020 – 2025, 2019).

However, it should be noticed that the pandemic has changed the world, and Kazakhstan must be ready for a new reality after COVID-19. The government is already actively working on adjusting strategic documents and policies to reflect the new conditions. Adjustments and changes will be made to the Strategic Development Plan of Kazakhstan until 2025, the State Program "Digital Kazakhstan" and a number of strategic documents for the development of the country's economy (Shevchenko, 2021).

Under these conditions, only an intensive approach to development is able to set an increasing trend for the Kazakhstani economy, which is associated with the tasks of increasing its technological competitiveness, given that the main factors of Kazakhstan's global competitiveness are the high level of national human capital, technological modernization and digitalization; creation of conditions for the transition to a new technological order of Industry 4.0; technological renewal of the basic industries (agro-industrial, mining and metallurgical and fuel and energy complexes), which form the basis of the economy and will remain the engine for other industries in the medium term (Approval of the Strategic Development Plan of the Republic of Kazakhstan until 2025, 2018).

It should be noted that the new model of economic growth of the Republic of Kazakhstan requires the introduction of many technological innovations used in various industries, since the methods of production and value added are currently changing significantly. Today, artificial intelligence, the industrial Internet of things, 3D printing technologies are shaping the future of manufacturing industries, using the possibilities of flexible and smart manufacturing, which provides a revolutionary increase in productivity, while it should be said that the Kazakh scientific and technological complex already today has something to offer the world (table 1).

Table 1 – Technological innovative products and solutions created by the scientific and technological complex of the Republic of Kazakhstan (Trubacheva T., Suleimenova A., 2017)

Technologies and their practical potential	Organization -Developer
Technology for creating biocompatible implants stimulating the natural regeneration of tooth enamel and dentin. In 2015 InnoDent technology was patented in Kazakhstan. Nowadays, 50 dental clinics in Kazakhstan, 20 – in Ukraine, 10 – in Russia have purchased drugs created using this technology.	LLP "InnoDent"
Spilled oil collection technology using superhydrophobic sponges. it is possible to produce superhydrophobic filters for selective water and organic collection plants, using this technology.	RSE «Institute of Combustion Problems»

Table continuation

Technologies and their practical potential	Organization -Developer
Technology for the creation of fire-retardant paints for the protection of metal load-bearing structures of industrial and civil facilities in order to increase the stability of the structure to temperature effects and deformation during a fire	RSE «Institute of Combustion Problems»
The technology of creating «supercapacitors». Capable of fast charging and fast transfer of the received energy, which is especially actual for the creation of electric vehicles.	Al-Farabi Kazakh National University
Technology of bioresonance activation of seed material based on the developed device for influencing seeds with a low-frequency electromagnetic field using cosmic geophysical characteristics in order to increase crop yields	South Kazakhstan State Pedagogical Institute
Technology of creating glue for tissue bonding based on recombinant mussel adhesive proteins (MFP). There are no analogues of this technology in the world yet, and therefore there is a good potential for bringing a unique product to the market.	National Center for Biotechnology KN MES RK
A unique technology for obtaining metallic osmium has been developed. Considering that it is the most expensive metal in the world with completely unique properties, the prospects for this technology, in terms of its widespread adoption and use, look promising.	RSE "NC CMMS RK"

The presence in Kazakhstan of a sufficient number of "breakthrough" technological developments determines the technological competitiveness of the economy, as well as the need for legal protection of these technologies in terms of their use. This aspect of technological development is a matter of competitiveness of the national economy and national security, given the fact that these technologies determine the state of security of the state in the economic sphere, ensuring the sustainable development of the economy of the Republic of Kazakhstan and its economic independence (c. 4, ar. 4 of the Law of the Republic of Kazakhstan dated 6 January 2012 "On the national security of the Republic of Kazakhstan").

Literature review

Theoretical aspects of ensuring national security in general and economic security as an integral part, in the context of technological shifts in the economy, were considered in the works of foreign authors (Ripsman, Norrin &. Paul, 2010; Kazeki, 2021; Jackson, 2009; Rogers, 2010; Tal, 2000; Wright, 1983; Qian, 2007; Granstrand, 2010).

Analysis of research data shows that the problem of legal protection of technological innovations, as an integral part of ensuring economic security in the world, has come to the fore and has become not just a legal or commercial issue. As a result of the comprehensive intellectualization of the modern economy, they are increasingly becoming a political problem that requires strategic integrated approaches to solving. Under these conditions, the problems of stimulating the development and legal protection of technological innovations acquire the role of one of the most important factors in the entire complex of political and economic relations and the security of each civilized country. The complexity of solving these problems lies in the extremely high degree of dynamism and versatility of relations associated with the development and implementation of technological innovations, as well as the fact that modern globalization and active information exchange create objective prerequisites for uncontrolled "technology spillover" from the countries that create technological innovations to countries that are able to see its perspective and quickly introduce innovation in the production process.

Western researchers have convincingly proven that there is a close relationship between the effectiveness of the protection of intellectual property rights, economic performance, the country's competitiveness and economic security. The system of protection of intellectual property rights has a significant impact on the performance of economic growth in each country, on foreign direct investment, employment, innovation and overall competitiveness. Thus, the introduction of a reliable mechanism for the protection of intellectual property rights and enforcement is a key aspect of increasing the level of competitiveness of the country.

Many authors addressed issues related to ensuring the economic security of the Republic of Kazakhstan (Kalykov, 2017; Nurgaliuly, Kazbekova, 2021; Alpysbaev, 2019; Kuchukova, 2020; Madiyarova, Ryspekova, 2018, etc.).

The works of these researchers note the necessity to increase the level of competitiveness of the Kazakhstani economy with the help of using of the country's financial capabilities, its innovative and intellectual potential.

Despite the fact that the problems of ensuring economic security in general, and the economic security of the Republic of Kazakhstan, in particular, have been sufficiently and comprehensively reflected in the scientific literature, certain aspects of this topic have remained outside the field of view of researchers. These little-studied issues include the problems of forming a mechanism and assessing the problems of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy of Kazakhstan.

Thus, the aim of this article is to identify the problems of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy and develop recommendations for their solution.

The objectives of the article are to study the mechanism of legal protection of technologies and technological innovations as a factor in the economic security of the Republic of Kazakhstan, to determine the range of issues related to this problem which must to be improved.

The object of research in the article is the process of ensuring the economic security of the Republic of Kazakhstan in terms of increasing the technological competitiveness of the economy.

Subject of research: legal protection of technologies and technological innovations ensuring economic security and competitiveness of the Kazakhstani economy.

Methodology

The research questions mentioned in this article determine the elements of its novelty. In particular, the article analyzes the elements that form the mechanism of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy, which made it possible to offer the author's vision of this mechanism, which was embodied in the corresponding graphic model. Also in the article, are drawn conclusions about the problems arising in the process of developing the mechanism under study, based on the results of rating assessments.

The study was based on a systematic analysis, on the principle of a phased solution of scientific and practical problems. At the first stage, the mechanism of legal protection of the economic security of the Republic of Kazakhstan was studied in the conditions of increasing the technological competitiveness of the economy, the problems associated with the development of this mechanism were identified; the second stage of the study was aimed at developing practical recommendations related to solving the previously identified problems.

The hypothesis of the study is the statement that the mechanism of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy is at the stage of active development, and so there are problems in the development of the institutional and legal system that need to be resolved.

The methodological basis of the study is general scientific and special methods of cognition of socio-economic processes and phenomena of legal reality.

The main scientific results of the study were obtained with the use of the following methods: the method of structuring the elements of complex social objects in the study of the structure of the institutional and legal mechanism for the legal protection of technologies and the management of their development processes; the method of systematization and analysis of the legal framework at the stage of studying the legal aspects of the problem raised in the article; method of analysis and synthesis – in the study of problems associated with the development of the mechanism under study; design method and deduction method – in the development of recommendations related to the solution of identified problems; methods of legal statistics and methods for researching ratings at the stage of confirming the assumptions put forward.

The novelty of the chosen methodological approach is determined by the fact of synthesizes methods of cognition of legal and economic reality.

Results and discussion

The current stage of development of the world economy is characterized by a change in priorities, when various technologies (digital, information, industrial, biological, social and managerial) become the main drivers of socio-economic progress.

In this regard, the achievement of economic development through the large-scale introduction into economic circulation of such products of intellectual labor as knowledge, technology, scientific and technical developments, as well as their commercialization, is recognized as a priority model of innovative development of the Republic of Kazakhstan. This model should ensure the resumption of

the pace of development of the national economy in the post-pandemic period, the entry of Kazakhstan into the number of developed world economies. An important element of this model is not only the development and support of domestic high-tech industries, but also the protection of intellectual property rights, which is an integral part of the process of developing a competitive innovative economy of the Republic of Kazakhstan and requires special attention to the legal protection of the technological innovation potential of the country, ensuring its competitiveness in world markets.

At the same time, referring to the world rankings, it is necessary to note the low competitive position of Kazakhstan in the main aspects of competitiveness, technological development and protection of intellectual property rights. So, for example, according to the international index of property rights protection, which determines the level of protection of this form of property, the level of piracy in the country of Kazakhstan takes 85th place (Ranking of countries by the level of property rights protection, 2020). In the ranking of countries by the level of innovation at 79th place (Ranking of countries by the level of innovation, 2021); in the ranking of countries in terms of global competitiveness at 35th place (Ranking of global competitiveness of the countries of the world, 2021); in the ranking of countries by the number of patents granted – at 145th place (Ranking of countries by the number of patents, 2020).

These data indicate the problematic of Kazakhstan's entry into the 30 most developed countries of the world, which is defined as a strategic goal of the country's economic development (Concept for Kazakhstan's entry into the 30 most developed countries of the world, 2014).

In many respects, these problems are connected with the fact that Kazakhstan could not fully ensure the creation of a mechanism for the legal protection of economic security in order to increase the technological competitiveness of the economy.

Considering directly the concept of "mechanism of legal protection of economic security", our analysis of the scientific literature showed the absence of any precise definition of it, despite the fact that researchers widely use the term "legal mechanism", indicating that legal mechanisms are special constructions of positive law that formalize a certain "set" of legal regulators (legal means), such as: rights, obligations, prohibitions, principles, presumptions, fictions, terms, procedures, incentives, means of responsibility, etc. The legal mechanism is a complex legal tool (Amangeldy Aizhan Amangeldykyzy, 2015).

At the same time, the analysis of works (Kalykov, 2017; Nurgaliuly, Kazbekova, 2021; Alpysbaev, 2019; Kuchukova, 2020; Madiyarova, Ryspekova, 2018, etc.) allows us to determine the mechanism of legal protection of economic security, taking into account the need to protect technological innovations that ensure the competitiveness of the Republic of Kazakhstan in the world markets as a set of actions of the authorities subject to the norms of national legislation aimed at increasing the level of competitiveness of the economy of Kazakhstan by creating conditions for the protection of intellectual property rights in the technological sphere, as well as stopping violations if they are committed, ensuring the restoration of violated rights and bringing those responsible to justice.

It should be admitted that there were created the grounds for further development of the mechanism of legal protection of economic security in terms of ensuring the technological competitiveness of the economy in the country (Fig. 1).

It is necessary to consider the structural elements of this mechanism in more detail.

This mechanism is based on the system of legal protection of the economic security of the Republic of Kazakhstan in terms of ensuring the national interests of the country in the field of technological development. This system is based on the Constitution of the Republic of Kazakhstan; the Law of the Republic of Kazakhstan The Law of RK "National Security of the Republic of Kazakhstan", the Entrepreneurial Code of the Republic of Kazakhstan, the Code of the Republic of Kazakhstan "On Customs Regulation in the Republic of Kazakhstan", the Criminal Code of the Republic of Kazakhstan, the Code of Administrative Offenses of the Republic of Kazakhstan, the Customs Code of the Eurasian Economic Union, etc.; on the norms of the Civil Code; the Law of the Republic of Kazakhstan "On Copyright and Related Rights", the Law "On the Legal Protection of Topographies of Integrated Circuits"; Law "On Trademarks, Service Marks and Appellations of Origin"; Law "On protection of breeding achievements"; Patent Law; Law "On State Secrets". Law "On Forensic Activities in the Republic of Kazakhstan", Law of the Republic of Kazakhstan "On Arbitration Courts", Law of the Republic of Kazakhstan "On International Commercial Arbitration".

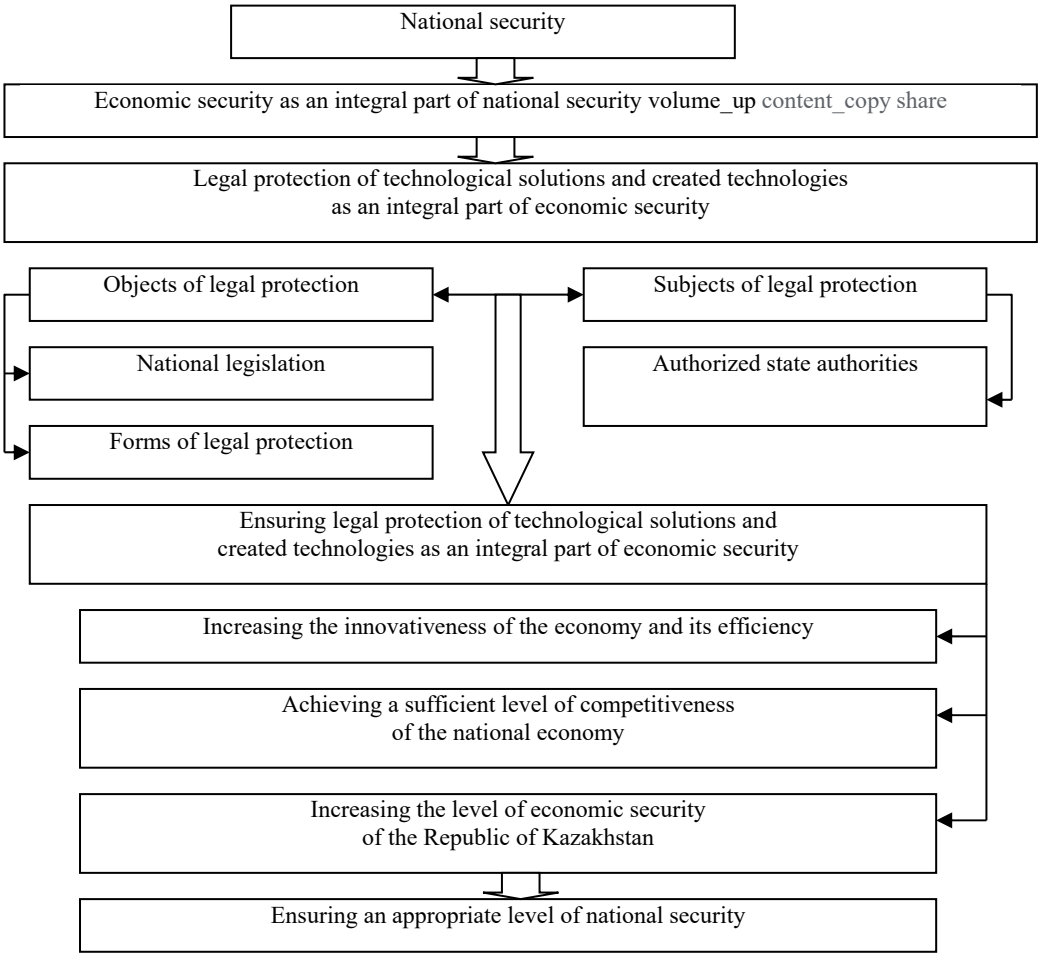

Figure 1 – The mechanism of legal protection of national security in order to increase the technological competitiveness of the economy of the Republic of Kazakhstan (made by the author)

In general, the existing regulatory framework provides legal protection of intellectual property objects and the procedure for their use.

It should also be noted that one of the fundamental theoretical problems is to determine the very content and structure of the mechanism under study (in this case we are talking about the "mechanism of legal protection of the economic security of the Republic of Kazakhstan from the point of view of the technological competitiveness of the economy"), is the definition of objects of legal protection. Referring to the patent law and the Civil Code of the Republic of Kazakhstan, industrial property objects – inventions, utility models and industrial designs (clause 7 of article 1 of the Patent Law of the Republic of Kazakhstan), as well as breeding achievements should be considered as such; topology of integrated circuits; undisclosed information, including production secrets (know-how).

It is equally important the definition of entities that protect the national interests of Kazakhstan in the field of intellectual property, among which a special place is occupied by:

- Ministry of Justice of the Republic of Kazakhstan (represented by the Committee for Intellectual Property Rights of the Ministry of Justice of the Republic of Kazakhstan);
- the national patent authority responsible for the implementation of state policy in the field of intellectual property, initiation and proceedings in cases of administrative violations, patent examination);
- Ministry of Internal Affairs of the Republic of Kazakhstan – initiation and proceedings on cases of administrative violations and criminal cases;
- Ministry of Finance of the Republic of Kazakhstan – suspension of the release of goods with violations of intellectual property rights, initiation and proceedings in cases of administrative violations and criminal cases;
- The National Security Committee of the Republic of Kazakhstan, which implements a unified policy in the field of protecting state secrets;

- Courts considering cases of administrative offenses in the field of intellectual property and, accordingly, protecting already violated rights of owners of intellectual property objects.

The given study shows that a significant number of functional components operating in various areas of public administration, which have distinctive functions and capabilities, are integrated into the national system of legal protection in the field of intellectual property and technological development. This fact is an objectively existing problem of the development of the institutional and legal system, which negatively affects the practice of law enforcement and hinders the process of forming an effective legal system.

Considering reserched legal mechanism, it is obvious to point out that an integral element of the legal mechanism for the protection and protection of intellectual property rights in the field of technological development are forms of protection and protection.

An analysis of the scientific literature (Amangeldy Aizhan Amangeldykyzy, 2021, Kalykov, 2017; Nurgaliuly, Kazbekova, 2021) suggests that there are currently two such forms: a general and a special form of protection of intellectual property rights Accordingly, the general form of protection can be attributed the judicial procedure already mentioned by us, while the special one provides for the applicable administrative procedure for protection, for example, by the customs authorities of the Republic of Kazakhstan in relation to the protection of intellectual property rights, as well as authorized bodies that carry out checks aimed at detecting cases of piracy, the use of a licensed product in the absence of a license.

Thus, in general, in Kazakhstan, the main elements of the mechanism of legal protection of national security have been formed in order to increase the technological competitiveness of the economy.

At the same time, evaluating this mechanism, we can identify those problematic aspects that reduce the effectiveness of its functioning. The following problems need to be highlighted:

- the imperfection of certain provisions of the legislation that do not allow copyright holders to fully protect their rights, in particular, we are talking, for example, about a conflict between Art. 15 of the Patent Law, which determines that "…..a new product is considered to be obtained by a protected method in the absence of evidence to the contrary", and art. 72 of the Civil Procedure Code of the Republic of Kazakhstan, according to which the party must prove the circumstances to which it refers as the basis for its claims. That is, Art. 15 of the Patent Law, in fact, gives the patent holder the opportunity to demand that the person who violated his right prove that the invention, the created technology does not bear any signs of novelty. At the same time, the norms of civil procedural law reject such a possibility.

As a result of such a conflict, the patent owner often loses the incentive to protect his rights. And in the end, patent activity is decreasing, which directly affects the level of the country's economic security.

It should also be noted that the national legislation in the field of technological intellectual property does not determine what actions are recognized as infringement in relation to a particular object of such rights, at the same time indicating that industrial property offenses are, without the permission of the copyright holder, the following actions: using a patented invention (utility model), the use of such a product, offer for sale, sale, import, introduction into civil circulation in another way, storage of the product for such a purpose; application of a patented technological process or its proposal for application (Amangeldy Aizhan Amangeldykyzy, 2021).

We believe that such specification of illegal acts may well be included in the regulatory framework of Kazakhstan, which will make it possible to more effectively protect the rights of patent holders to ensure the economic security of the Republic of Kazakhstan in order to increase the technological competitiveness of the economy.

A significant problem related to the protection of technological innovations is the fact that in Kazakhstan, there are still (on the part of Kazakhstani business) ignoring the requirements of laws on compliance with intellectual property rights, as a result of which the investment attractiveness of the country is reduced, since Western and already Chinese businesses are ready to cooperate with countries that have "transparent" conditions for the use of intellectual property. It is difficult for foreign rights holders to defend their rights in the judicial bodies of Kazakhstan due to the fact that Kazakh courts, as well as other legal protection bodies, as a rule, take the side of local businessmen, which gives investors and right holders the impression that these bodies are corrupt, that the transfer of Kazakhstan technologies, since the terms of such contracts are often not followed.

At the same time, according to the latest data (end of 2019), despite the overall decrease in the number of infringements in the field of intellectual property, their number is still very significant. It is noteworthy that the category of violations un-

der consideration acquires, in the main, the nature of administrative offenses (Fig. 2). At the same time, the total number of detected offenses does not correspond to foreign ideas about the state of legal protection of technologies, which appeal to the data of the rating of countries by the level of use of pirated software, according to which 74.0% of software in Kazakhstan is of "pirated origin" (Ranking of countries by the level of use of pirated software, 2019).

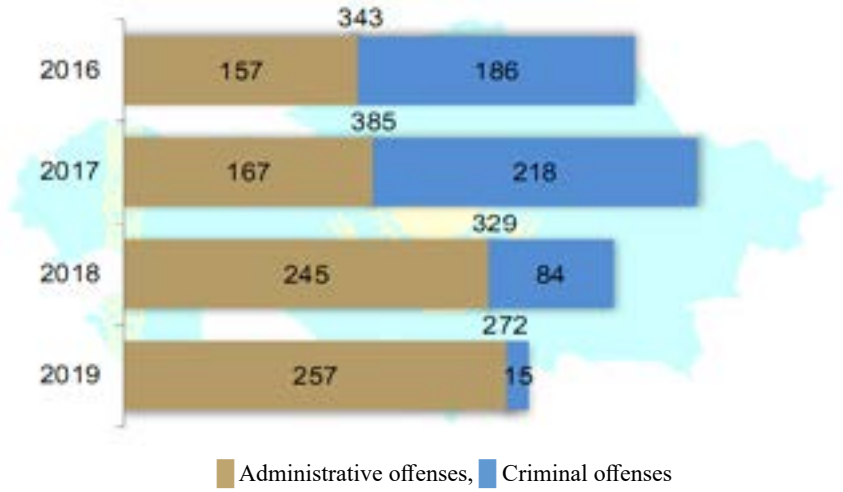

Figure 2 – The number of violations detected in the Republic of Kazakhstan by types of violations from 2016 to 2019 (Report on the state of law enforcement practice in the field of protection of intellectual property rights, 2020)

Thus, assessing the mechanism of legal protection of the economic security of the Republic of Kazakhstan in order to increase the technological competitiveness of the economy, we can say that the development of this mechanism requires further improvement in terms of legislative support for this activity, as well as in the direction of increasing the level of state control associated with the use of technology and technological innovations (both domestic and foreign origin) on the territory of Kazakhstan. Exactly these two spheares (legislative support and control) that should become a priority in providing legal protection for the economic security of the Republic of Kazakhstan in order to increase the technological competitiveness of the country's economy.

The effectiveness of protecting the rights of technology and technological innovation right holders depends on the perfection of the regulatory framework, and therefore we recommend revising it in order to identify legal conflicts that impede the process of protecting these rights. In the process of implementing the revision of the legislation, repetitions, gaps are revealed, the quality of the conceptual apparatus, legalized in the norms of the legislation, is determined. Also, it should be noted that the protection of the rights of technology developers seeks to meet modern requirements, be transparent and democratic. So, for example, laws aimed at protecting industrial property should, first of all, ensure the economic and moral rights of authors to the results of scientific and technical activities, stimulate their creative activity in accordance with state interests, commercialize technologies and on the basis of real exchange. The development of the management of the state system of legal protection of technological developments in the Republic of Kazakhstan should provide for the creation of conditions for improving the investment climate and supporting entrepreneurship; raising the level of consciousness and culture of Kazakhstani business in the field of intellectual property for technological purposes.

The most important aspect of the state policy for the acquisition, use and protection of intellectual property rights in the field of technological development is the implementation by the state of control functions in this area. Currently, the functions of control in this area of activity are carried out by the justice authorities (Article 21 of the Law "On the Bodies of Justice"), which control the activities of organizations managing property rights on a collective basis, patent attorneys and interact with them; as well as control over the activities of a state organization that carries out examination in the field

of patent business and registration of copyright in official registers.

In addition, other bodies that have already been listed above in this article have a number of control powers, which objectively reduces the effectiveness of control activities due to the presence of initial powers, departmental competition, etc.

In this regard, we believe that in order to effectively improve the existing system for managing the system of legal protection of technologies and technological innovations in the Republic of Kazakhstan, it is necessary to create an organizational structure for managing intellectual property that meets the principles of the innovative economy of the Republic of Kazakhstan.

We propose the creation of a specialized department responsible for managing intellectual property, technological development and protecting the rights of creators of technological and other innovations. The implementation of this proposal involves the formation of a contingent of specialists from public authorities capable of skillfully solving the problems of managing the intellectual property of the Republic of Kazakhstan, its legal protection and control over its use. Such a body (an agency for the development and protection of intellectual property rights of the Republic of Kazakhstan) can be created in the form of a state institution and perform the following functions: organizing accounting and maintaining a unified register of the results of scientific and technical activities, the rights to which are assigned to the Republic of Kazakhstan; forecasting, planning, control over projects for the commercialization of the results of scientific and technical documentation of national importance.

This approach allows to transfer a significant amount of work in the field of legal protection of technologies and technological innovations to the level of a single state body, which will increase the responsibility of the state and those authorized for the results of this activity, create conditions for making prompt decisions based on the results of control over the use of technologies at the level of public authorities and business.

Conclusion

The purpose of this study was defined as identifying the problems of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy and developing recommendations for their solution.

To achieve this goal, the author used a set of methods for structuring the elements of complex social objects; systematization and analysis of the legal framework; methods of analysis and synthesis; design and deduction method; legal statistics and methods for researching ratings.

As a result of using these methods, practical results, which were obtained, aimed at improving the mechanism of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy.

The given study allows us to state that at present the mechanism under study needs to be improved, since the current legislative and institutional structure of this mechanism makes it difficult to implement the tasks of increasing the competitiveness of the Kazakhstani economy.

In this regard, at present in the Republic of Kazakhstan, there is a need to revise the legislative framework in order to eliminate the contradictions in it, as well as to create a state control body, which will be delegated the authority to solve the problems of legal protection of technologies and technological innovations.

We associate the prospects for further research with the necessity to specify the conditions that contribute to the further technological development of the Republic of Kazakhstan.

In general, the article confirmed the hypothesis that the mechanism of legal protection of the economic security of the Republic of Kazakhstan in the context of increasing the technological competitiveness of the economy is at the stage of active development, in connection with which there are problems in the development of the institutional and legal system that need to be resolved.

Литература

Алпысбаев К. С. Политика экономической безопасности как элемент корпоративного управления [Текст]: дисс. канд. эконом. наук / К. С. Алпысбаев. – СПб., 2019. – 174 с.

Амангельды А.А. Право интеллектуальной собственности Республики Казахстан на современном этапе [Текст]: дисс. канд. наук / Амангельды А.А. – М., 2015. – 540 с.

Гражданский процессуальный кодекс Республики Казахстан от 31 октября 2015 года № 377-V // «Казахстанская правда» от 03.11.2015 г., № 210 (28086)

Закон Республики Казахстан от 6 января 2012 года № 527-IV «О национальной безопасности Республики Казахстан» // «Казахстанская правда» от 17.01.2012 г., № 19-20 (26838-26839)

Инновационное и предпринимательское развитие национальной экономики в условиях глобализации [Текст]: монография / под ред. Д.М. Мадияровой, М.О. Рыспековой. – Астана: Евразийский национальный университет им. Л.Н. Гумилева, 2018. – 276 с.

Калыков Д.Д. Правовое обеспечение экономической безопасности Республики Казахстан [Текст] / Д.Д Калыков // В сборнике: Юридическая наука и практика. альманах научных трудов Самарского юридического института ФСИН России. – 2017. – С. 115-116.

О Концепции по вхождению Казахстана в число 30 самых развитых государств мира: Указ Президента Республики Казахстан от 17 января 2014 года № 732 // «Казахстанская правда» от 28.01.2014 г. № 18 (27639);

Об органах юстиции: Закон Республики Казахстан от 18 марта 2002 года N 304 // Ведомости Парламента Республики Казахстан, 2002 г., N 6, ст. 67; «Казахстанская правда» от 22 марта 2002 года N 062-063.

Об утверждении Государственной программы индустриально-инновационного развития Республики Казахстан на 2020 – 2025 годы: Постановление Правительства Республики Казахстан от 31 декабря 2019 года № 1050. – (https://adilet.zan.kz/rus/docs/P1900001050).

Об утверждении Стратегического плана развития Республики Казахстан до 2025 года: Указ Президента Республики Казахстан от 15 февраля 2018 года № 636 // «Казахстанская правда» от 20.02.2018 г., № 35 (28664)

Отчет о состоянии правоприменительной практики в сфере защиты прав на объекты интеллектуальной собственности в Евразийском Экономическом Союзе за 2019 год. – М., 2020. – 47 с.

Патентный закон Республики Казахстан: Закон Республики Казахстан от 16 июля 1999 года № 427-I // Ведомости Парламента Республики Казахстан, 1999 г., N 20, ст. 718; 2004 г., N 17, ст. 100.

Рейтинг глобальной конкурентоспособности стран мира. – (https://gtmarket.ru/ratings/ imd-world-competitiveness-ranking)

Рейтинг стран по количеству патентов. – (https://nonews.co/directory/ lists/countries/number-patents)

Рейтинг стран по уровню защиты прав собственности. – (https://nonews.co/directory/ lists/ countries/property-right-index)

Рейтинг стран по уровню инноваций. – (https://nonews.co/directory/ lists/countries/global-innovation-index)

Рейтинг стран по уровню использования пиратского ПО. – (https://nonews.co /directory/lists/countries/software-license)

Трубачева Т. 10 изобретений, которые могут предложить миру учёные Казахстана / Т. Трубачева, А. Сулейменова. – (https://forbes.kz/process/science/ fantasticheskaya_desyatka_1/)

Финансовые аспекты Третьей модернизации экономики Казахстана [Текст]: монография / Под ред. д.э.н., проф. Н.К. Кучуковой; Евразийский национальный университет им. Л.Н. Гумилева. – Нур-Султан, ИП Булатов А.Ж., 2020. – 605 с.

Шевченко Е. Анализ пробелов в сфере науки, технологий и инноваций (НТИ) в Казахстане. – (https://unece.org/sites/default/files/2021-03/STI%20gap%20analysis_ Kazakhstan_Report_Elena%20Shevchenko_RUS.pdf)

Granstrand, O. (2010). Industrial Innovation Economics and Intellectual Property. 5th ed. – Gothenburg: Svenska Kulturkompaniet.

Jackson, T (2009). Prosperity without growth: economics for a finite planet. – London: Earthscan.

Kazeki J. Economic Security Policy as Growth Strategy and Recent Developments in Trade Rules – (https://www.rieti.go.jp/en/events/bbl/21090601.html)

Nurgaliuly A. Economic security of Kazakhstan: applying foreign experience. Nurgaliuly A., Kazbekova L.A. // Central Asian Economic Review. – 2021. No 3 (138). – С. 53-65.

Qian, Y. (2007). Do National Patent Laws Stimulate Domestic Innovation in a Global Patenting Environment? A Cross-Country Analysis of Pharmaceutical Patent Protection, 1978–2002. // The Review of Economics and Statistics. – No 89(3). – P. 436-453.

Ripsman, Norrin M., and T. V. Paul (2010). Globalization and the National Security State. – Oxford: Oxford University Press.

Rogers, P (2010). Losing control: global security in the twenty-first century (3rd ed.). – London: Pluto Press.

Tal, Israel (2000). National Security: The Israeli Experience. – Westport, Conn: Praeger,

Wright, B.D. (1983). The economics of invention incentives: Patents, prizes, and research contracts // American Economic Review. – No 73(4). – Pp. 691–707.

References

Alpysbayev K. S. Politika ekonomicheskoy bezopasnosti kak element korporativnogo upravleniya [Economic security policy as an element of corporate governance]: diss. kand. ekonom. nauk / K. S. Alpysbayev. SPb., 2019. 174 s.

Amangel'dy Ayzhan Amangel'dykyzy. Pravo intellektual'noy sobstvennosti Respubliki Kazakhstan na sovremennom etape [Intellectual property law of the Republic of Kazakhstan at the present stage]: diss. kand. nauk / Amangel'dy Ayzhan Amangel'dykyzy. M., 2015. 540 s.

Grazhdanskiy protsessual'nyy kodeks Respubliki Kazakhstan ot 31 oktyabrya 2015 goda № 377-V // "Kazakhstanskaya pravda" ot 03.11.2015 g., № 210 (28086)

Zakon Respubliki Kazakhstan ot 6 yanvarya 2012 goda № 527-IV. O natsional'noy bezopasnosti Respubliki Kazakhstan» // "Kazakhstanskaya pravda" ot 17.01.2012 g., № 19-20 (26838-26839)

Innovatsionnoye i predprinimatel'skoye razvitiye natsional'noy ekonomiki v usloviyakh globalizatsii [Innovative and entrepreneurial development of the national economy in the context of globalization]: monografiya / pod red. D.M. Madiyarovoy, M.O. Ryspekovoy. Astana: Yevraziyskiy natsional'nyy universitet im.L.N.Gumileva, 2018. 276 s.

Kalykov D.D. Pravovoye obespecheniye ekonomicheskoy bezopasnosti Respubliki Kazakhstan [Legal support of the economic security of the Republic of Kazakhstan]. V sbornike: Yuridicheskaya nauka i praktika. al'manakh nauchnykh trudov Samarskogo yuridicheskogo instituta FSIN Rossii. 2017. pp. 115-116.

Kontseptsii po vkhozhdeniyu Kazakhstana v chislo 30 samykh razvitykh gosudarstv mira: Ukaz Prezidenta Respubliki Kazakhstan ot 17 yanvarya 2014 goda № 732 // "Kazakhstanskaya pravda" ot 28.01.2014 g. № 18 (27639);

Ob organakh yustitsii: Zakon Respubliki Kazakhstan ot 18 marta 2002 goda N 304 // Vedomosti Parlamenta Respubliki Kazakhstan, 2002 g., N 6, st. 67; "Kazakhstanskaya pravda" ot 22 marta 2002 goda N 062-063

Ob utverzhdenii Gosudarstvennoy programmy industrial'no-innovatsionnogo razvitiya Respubliki Kazakhstan na 2020 – 2025 gody: Postanovleniye Pravitel'stva Respubliki Kazakhstan ot 31 dekabrya 2019 goda № 1050. – (https://adilet.zan.kz/rus/docs/P1900001050).

Ob utverzhdenii Strategicheskogo plana razvitiya Respubliki Kazakhstan do 2025 goda: Ukaz Prezidenta Respubliki Kazakhstan ot 15 fevralya 2018 goda № 636 // "Kazakhstanskaya pravda" ot 20.02.2018 g., № 35 (28664)

Otchet o sostoyanii pravoprimenitel'noy praktiki v sfere zashchity prav na ob"yekty intellektual'noy sobstvennosti v Yevraziyskom ekonomicheskom soyuze za 2019 god. – Mostkva, 2020. – 47 s.

Patentnyy zakon Respubliki Kazakhstan: Zakon Respubliki Kazakhstan ot 16 iyulya 1999 goda № 427-I // Vedomosti Parlamenta Respubliki Kazakhstan, 1999 g., N 20, st. 718; 2004 g., N 17, st. 100.

Reyting global'noy konkurentosposobnosti stran mira. – (https://gtmarket.ru/ratings/imd-world-competitiveness-ranking)

Reyting stran po kolichestvu patentov. – (https://nonews.co/directory/lists/countries /number-patents)

Reyting stran po urovnyu zashchity prav sobstvennosti. – (https://nonews.co/directory/ lists/ countries/property-right-index)

Reyting stran po urovnyu innovatsiy. – (https://nonews.co/directory/lists/countries/global-innovation-index)

Reyting stran po urovnyu ispol'zovaniya piratskogo PO. – (https://nonews.co/directory/lists/countries/software-license)

Trubacheva T. 10 izobreteniy, kotoryye mogut predlozhit' miru uchonyye Kazakhstana [10 inventions that scientists of Kazakhstan can offer the world] / T. Trubacheva, A. Suleymenova. – (https://forbes.kz/process/science/fantasticheskaya_desyatka_1/)

Finansovyye aspekty Tret'yey modernizatsii ekonomiki Kazakhstana [Financial aspects of the Third modernization of the economy of Kazakhstan]: monografiya, Pod red. N.K. Kuchukovoy /Yevraziyskiy natsional'nyy universitet im. L.N. Gumileva. Nur-Sultan, IP Bulatov A.ZH., 2020. 605 s.

Shevchenko Ye. Analiz probelov v sfere nauki, tekhnologiy i innovatsiy (NTI) v Kazakhstane [Gap Analysis in Science, Technology and Innovation (STI) in Kazakhstan.]. – (https://unece.org/sites/default/files/2021-03/STI%20gap%20analysis_Kazakhstan_Report_Elena%20Shevchenko_RUS.pdf)

Granstrand, O. (2010). Industrial Innovation Economics and Intellectual Property. 5th ed. Gothenburg: Svenska Kulturkompaniet.

Jackson, T (2009). Prosperity without growth: economics for a finite planet. London: Earthscan.

Kazeki J. Economic Security Policy as Growth Strategy and Recent Developments in Trade Rules – (https://www.rieti.go.jp/en/events/bbl/21090601.html)

Nurgaliuly A. Economic security of Kazakhstan: applying foreign experience. Nurgaliuly A., Kazbekova L.A. Central Asian Economic Review. 2021. № 3 (138). C. 53-65.

Qian, Y. (2007). Do National Patent Laws Stimulate Domestic Innovation in a Global Patenting Environment? A Cross-Country Analysis of Pharmaceutical Patent Protection, 1978–2002. The Review of Economics and Statistics. No 89(3). pp. 436-453.

Ripsman, Norrin M., and T. V. Paul (2010). Globalization and the National Security State. Oxford: Oxford University Press.

Rogers, P (2010). Losing control: global security in the twenty-first century (3rd ed.). London: Pluto Press.

Tal, Israel (2000). National Security: The Israeli Experience. Westport, Conn: Praeger,

Wright, B.D. (1983). The economics of invention incentives: Patents, prizes, and research contracts. American Economic Review. No 73(4). pp. 691–707.

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СОБЛЮДЕНИЕ НАЦИОНАЛЬНЫХ ИНТЕРЕСОВ РЕСПУБЛИКИ КАЗАХСТАН ПРИ ПОДГОТОВКЕ, ПРИНЯТИИ И ИСПОЛНЕНИИ НОРМАТИВНЫХ ПРАВОВЫХ АКТОВ

В статье проводится анализ действующего законодательства Республики Казахстан на предмет разработки, принятия и исполнения законодательных и иных нормативных правовых актов в сфере национальной безопасности. Рассматривается научная экспертиза в роли главного инструмента в оценке качества и эффективности нормотворческого процесса, при этом автор подчеркивает, что проводимые в Республике Казахстан виды научной экспертизы (правовая, экономическая, антикоррупционная, экологическая) способны обеспечить соблюдение требований национальной безопасности лишь частично.

В качестве наиболее перспективного для обеспечения безопасности правотворческого процесса в статье обосновано проведение научной экспертизы на предмет соблюдения национальных интересов, как самостоятельного вида экспертизы. Развивая позиции относительно введения самостоятельного вида научной экспертизы на предмет соблюдения национальных интересов, следует отметить, что она не должна ограничиваться только этапом подготовки проекта закона. Научная экспертиза по соблюдению национальных интересов должна применяться в отношении действующих нормативных правовых актов и, таким образом, с институтом правового мониторинга будет направлена на обеспечение качества и эффективности правового регулирования общественных отношений в Республике Казахстан.

Статья написана в рамках научного проекта № AP14872048 «Разработка мер по обеспечению национальной безопасности Республики Казахстан в законотворческой сфере».

Ключевые слова: национальная безопасность, законодательство, научная экспертиза, нормативный правовой акт, национальные интересы, международные договоры.

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Observance of the national interests of the Republic of Kazakhstan in the preparation, adoption and execution of regulatory legal acts

The article analyzes the current legislation of the Republic of Kazakhstan for the development, adoption and execution of legislative and other regulatory legal acts in the field of national security. Scientific expertise is considered as the main tool in assessing the quality and effectiveness of the rule-making process, while the author emphasizes that the types of scientific expertise carried out in the Republic of Kazakhstan (legal, economic, anti-corruption, environmental) are able to ensure compliance with national security requirements only partially.

The most promising way to ensure the safety of the law-making process in the article is to conduct a scientific examination for compliance with national interests as an independent type of examination. Developing positions on the introduction of an independent type of scientific expertise for compliance with national interests, it should be noted that it should not be limited only to the stage of preparation of the draft law. Scientific expertise on the observance of national interests should be applied to the existing regulatory legal acts, which, together with the Institute of Legal Monitoring, will be aimed at ensuring the quality and effectiveness of legal regulation of public relations in the Republic of Kazakhstan.

Within the framework of the scientific project No. AR14872048: Development of measures to ensurethe national security of the Republic of Kazakhstan in the legislative sphere.

Key words: national security, legislation, scientific expertise, regulatory legal act, national interests, international treaties.

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Нормативтік құқықтық актілерді дайындау, қабылдау және орындау кезінде Қазақстан Республикасының ұлттық мүдделерін сақтау

Мақалада ұлттық қауіпсіздік саласындағы заңнамалық және өзге де нормативтік құқықтық актілерді әзірлеу, қабылдау және іске асыру үшін Қазақстан Республикасының қолданыстағы заңнамасына талдау жасалған. Ғылыми сараптама норма шығару процесінің сапасы мен тиімділігін бағалаудың негізгі құралы ретінде қарастырылса, автор Қазақстан Республикасында жүргізілетін ғылыми сараптаманың түрлері (құқықтық, экономикалық, сыбайлас жемқорлыққа қарсы, экологиялық) болып табылатынын атап көрсетеді, бұл ұлттық қауіпсіздік талаптарының сақталуын ішінара ғана қамтамасыз ете алады.

Мақалада заң шығармашылығы процесінің қауіпсіздігін қамтамасыз етудің ең тиімдісі сараптаманың тәуелсіз түрі ретінде ұлттық мүдделерге сәйкестігіне ғылыми сараптама жүргізу негізделген. Ұлттық мүдделерге сәйкес ғылыми сараптаманың тәуелсіз түрін енгізуге қатысты ұстанымдарды дамыта отырып, оның тек заң жобасын дайындау кезеңімен ғана шектеліп қалмауы тиіс екенін атап өткен жөн. Ұлттық мүдделерді сақтау жөніндегі ғылыми сараптама құқықтық мониторинг институтымен бірге Қазақстан Республикасындағы қоғамдық қатынастарды құқықтық реттеудің сапасы мен тиімділігін қамтамасыз етуге бағытталатын қолданыстағы нормативтік құқықтық актілерге қатысты қолданылуы тиіс.

No AP14872048 ғылыми жоба аясында: Қазақстан Республикасының ұлттық қауіпсіздігін заңнамалық салада қамтамасыз ету шаралары әзірленді.

Түйін сөздер: ұлттық қауіпсіздік, заңнама, ғылыми сараптама, нормативтік құқықтық акт, ұлттық мүдделер, халықаралық шарттар.

Введение

Согласно пункту 2 статьи 18 Закона Республики Казахстан от 6 января 2012 года «О национальной безопасности Республики Казахстан» (https://adilet.zan.kz*)* требования по обеспечению национальной безопасности в обязательном порядке учитываются при разработке, принятии и исполнении законодательных и иных нормативных правовых актов в сфере национальной безопасности.

Вместе с тем, каким образом функционирует данный механизм, остается неясным. Толкование пункта 2 статьи 18 Закона «О национальной безопасности Республики Казахстан» указывает на необходимость изучения следующих взаимосвязанных между собой вопросов:

1) где (в каком документе) должно найти оценку соблюдение требований по обеспечению национальной безопасности применительно к нормативному регулированию общественных отношений;

2) какие инструменты используются для отражения требований по обеспечению национальной безопасности в нормативном регулировании;

3) достаточно ли использования имеющегося инструментария для обеспечения соблюдения требований национальной безопасности относительно каждой стадии процесса регуляторного воздействия – разработка, принятие и исполнение нормативного правового акта? (Мамонов 2020: 110)

Практика подготовки, принятия и исполнения нормативных правовых актов должным образом не учитывает вышеназванные положения и не подтверждается процедурно-процессуально. Между тем, все стадии законотворческого процесса достаточно регламентированы. Принята и действует необходимая правовая основа, которая регулируют общественные отношения, связанные с порядком разработки, представления, обсуждения, принятия, регистрации, введения в действие, изменения, дополнения, прекращения, приостановления действия и опубликования правовых актов Республики Казахстан.

Осуществляется правовой мониторинг с целью выявления в принятых нормативных правовых актах противоречий законодательству Республики Казахстан, дублирований, пробелов, неэффективно реализуемых, устаревших и коррупциогенных норм права и выработки предложений по их совершенствованию путем прогнозирования, анализа, оценки эффективности реализации принятых нормативных правовых актов (https://adilet.zan.kz).

Но если оценить те или иные общественные отношения, на эффективную реализацию которых направлены, в первую очередь, законы Республики Казахстан, то имеют место примеры, когда приоритетные направления в полной мере не обеспечиваются.

В Законе Республики Казахстан от 6 января 2012 года «О национальной безопасности Республики Казахстан» устанавливается перечень основных национальных интересов. Это достаточно крупные блоки общественных отношений. Отдельные из них непосредственно выведены на уровень конституционных ценностей и основополагающих принципов деятельности государства (https//www.dhs.gov.assets (18.07.2020).) Это, прежде всего, обеспечение прав и свобод человека и гражданина, являющееся фактически базисом в деле построения современного правового государства, и от уровня его соблюдения во многом зависит реализация всех основных национальных интересов страны. По этому вопросу академик Гайрат Сапаргалиев справедливо отмечал: «необходима ориентация законотворчества на конституционное положение о том, что «Республика Казахстан утверждает себя демократическим, светским, правовым и социальным государством, высшими ценностями которого являются человек, его жизнь, права и свободы» (Сапаргалиев 2006).

Методы исследования

В статье использованы общенаучные методы исследования, а также специальные общенаучные и частнонаучные, в том числе анализ, сравнение, сопоставление и другие.

Обсуждение

Для оценки качества и эффективности отдельных нормативных правовых актов Закон Республики Казахстан «О правовых актах» от 6 апреля 2016 года предусматривает правовой мониторинг. В этой связи в 2007 году Гайрат Сапаргалиев подчеркивал: «следует проводить мониторинг и действующих законов с позиции их эффективности, полезности и т.д. Может быть, в будущем этот вопрос следует закрепить в Законе о НПА» (Сапаргалиев 2006).

Если провести правовой мониторинг дорожно-транспортной сферы Казахстана, занимающей лидирующее положение по степени угрозы для человеческой жизни, нетрудно определить, что неверно реализуются конституционные и законодательные положения о высшей ценности – человеческой жизни (https://adilet.zan.kz/rus/docs).

Согласно письму Премьер-Министра Республики Казахстан А.А. Смаилова, только за январь 2022 года количество погибших на дорогах составило 166 случаев, с ростом на 54 % по отношению к прошлому году. За 2021 год (по данным Национального координационного центра экстренной медицины) зарегистрировано 33 643 вызова по ДТП, общее количество пострадавших составило 40 593 человека, что на 30 % больше показателя 2020 года. Дорожно-транспортный травматизм в Казахстане является основной причиной смертности среди детей в возрастной группе от 5 до 14 лет, за последние 5 лет по причине ДТП погибло 623 ребенка, что свидетельствует о потере демографического резерва страны и об острой необходимости более пристального внимания Правительства к данному вопросу. В мировом рейтинге (по итогам 2019 года) по смертности в дорожно-транспортных происшествиях Казахстан занимает 107 место с показателем 10,4 погибших на 100 тыс. населения. За последние 5 лет 1 971 человек признаны лицами с инвалидностью различных групп вследствие ДТП (https://bestprofi.com/document/2799662758?5&isScroll=true).

Приведенное письмо наглядно показывает состояние защищенности человеческой жизни в Казахстане, когда население страны ежедневно подвергается риску по потере здоровья и, что особенно непоправимо, жизни человека.

Однако действующее законодательство страны в дорожно-транспортной сфере в полной мере устанавливает правовые основы, общие и специальные условия функционирования дорожного движения и обеспечения его безопасности в Республике Казахстан. Более того, в статье 3 Закона РК «О дорожном движении» от 17 апреля 2014 года основными принципами дорожного движения являются:

1) приоритет жизни и здоровья участников дорожного движения над экономическими результатами хозяйственной деятельности;

2) приоритет ответственности государства за обеспечение безопасности дорожного движения над ответственностью участников дорожного движения;

3) соблюдение интересов участников дорожного движения, общества и государства при обеспечении безопасности дорожного движения;

4) системный подход к обеспечению безопасности дорожного движения.

Нормы административного и уголовного законодательства страны устанавливают ответственность за нарушение правил в дорожно-транспортной сфере страны. Кроме того, в дорожно-транспортной сфере страны идет активное строительство автомобильных дорог, транспортных развязок, куда из республиканского бюджета выделяются многомиллиардные ассигнования. Причем это осуществляется с целью снижения, главным образом, транспортной нагрузки, обеспечения безопасности дорожного движения и, что немаловажно, улучшения экологической ситуации в этих городах. Безусловно, это в комплексе необходимая и стратегически важная задача, в реализации которой соответствующие уполномоченные органы должны руководствоваться вышеназванными благими целями, но эта деятельность, хотя и бесспорно необходима, тем не менее имеет, в первую очередь, экономическую основу и, следовательно, направлена на улучшение транспортной инфраструктуры городов.

Задача же приоритета жизни и здоровья граждан, участвующих в дорожном движении, над экономическими результатами хозяйственной деятельности в данном случае реализуется, однако не прямо, а лишь опосредованно. К примеру, при активном строительстве дорожно-транспортной инфраструктуры в условиях автомобильной загруженности в таком мегаполисе, как Алматы, такой важный аспект дорожно-транспортных отношений, как безопасность пешеходного движения, практически не обеспечена и отсутствует порядок его регламентации. Речь в данном случае идет о регулируемых пешеходных переходах (со светофорами) и нерегулируемых пешеходных переходах. И суть проблемы заключается в неисполнении законодательных норм по обеспечению приоритета человеческой жизни над экономическими результатами в дорожно-транспортных отношениях, и за то время, когда приходит осознание опасности таких мер, могут происходить необратимые последствия.

О какой безопасности пешеходного движения можно утверждать, когда, к примеру, на выезде в Талгарском направлении из города Алматы установлено более 10 нерегулируемых пешеходных переходов (к тоже неосвещаемых), и какая безопасность пешеходного движения на Талгарской трассе может быть обеспечена, если жизнь и здоровье переходящего дорогу человека исключительно зависят только от водителя транспортного средства. Таким образом, только от водителя транспортного средства зависит здоровье и жизнь переходящего автомобильную дорогу человека и, соответственно, такие водители должны:

- хорошо знать правила дорожного движения и профессионально водить автотранспортное средство;
- быть предельно внимательными во время езды;
- не употреблять спиртные или другие одурманивающие средства;
- иметь технически исправные автомобили;
- обладать хорошим зрением, от качества которого во многом зависит осмотрительность, особенно в вечернее и ночное время;
- обладать великолепной реакцией на случай непредвиденных обстоятельств и многими другими обязательными свойствами.

Но насколько наши водители соответствуют этим требованиям, когда статистика Генеральной прокуратуры РК говорит о потенциальной опасности для жизни и здоровья человека от большого количества автовладельцев, задержанных в состоянии алкогольного или наркотического опьянения во время автомобильного движения.

Учитывая другие факты, связанные с неопределением реального количества нарушителей правил дорожного движения и не отраженные в официальной статистике, все это подчеркивает необходимость применения в Казахстане более радикальных мер, направленных на охрану жизни и здоровья человека, чтобы исключить случаи смертельных наездов на детей, когда сбивают насмерть на регулируемых пешеходных переходах мать с малолетним ребенком (https://tengrinews.kz/accidents/almatinets-sbil-nasmert-mat-rebenkom-zebre-almatinskoy-427793/) и т.д. И до тех пор, пока на городских автодорогах будут действовать потенциально опасные для любого переходящего автодорогу человека так называемые «пешеходные переходы» (регулируемые или нерегулируемые) и не сократится количество нарушителей в состоянии алкогольного, наркотического опьянения, одним словом, безответственного отношения, будут неизбежно происходить происшествия, приводящие к трагическим последствиям, и нередко в отношении детей дошкольного возраста. Ведь автомобиль – это, в первую очередь, источник повышенной опасности, и статистика подтверждает, что многие водители не просто не уступают дорогу пешеходам, а довольно часто игнорируют данное правило, тем самым ставя всех участников

дорожного движения в потенциально опасную ситуацию.

И это притом, что установленные санкции в административном и уголовном законодательстве страны не останавливают и не предотвращают реально наступление трагических последствий. Следовательно, требуется изменение государственной политики или иной подход в дорожно-транспортной сфере в сторону обеспечения действующих норм о приоритете человеческой жизни над экономическими, хозяйственными результатами. Если существует потенциальная опасность для жизни и здоровья человека в дорожно-транспортных отношениях, то государство незамедлительно обеспечивает такую защиту. Ведь жизнь человека бесценна и её невозможно вернуть в отличие от возведенных строений.

Отход от политики, направленной на обеспечение приоритета человеческой жизни в дорожно-транспортной сфере Республики Казахстан, свидетельствует о нарушении режима законности в стране, и вряд ли можно утверждать об их эффективной реализации в обозначенной сфере общественных отношений страны.

В этой связи государственные органы должны решительно предпринимать необходимые меры по обеспечению безопасности пешеходного движения, которые должны включать:

- запрет по установлению «пешеходного движения» на оживленных городских и пригородных автомобильных трассах, развитие сети подземных и надземных переходов и других безопасных переходов (новые инновационные подходы, относимые к степени не особой сложности), где исключалась бы какая-либо связь пешехода с транспортным средством, являющимся, в первую очередь, источником повышенной опасности;

- задействовать весь круг юридических и физических лиц, участвующих в дорожно-транспортной сфере, в вопросах повышения квалификации с целью исполнения нормативного приоритета человеческой жизни над экономическими результатами. Это легко заметить по количеству видеокамер над пешеходными переходами, которые установлены в минимальном количестве. Но зато есть огромное количество видеокамер, устанавливающих пределы скоростного движения, порядка транспортного расположения, автомобильного движения и т.д. Безусловно, они направлены на безопасность дорожно-транспортных отношений, но безопасность человека они обеспечивают опосредованно. Приведенные примеры также связаны с незнанием и непониманием сути поставленных вопросов, когда непосредственно обеспечивается на практике дорожно-транспортная политика государства;

- устанавливать святящиеся пешеходные переходы, как это предложили китайские специалисты более 10 лет назад, а также трудно переходимые заградительные сооружения на оживленных городских трассах с интенсивным движением для исключения возможности перехода дороги в неустановленных пешеходных переходах и многие другие меры.

Кроме того, практически ни в одном нормативном правовом акте страны, ни в государственных программных документах не содержатся четко прописанные правила, которые непосредственно были бы направлены на охрану жизни и здоровья участника пешеходного движения. Если проект на строительство транспортного объекта в каком-либо районе города Алматы получает одобрение по государственному частному партнерству или по иным условиям, т.е., соответственно, проходит все этапы конкурсного отбора, включая различные виды экспертизы и соответствия предъявляемым требованиям, то насколько подрядные организации при проведении строительных работ понимают или знают об установленной норме, о приоритете жизни и здоровья участников дорожного движения над экономическими результатами хозяйственной деятельности. Кто-то может возразить относительно такого высказывания, поскольку все строительные проекты проходят обязательную экспертизу и их задача состоит только в точном выполнении поставленных задач по реализации проекта. Но повседневная практика в дорожной сфере, когда регулярно происходят трагические события, показывает противоположную ситуацию.

Причем, проведение правового мониторинга в дорожно-транспортной сфере Республики Казахстан должно исходить из оценки эффективности реализации принятых нормативных правовых актов на предмет обеспечения человеческой жизни. Такая оценка, помимо правовых актов, и других государственных, ведомственных актов, заключается в мониторинге сложившей системы организации уполномоченных органов и хозяйствующих субъектов страны по исполнению законодательных положений в дорожно-транспортной сфере на предмет обеспечения человеческой жизни.

Аналогичные примеры, связанные с дорожно-транспортными отношениями, можно при-

вести по событиям в Казахстане во второй половине 2020 года. Тогда, в условиях обострения коронавирусной инфекции в июне 2020 года среди соответствующих структур страны, проявилось неполное понимание и реализация законодательных норм в сфере здравоохранения. Что, в свою очередь, явилось нарушением национальных интересов в сфере защиты населения и территории Казахстана от угрозы коронавирусной инфекции. Приведенные примеры обуславливают необходимость эффективного взаимодействия всей системы государственного управления с расширением института конституционного контроля по вопросам соответствия конституционного принципа о приоритете человеческой жизни.

Выводы

Исходя из вышеизложенного, следует, что важно усилить интеграцию защиты национальных интересов и законодательного регулирования общественных отношений, которые служат отражением сущности современного правового государства. В правовом государстве юридические нормы должны с исчерпывающей полнотой отражать потребности личности и общества, препятствовать возникновению негативных социальных явлений. При этом они сами не должны создавать угрозу реализации национальных интересов в силу своего несовершенства, закрепления ложных целей и приоритетов (Мамонов 2020).

В соответствии с законодательным определением, национальная безопасность состоит в защите национальных интересов страны не только от реальных, но и от потенциальных угроз. Речь идет о выявлении зарождающегося конфликтного потенциала, когда процесс еще слабо проявляется вовне, не носит ярко выраженного характера угрозы, обнаруживается в виде отдельных, иногда не связанных между собой факторов (Мамонов 2020).

В этом контексте особое внимание заслуживает подпункт 7 статьи 5 Закона «О национальной безопасности Республики Казахстан» – достижение и поддержание уровня и качества образования и научного потенциала страны, адекватного потребностям социально-экономического, инновационного и интеллектуального развития общества и граждан. Дело в том, что на протяжении более 30 лет после распада СССР, к сожалению, произошло заметное снижение интеллектуального потенциала среди населения постсоветских стран, и прежде всего, подрастающего поколения, что, в свою очередь, отразилось на их культуре, нравственности, морали и др. ценностных категориях. Весьма успешно появился характерный для многих стран Запада принцип индивидуализма, культ эгоизма, когда ради обеспечения прав и интересов индивида идет стремительный упадок духовности, культуры, нравственности населения. Это спровоцировало потребительское отношение человека по всем направлениям человеческой деятельности, утрату и безразличие ко всему окружающему. Утрачивается такой важный компонент жизнедеятельности государства, как духовность народа, отношения людей к друг другу.

И самое опасное для развития общества – идет незаметное, планомерное лоббирование «новых ценностей», не приемлемое для казахстанского общества. Причем, такое лоббирование наблюдается главным образом в информационной и культурной сферах страны.

В данном случае определить негативные последствия правотворчества способны лишь глубокие, системные научные исследования, предметом которых непосредственно являются требования по обеспечению национальной безопасности.

Особого внимания заслуживает изучение и оценка законотворческого процесса в контексте влияния норм международных договоров на его содержание и динамику. Согласно пункту 2 статьи 2 Закона Республики Казахстан от 30 мая 2005 года «О международных договорах» «не допускается заключение международных договоров, не соответствующих национальным интересам Республики Казахстан, способных нанести ущерб национальной безопасности или ведущих к утрате независимости Республики Казахстан». Аналогичные нормы о соблюдении национальных интересов содержатся и в других нормативных правовых актах Казахстана. Но на практике многие международные договоры, заключаемые Республикой Казахстан, не всегда отвечают данному фундаментальному принципу. Достаточно привести примеры с соглашениями по трансграничным рекам. Так, согласно статье 141 Водного Кодекса РК от 9 июля 2003 года основными направлениями международного сотрудничества в области использования и охраны трансграничных вод являются защита интересов Республики Казахстан в области использования и охрана трансграничных вод на основе заключения международных договоров (https://adilet.zan.kz).

Одними из причин неэффективности казахстанских соглашений по трансграничным рекам являются следующие:

- отсутствие соответствующей квалификации и многолетнего опыта по проведению двусторонних переговоров по столь специфическому для казахстанской дипломатии и науки вопросу по регулированию трансграничных водных ресурсов. Данный институт является относительно новым для науки международного права, когда в бытность нахождения в СССР в республике отсутствовали национальные кадры по данной тематике;

- отсутствие в Казахстане взаимосвязи между внешнеполитическими органами страны, государственными органами управления в сфере водного хозяйства и научно-образовательными учреждениями страны в рамках проведения единой политики и её обязательным научным обеспечением. Исследования, проводимые научными организациями страны по водным проблемам, практически не оказывают содействия для решения узловых и актуальных проблем Казахстана по трансграничным водным ресурсам, исходя из качества содержания и актуальности для страны проводимых исследований;

- выделяя огромные финансы из республиканского бюджета на программно-целевое финансирование, к примеру, по трансграничным водным ресурсам, Казахстан так и не решил за 30 лет задачи по ключевым направлениям, связанным с режимом использования трансграничных водных ресурсов страны. А этот факт в свою очередь показывает неэффективное использование бюджетных средств Казахстана.

Приведенные факты обязывают уполномоченные органы страны при реализации внутренней и внешней политики придерживаться в своей деятельности в первую очередь национальными интересами Казахстана.

Рассматривая научную экспертизу в роли главного инструмента в оценке качества и эффективности нормотворческого процесса, следует отметить, что проводимые в Республике Казахстан виды научной экспертизы (правовая, экономическая, антикоррупционная, экологическая) способны обеспечить соблюдение требований национальной безопасности лишь частично (Мамонов 2020). В соответствии с Правилами организации и проведения научной экспертизы, а также отбора научных правовых экспертов, утвержденных Постановлением Правительства Республики Казахстан от 8 июня 2021 года № 386, перед научной правовой экспертизой в числе других ставятся следующие вопросы:

- описание проблемных вопросов, на решение которых направлен проект закона, в том числе оценку научной обоснованности и своевременности принятия проекта закона;

- описание всех известных и эффективных способов, механизмов, подходов к разрешению проблемных вопросов, на решение которых направлено принятие закона, в том числе применявшихся на разных исторических этапах, зарубежной практике, а также описание смежных сфер правоотношений и влияния на них в виде последствий от принятия закона;

- анализ предлагаемых проектом закона способов, механизмов, подходов к разрешению поставленных проблемных вопросов, возможных последствий от принятия тех или иных способов разрешения проблемных ситуаций:

- проверка на соответствие проекта закона Конституции Республики Казахстан (далее – Конституция) нормативным правовым актам вышестоящих уровней, международным обязательствам Республики Казахстан;

- оценка правовых, социальных, экономических и иных последствий принятия проекта закона, в том числе в части возможных рисков социальной напряженности;

- определение наличия причин и условий, способствующих совершению уголовных и административных правонарушений в связи с принятием проекта закона, а также оценка его влияния на предупреждение их совершения;

- определение наличия причин и условий, способствующих ущемлению права на гендерное равенство в связи с принятием проекта закона;

- определение перечня нормативных правовых актов, подлежащих уточнению при условии принятия проекта закона;

- выработка научно обоснованных предложений по улучшению законодательной базы;

- выявление возможных противоречий принципам соответствующей отрасли права;

- выявление явного или скрытого ведомственного или группового интереса, обеспечиваемого проектом закона.

При проведении научной экономической экспертизы важную роль играет такой аспект, как «оценка влияния положений проекта на макроэкономическую эффективность, социальное развитие, развитие предпринимательства, экономическую безопасность отрасли и (или) страны».

Научная антикоррупционная экспертиза содержит раздел «оценка последствий принятия нормы проекта нормативного правового акта в части возможности совершения коррупционных правонарушений» (включая позиции о недостаточной прозрачности деятельности, необоснованных затратах по отношению к общественной пользе, нарушении баланса интересов, недостаточности механизмов контроля, «навязанной» коррупциогенности и др.).

При проведении научной правовой экспертизы эксперт чаще всего может оценить только реальные угрозы национальной безопасности, возникающие из некачественного правотворчества. Они четко корреспондируются с такими критериями экспертной оценки, как «описание проблемных вопросов, на решение которых направлен проект закона, в том числе обоснованность и своевременность принятия проекта закона», «соответствие проекта закона Конституции, нормативным правовым актам вышестоящих уровней, международным обязательствам Республики Казахстан», «определение наличия причин и условий, способствующих совершению уголовных и административных правонарушений, в связи с принятием проекта закона», «выявление возможных противоречий принципам соответствующей отрасли права» (https://adilet.zan.kz).

При положительных выводах по названным позициям эксперт в большинстве случаев ограничивается тремя-четырьмя предложениями, позитивно оценивая последствия принятия законодательного акта, фиксирует отсутствие ведомственного или группового интереса, противоречащего целям нормативного регулирования.

На основе аналогичных подходов составляются также заключения научной экономической и антикоррупционной экспертизы.

Таким образом, все виды научной экспертизы нормативных правовых актов направлены в итоге на повышение эффективности действующего законодательства Республики Казахстан, которая, однако, не повышается на основе приведенных примеров. О какой эффективности принятых нормативных правовых актов можно утверждать, когда допускаются факты нарушения конституционной нормы по обеспечению человеческой жизни в дорожно-транспортной сфере или в условиях коронавирусной инфекции. В этой связи встает вопрос об эффективности конституционной нормы.

Как отмечают российский ученые: «Эффективность действия конституционного права есть его результативность в достижении тех целей, которые преследуются конституцией и другими нормами конституционно-правового содержания. Анализ эффективности конституционной нормы требует не только выявления ее роли в получении определенного результата, но и определения соотношения между этим результатом и целью, ради достижения которой данная норма создавалась. Степень эффективности конституционных норм тем выше, чем больше положительных последствий, как предусмотренных целями конституции, так и не охватываемых ими, и чем меньше отрицательных последствий» (Лазарев 1999).

В то же время отмечать о возможной эффективности или неэффективности законопроектов преждевременно. Безусловно, эффективность проекта закона может быть оценена на основе разработанности его положений, но пока закон не принят и не начал действовать, вряд ли уместно утверждать о действенности проекта закона. Поэтому эффективность разрабатываемых проектов может быть оценена на основе всего процесса его реализации, начиная с определения содержания, механизма реализации и наличия достигнутого результата.

Вряд ли самый умный эксперт может априори утверждать о возможной эффективности или неэффективности закона, пока он не принят и не начал действовать. Разумеется, необходимо знать об эффективности закона. Но для этого нужно принять закон, а затем через некоторое время проводить его мониторинг (Сапаргалиев 2006).

Учитывая изложенное, наиболее перспективным для обеспечения безопасности правотворческого процесса представляется введение научной экспертизы на предмет соблюдения национальных интересов как самостоятельного вида экспертизы. Развивая позиции относительно введения самостоятельного вида научной экспертизы на предмет соблюдения национальных интересов, следует отметить, что она не должна ограничиваться только этапом подготовки проекта закона. Научная экспертиза по соблюдению национальных интересов должна применяться на этапе «принятия» нормативного правового акта, а также в отношении действующих, и совместно с институтом правового мониторинга будет направлена на обеспечение качества и эффективности правового регулирования общественных отношений в Республике Казахстан. Дальнейшие исследования по данной теме, соответственно, будут более подробно изложены в последующих публикациях автора.

Литература

Алматинец сбил насмерть мать с ребенком на зебре в Алматинской области // https://tengrinews.kz/accidents/almatinets-sbil-nasmert-mat-rebenkom-zebre-almatinskoy-427793/

Ахременко А.С. Политический анализ и прогнозирование: Учебное пособие. – М.: Гардарики, 2006. – 333 с.

Байкенжеев А.С. Конституционно-правовые оснрвы обеспечения национальной безопасности в Республике Казахстан: Монография. – Алматы: ТОО ЦКО Сервис, 2017. – 150 с.

Бородушко В.И. Исследование проблем национальной безопасности с позиции теории рисков [Электронный ресурс] // Известия Санкт-Петербургского Государственного экономического университета, 2013. – С. 57-64 // URL: https://www.Cyberleninka.ru.-article/v/issledovanie-problem-natsionalnoy-bezopasnosti-s-pozitsiy-teorii-riskov (22.06.2020).

Воробьев Ю.Л. Национальная безопасность и управление стратегическими рисками в России // Стратегия гражданской защиты: проблемы и исследования. – М., 2013. – С. 95-104.

Водный Кодекс Республики Казахстан от 9 июля 2003 года [электронный ресурс]//Информационно-правовая система нормативных правовых актов Республики Казахстан «Адилет» URL: https://adilet.zan.kz

Глушко Е.К. Дорожные карты в государственном управлении // Право и государство: теория и практика. – №11; Методологические основы обеспечения национальной безопасности Республики Казахстан: системный подход: Монография / Под общ. ред. В.В. Мамонова. – Алматы: Академия КНБ Республики Казахстан, 2020. – 128 с. – С. 110.

Городецкии А.Е. О научно обоснованных подходах к формированию национальной системы управления рисками экономической безопасности // Проблемы стратегического управления: сб. матер. всероссийского симпозиума. – 20 февраля 2018 г. / Под ред. С.Н. Сильвестрова. – М.: Когито-Центр, 2018. – 133 с.

Закон Республики Казахстан от 30.05.2005 г. № 54-III «О международных договорах Республики Казахстан» (с изменениями и дополнениями по состоянию на 13.03.2021 г. Ведомости Парламента Республики Казахстан, май, 2005 г., № 10, ст. 35)

Закон Республики Казахстан от 6 января 2012 года «О национальной безопасности Республики Казахстан» [электронный ресурс] // Информационно-правовая система нормативных правовых актов Республики Казахстан «Адилет» URL: https://adilet.zan.kz

Закон Республики Казахстан «О правовых актах» от 6 апреля 2016 года [электронный ресурс] // Информационно-правовая система нормативных правовых актов Республики Казахстан «Адилет» URL: https://adilet.zan.kz

Закон Республики Казахстан от 6 января 2012 года «О национальной безопасности Республики Казахстан» [электронный ресурс] // Информационно-правовая система нормативных правовых актов Республики Казахстан «Адилет» URL: https://adilet.zan.kz

Информационная безопасность и защита информации [Электронный ресурс] // URL: https://m.studref.com/325284/-informatika/analiz_riskov_ugroz_uyazvimostey_sistemy (15.08.2020).

Малиновский В.А. Становление и укрепление конституционализма в Казахстане: тернистый путь к стабильности // «Конституция Республики Казахстан: стабильность и динамизм: Научно-практическая конференция, 2006. 7 декабря. – Алматы: КИСИ при Президенте РК, 2007. – С. 14, 15.

Методологические основы обеспечения национальной безопасности Республики Казахстан: системный подход: Монография / Под общ. ред. В.В. Мамонова. – Алматы: Академия КНБ Республики Казахстан, 2020. – 128 с.

Ким. В.А., Ким. Г.В. Конституционный строй Республики Казахстан (общие положения). – Алматы, 1998.

Конституция Республики Казахстан от 30.08.1995 г. [Электрон. ресурс]-URL: https: adilet.zan.kz/rus/docs

Kolios A., Read G. A Political, Economic, Social, Technology, Legal and Environmental (PESTLE) //Approach for Risk Identification of the Tidal Industry in the United Kingdom, 2013// URL: www.mdpi.com./journal/energies (22.06.2020).

Конституционное право: Учебник / отв. ред. В.В. Лазарев. – М.: Юрист, 1999. – 592 с.

Концепция федеральной системы управления рисками в области экономической безопасности // Проблемы стратегического управления: сб. Матер. Всероссийского симпозиума. – 20 февраля 2018 г. / Под ред. С.Н. Сильвестрова. – М.: Когито – Центр, 2018. – 133 с .

Постановление Правительства Республики Казахстан от 29 ноября 2017 года №790 «Об утверждении Системы государственного планирования в Республике Казахстан» [Электронный ресурс] // Информационно-правовая система нормативных правовых актов Республики Казахстан «Әділет» // URL:http://adilet.zan.kz./rus/docs/P1700000790 (15.05.2020).

Правила организации и проведения научной экспертизы, а также отбора научных правовых экспертов, утвержденные Постановлением Правительства Республики Казахстан от 8 июня 2021 года № 386 [электронный ресурс]//Информационно-правовая система нормативных правовых актов Республики Казахстан «Адилет» URL: https://adilet.zan.kz

Письмо Премьер-Министра Республики Казахстан от 13 апреля 2022 года № 23-09/1621 дз// https://bestprofi.com/document/2799662758?5&isScroll=true

Сапаргалиев Г.С. Проблемы развития законотворчества в Республике Казахстан: тенденции и факторы // Вестник Института законодательства. – 2006 год. – №3.

СТ РК ISO 31000 «Менеджмент риска. Руководящие указания», 2020. – 18 с. (вводится с 1 июля 2021г.) [Электронный ресурс] // URL: https://ksm/public-discussion/standarts/discussion-of-draft-st-rk/40015/

Шабуров А.С. Правовая безопасность в системе национальной безопасности // Вестник ЮУрГУ. Серия «Право». – 2015. – Т. 15, №3. – С. 24-30.

Risk Management Fundamentals // Homeland Security Management Doctrine? 2001. – 31с. // URL:https//www.dhs.gov.assets(18.07.2020).

References

Almatinec sbil nasmert' mat' s rebenkom na zebre v Almatinskoj oblasti [An Almaty man knocked down a mother and child to death on a zebra in the Almaty region]// https://tengrinews.kz/accidents/almatinets-sbil-nasmert-mat-rebenkom-zebre-almatinskoy-427793/

Ahremenko A.S. Politicheskij analiz i prognozirovanie: Uchebnoe posobie. [Political analysis and forecasting: A textbook]. – M.: Gardariki, 2006. – 333 s.

Bajkenzheev A.S. Konstitucionno-pravovye osnrvy obespechenija nacional'noj bezopasnosti v Respublike Kazahstan: Monografija. [Constitutional and legal foundations of national security in the Republic of Kazakhstan: Monograph.] – Almaty: TOO CKO Servis , 2017. -150 s.

Borodushko V.I. Issledovanie problem nacional'noj bezopasnosti s pozicii teorii riskov [Research of national security problems from the perspective of risk theory][Jelektronnyj resurs] // Izvestija Sankt-Peterburgskogo Gosudarstvennogo jekonomicheskogo universiteta, 2013. – S.57-64 // URL: https://www.Cyberleninka.ru.-article/v/issledovanie-problem-natsionalnoy-bezopasnosti-s-pozitsiy-teorii-riskov (22.06.2020).

Vorob'ev Ju.L. Nacional'naja bezopasnost' i upravlenie strategicheskimi riskami v Rossii [National security and strategic risk management in Russia] // Strategija grazhdanskoj zashhity: problemy i issledovanija. – M., 2013. – s. 95-104.

Vodnyj Kodeks Respubliki Kazahstan ot 9 ijulja 2003 goda [Water Code of the Republic of Kazakhstan dated July 9, 2003]// [jelektronnyj resurs]//Informacionno-pravovaja sistema normativnyh pravovyh aktov Respubliki Kazahstan «Adilet» URL: https://adilet.zan.kz

Glushko E.K. Dorozhnye karty v gosudarstvennom upravlenii [Road maps in public administration]// Pravo i gosudarstvo: teorija i praktika. – №11Metodologicheskie osnovy obespechenija nacional'noj bezopasnosti Respubliki Kazahstan: sistemnyj podhod: Monografija/Pod.obshh.red. V.V.Mamonova-Almaty: Akademija KNB Respubliki Kazahstan, 2020.-128s. S.110.

Gorodeckii A.E. O nauchno obosnovannyh podhodah k formirovaniju nacional'noj sistemy upravlenija riskami jekonomicheskoj bezopasnosti [On scientifically based approaches to the formation of a national risk management system of economic security] // Problemy strategicheskogo upravlenija: sb. mater. vserossijskogo simpoziuma. – 20 fevralja 2018 g. / Pod red. S.N. Sil'vestrova . – M.: Kogito-Centr, 2018. – 133 s.

Zakon Respubliki Kazahstan ot 30.05.2005 g. № 54-III «O mezhdunarodnyh dogovorah Respubliki Kazahstan» (s izmenenijami i dopolnenijami po sostojaniju na 13.03.2021 g. Vedomosti Parlamenta Respubliki Kazahstan, maj, 2005 g., № 10, st.35) [Law of the Republic of Kazakhstan dated 30.05.2005 No. 54-Sh "On International Treaties of the Republic of Kazakhstan" (with amendments and additions as of 13.03.2021 Bulletin of the Parliament of the Republic of Kazakhstan, May, 2005, No. 10, Article 35)]

Zakon Respubliki Kazahstan ot 6 janvarja 2012 goda «O nacional'noj bezopasnosti Respubliki Kazahstan» [jelektronnyj resurs] [The Law of the Republic of Kazakhstan dated January 6, 2012 "On National Security of the Republic of Kazakhstan"]//Informacionno-pravovaja sistema normativnyh pravovyh aktov Respubliki Kazahstan «Adilet» URL: https://adilet.zan.kz

Zakon Respubliki Kazahstan «O pravovyh aktah» ot 6 aprelja 2016 goda [The Law of the Republic of Kazakhstan "On legal Acts" dated April 6, 2016]// [jelektronnyj resurs]//Informacionno-pravovaja sistema normativnyh pravovyh aktov Respubliki Kazahstan «Adilet» URL: https://adilet.zan.kz

Zakon Respubliki Kazahstan ot 6 janvarja 2012 goda «O nacional'noj bezopasnosti Respubliki Kazahstan»[he Law of the Republic of Kazakhstan dated January 6, 2012 "On National Security of the Republic of Kazakhstan"] [jelektronnyj resurs]//Informacionno-pravovaja sistema normativnyh pravovyh aktov Respubliki Kazahstan «Adilet» URL: https://adilet.zan.kz

Informacionnaja bezopasnost' i zashhita informacii [Information security and information protection] [Jelektronnyj resurs]// URL: https://m.studref.com/325284/-informatika/analiz_riskov_ugroz_uyazvimostey_sistemy (15.08.2020).

Malinovskij V.A. Stanovlenie i ukreplenie konstitucionalizma v Kazahstane: ternistyj put' k stabil'nosti [Formation and strengthening of constitutionalism in Kazakhstan: a thorny path to stability // "Constitution of the Republic of Kazakhstan: stability and dynamism: Scientific and practical conference]// «Konstitucija Respubliki Kazahstan: stabil'nost' i dinamizm: Nauchno-prakticheskaja konferencija, 2006. 7 dekabrja. – Almaty. – KISI pri Prezidente RK. – 2007. – S. 14, 15.

Metodologicheskie osnovy obespechenija nacional'noj bezopasnosti Respubliki Kazahstan: sistemnyj podhod: Monografija [Methodological foundations of ensuring national security of the Republic of Kazakhstan: a systematic approach: Monograph]/Pod. obshh.red. V.V.Mamonova-Almaty: Akademija KNB Respubliki Kazahstan, 2020.-128s.

Kim. V.A., Kim. G.V. Konstitucionnyj stroj Respubliki Kazahstan (obshhie polozhenija) [Constitutional system of the Republic of Kazakhstan (general provisions).] – Almaty. – 1998.

Konstitucija Respubliki Kazahstan ot 30.08.1995 g. [Constitution of the Republic of Kazakhstan dated 30.08.1995] [Jelektron. resurs]-URL: https: adilet.zan.kz/rus/docs

Kolios A., Read G. A Political, Economic, Social, Technology, Legal and Environmental (PESTLE) [Political, economic, Social, Technological, legal and environmental (PESTL)] //Approach for Risk Identification of the Tidal Industry in the United Kingdom, 2013// URL: www.mdpi.com./journal/energies (22.06.2020).

Konstitucionnoe pravo: Uchebnik/otv.red.V.V.Lazarev. [Constitutional law: Textbook/ed.V.V.Lazarev] -M.:Jurist, 1999.-592s.

Koncepcija federal'noj sistemy upravlenija riskami v oblasti jekonomicheskoj bezopasnosti // Problemy strategicheskogo upravlenija: sb. Mater. Vserossijskogo simpoziuma. [The concept of the federal risk management system in the field of economic security // Problems of strategic management: collection of Materials. All-Russian Symposium.] – 20 fevralja 2018 g. /Pod red. S.N. Sil'vestrova. – M.: Kogito – Centr, 2018. – 133 s .

Postanovlenie Pravitel'stva Respubliki Kazahstan ot 29 nojabrja 2017 goda №790 «Ob utverzhdenii Sistemy gosudarstvennogo planirovanija v Respublike Kazahstan» [Jelektronnyj resurs] // Informacionno-pravovaja sistema normativnyh pravovyh aktov Re-

spubliki Kazahstan «Ədilet» [Resolution of the Government of the Republic of Kazakhstan dated November 29, 2017 No. 790 “On approval of the State planning System in the Republic of Kazakhstan” [Electronic resource]]// URL:http://adilet.zan.kz./rus/docs/P1700000790 (15.05.2020).

Pravilami organizacii i provedenija nauchnoj jekspertizy, a takzhe otbora nauchnyh pravovyh jekspertov, utverzhdennyh Postanovleniem Pravitel’stva Respubliki Kazahstan ot 8 ijunja 2021 goda № 386 [The Rules for the organization and conduct of scientific expertise, as well as the selection of scientific legal experts, approved by the Decree of the Government of the Republic of Kazakhstan dated June 8, 2021 No. 386/]//[jelektronnyj resurs]//Informacionno-pravovaja sistema normativnyh pravovyh aktov Respubliki Kazahstan «Adilet» URL: https://adilet.zan.kz

Pis’mo Prem’er-Ministra Respubliki Kazahstan ot 13 aprelja 2022 goda № 23-09/1621 dz [Letter of the Prime Minister of the Republic of Kazakhstan dated April 13, 2022 No. 23-09/1621 dz/]// https://bestprofi.com/document/2799662758?5&isScroll=true

Sapargaliev G.S. Problemy razvitija zakonotvorchestva v Respublike Kazahstan: tendencii i faktory. Vestnik Instituta zakonodatel’stva. [Problems of lawmaking development in the Republic of Kazakhstan: trends and factors. Bulletin of the Institute of Legislation] 2006 god. №3. [9]

CT PK ISO 31000 «Menedzhment riska. Rukovodjashhie ukazanija», 2020. [CT PK ISO 31000 “Risk management. Guidelines”, 2020] – 18 s. (vvoditsja s 1 ijulja 2021g.) [Jelektronnyj resurs] // URL: https://ksm/public-discussion/standarts/discussion-of-draft-st-rk/40015/

Shaburov A.S. Pravovaja bezopasnost’ v sisteme nacional’noj bezopasnosti [Legal security in the national security system] // Vestnik JuU rGU. Serija «Pravo». – 2015. – T. 15, №3. S. 24-30.

Risk Management Fundamentals//Homeland Security Management Doctrine? 2001/-31c// URL:https//www.dhs.gov.assets (18.07.2020).

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КОНСТИТУЦИОННО-ЭКОНОМИЧЕСКОЕ РЕГУЛИРОВАНИЕ СОБСТВЕННОСТИ

Конституционная экономика как категория недостаточно освещена в литературе. Ввиду этого необходимо в теоретическом плане рассматривать суть конституционной экономики в аспекте взаимосвязи с правом и экономической эффективностью. Помимо этого, для формирования более четкого понимания конституционной экономики важно рассматривать экономическую нормативность. В данном случае стоит указать, что нормативность законодательства и нормативность экономического и трудового права сильно взаимосвязаны. Экономическая нормативность – это процесс, при котором правовые нормы будут все чаще подвергаться соблюдению экономической эффективности или рациональности торговли.

Основой любой экономики является собственность. От того, каким образом осуществляется конституционно-правовое регулирование вопросов собственности, зависит природа экономической системы. Более того, зачастую порядок такого регулирования существенно влияет на политическую, социальную, демографическую и другие сферы жизнедеятельности общества. Можно говорить о том, что конституционно-экономическое регулирование вопросов собственности является одним из наиболее ключевых моментов регулирования общества в целом.

Ключевые слова: конституция, экономика, регулирование, собственность, индивидуальность, права.

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Constitutional-economic regulation of property

Constitutional economics, as a category, is insufficiently covered in the literature. In view of this, it is necessary to theoretically consider the essence of constitutional economics in the aspect of the relationship with law and economic efficiency. In addition, in order to form a clearer understanding of the constitutional economy, it is important to consider economic normativity. In this case, it is worth pointing out that the normativity of legislation and the normativity of economic and labor law are strongly interrelated. Economic normativity is a process in which legal norms will increasingly be subjected to compliance with the economic efficiency or rationality of trade.

Property is the foundation of any economy. The nature of the economic system depends on how the constitutional and legal regulation of property issues is carried out. Moreover, the procedure for such regulation often significantly affects the political, social, demographic and other spheres of society. We can say that the constitutional and economic regulation of property issues is one of the most key moments in the regulation of society in general.

Key words: constitution, economics, regulation.

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Меншікті конституциялық-экономикалық реттеу

Конституциялық экономика категория ретінде әдебиетте жеткілікті түрде қамтылмаған. Осыған байланысты конституциялық экономиканың мәнін теориялық тұрғыдан заңмен және экономикалық тиімділікпен байланыс тұрғысынан қарастыру қажет. Сонымен қатар, конституциялық экономиканы неғұрлым нақты түсінуді қалыптастыру үшін экономикалық нормативтілікті қарастыру маңызды. Бұл жағдайда заңнаманың нормативтілігі мен экономикалық

және еңбек құқығының нормативтілігі бір-бірімен тығыз байланысты екенін атап өткен жөн. Экономикалық нормативтілік – бұл құқықтық нормалар экономикалық тиімділікке немесе сауданың ұтымдылығына көбірек ұшырайтын процесс.

Кез келген экономиканың негізі – меншік. Экономикалық жүйенің табиғаты меншік мәселелерін конституциялық-құқықтық реттеудің қалай жүзеге асырылатынына байланысты. Сонымен қатар, мұндай реттеу тәртібі көбінесе қоғамның саяси, әлеуметтік, демографиялық және басқа салаларына айтарлықтай әсер етеді. Меншік мәселелерін Конституциялық-экономикалық реттеу жалпы қоғамды реттеудің маңызды сәттерінің бірі болып табылады деп айтуға болады.

Түйін сөздер: конституция, экономика, реттеу, меншік, даралық, құқықтар.

Введение

Основой любой экономики является собственность. От того, каким образом осуществляется конституционно-правовое регулирование вопросов собственности, зависит природа экономической системы. Более того, зачастую порядок такого регулирования существенно влияет на политическую, социальную, демографическую и другие сферы жизнедеятельности общества. Можно говорить о том, что конституционно-экономическое регулирование вопросов собственности является одним из наиболее ключевых моментов регулирования общества вообще.

В первых конституциях формы собственности четко не разграничивались, предполагался равный статус всех собственников. Более поздние конституции стали выделять несколько форм собственности, общепринятыми из которых являются публичная (государственная) и частная. В большинстве конституций зарубежных стран признается принцип неприкосновенности частной собственности, однако данный принцип, как правило, имеет ряд ограничений, связанных с изъятиями собственности для общественных нужд при справедливой компенсации собственникам.

Конституциями обычно устанавливается степень вовлеченности государства в экономическую жизнь. Необходимо отметить, что государство всегда осуществляет экономическую политику, что означает ту или иную степень публичного регулирования вопросов собственности. В современных условиях, когда директивная экономика практически не применяется, а формы собственности в большинстве стран признаны равными по статусу, применяются новые, современные формы государственного экономического регулирования: налоговые, бюджетные, денежно-кредитные, причем такое регулирование всегда производится с использованием планового метода. Кроме того, регулирование в иных сферах общественной жизни (социальной, политической) существенно сказывается на экономических отношениях, делая их более или менее цивилизованными, развитыми и стабильными.

Методы и материалы

Из изложенного следует, что эффективная экономическая политика не может осуществляться только путем собственно экономического регулирования. Напротив, развитые экономические отношения возможны только при комплексном и взвешенном подходе, гарантирующем стабильность общественных отношений. Так, неспособность государства правильно организовать работу правоохранительных органов (политическая сфера) будет нивелировать само существование развитых экономических норм в силу безнаказанности экономических преступлений, что неизбежно повлечет снижение качества экономики в целом.

Конституции часто включают положения, которые могут повлиять на производство и распределение богатства. Более новые конституции отличаются от старых конституций тем, что включают больше экономических институтов. Новые конституции, такие как конституции Южной Африки и Намибии, как правило, включают большее число экономических институтов в соответствии с нынешним представлением о необходимости увязки политических и экономических показателей. Экономические положения, обычно включаемые в конституции или рассматриваемые экспертами-конституционистами как подходящие для включения, следующие:

- центральный банк;
- положения о налогообложении, которые включают сбор доходов и перераспределение этих доходов;
- определение фискальной политики и управление им;
- частная и государственная собственность и права на землепользование;

- трудовые и профессиональные организации;
- свобода торговать, создавать ассоциации и заниматься коммерческой, промышленной и профессиональной деятельностью;
- права на полезные ископаемые; права на воду; и охрана окружающей среды.

Результаты и обсуждения

В свою очередь, стабильность отношений собственности напрямую зависит от существующих механизмов ее защиты, что подтверждается приведенным частным примером о правоохранительных органах. Эти основополагающие механизмы защиты должны устанавливаться конституцией государства. Современные конституции, как правило, провозглашают защиту всех форм собственности в равной степени. Это означает, прежде всего, что публичные субъекты в имущественных отношениях, если они выступают в качестве участников хозяйственного оборота, должны действовать на равных с частными. Важно при этом заметить, что признаками публичности в данном случае обладает не только собственно публичная власть (государство, муниципальные образования), но и формально частные элементы, связанные с властью (в частности, за счет государственной собственности на доли и акции и пр.). Несоблюдение принципа равной защиты зачастую выражается в преференциальном отношении к тем или иным связанным с государством организациям. Особенно губительно это для экономической системы при установлении «особых» отношений между государством и убыточными организациями. Так, по мнению ряда исследователей, в российской экономике сохраняются унаследованные от советской системы структурные деформации в экономике. Около 40% российских предприятий убыточны и отягощены колоссальными долгами. Несомненно, значительная часть из этих компаний полностью или в части принадлежит государству. В то же время очевидно, что многие из них, несмотря на свою убыточность, не могут быть просто ликвидированы, поскольку представляют собой огромную социальную значимость. Но такие организации также не должны быть «черной дырой», в которой бесследно исчезают значительные денежные потоки (это напрямую следует из принципа равной защиты всех форм собственности). Таким образом, единственный выход, который подсказывает нам современная конституция, – эффективная реструктуризация и оптимизация деловых процессов в таких «государственных» организациях, приводящая к выходу на рентабельность (государство должно проводить их не как публичный регулятор, а как эффективный собственник). Только это может поставить подобные компании в равные условия с частными субъектами. Иначе рассматриваемый принцип будет нарушаться, убыточные «государственные» предприятия будут паразитировать за счет здоровых экономических сегментов. Итак, мы приходим к выводу о необходимости равноудаленности публичной власти от всех частных субъектов как одному из конституционных критериев равной защиты собственности. Кроме того, государство (это обычно выражается в современных конституциях) обязано возмещать вред, причиненный незаконными действиями (бездействием) органов власти и должностных лиц. Как уже указывалось, предусматривается возможность изъятия собственности для общественных нужд. При этом в конституциях устанавливаются гарантии собственников (прежде всего, справедливое возмещение), и это также является дополнительным механизмом конституционной защиты.

Конституционная экономика является областью исследований и практики на стыке экономики и соблюдения конституции, в которой описывается и анализируется взаимное правовое и экономическое влияние на решения правительства, влияющее на гарантированные конституцией экономические и социальные права, а также взаимосвязь проблем применения Конституции и структуры и функционирования экономики.

Конституционной экономикой отражается осознание того факта, что решение проблем государственного регулирования экономики должно быть найдено не только на основе экономической целесообразности, но и учитывая реалии конституционного строя государства. Поэтому конституционную экономику традиционно характеризуют как научное направление, которое изучает принципы оптимального сочетания экономической целесообразности и достигнутого уровня конституционного развития. Это отражается в нормах конституционного права и регулирует экономическую и политическую деятельность в государстве (Бондарева 2012: 102).

Конституционная экономика является совместной программой изучения экономики и конституционализма. Ее часто описывают как экономический анализ конституционного права. Конституционная экономика направлена на

то, чтобы объяснить выбор разных конституционных правил, ограничивающих возможности и деятельность экономических и политических организаций. Это отличается от подхода традиционной экономики. Помимо этого, конституционной экономикой изучается, в какой степени экономические решения государства согласуются с существующими экономическими конституционными правами граждан. В частности, справедливое распределение экономических и финансовых ресурсов государства является очень важной проблемой для всех стран. Конституционная экономика оказывает помощь в поиске правового механизма для решения данной проблемы.

Понятие «конституционная экономика» впервые ввел в 1982 году американский экономист Ричард Маккензи. Затем данный термин использовал другой американской экономист – Джеймс М. Бьюкенен – в качестве названия новой академической субдисциплины. Дж. Бьюкенен отвергает любое органическое представление о государстве, которое превосходит по мудрости граждан. Эта философская позиция является основой конституционной экономики. Дж. М. Бьюкенен считает, что любая Конституция формируется как минимум для нескольких поколений граждан. Таким образом, она должна быть в состоянии сбалансировать интересы государства, общества и каждого отдельного человека (Лагутенко 2012: 59).

Основными инструментами позитивной конституционной экономики можно считать институциональный сравнительный анализ, который состоит из четырех основных элементов:

- изучение возникновения конституционных норм и причин их развития;
- изучение того, как отличить правила от коллективных и индивидуальных факторов;
- рассмотрение возможностей изменения конституций либо правил. Каждое изменение подлежит экономическому анализу их воздействия на эффективность и справедливость;
- изучение экономических последствий изменения правил;
- позитивная конституционная экономика.

Эффективность политики, как и эффективность рынка, возникает, когда все люди в сообществе согласны с политическими структурами. Аргументация Дж. М. Бьюкенена похожа на точку зрения правительства в отношении подхода к социальному договору, когда люди принимают ограничения в обмен на получаемые в результате выгоды. Дж. М. Бьюкенен утверждает, что обмен политическими правами и полномочиями является процессом, идентичным процессу на рынках, где сделки совершаются посредством добровольного и взаимовыгодного обмена.

Ключевым моментом, который необходимо понять в системе мышления Дж.М. Бьюкенена, является различие, которое он проводит между политологией и политикой. По его словам, политология занимается правилами игры, в то время как политика касается стратегий, которые игроки будут применять в рамках набора правил.

Некоторые ученые, такие как У. Блок и Т. Дилоренцо, сомневаются, что конституционная экономика может быть наукой. Они утверждают, что политика не может быть приравнена к рынку и оттуда может существовать как наука. Эти ученые утверждают, что в отличие от рынка согласие не является основой политики, напротив, она руководствуется насильственным и исторически воинственным принуждением. Они считают, что метод конституционной экономики мешает обсуждению теории общественного выбора и политической экономии. По их словам, Дж. М. Бьюкенен предполагает, что в результате злоупотребления, основанного на контракте, политика основана на обмене имуществом (Баренбойм 2006: 96).

В рамках концепции конституционной экономики необходимо рассматривать и категорию экономической нормативности. Выражение «экономическая нормативность» может вызвать некоторое удивление. Интуитивно понятно, что она, по-видимому, относится к обсуждению взаимосвязей между правом и экономикой. В этой области доктрина много обсуждалась в совершенно разных направлениях. Речь идет о нормативности законодательства и нормативности экономического и трудового права. Экономическую нормативность можно описать как процесс, при котором правовые нормы будут все чаще подвергаться соблюдению «экономической эффективности» или «рациональности торговли». Таким образом, «правовая нормативность» будет достигнута или «конкурирована»; она исчезнет в пользу другой нормативности – экономической нормативности, преследующей определенную цель – экономическую эффективность.

Хотелось бы продемонстрировать, что понятие «экономическая нормативность», по-видимому, является результатом путаницы в отношении понятия «норма». Бессилие понятия «норма» не должно оставлять юриста безоружным перед лицом такого важного вопроса, как

автономия права. В этом вихре путаницы, который может вызвать взаимосвязь между правом и экономикой, нам кажется, что конституционное право обладает ценными инструментами. Эта тема, особенно через ее самых выдающихся мыслителей, кажется интересной, позволяющей вывести экономику из-под контроля нормы и, таким образом, перейти от «экономического стандарта» к «силе экономики».

Не стоит думать о праве через призму нормативности, представляется более целесообразным мобилизовать концептуальные инструменты, предоставленные некоторыми конституционалистами. Их размышления об автономии политической власти показывают, что роль экономики в процессе разработки права можно понять из позиции силы экономики.

Конституционное право можно определить как предмет изучения организации осуществления политической власти. Это определение является частью институциональной концепции конституции, которая имеет большое значение для того, чтобы подчеркнуть источники автономии права. Актуальным примером в этом отношении, по-видимому, являются исследования, посвященные современным государственным структурам.

Не претендуя на большую полноту в этом вопросе, вопрос о разграничении политического поля привел к постановке вопроса о его институционализации. Этот «критический период интенсивных религиозных конфликтов», который часто называют вмешательством в период с середины XVI по конец XVII века, привел к «формированию политического порядка, оторванного от его религиозного происхождения». Здесь речь идет о расширении прав и возможностей политической сферы, что вытекает из решения, принятого, когда люди вступают в тип коллективного объединения, которое не определяется законами природы. Это расширение прав и возможностей предполагало институционализацию политической власти. Опасение политической власти перешло от идеи суверена сохранить свое государство к идее существования отдельного правового и конституционного порядка – того же самого государства, которое суверен обязан поддерживать. В этом вопросе роль государства, естественно, имеет решающее значение, поскольку именно этот институт обеспечил стабильность суверенной власти. Он становится отражением «правовой власти» в той мере, в какой политическая функция будет выполняться от имени юридического института, который ее курирует. Следовательно, процесс «институционализации», кратко описанный здесь, выходит за рамки простого идеала, который он преследует. Его функция состоит в том, чтобы вписать в основу права основы многолетней власти. Таким образом, изучение институционального процесса не позволяет развить мысль о месте экономики в позитивном праве, поэтому изучение институционального процесса позволяет понять роль экономики в процессе создания института. Это то, что показывает Морис Хориу, говоря о государственных институтах (Баглай 2006: 105).

В отстаиваемом здесь понимании конституционного права роль экономики исследуется с точки зрения ее влияния на процесс формирования права. Социальная активность, включающая в себя вопросы власти, понятие «экономическая власть» позволяет исследовать способность субъекта превалировать над экономическими интересами. Способность обеспечивать себя средствами к существованию, экономическая власть обычно рассматривается как власть, с помощью которой экономические субъекты могут влиять на осуществление политической власти.

Заключение

Тем не менее, упоминание «экономической власти» создает серьезные трудности с ее определением. Некоторые авторы изучали экономическую власть, используя органический критерий, в частности, исходя из единицы, которая будет ее осуществлять (компании, фирмы), другие полагались на критерий экономической функции, выполняемой любым государственным органом. Сложность и в то же время ценность понятия «экономическая сила» заключается именно в том, что оно призвано превзойти эти критерии. Она включает в себя даже диалектику между человеком, осуществляющим эту деятельность (органический критерий), и идеей, на службе которой осуществляется власть (функциональный критерий). На самом деле вся проблема власти заключается в этой двойственности составляющих ее элементов и взаимно влияющих друг на друга: воли человека и силы идеи, которая одновременно несет ее и превосходит ее.

Эта необходимость учитывать, как лицо, осуществляющее эту власть, – экономический агент, так и цель, во имя которой осуществляется эта власть, – экономические интересы – делают эту концепцию сложной для определения. Например, Морис Хориу сам признает трудность разделения политической и экономической вла-

сти, потому что «таким образом, в некотором смысле все полномочия сводятся к удовлетворению потребностей и возможностей, которые мы видим для их удовлетворения» (Кошанов 2006: 51). Это неразрешимое родство между политической властью и экономической властью становится еще более очевидным, когда влияние экономической власти все еще ощущается, даже несмотря на то, что позитивное право предусматривает статутную независимость между осуществлением правовой юрисдикции и влиянием экономических субъектов. Например, появление независимых административных органов можно было объяснить необходимостью избежать процесса захвата исполнительной власти крупными экономическими субъектами. Это одна из причин, по которой был создан орган по вопросам конкуренции, которому поручено независимо поддерживать конкурентное функционирование рынка. Такое разделение, формально одобренное положительным правом, не приводит к исключению каких-либо экономических интересов. Например, орган по вопросам конкуренции закрывает «узкие двери» в конституционный совет, когда вопрос о свободной конкуренции затрагивается законом, подлежащим проверке на конституционность. Это хорошо показывает, что формально независимая власть всегда может стремиться к достижению экономических интересов. Влияние экономической идеи не может быть понято только с помощью органического критерия, поскольку экономический агент, обладающий большим размахом, может влиять на лицо, принимающее политические решения.

В целом, сущность субъекта конституционной экономики заключается в выработке рациональных правил взаимодействия государственной власти и делового сообщества и выражается в конкретизации и защите принципов основ конституционного строя, обеспечении стабильности существующих условий экономики и правовой определенности. В большей степени система конституционной экономики прослеживается через определение содержания функции государства в исследуемой области. Конституционная экономика является междисциплинарной областью, что обусловлено своеобразной эклектичностью в определении ее содержания и структуры: сюда входят явления экономической, правовой и политической реальности.

Литература

Бондарева Е.А. Власть и бизнес: вопросы ответственности в социальном государстве // Вестн. ВГУ. Право. – 2012. – №2. – С. 102-115.

Лагутенко К.Е. Система конституционной экономики // Публично-правовые исследования: электрон. журн. – 2012. – №1. – С. 59-68.

Баренбойм П.Д., Гаджиев Г.А., Лафитский В.И., Мау В.А. Конституционная экономика: учеб. для юрид. и экон. вузов. – М., 2006. – 650 с.

Конституционное право зарубежных стран: учеб. для вузов / М.В. Баглай и др.; под общ. ред. М.В. Баглая, Ю.И. Лейбо, Л.М. Энтина; МГИМО. – 2-е изд., перераб. – М.: НОРМА, 2006. – 1043 с.

Кошанов А. Национальные экономики и мирохозяйственные связи / А. Кошанов, Б. Хусаинов // О-во и экономика. – 2006. – № 9. – С. 51-99.

Маттеи У., Суханов Е.А. Основные положения права собственности. – М., 1999

Алексеев С.С. Право собственности. Проблемы теории. – М., 2007.

Гаджиев Г.А., Баренбойм П.Д., Лафитский В.И. и т.д. Конституционная экономика: учебник. – М., 2006. – 528 с.

References

Bondareva E.A. Vlast’ i biznes: voprosy otvetstvennosti v social’nom gosudarstve // Vestn. VGU. Pravo. – 2012. – № 2. – S.102-115.

Lagutenko K.E. Sistema konstitucionnoj jekonomiki // Publichno-pravovye issledovanija: jelektron. zhurn. – 2012. – № 1. – S.59-68.

Barenbojm P.D., Gadzhiev G.A., Lafitskij V.I., Mau V.A. Konstitucionnaja jekonomika: ucheb. dlja jurid. i jekon. vuzov. M., 2006. – 650 s.

Konstitucionnoe pravo zarubezhnyh stran: ucheb. dlja vuzov/M.V. Baglaj i dr.; pod obshh. red. M.V. Baglaja, Ju.I. Lejbo, L.M. Jentina; MGIMO. – 2-e izd., pererab. – M.: NORMA, 2006. – 1043 s.

Koshanov A. Nacional’nye jekonomiki i mirohozjajstvennye svjazi/A. Koshanov, B. Husainov//O-vo i jekonomika. – 2006. – № 9. – S. 51-99.

Mattei U., Suhanov E.A. Osnovnye polozhenija prava sobstvennosti. M., 1999

Alekseev S.S. Pravo sobstvennosti. Problemy teorii. M. 2007.

Gadzhiev G.A., Barenbojm P.D., Lafitskij V.I. i t.d. «Konstitucionnaja jekonomika». M., 2006.

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THE ROLE OF ELECTIONS IN THE POLITICAL LIFE OF AN INDEPENDENT STATE

Following the Constitution of the Republic of Kazakhstan, Kazakhstan claims to be a democratic state; the people of Kazakhstan are the only source of state power; the people exercise state power directly and through their representatives. Elections are one of the forms of direct exercise of state power by the population of the Republic, the central element of the political system, observing the democratic nature of the state. It is the basis for all representative authorities at the republican and local levels, municipal bodies, the head of state, and the head of regional executive power in some democratic states. Elections are recognized as one of the most effective forms of democracy, allowing citizens to interfere in the state's political life and participate in the management of state affairs. The article is devoted to disclosing the role of elections in the life of the state and society. To fulfill the corresponding task, the report reveals the importance of elections in the conditions of the democratic regime, examines its role in ensuring the legitimacy of the current state power as a whole, the function of elections. At the same time, for the institution of elections to fully comply with its purpose in the state's political system, the article considers the guarantees of the implementation, the integrity of electoral rights and justifies the need for their improvement.

Key words: state power, democratic state, political system, elections, people's elections, electoral rights, guarantees of electoral rights, voter, candidate, voting, absenteeism.

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Тәуелсіз мемлекеттің саяси өміріндегі сайлаудың рөлі

ҚР Конституциясына сәйкес Қазақстан өзін демократиялық мемлекет ретінде орнықтырады, Қазақстан халқы мемлекеттік биліктің бірден-бір бастауы болып табылады, халық мемлекеттік билікті тікелей және өз өкілдері арқылы жүзеге асырады. Сайлау – Республика халқының мемлекеттік билікті тікелей жүзеге асыруының бір нысаны, мемлекеттің демократиялық сипатын байқататын саяси жүйенің орталық элементі. Ол республикалық және жергілікті деңгейдегі барлық өкілді билік органдарының, муниципалдық органдардың, мемлекет басшысы мен біраз демократиялық мемлекеттерде жергілікті атқарушы билік басшысының қызмет етуінің негізі болып табылады. Сайлау азаматтардың мемлекеттің саяси өміріне араласуына, мемлекет істерін басқаруға қатысуына мүмкіндік беретін демократияның ең бір ықпалды нысаны ретінде танылады. Мақала сайлаудың мемлекет пен қоғам өмірінде атқаратын рөлін ашуға арналған. Тиісті міндетті орындау үшін мақалада сайлаудың демократиялық режимдегі мемлекеттердегі маңызы ашылып, оның әрекет етуші тұтастай мемлекеттік биліктің легитимділігін қамтамасыз ету рөлі, сайлаулардың функциялары қарастырылды. Сонымен қоса, сайлау институтының мемлекеттің саяси жүйесінде өзінің тағайымына толық сай келуі үшін мақалада сайлау құқықтарының іске асуының, бұзылмауының кепілдіктері қарастырылып, оларды жетілдіру қажеттігі негізделді.

Түйін сөздер: мемлекеттік билік, демократиялық мемлекет, саяси жүйе, сайлау, халықтық сайлау, сайлау құқықтары, сайлау құқықтарының кепілдіктері, сайлаушы, үміткер, дауыс беру, абсентеизм.

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Роль выборов в политической жизни независимого государства

В соответствии с Конституцией РК Казахстан утверждает себя демократическим государством, народ Казахстана является единственным источником государственной власти. Народ осуществляет государственную власть непосредственно и через своих представителей. Выборы – одна из форм непосредственного осуществления государственной власти населением республики, центральный элемент политической системы, наблюдающий демократический характер государства. Выборы являются основой функционирования всех представительных органов власти на республиканском и местном уровнях, муниципальных органов, главы государства и главы местной исполнительной власти в некоторых демократических государствах. Выборы признаются одной из наиболее влиятельных форм демократии, позволяющей гражданам вмешиваться в политическую жизнь государства, участвовать в управлении делами государства. Статья посвящена раскрытию роли выборов в жизни государства и общества. Для выполнения соответствующей задачи в статье раскрывается значение выборов в государствах демократического режима, рассматривается его роль в обеспечении легитимности действующей государственной власти в целом, функции выборов. Вместе с тем, для того, чтобы институт выборов полностью соответствовал своему назначению в политической системе государства, в статье рассмотрены гарантии реализации, неповрежденности избирательных прав и обоснована необходимость их совершенствования.

Ключевые слова: государственная власть, демократическое государство, политическая система, выборы, народные выборы, избирательные права, гарантии избирательных прав, избиратель, кандидат, голосование, абсентеизм.

Introduction

Today, an important place in the Basic Law of the countries of the world and several international legal documents is occupied by a provision that establishes the status of the people as the only source of state power. This status of the people determines the democracy of the state and has its roots deep.

A Democratic state is a state whose structure and activities correspond to the people's will. Since democracy is based on the people's choice, in states with a democratic regime, the source of power is the people. Accordingly, democracy means that all power belongs to the people and their free exercise under their sovereign will and interests. Democracy manifests itself in the sovereignty of the people, the division of power, ideological and political diversity, and the recognition of local self-government. One of the manifestations of the democracy of the state is the variability and electability of officials.

Methods and materials

In a «true» democracy, the people are the sovereign source of state power, the subject of management. As the bearer of sovereignty, the people directly exercise the power it belongs to and transfers its exercise to a particular person or persons. The granting of the people's right to exercise control belonging to them is carried out by the will of the majority of the population through elections, formalized following the people's choice. Accordingly, a person (s) who has received the right to exercise state power from the people shall exercise the corresponding right on behalf of the people.

In the Constitution of 1995, the Republic of Kazakhstan, defining itself as a Democratic state, recognized that the people of the Republic are the bearer of state power and enshrined some sovereign rights in connection with the participation of the people in the exercise of state power and the management of State Affairs. The most influential of them is the right of citizens of the Republic to elect and be elected to state and local government bodies. Free elections are a way for the people to create institutions of power.

Discussion

Elections are the main element of democracy, the central institution. It is the main element that emphasizes the democratic character of the state. Elections are one of the most effective forms of people's participation in the state's political life, participation in the management of State Affairs.

Following the Constitution of the Republic of Kazakhstan, the people are the sole source of state power. Subjects of state power acquire ability due to

popular elections, so to speak, based on the people's approval of them (their program) and their consent to them. Accordingly, in states with a democratic regime, elections are a form of observation of the people's approval of state power, coordination with their programs, and the authorities' primary mechanism for acquiring executive power. Consequently, elections are the essential tool for the legitimacy of state political power, the most effective means to legalize state political power.

Elections are a mass event. This mass measure determines that elected state entities acquire power due to the population's transfer of powers to them. In Kazakhstan, it is a form of formation by citizens of the state's head of state, legislative, representative, and self-governing bodies, in some countries, including judicial and executive bodies. By its very nature, elections are used for Public Administration and the formation of subjects of power. By participating in elections, citizens exercise the people's right, that is, on their behalf, to determine who governs the state and who decides state affairs. This is the nature of elections in states with a truly democratic regime. It can be argued that the function of elections in states under an authoritarian government is to give a legal character to pre-made elections by specific subjects.

Elections have a great place in truly democratic, rule-of-law states. In such conditions, elections and the electoral process are generally considered to ensure the legitimacy (legality) of elected, representative power, and the current state power as a whole. It can be justified in the order of formation of state governing power. As you know, in Kazakhstan, the president of the Republic, one of the links of representative legislative power – the Mazhilis-is directly elected by citizens of the Republic in the Republican general elections, and the Senate-indirectly. Although the executive and judicial branches of energy are not formed by direct expression of the will of citizens, they acquire power from persons who are representatives of the people – the head of state and the Parliament, who are directly elected in elections. At the same time, the Parliament, carrying out legislative activities, grants them legislative powers. Consequently, the Parliament, consisting of representatives of the people, participates in their formation and activities directly and indirectly. If so, elections are the basis for the legitimacy of general power.

The Constitution of the Republic of Kazakhstan of 1995, for the first time introducing a proportional representative electoral system, created prerequisites for political parties to participate in the state's political life. Today, political parties are given priority in the elections of the President, Deputies of the Mazhilis, and maslikhats. «In particular, following articles 55, 87, 103 of the law» «on elections in the Republic of Kazakhstan», only one way of the right to nominate presidential candidates is established, that is, the nomination of presidential candidates belongs only to Republican public associations registered by the established procedure, and the right to nominate candidates for Deputies of the Mazhilis and deputies of maslikhats elected on party lists is inherent in political parties registered following the established procedure (http://adilet.zan.kz/kaz/docs / Z950002464_). The participation of political parties in the elections of the highest echelon of power is currently regulated in Kazakhstan and several countries. In general, elections, which allow political parties to participate equally in the formation of the political system of the state, are a powerful mechanism that provides legal opportunities for parties to fight for their goals, thereby positively affecting the active development of political diversity in the form, in other words, increasing the number of parties rather than decreasing, and contributing to the formation of genuine competition between political parties. The participation of political parties in forming government bodies is beneficial for states.

However, we cannot entirely approve of the high priority given to parties in building the state's political system. In Kazakhstan, the focus is on political parties in the election (candidates) for elected positions. The right to nominate a presidential candidate in the elections of the president of the Republic of Kazakhstan belongs only to Republican public associations and only to parties in the elections of Deputies of maslikhats. Only political parties have the right to elect 98 of the 107 Deputies of the Mazhilis. It can be argued that such a procedure for nominating candidates restricts the weak suffrage of citizens and the freedom of choice of voters concerning the relevant positions. For example, in the presidential election, voters choose a candidate only from among the candidates nominated by competing parties (Public Associations).

At the same time, in the elections of Deputies of the Mazhilis and maslikhats, voters cannot even choose candidates approved by the parties; they choose only concerning one of the parties on the ballot. And, depending on the winning place, who will go to the Mazhilis or maslikhats will be selected by political parties that are not voters. In this regard,

in political science, «elections are a kind of political procedure that does not have a decisive impact on the state's political processes. It shows only the manifestation of citizens ' participation in making political decisions. This interpretation is based on the fact that the nomination of candidates for elected positions is mainly a prerogative of political parties» (Bobkova 2003: 118-120).

Once again, the participation of political parties in elections does not, in all cases, strengthen the democracy of the state. It depends on the place in the state to be given to political parties, on the state of political diversity. In particular, we can say that in states with a single-party system or in conditions where only one party is dominated, the level of influence of the population on power, that is, the level of democracy, is insignificant. This is because the lack of competition between political parties in the struggle for power limits the freedom of choice of the population in the election of a particular position. Accordingly, in countries with such a system, new political forces do not come to power following the true wishes of the people. Consequently, the role of elections in the state's political life is not the same in all countries.

Fair and honest elections give a reality rather than a formality to the constitutional norm, which asserts that the people are the only source of state power. In other words, fair, democratic elections reflect the level of application and viability of the norms of Article 3 (Article 1) of the Constitution of the Republic, which stipulates that the people are the only source of state power. In states under a purely democratic regime, citizens are genuinely involved in state power, participating in elections directly and through their electing. Such elections greatly influence the growth of the scale of interference of the population in power and the resolution of State Affairs. Because fair, democratic elections, as subjects of political relations, allow citizens and political parties to understand better the technology of fighting for power (technology of political struggle) and conduct it effectively. Such a feature of elections has a positive effect on the absence of absenteeism in the course of elections, that is, on the broad participation of the population in the elections, and allows the will of citizens to have a tangible impact on the results of the voting, as well as ensure the proportionality of representation of various segments of society in elected representative bodies. Therefore, accurate popular elections reveal the essence of the democracy of the state. Accordingly, citizens form democratic institutions of the state, exercising their electoral rights.

An important aspect of fair and honest elections is that electoral fairness strengthens confidence in democracy. Election fairness is a tool that allows us to resolve electoral conflicts in social peace and political stability, which are the main conditions for democratic governance. It is also the best guarantee of society to protect political rights and ideological pluralism that ensures the legality of the electoral process (Hernán 2006: 6).

Elections are a more critical, more common, and more common mass event in the state and public life than other institutions of democracy. It extends to many institutions and levels, starting with the head of state. In particular, elections are the basis for all representative authorities at the Republican and local levels, municipal authorities, the head of state, and regional executive power in some Democratic states.

The scale of elections is not limited to state power; it is also a mechanism for the legality of some non-state public institutions. An example of this is elections in political parties, professional unions, public organizations, Joint-Stock Companies, and many other free associations. It is impossible not to mention the positive side of such a feature of elections, that is, the breadth and scope of their application. The wide variety of elections, in turn, opens up vast opportunities for citizens to become politically active, to participate in state life as the only source of state power, and to influence public affairs.

In genuinely democratic states, the next important aspect of elections is that they affect the effectiveness of state power, being the basis for its formation, that is, it's functioning. It should be noted that in such states, persons who can govern and rule based on the support of the people after their election do not conduct their activities in the interests of the people; that is, they do not take into account and represent the interests of the people and voters in their performance of their functions, the people may replace them with other subjects in the upcoming elections. Therefore, fair and democratic elections will allow the population to replace existing power with opposition groups. Accordingly, in such a situation, the right to manage state affairs may pass from a particular person (s) serving to other entities that the population considers most worthy, i.e., have the support of voters.

Therefore, in a genuinely democratic state, such elected persons try to change their course according to the people's wishes not to lose their power in the future. If so, elections occupy an important place in a genuinely democratic state. In such a state, elections

are the most crucial factor that indirectly affects the effectiveness of state authorities' activities and the effectiveness of fundamental reforms carried out in the form. This can be seen from one scientific point of view: «... if unnecessary or poor-quality legislation is adopted in the future, if elected officials of the government are incompetent or ineffective, or if the government suffers from widespread corruption, then such tragic results are the result of voters 'decision to entrust state powers to a specific elected person» (Blackwell 2009: 107).

In the political system of society, elections perform some essential socio-political functions. Among them, political scientists distinguish mainly the following parts of elections. First, elections are for individual citizens and social groups ... it is a political institution that allows you to formulate your requirements. An election campaign supports political leaders whose positions and views correspond to the relevant requests (conditions). In Democratic states, elections are a kind of Special Political market in which candidates for the role of power replace their programs, platforms, and promises with voters' powers. Secondly, elections are one of the mechanisms for resolving political conflicts. Thirdly, elections are a reliable tool for legitimizing (legalizing) the political regime, as they (elections) contribute to the organization, involvement of the population in electoral associations, individual political parties, and other socio-political organizations, as well as elections as a democratic basis for the recognition and support of elected leaders and institutions of power, depending on how various channels of interaction and interaction with voters are formed.

The widespread use of mass media, as well as party programs and platforms for the implementation of citizens ' electoral rights, the creation of pre-election organizations, campaigning, and propaganda, to some extent, create conditions for the active involvement of citizens and their associations in the political process, in addition, to directly or indirectly contributing to the political enlightenment of the masses. Therefore, electoral functions can also be attributed to the political socialization of the population (https:// all-politologija.ru/knigi/politologiya-uchebnoe-posobie / vybory-kakpoliticheskij-Institut).

By revealing the essence and functions of Elections above, we have justified the fact that in a Democratic state, it is an important and valuable institution. No matter how important elections are for the development of the state and society, there are often facts of violations of electoral rights. Even in developed democracies, violations of electoral rights are a common phenomenon. In general, actions that violate citizens ' electoral rights, «widespread offenses such as the exclusion of ballots in elections and the intimidation of voters, undermine citizens 'confidence in the representative nature of the institutions they create» (Margie 1995: 483).

As Alexis de Tocqueville pointed out, when one of the most democratic, developed states in the United States lost its true meaning due to the destruction and distortion of the electoral institution: «it is customary for modern America to attract famous, famous people to state posts rarely. And it is necessary to recognize that this is happening in terms of the development of democracy, the level of development. It is clear that over the past half-century, American statesmen have been significantly crushed» (Tocqueville 1992: 148).

Therefore, although elections are considered one of the main manifestations of the democracy of the state, their legal regulation is not the only criterion for defining the state as purely democratic. Accordingly, the constitutional and legal recognition and consolidation of citizens ' rights to form Republican and local authorities (elected bodies) is not the only prerequisite for their practical implementation. If electoral rights are not implemented or violated even on their performance, they are meaningless.

We should focus on the following point of view of I. L. Buravchenko: «the basis of the legal status of the voter is undoubtedly his rights and legal obligations. However, the normative consolidation of rights and obligations without creating guarantees for their implementation makes them a declaration» (Buravchenko 2010: 17).

At the same time, only their legal regulation, without creating guarantees of the legality and authenticity of elections, the exercise of electoral rights, does not determine the democracy of the state and does not make it possible for decent and responsible persons, leaders to come to power per the will of the people.

Indeed, like any other right, the right to vote manifests itself as a value only when recognized and implemented in real life. In other words, only if the institution of general elections is protected by law and, accordingly, implemented within the framework of the law, if a system of guarantees necessary for the exercise and non-violation of electoral rights is created, it is possible to talk about the fact that, along with other rights of citizens, the right to vote

is the highest treasure of the state. The election fully corresponds to its purpose. The guarantee of electoral rights by the state creates conditions for the protection and free exercise of citizens ' electoral rights and objective determination of the results of their voting, respectively, the legitimacy of state power.

For elections to be accurate, democratic, and fair in any state, the organization and conduct of elections must be based on certain legally-established principles. Among them, we can highlight the principles of legality, voluntariness, equality, justice, universal equality of elections, equality, democracy, and non-interference in expressing voters ' will. Guarantees of electoral rights are also crucial in this context. After all, they ensure the actual implementation of the principles of electoral law, which are the basis for the fairness and authenticity of elections.

In general, in science, guarantees of electoral rights are understood as conditions aimed primarily at implementing electoral rights of persons participating in the electoral process, ensuring the freedom of election of citizens. In some countries, the definition of guarantees of electoral rights is given in their legislation. Accordingly, the content is disclosed, for example, in the Russian Federation and the Kyrgyz Republic. «Familiarization with the federal law of the Russian Federation» «on basic guarantees of the rights and freedoms of citizens to participate in the referendum of the Russian Federation» «shows that the guarantees of electoral rights are defined in it in a somewhat vague general nature, as in the Kyrgyz Republic». That is, guarantees of electoral rights per the relevant law are conditions, rules, and procedures established by the Constitution of the Russian Federation, regulations, and other normative legal acts that ensure the exercise of electoral rights by citizens of the Russian Federation (Articles 2, 11 p.).

At the same time, the legislation of the Kyrgyz Republic provides for the content of guarantees in the norm, which defines guarantees of electoral rights of citizens. According to the relevant standard, guarantees of citizens ' electoral rights in the Kyrgyz Republic are organizational, legal, informational, and other methods of ensuring the electoral rights of citizens of the Kyrgyz Republic (http://cbd.minjust.gov.kg/act/view/ru-ru/203244). As we can see, this law of the Russian Federation does not clearly define the conditions that ensure the implementation of guarantees of electoral rights-electoral rights and, most importantly, limit them to legal regulation. The requirements (promises) that provide the exercise of electoral rights per the relevant norm of the appropriate law must be established in legal acts, legal regulation.

Of course, most of the guarantees of electoral rights are regulated and controlled by the electoral law. Still, it is unnecessary to limit them to legal regulation, conditions, and methods that ensure citizens ' electoral rights are fully implemented. And their complete legal rule is not possible. For example, economic, political guarantees of electoral rights, ideological guarantees. We believe that the definition of guarantees of electoral rights only concerning legal regulation does not fully reveal its essence or meet its purpose. We can say that the purpose of the appointment of guarantees of electoral rights is to create the necessary environment and conditions for the implementation and non – violation of the rights of citizens and public associations arising in the course of the electoral process. Accordingly, the legal establishment of guarantees of electoral rights does not guarantee the proper implementation of electoral rights in practice.

The exercise of citizens ' voting on a free, equal basis, as established by law, also depends on other circumstances. For example, the economic situation of the state, the state of political stability, etc. it can be traced from the point of view of the scientist L. D. Voevodin, who divided the guarantees of General rights and freedoms into two groups: «conditions» and «means» of realization of constitutional rights and freedoms. He points out that «the first group of guarantees aims to create a favorable environment, conditions for exercising fundamental rights and freedoms and performing duties».

And as «tools» for the implementation of constitutional rights and freedoms, the relevant scientist considers methods, methods, and methods of protecting and ensuring the rights and freedoms of the individual and shows that they (the second group of guarantees) provide state bodies, Local Self-Government Bodies, Public Associations, citizens themselves with effective means in the struggle for the proper implementation of fundamental rights and freedoms (Voevodin 1997: 229).

From the point of view of the relevant scientist, who determines why the guarantees of the first group are aimed, it can be seen that the legal regulation of warranties is not mandatory and cannot be fully regulated. This is since the creation of a favorable environment and conditions for the exercise of fundamental rights and freedoms and the

performance of duties also provides conditions that are not subject to legal regulation (peace, political stability in the state, economic state of the state, etc.).

The next scientist M. S. Mateikovich L.D., considers Voevodin's stressed guarantees to specific electoral rights; the first group of contracts includes economic, social, political, information guarantees and shows that these guarantees can be created only when civil society is formed. Its institutions are strengthened and when state regulation of the economy is maintained to ensure social justice, competition and protect the interests of domestic producers and service providers. «I don't know», he said ... «tools» include procedures for exercising and protecting electoral rights, i.e., legal guarantees, enshrined in legal norms, he writes (Mateikovich 2003: 34-35).

As we can see, the relevant scientific approach also shows the impossibility of full legal regulation of the guarantees of electoral rights – «conditions» for the implementation of electoral rights. It connects only the second group of promises, only «tools" for implementing electoral rights, with legal regulation.

Guarantees of electoral rights, along with the exercise of electoral rights, indicate an established, stable mechanism for its protection. In general, guarantees of electoral rights are social-economic, political, legal, material, organizational, etc., conditions, legal methods, methods for the implementation, protection of the rights and freedoms of citizens, and public associations arising during elections, their protection from various offenses. It should be noted that the guarantees of electoral rights – conditions that ensure freedom of elections, exercise, and non-violation of electoral rights-do do not act effectively independently, individually, in isolation, that is, do not fully fulfill their assignment. They are practical and effective only if connected and act as a single mechanism that complements each other. After all, the guarantees of electoral rights only in their totality create the necessary environment for fair elections based on the law.

Each state enshrines guarantees of electoral rights to a certain extent in its legislation. In the Constitution of the Republic of Kazakhstan, the constitutional legislation of the Republic enshrines certain guarantees of electoral rights and freedoms of citizens, public associations. «In the neighboring state of Russia, the federal law» «on basic guarantees of rights and rights to participate in the referendum of citizens of the Russian Federation» «was adopted, which is aimed at regulating the guarantees of electoral rights of citizens». This Act provides for a wide variety of guarantees of electoral rights of citizens of the Russian Federation. The scientific and practical explanation given to the relevant law (subparagraph 11 of Article 2) indicates that the variety of such guarantees is primarily justified by a large number of rights of citizens concerning elections, and provides that the subject of the central warranties is the following rights of citizens in connection with elections: rights related to the appointment of elections; formation of electoral infrastructure (registration of voters and preparation of voter lists, electoral districts, and polling stations, election commissions); to nominate candidates ..., rights related to the receipt and dissemination of election information; rights related to the voting process, the determination of voting results and the appeal of violations of election laws (http://cikrf.ru/law/federal_law/comment/st2.php).

Due to its importance, guarantees for the exercise of electoral rights are the most necessary and valuable element of the electoral institution. At the time, the Convention on standards of democratic elections, electoral rights, and freedoms in the Commonwealth of Independent States established that one of the standards of democratic elections is the guarantee of the exercise of electoral rights and freedoms by participants in the electoral process (Lysenko V. I. 2008: 100).

Today, as a result of the recognition of the electoral institute as the leading indicator of the legality of the state, state power, and the power of the people, the right to vote is recognized as the fundamental right of citizens. The state guarantees it under various circumstances (political, legal, material, etc.). This is both necessary and important. After all, for the legality (legitimacy) of power, the establishment of the electoral rights of citizens on paper and the actual implementation of these rights in practice is essential for establishing Kazakhstan as a genuinely democratic state governed by rule law. «Thus, the protection of human rights in general, including electoral rights, the formation of guarantees for citizens to live a decent life, live a Standard Life, and participate in the management of the state should be a noble goal and task set for independent Kazakhstan» (Umbetov 2016: 32).

Since gaining sovereignty and declaring independence, the Republic of Kazakhstan has taken steps to protect and guarantee citizens' electoral rights and freedoms. This shows that Kazakhstan

respects the right of its citizens to participate in the exercise of state power directly, including through elections and representatives elected by them in free elections, and is interested in the actual implementation and non-violation of these rights. The main reason for this is that the will and will of citizens expressed in fair elections are the basis of the legality of state power.

Conclusion

In the article's content, we revealed the essence of elections. We demonstrated the state's place in political life, justifying the fact that in a genuinely democratic state, it is a vital and valuable institution. The institution of elections occupies a special place in the state's life. In a political system, it can be evaluated as a determining factor. The fact is that the permanent establishment and accurate implementation of the voting of citizens in the life of the state determine the establishment of the following institutions and values in the form: the fact that the will of the majority of the population (voluntary citizens) is a determinant in determining the policy of the state (the institution of people's power); the priority of human rights and freedoms (interests) over the interests of the state; the recognition of human and civil rights and liberties by the state; the diversity of forms of protection of citizens ' rights and freedoms; the duty of the state to ensure their implementation; equality of citizens, the legality of power.

However, for the state power to be entirely legitimate, for the permanent establishment and actual implementation of citizens ' electoral rights in the life of the state, it is necessary to create guarantees of legality and authenticity of elections, the implementation of electoral rights, their final establishment and continuous improvement. After all, guarantees of electoral rights are a prerequisite for the authenticity of the electoral institution, an integral element of it. Suppose a system of guarantees is created that ensures the exercise and non-violation of electoral rights. In that case, we can say that the people are actually the only source of power, and the elections fully correspond to their purpose.

References

Buravchenko I.L. Constitusionno-pravovoi status izbiratelya v Rossiiskoi Federacii: avtoref. dis. cand. jurid. nauk: 12.00.02 / Buravchenko Irina Leonidovna. [Constitutional and legal status of a voter in the Russian Federation: avtoref. dis. kand. the faculty of law. Sciences: 12.00.02]. M., 2010. 26 p.

Bobkova I.N. (2003) Politologia. Uchebnic dlya vuzov. Minsk: Interpresservis. [Political science. Textbook for universities. Minsk: Interpresservis] – 352 s.

Constitutionnyi zacon Kyrgyzskoi Respublici «O vyborov Prezidenta Kyrgyzskoi Respublici I deputatov Zhogargu Cenesha Kyrgyzskoi Respublici» ot 2 ijulya 2011 goda № 68 [Constitutional law of the Kyrgyz Republic "On elections of the President of the Kyrgyz Republic and deputies of the Jogorku Kenesh of the Kyrgyz Republic" dated July 2, 2011 No. 68] // http://cbd.minjust.gov.kg/act/view/ru-ru/203244 43

Dokumenty I materialy / Otv. red. doktor juridicheskih nauk, zasluzhennyj jurist Rossiiskoi Federacii V. I. Lysenko.– M.: RCOIT. [Documents and materials / Resp. edited by Doctor of Legal Sciences, honored lawyer of the Russian Federation V. I. Lysenko. – Moscow: RTSOIT] 2008. 528 p.

Gonçalves Figueiredo, Hernán. Observing Electoral Justice Systems: A MANUAL FOR OAS ELECTORAL OBSERVATION MISSIONS. Washington, 2006. 48 p., ISBN 978-0-8270-6913-8 // http://www.oas.org/es/sap/deco/Pubs/Manuales/Observing-Electoral-Justice-Systems-a-Manual-for-OAS-Electoral-Observation--Missions.pdf

J. Kenneth Blackwell and Kenneth A. Klukowski. The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box // Yale Law & Policy Review. Volume 28, Issue 1 (2009). 107-123 p.

"Qazaqstan Respublicasyndagy sailau turaly" Qazakhstan Republicasynyn 1995 zhylgy 28 qyrkiektegi N 2464 constitutiolyk zany [Constitutional law of the Republic of Kazakhstan dated September 28, 1995 N 2464 "On elections in the Republic of Kazakhstan"] // http://adilet.zan.kz/kaz/docs/Z950002464_

Mateikovich M. S. Zashhita izbiratel'nyh prav grazhdan v Rossiiskoi Federacii: problemy teorii I praktiki: avtoref. dis. dokt. jurid. nauk: 12.00.02 / Mateikovich Maxim Stanislavovich. Protection of electoral rights of citizens in the Russian Federation: problems of theory and practice: Avtoref. dis. doctor. the faculty of law. Sciences: 12.00.02 / Mateikovich Maxim Stanislavovich]. Saratov. 2003. 59 p.

Nauchno-practichescii commentarii c federal'nomu zaconu «Ob osnovnyh garantiyah izbiratel'nyh prav i prav na uchastie v referendum grazhdan Rossiiskoi Federacii». [Scientific and practical commentary on the Federal law "On basic guarantees of electoral rights and the right to participate in a referendum of citizens of the Russian Federation".] – [Elect. resurs]. http://cikrf.ru/law/federal_law/comment/st2.php

Politologia: Uchebnoe posobie. [Political science: A training manual.] Stavropol. [Elect. resurs]. https://all-politologija.ru/knigi/politologiya-uchebnoe-posobie/vybory-kak-politicheskij-institut

R. Paul Margie. Protecting the Right to Vote in State and Local Elections under the Conspiracy against Rights Act. // https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1193&context=uclf

Tokvil Alecsis de. (1992) Democratiya v Americe: Perevod s franc. / Predisl. Garolda Dzh. Laski. [Democracy in America: Translated from French. / Foreword By Harold J. Lasky.] M.: Progress. 554 p.

Umbetov M.N. Qazaqstan Respublicasynda halyqaralyq dengeide adam quqygyn qorgau // QazYU Habarshysy. Zan seriyasy. Protection of human rights at the international level in the Republic of Kazakhstan // the Bulletin of KazNU. Legal series.] Almaty: Qazaq Universiteti. 2016. No. 2 (78). Pp. 30-36.

Voevodin L.D. (1997) Juridichescii status lich'nosti v Rossii. Uchebnoe posobie. [Legal status of a person in Russia. Textbook.]. M.: Izdatel'stvo MGU, Infra – M – Norma, 1997. 299 p.

3-бөлім

ТАБИҒИ РЕСУРС ЖӘНЕ ЭКОЛОГИЯЛЫҚ ҚҰҚЫҚ

Section 3

NATURAL RESOURCE AND ENVIRONMENTAL LAW

Раздел 3

ПРИРОДОРЕСУРСОВОЕ И ЭКОЛОГИЧЕСКОЕ ПРАВО

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ПРАВОВАЯ ОХРАНА ЗЕМЕЛЬНЫХ РЕСУРСОВ ОТ ДЕГРАДАЦИИ В УСЛОВИЯХ ГЛОБАЛЬНОГО ПОТЕПЛЕНИЯ И ИЗМЕНЕНИЯ КЛИМАТА

Последние десятилетия глобальное потепление и изменение климата находятся на повестке дня. Во всем мире наблюдается сокращение плодородных почв, увеличивается степень деградации земель. Остро встает вопрос обеспечения населения продовольствием в достаточном объеме и качестве. Очевидным становится, что система охраны земельных ресурсов и окружающей среды требует решительных мер для сохранения плодородия. Целью данной статьи является предложить изменения в правовой охране земельными ресурсами на основе экологического подхода. Поэтому в работе проводится подробный анализ причин деградации почв как в мире, так и в Казахстане и экологическое законодательство рассматривается через призму повышения качества земель и повышения плодородия на долгосрочной основе. Республика Казахстан входит в число стран, где экологические проблемы проявляются довольно остро, но пока не находят адекватного решения на различных уровнях государственного управления. В процессе написания научной статьи использовался комплекс методологических подходов и методов научного познания, в том числе экосистемный, информационный, анализ статистических данных, количественные и качественные методы данных, контент-анализ и другие. Правовые нормы могут лишь частично влиять на изменение экологической ситуации в условиях, когда землю рассматривают как ресурс, а не как часть природной системы, в которой человечество также является одним из элементов. В экологическом кодексе требуется закрепление принципов экономического стимулирования пользователей земельных ресурсов в снижении загрязнения и деградации земель, обеспечение плодородия почв и сохранения биоразнообразия.

Ключевые слова: экология, деградация почв, экологический кодекс, глобальное потепление, изменение климата, земельные ресурсы.

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Legal protection of land resources from degradation in conditions of global warming and climate change

Over the past decades, global warming and climate change have been on the agenda. All over the world, there is a decrease in fertile soils, and the degree of land degradation is increasing. The issue of providing the population with food in sufficient quantity and quality is acute. It becomes obvious that the system of protection of land resources and the environment require decisive measures to preserve fertility. The purpose of this article is to propose changes in the legal protection of land resources based on an ecological approach. Therefore, the work provides a detailed analysis of the causes of soil degradation, both in the world and in Kazakhstan, and environmental legislation is considered through the prism of improving land quality and increasing fertility on a long-term basis. The Republic of Kazakhstan is one of the countries where environmental problems are quite acute, but have not yet found an adequate solution at various levels of government. In the process of writing a scientific article, a complex of methodological approaches and methods of scientific knowledge was used, including ecosystem, informational, statistical data analysis, quantitative and qualitative data methods, content analysis, and others. Legal norms can only partially affect the change in the ecological situation, in conditions when the land is considered as a resource, and not as part of the natural system, in which humanity is also one of the elements. The environmental code requires the consolidation of the principles of economic incentives for land users in reducing pollution and land degradation, ensuring soil fertility and biodiversity conservation.

Key words: ecology, soil degradation, environmental code, global warming, climate change, land resources.

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Жаһандық жылыну және климаттың өзгеруі жағдайында жер ресурстарын деградациядан құқықтық қорғау

Соңғы онжылдықтарда жаһандық жылыну мен климаттың өзгеруі күн тәртібіндегі басты мәселе. Бүкіл әлемде құнарлы топырақтың азаюы, жердің деградация дәрежесінің артуы байқалады. Халықты жеткілікті мөлшерде және сапалы азық-түлікпен қамтамасыз ету мәселесі өткір тұр. Жер ресурстары мен қоршаған ортаны қорғау жүйесі құнарлылықты сақтау үшін шешуші шараларды қажет ететіні анық. Бұл мақаланың мақсаты экологиялық көзқарас негізінде жер ресурстарын құқықтық қорғауға өзгерістер енгізуді ұсыну болып табылады. Сондықтан жұмыста дүниежүзінде және Қазақстандағы топырақтың тозу себептеріне егжей-тегжейлі талдау жасалып, табиғатты қорғау заңнамасы ұзақ мерзімді негізде жердің сапасын жақсарту және құнарлылығын арттыру призмасы арқылы қарастырылады. Қазақстан Республикасы экологиялық проблемалары айтарлықтай өткір, бірақ мемлекеттік басқарудың әртүрлі деңгейлерінде тиісті шешімін таппаған елдердің бірі болып табылады. Ғылыми мақаланы жазу барысында экожүйелік, ақпараттық, статистикалық деректерді талдау, деректердің сандық және сапалық әдістері, мазмұнды талдау және т.б. қамтитын ғылыми танымның әдіснамалық тәсілдері мен әдістерінің кешені пайдаланылды. Құқықтық нормалар жерді табиғи жүйенің бөлігі ретінде емес, табиғи ресурстар ретінде қарастыру жағдайында экологиялық жағдайдың өзгеруіне ішінара ғана әсер ете алады, оның ішінде адамзат элементтерінің бірі болып табылады. Экологиялық кодекс ластану мен жердің тозуын азайту, топырақ құнарлылығын қамтамасыз ету және биоәртүрлілікті сақтауда жер пайдаланушыларды экономикалық ынталандыру қағидаттарын біріктіруді талап етеді.

Түйін сөздер: экология, топырақтың деградациясы, экологиялық кодекс, жаһандық жылыну, климаттың өзгеруі, жер ресурстары.

Введение

Охрана земельных ресурсов и вообще всей окружающей среды является основой всего существования человечества и его будущих поколений. В условиях системы капитализма привычно рассматривать земельные ресурсы как средство производства, а не как важный элемент окружающей среды. Такой подход привел к тому, что население и государства по всему миру истощают плодородие почв, загрязняют окружающую среду. Промышленные предприятия осуществляют огромные выбросы парниковых газов и ускоряют и без того начавшееся глобальное потепление на планете. С другой стороны, изменение климата является объективным процессом и циклом в жизни планеты, но антропогенный фактор влияния на экологию нельзя отрицать. Он усугубляет экологическую ситуацию в мире. Несмотря на то, что сегодня имеется огромное количество исследований экологов, экономистов и биологов о том, что промышленность наносит огромный ущерб окружающей среде, появилась альтернативная энергетика, есть понимание о важности развития органического земледелия, всё же окружающая среда и экология не вышли на передовые позиции во многих государствах мира и мышлении людей.

Проблема такой ситуации видится авторам в конфликте интересов. Развивая тяжелую промышленность и развивая крупные монополистические предприятия, от которых зависят экономики стран, нельзя сохранить экологию в хорошем или хотя бы в удовлетворительном состоянии. Стремление к максимизации прибыли экономических агентов никак не согласуется с экологическими стандартами большинства стран. Например, всем известно, что горнодобывающая и энергетическая отрасли являются наиболее опасными для экологии, однако от этих отраслей зависит экономическое благосостояние населения и страны. Поэтому решить полностью экологические проблемы в таких условиях практически невозможно, можно лишь сократить негативное влияние на экологию, что и делают в мире. Принимаются международные конвенции, законы и экологические кодексы, ужесточается наказание за экологические преступления и растут штрафы за вред, нанесенный экологии.

В XXI веке мир достиг небывалого уровня роста. Пока кризис экономического роста все еще продолжается, ключевой вопрос, который часто возникает, – может ли экономический рост заменить заботу об охране окружающей среды и может ли устойчивое развитие быть достигнуто только путем защиты окружающей среды и со-

хранения природных ресурсов в интересах человечества и будущих поколений – может быть проигнорирован в рамках экономического роста или в связи с неотложной человеческой необходимостью (Chaturvedi 2021).

В современной научной литературе охрану земель можно обеспечить за счет определенных организационных, правовых и экономических мер, которые способны снизить уровень загрязнения и другого негативного воздействия антропогенной деятельности на почвы, восстановить деградированные земли и создать условия для рационального использования.

Экосистемный подход в принятии государственных решений в Казахстане находится на начальной стадии развития и пока ещё имеет незначительную роль в государственном управлении. Развитие органического земледелия, которое бы могло улучшить ситуацию с качеством и плодородием земель также остается нерешенным, хотя закон об органическом земледелии принят. В связи с этим актуальность данного исследования заключается в формировании эффективных правовых мер, обеспечивающих рациональное использование и охрану почв как одного из важнейших природных компонентов окружающей среды.

Объектом исследования являются земельные ресурсы Казахстана. Предметом исследования выступает система методов и правовых механизмов охраны земельных ресурсов от деградации земельных ресурсов. Целью исследования послужила необходимость разработки предложений к правовой охране земель от деградации в условиях глобального потепления.

Материалы и методы

Для написания научной статьи использовались следующие методы: комплекс методологических подходов и методов научного познания, в том числе экосистемный, информационный, анализ статистических данных, количественные и качественные методы данных, контент-анализ и другие. В качестве информационной базы служили научные труды зарубежных и отечественных ученых, занимающихся проблемами глобального потепления, деградации почв и правовой охраной земель. Кроме этого, данные для исследования брались из статистических сборников Казахстана, национальных докладов об экологической ситуации, опубликованными соответствующими министерствами и их ведомствами. В статье использовались материалы ООН, правительственных и неправительственных организаций, научные доклады, проекты и публикации по теме исследования и специализированные Интернет-источники, материалы зарубежных исследований, материалы СМИ и результаты исследования, полученные лично авторами. Правовые основы экологической безопасности черпались из экологического кодекса РК, а также международных конвенций и положений.

Обзор литературы

Изменение климата и глобальное потепление многими государствами рассматриваются сейчас как один из серьезных вызовов. Данные изменения в природе оказывают серьезное воздействие на экономику и политику государств. При этом экологи согласны в том, что данные климатические изменения являются частью эволюционного процесса. Данный процесс осуществляется медленно и часто является незаметным, а выражается лишь в некоторых временных климатических флуктуациях, в виде разного рода природных аномалий по всему миру (наводнений, засух, ураганов и т.д.).

В последние десятилетия отмечается рост исследований проблем деградации земель в связи с изменением климата. Ряд зарубежных исследований провели анализ базы данных Webof Science научных исследований по проблемам деградации земель за период с 1990 по 2019 год, который показал, что число исследований увеличилось. В данной выборке находились исследования, охватывающие 93 страны или региона, из которых ведущими по объему исследований являются Китай, США, Великобритания, Германия и Австралия. Отмечено, что в плане исследования проблем деградации земель между этими странами отсутствует тесное сотрудничество. Акцент и основное направление исследований сфокусированы на задачах восстановления земель и устойчивого управления земельными ресурсами (https://doi.org/10.3390/land9010028).

Для экологической ситуации Казахстана в условиях изменения климата остро стоит проблема повышения среднегодовой температуры, так как наша страна находится в значительной удаленности от океанов и наблюдается периодически дефицит осадков, а больше половины земель подвержены риску опустынивания. Следует отметить, что длительность мониторинга воздуха на Земле составляет всего 150 лет. Сред-

няя температура воздуха за последние 100 лет увеличилась на 0.6 градуса (Шайтура 2021).

Метеорологические данные по Северному и Центральному Казахстану показывают повышение температуры за последние 100 лет от 1,7 до 2 градусов по Цельсию. В среднем по Казахстану скорость повышения среднегодовой температуры воздуха за период 1976-2019 гг. составила 0,30 ºС каждые 10 лет. При этом аномальная среднегодовая температура воздуха составила +1,59 градусов по Цельсию. В западных и южных регионах Казахстана было повышение среднегодовой температуры на 2 градуса (Национальный доклад 2019). Более сильный рост температуры наблюдался в зимний сезон – до 5-6 градусов.

Если рассмотреть период с 1895 года, то на территории Казахстана наблюдается рост среднегодовой температуры. В последние несколько десятилетий этот темп ускоряется.

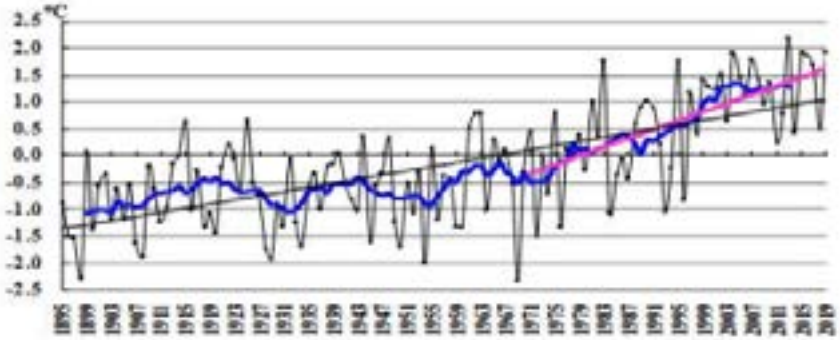

Рисунок 1 – Средняя годовая аномалия приповерхностной температуры на территории Казахстана за 1884-2019 годы

Исследование проблем глобального потепления на процессы деградации и опустынивания земель было проведено многими учеными. Бельгибаев М.Е. в своем труде приводит анализ воздействия на земли под воздействием потепления климата. И прогнозирует, что если произойдет максимальное потепление, то природные зоны переместятся в Казахстане на 350-400 км с юга на север (Бельгибаев 2021). Таким образом, можно будет наблюдать на юге Казахстана более засушливую погоду, а на севере – повышение средней температуры. И станет возможным выращивать те сельскохозяйственные культуры, которые ранее росли только в более теплых южных природных зонах.

Такое изменение климата свидетельствуют о высоком риске опустынивания земель на юге Сибири и Северной Азии. Наблюдается предрасположенность данных территорий к деградации почв по причинам глобального потепления и антропогенного воздействия на природу. Могут возникнуть следующие негативные последствия: засуха, пожароопасные периоды, снижение плодородия почв, исчезновение водоемов.

Долгих С.А. считает, что такая динамика роста среднегодовой температуры в регионе продолжится или даже ускорится темп роста, а динамика количества осадков будет снижаться (Долгих 1997).

Многие зарубежные исследователи раскрывали проблему изменения климата с различными последствиями в социально-экономической жизни общества. Kathleen Hermans, Robert McLeman (https://doi.org/10.1016/j.cosust.2021.04.013) отмечают, что засуха является существенным фактором деградации земель, что, в свою очередь, оказывает негативное воздействие на зависящее от ресурсов сельское население и потенциально может привести к потере средств к существованию и последующей миграции из затронутых районов. Деградация земель очень сильный удар может нанести по бедным регионам стран, которые подвержены этим экологическим процессам. Большинство населения в таких странах проживает в сельскохозяйственных регионах, в которых материальное благополучие зависит от качества земель. Возрастает риск увеличения бедности (https://doi.org/10.1038/s41893-018-0155-4).

Спрос на глобальные земельные ресурсы растет по мере роста численности и благосостояния населения мира, однако здоровье и продуктивность земли ухудшаются (Montanarella 2016).

Усиление конкуренции за земельные ресурсы приведет к усилению социальной и политической нестабильности, усугублению проблем продовольственной безопасности, нищеты, конфликтов и миграции (UN-Habitat-GLTN 2016).

Борьба с деградацией земель будет способствовать смягчению последствий изменения климата и адаптации к нему, а также сохранению биологического разнообразия, повышению продовольственной безопасности и устойчивости источников средств к существованию (Sci. Policy 2007).

Исследования и прогнозы Метеорологического агентства Соединенного Королевства (UKMO) свидетельствуют о максимальном потеплении на территории Казахстана. По их данным степная зона будет исчезать, а полупустынная расширять свои территории.

В рамках стратегических мер по борьбе с опустыниванием в РК до 2025 года описана деградация земель как один из негативных факторов социально-экономического воздействия. Содержание термина «опустынивание» приведено в «Конвенции ООН по борьбе с опустыниванием» Бонн, 1994: «Опустынивание означает деградацию земель в засушливых, полузасушливых и сухих субгумидных районах в результате действия различных факторов, включая изменение климата и деятельность человека».

В этой же Конвенции приводится определение термина «деградация земель» как снижение или потерю биологической и экономической продуктивности в результате землепользования или действия одного или нескольких процессов, в том числе связанных с деятельностью человека. Кроме этого, деградация земель может быть выражена как результат: ветровой или водной эрозии почв; снижения качественных характеристик почвы (физических, химических и биологических свойств); долгосрочной потери естественного растительного покрова.

В широком смысле деградация земли определяется как форма ухудшения естественного потенциала земли, которая оказывает влияние на целостность экосистем путем снижения их устойчивости экологической продуктивности или их естественной биологической продуктивности и способности к восстановлению (Жумабаев 2012).

Результаты и обсуждение

Проблемы обеспечения экологической безопасности и рационального природопользования уже давно приобрели «наднациональный» характер и продолжают оставаться в центре внимания международного сообщества. В последние годы Казахстан стал принимать активное участие в деятельности ЮНЕП, в 2016 г. ратифицировал Парижское соглашение по климату от 2015 г. (http://docs.cntd.ru/document/542655698), активно развивает подходы к обеспечению устойчивого развития, совершенствует экологическое законодательство, основываясь на целесообразности и реальной возможности использования потенциала международных организаций и мирового опыта для решения собственных экологических задач.

С 1 июля 2021 года в республике действует новый Экологический кодекс РК (ЭК РК) (Экологический кодекс РК от 9 января 2007 г.). Новый ЭК РК базируется на 10 принципах: предотвращения; исправления; предосторожности; пропорциональности; «загрязнитель платит»; устойчивого развития; интеграции; доступности экологической информации; общественного участия; экосистемного подхода. Однако, действие этих принципов нуждается в практической апробации, к которой лица, принимающие управленческие решения в сфере управления природными ресурсами и охраны окружающей среды, зачастую не готовы.

Проведенное исследование правовых механизмов охраны земельных ресурсов показало, что юридическая наука всё ещё рассматривает землю как средство производства, а не как часть окружающей среды, так как в рамках новой стратегии «зеленой экономики» необходимо вырабатывать новые соответствующие подходы к пониманию земли, её плодородию и причинам деградации. В ближайшем будущем должен сформироваться экосистемный подход в государственном управлении и мышлении населения. Такой подход предполагает симбиоз экологических, экономических и социальных принципов управления биологическими и физическими экосистемами, преследующими три основные цели: экологической устойчивости, биологического разнообразия и продуктивности окружающей среды. Понятие экосистемного управления, выработанное ЮНЕП, фокусируется на устойчивости экосистем с целью обеспечения экологических и гуманитарных потребностей в будущем. А пока в понимании охраны земли и окружающей среды отсутствует понятие ценности природы, а есть ценность природных ресурсов, нет понимания ценности воды, а есть водные ресурсы. Американские ученые Г. Пав-

ликакис и В. Цихринцис обратили внимание на то, что экосистемный подход является новым и комплексным, что обуславливает его практическую ценность для системы современного менеджмента (Pavlikakis 2000). Основным объектом управления в рамках экосистемного подхода является экосистема как главная структурная единица.

Необходимо принимать управленческие решения, влияющие на экосистемы, с учетом понимания связей с природным капиталом. Разрешить конфликт между экологией и экономикой в новом тысячелетии можно с использованием научно обоснованной оценки компромиссов. К примеру, расширение и очистка земель для перевода их в пашню включают компромисс между увеличением производства продуктов питания и защитой биологических ресурсов, при решении вопроса о вырубке леса имеется компромисс между доходами от продажи древесины и сокращением поглощения лесами углекислого газа в атмосфере и ветровой эрозии почв. Ещё до сих пор не решена экологическая проблема в столице с озером Малый Талдыколь – не учитываются экосистемные факторы при застройке города. То есть каждое такое решение впоследствии оказывает существенное влияние на экосистемы.

Согласно Экологическому кодексу РК земли представляют земную поверхность или территорию для удовлетворения материальных, культурных и других потребностей общества. В статье 228 ЭК РК представлена суть земли как ресурса, который используется или может быть использован в качестве удовлетворения потребностей общества. Прослеживается потребительский подход к земле.

Как указано в Экологическом кодексе РК, деградация почв выражается в ухудшении свойств и состава почвы, определяющих её плодородие, в результате воздействия природных или антропогенных факторов. Истощенными почвами считаются те почвы, которые полностью утратили свои плодородные свойства. В итоге ценным в землях для удовлетворения потребностей общества является их плодородие. Повышение плодородия почв можно считать основой борьбы против деградации почв.

В настоящее время около 76% всей территории уже подвержено деградации и опустыниванию, а из 186,5 млн га пастбищ 48 млн га достигли своей крайней деградации. Площади малоплодородных земель в нашей стране составляют около 75% от всей территории, что требует эффективных и срочных мер по воспроизводству плодородия (https://agbz.kz/pochvennoe-plodorodie-sohranit-ne-pritesnyaya-fermera/).

Улучшение плодородия земель в условиях глобального кризиса продовольствия и продовольственной инфляции является очень актуальным. При такой острой проблеме одним из вариантов правой охраны станет принятие закона «Об охране почв» или «О государственном регулировании обеспечения плодородия земель сельскохозяйственного назначения», такие законы имеются в других странах. Также можно создать государственную программу «Плодородие», которая будет направлена на обеспечение продовольствием население страны.

Весной 2022 года в Казахстане была зафиксирована годовая инфляция около 13-14%. Однако, на продовольственные товары значительное повышение цен в годовом выражении отмечено на такие товары, как сахар-песок – 60,5%, свежие овощи –31,5%, мука – 29,9%. Продовольственная инфляция превышает общую инфляцию в 2-3 раза. Кроме этого, прогнозируется рост населения до 9,1 млрд человек к 2050 году. Возрастает нагрузка на сельскохозяйственную отрасль, а следовательно, и на земли сельскохозяйственного назначения. Требуется повышение производительности и рост плодородия почв, внедрение энергоэффективных технологий в сельском хозяйстве и использовании земель. Так как без достаточной регулировки и новых подходов в сельском хозяйстве количество голодающих в ближайшие десятилетия будет увеличиваться. С другой стороны, опустынивание территорий Южной и Центральной Азии будет снижать урожайность и может угрожать продовольственной безопасности более одного миллиарда человек. В Казахстане уже наблюдается расширение зоны полупустыни на север.

Плодородие почв в основном зависит от содержания в ней естественного гумуса. В среднем почвы Казахстана содержат около 2% гумуса. И требуется вносить органические удобрения, чтобы запустить процесс восстановления и улучшения почв. Для этого имеются органические удобрения – биогумус. Поэтому этот вопрос надо регулировать на государственном уровне. На сегодняшний день существует проблема сельского хозяйства, которая заключается в высокой степени зависимости от минеральных удобрений, химической обработки пестицидами и гербицидами почвы. По мнению большинства крупных фермеров, считается, что нельзя получить даже среднестатистический уровень урожая без использования химической обработки и

добавления большого количества минеральных удобрений в почву. Те, кто занимается земледелием в промышленных масштабах и реализует свою продукцию как на внутреннем рынке, так и на экспорт, сильно зависят от использования удобрений.

Как известно, внесение в почву такого количества химических удобрений на ежегодной основе приводит к износу почвы и нарушению экосистемы. Данные удобрения дают краткосрочный эффект и вызывают сильную зависимость от их использования, чтобы обеспечить привычный уровень урожайности. И большинство фермеров привыкли использовать химические удобрения, которые в этом году очень сильно выросли в цене. Крестьянские хозяйства и крупные сельхозтоваропроизводители активно пользуются государственными субсидиями на минеральные удобрения. Ежегодно с государственного бюджета в среднем около 26 млрд тенге выплачивается в виде субсидий на покупку минеральных удобрений. Около 70-80% этих минеральных удобрений являются иностранного производства и импортируются в Казахстан. При этом органические удобрения, как, например, биогумус, произведенный специальными дождевыми червями, не субсидируются государством, что сильно тормозит развитие органического земледелия в Казахстане. Хотя есть фермеры, которые используют только органические удобрения в своей деятельности. То есть имеются противоречия – с одной стороны, необходимо не допустить деградацию почв, с другой стороны, субсидируются химические препараты и удобрения, которые используются при обработке почв.

Следующая проблема правовой охраны земельных ресурсов от деградации заключается в том, что присутствует серьезная проблема опустынивания, затронувшая по площади половину всей территории Казахстана, связи с чем остро стоит вопрос совершенствования нормативного правового регулирования в борьбе с опустыниванием с целью предотвращения и профилактики проблем опустынивания. Но в законодательных актах в сфере охраны окружающей среды не имеется четкого механизма правового регулирования от деградации и процессов опустынивания. Например, в Экологическом кодексе РК слово «опустынивание» встречается всего лишь шесть раз, в следующих статьях кодекса: 17, 142, 219, в которых не указывается правовой статус самой почвы. По данным Института мировых ресурсов, 99,2% территории Казахстана занимают земли, склонные к опустыниванию, в том числе земли, которые находятся в процессе истощения водными ресурсами. То есть почти вся территория Казахстана подвержена опустыниванию и деградации, а в законодательных актах и нормах об этом почти не упоминается. Требуется разработать специальный отдельный законопроект по охране почв от деградации и опустынивания, в котором бы прописывался статус таких почв и определенный режим их использования с целью восстановления плодородия. Тем более в мире имеется положительный опыт работы по борьбе с опустыниванием и деградацией почв и достижению восстановления плодородия. К примеру, можно взять за основу ведения сельского хозяйства некоторые элементы из пермакультуры и водосберегающие технологии.

Благоприятное воздействие на плодородие почв оказывает органическое ведение сельского хозяйства. Последние десятилетия в странах Западной Европы сокращается применение минеральных удобрений и химических средств защиты с целью увеличения производства органической продукции и сохранения биоразнообразия. В Казахстане тоже есть некоторые улучшения в данном направлении, например, был принят закон в 2015 году «О производстве экологической продукции». Данный метод ведения сельского хозяйства является одним из эффективных подходов в долгосрочной перспективе восстановить плодородие почв и снизить деградацию земель. Однако принятый закон на деле не стал способствовать развитию органического земледелия и сельского хозяйства. Об этом свидетельствует отрицательная динамика площади органических сельскохозяйственных земель в Казахстане после принятия закона. Так, в 2009 году площадь таких земель составляла 134,9 тыс. га, к моменту принятия закона достигла 303,4 тыс. га, а после принятия наблюдается сильный спад таких земель (2017 год – 277,1 тыс. га, 2018 год – 192,1 тыс. га) (Григорук 2020). Отсутствует четкая система сертификации такого производства, нет сертифицирующих компаний, которые бы имели право выдавать сертификат органического продукта. Большинство земель в Казахстане являются арендованными и основной упор и поддержка направлена на крупные хозяйства, которые владеют или пользуются огромными земельными ресурсами, а на таких площадях земли невозможно поддерживать и развивать органические подходы.

В Казахстане действует хорошо разработанная система законов, имеющих отношение

к УУЗР, однако большинство законов не являются актами прямого действия и для их реализации необходима разработка множества подзаконных актов на различных уровнях. В законодательстве существуют отдельные пробелы, дублирования и противоречия, работа над устранением которых ведется систематически. Следует также отметить недостатки в правоприменении этих законов. В законодательстве по лесным и земельным ресурсам не разработаны правовые основы для совместного управления ресурсами.

Исследование системы государственного управления природными ресурсами в Республике Казахстан, в ходе которого были детально рассмотрены имеющиеся в стране институты государственного управления природными ресурсами и инструменты, посредством которых реализуется государственная политика в данной сфере, продемонстрировало отсутствие межведомственной коммуникации и комплексного подхода в улучшении экологии Казахстана. Природоохранное законодательство рассматривается больше с позиции узковедомственных интересов, без учета интегрированного подхода по сохранению биоразнообразия. Хотя, по нашему мнению, на сегодняшний день имеются все инструменты и знания о внедрении механизмов, направленных на восстановление деградированных земель и, хотя бы, сдерживания процесса опустынивания.

Создание интегрированной системы по мониторингу деградации земель началось относительно недавно. Однако в процессе работ возникли проблемы с взаимоувязкой важнейших основных элементов. К ним относятся критерии оценки, исходная информация, сравнительные индикаторы, регулярно обновляющиеся на основе стандартных методов, данные по земле, связь данных, относящихся к различным индикаторам, а также включение социальных и экономических факторов в систему. Не разработана стандартная оценка текущей ситуации, нет согласованной процедуры для обновления и анализа данных по мониторингу.

Несмотря на тенденцию к расширению частных начал в экологическом праве, по мере развития рыночной экономики, при регулировании экологических отношений должен сохраняться приоритет императивных методов регулирования. Область природопользования – наиболее эксплуатируемая субъектами сфера деятельности, изобилующая нарушениями экологических требований, поэтому элементы публичного права по-прежнему будут востребованы в ближайшее время и останутся необходимыми до тех пор, пока уровень экологического сознания граждан не станет достаточно высоким. Потому что принятые законы не улучшают сами по себе экологическую обстановку, они действуют только в том случае, если их соблюдают.

В Казахстане экологической проблемой земельных ресурсов от деградации на прямую не занимаются. Структура государственного управления построена таким образом, что существует Министерство экологии, геологии и природных ресурсов. В её состав входят несколько комитетов: по водным ресурсам, по экологическому регулированию и контроля, комитет лесного хозяйства и животного мира, комитет геологии. В положениях описанных комитетов выделяется акцент на недропользование, а не на охрану земель от деградации. Одними из основных функций комитета экологического регулирования и контроля Министерства экологии, геологии и природных ресурсов утверждены следующие:

- консервация участка недр и объектов недропользования, ликвидация последствий проведения операций по недропользованию;
- соблюдение экологических норм и правил при использовании недр и переработке полезных ископаемых;
- соблюдение проектных решений по вопросам охраны окружающей среды при добыче и переработке полезных ископаемых.

При этом в Министерстве сельского хозяйства РК существует Комитет по управлению земельными ресурсами, который в основном занимается выдачей земель в пользование и мониторингом их использования. А функции по улучшению земельных ресурсов и достижению роста плодородия или сокращения деградации почв никто не выполняет. Таким образом, в условиях, когда земля и земельные ресурсы являются одним из ценных достояний государства, проблема деградации почв на практике не решается. При этом особое внимание уделено недрам земли, которые регулируются соответствующим министерством. Правовой механизм охраны земель следует рассматривать как комплекс элементов, различных по своей юридической природе, назначению и функциям, неразрывно связанных между собой общей целью в единую регулятивную систему, сочетающую общие меры охраны окружающей среды.

Заключение

В результате исследования было определено, что деградация почв для устойчивого развития Казахстана имеет серьезное значение, так как подвержено этой проблеме более половины территории. Факт роста среднегодовой температуры подтверждается многими исследования, но также отмечается в последние годы темп увеличения температуры. Присутствует угроза опустынивания земли на большей территории Казахстана. Правительство принимает соответствующие законы и акты, ужесточает наказания за экологические преступления. Но применение многих норм законодательства является трудноосуществимым. Глобальное потепление является объективным процессом, а деградация почв в больше мере зависит от ведения сельского хозяйства и рационального использования земель. Охрана земельных ресурсов от деградации сводится к использованию энергосберегающих технологий в сельском хозяйстве и органического подхода. Конкретно отсутствует закон о сохранении плодородия земель, в данном случае необходимы организационно-правовые механизмы, которые бы стимулировали население и правительство к экосистемному подходу в принятии управленческих решений. В статье выше отмечено о том, что система компромиссов не позволяет в полной мере развивать устойчивое развитие. Препятствующим фактором улучшения экологической ситуации является неадаптированность государственных институтов, их функций к принятию решений на основе экосистемного подхода (конфликт интересов, отсутствие отраслевых индикаторов и стандартов). Участие институтов гражданского общества и населения в процессе принятия решений носит формальный характер: коммуникации с экологическими НПО, бизнесом и населением по вопросам, касающимся комплексного управления земельными, водными и живыми ресурсами, которое обеспечивает их сохранение и устойчивое развитие, к сожалению, слабые. Вторая проблема экологической безопасности заключается в отсутствии единой системы сбора, обработки и хранения данных о состоянии природных экосистем. Правовые нормы могут лишь частично влиять на изменение экологической ситуации, в условиях, когда землю рассматривают как ресурс, а не как часть природной системы, в которой человечество также является одним из элементов. В экологическом кодексе требуется закрепление принципов экономического стимулирования пользователей земельных ресурсов в снижении загрязнения и деградации земель, обеспечении плодородия почв и сохранения биоразнообразия.

Литература

Chaturvedi, E. (2021). Climate Change Litigation: Indian Perspective // German Law Journal. – 22(8). – 1459-1470. doi:10.1017/glj.2021.85

Xie H., Zhang Y., Wu Z., Lv T. A Bibliometric Analysis on Land Degradation: Current Status, Development, and Future Directions. Land. 2020; 9(1):28. https://doi.org/10.3390/land9010028

Шайтура С.В., Сумзина Л.В., Томашевская Н.Г., Филимонов С.Л., Минитаева А.М. Аграрный сектор в контексте глобального изменения климата // Вестник Курской государственной сельскохозяйственной академии. – 2021. – №4. URL: https://cyberleninka.ru/article/n/agrarnyy-sektor-v-kontekste-globalnogo-izmeneniya-klimata (дата обращения: 11.08.2022).

Национальный доклад «О состоянии окружающей среды», подготовленный Министерством экологии, геологии и природных ресурсов РК, 2019.

Бельгибаев М.Е. Проблемы сохранения почв степной зоны Казахстана // Степи Северной Евразии: материалы IX международного симпозиума. – 2021. №. URL: https://cyberleninka.ru/article/n/problemy-sohraneniya-pochv-stepnoy-zony-kazahstana (дата обращения: 12.08.2022).

Долгих С.А., Есеркепова И.Б., Шамен А.М. Оценка вклада ожидаемого потепления глобального климата в развитие процессов опустынивания в Казахстане // Гидрометеорология и экология. – 1997. – №3. – С. 43-49

Kathleen Hermans, Robert McLeman. Climate change, drought, land degradation and migration: exploring the linkages. Current Opinion in Environmental Sustainability Volume 50. – June 2021. – P. 236-244 https://doi.org/10.1016/j.cosust.2021.04.013

Barbier, E.B., Hochard, J.P. Land degradation and poverty. Nat Sustain 1, 623–631 (2018). https://doi.org/10.1038/s41893-018-0155-4

L. Montanarella, D.J. Pennock, N. McKenzie, M. Badraoui, V. Chude, I. Baptista, T. Mamo, M. Yemefack, M. Singh Aulakh, K. Yagi World's soils are under threat Soil. – 2 (2016). – Pp. 79-82

UN-Habitat-GLTN Scoping and Status Study on Land and Conflict: Towards UN System-Wide Engagement at ScaleUnited Nations Human Settlements Programme (2016).

Potential synergies between existing multilateral environmental agreements in the implementation of land use, land-use change and forestry activities Environ // Sci. Policy. – 10 (2007). – Pp. 335-352

Жумабаев Е.Е. Стратегические меры по борьбе с опустыниванием в Республике Казахстан до 2025 года. – Астана, 2015. – 336 с.

Парижское соглашение по климату (Принято 12 декабря 2015 г. 21-й сессией Конференции Сторон Рамочной конвенции ООН об изменении климата); URL: http://docs.cntd.ru/document/542655698 (дата обращения: 11.08.2022).

Экологический кодекс РК от 9 января 2007 г. № 212 (ред. от 30.05.2020) // Ведомости Парламента Республики Казахстан. – 2007 г. № 1, ст. 1.

Pavlikakis G.E., Tsihrintzis V.A. Ecosystem Management: A Review of a New Concept and Methodology // Water Resources Management, 2000. – Vol. 14. – № 14. – P. 257

Сулейменов Б. Почвенное плодородие: сохранить, не притесняя фермера // Электронный ресурс: https://agbz.kz/pochvennoe-plodorodie-sohranit-ne-pritesnyaya-fermera/

Григорук В.В. Климов Е.В. Органическое сельское хозяйство: концептуальная позиция // Проблемы агрорынка, июль – сентябрь / 2020 г. С 88. DOI: 10.46666/2020.2708-9991.11

References

Barbier, E.B., Hochard, J.P. Land degradation and poverty. Nat Sustain 1, 623–631 (2018). https://doi.org/10.1038/s41893-018-0155-4

Bel'gibaev M.E. ProblemysohranenijapochvstepnojzonyKazahstana // StepiSevernojEvrazii: materialy IH mezhdunarodnogo-simpoziuma.[Problems of soil conservation in the steppe zone of Kazakhstan] (2021)

Dolgih S.A., Eserkepova I.B., Shamen A.M. Ocenkavkladaozhidaemogopoteplenijaglobal'nogoklimata v razvitieprocessovo-pustynivanija v Kazahstane[Assessment of the contribution of the expected warming of the global climate to the development of desertification processes in Kazakhstan]// Gidrometeorologijajekologija. (1997). №3.S.43-49

Grigoruk V.V. Klimov E.V. Organicheskoesel'skoehozjajstvo: konceptual'najapozicija // Problemyagrorynka, ijul' – sentjabr' / [Organic agriculture: a conceptual position] (2020) g. S 88. DOI: 10.46666/2020.2708-9991.11

Jekologicheskijkodeks RK [Environmental Code of the Republic of Kazakhstan] ot 9 janvarja 2007 g. № 212 (red. ot 30.05.2020) // VedomostiParlamentaRespublikiKazahstan, 2007 g., № 1, st. 1..

Chaturvedi, E. (2021). Climate Change Litigation: Indian Perspective. GermanLawJournal, 22(8), 1459-1470. doi:10.1017/glj.2021.85

Kathleen Hermans, Robert McLeman. Climate change, drought, land degradation and migration: exploring the linkages. Current Opinion in Environmental Sustainability Volume 50, June 2021, Pages 236-244 https://doi.org/10.1016/j.cosust.2021.04.013

L. Montanarella, D.J. Pennock, N. McKenzie, M. Badraoui, V. Chude, I. Baptista, T. Mamo, M. Yemefack, M. Singh Aulakh, K. Yagi World's soils are under threat Soil, 2 (2016), pp. 79-82

Nacional'nyjdoklad O sostojaniiokruzhajushhejsredypodgotovlennyjMinisterstvomjekologii, geologiiiprirodnyhresursov RK [National report on the state of the environment prepared by the Ministry of Ecology, Geology and Natural Resources of the Republic of Kazakhstan] (2019).

UN-Habitat-GLTN Scoping and Status Study on Land and Conflict: Towards UN System-Wide Engagement at ScaleUnited Nations Human Settlements Programme (2016)

Potential synergies between existing multilateral environmental agreements in the implementation of land use, land-use change and forestry activities Environ. Sci. Policy, 10 (2007), pp. 335-352

Zhumabaev E.E. Strategicheskiemerypobor'be s opustynivaniemv RespublikeKazahstan do 2025 goda. [Strategic measures to combat desertification in the Republic of Kazakhstan until 2025.] Astana, (2015) – 336 s.

Parizhskoesoglasheniepoklimatu[Paris Climate Agreement] (Prinjato 12 dekabrja 2015 g. 21-j sessiejKonferenciiStoronRamochnojkonvencii OON obizmeneniiklimata)

Pavlikakis G.E., Tsihrintzis V.A. Ecosystem Management: A Review of a New Concept and Methodology // Water Resources Management, 2000. – Vol.14. – № 14. – P. 257

Sulejmenov B. Pochvennoeplodorodie: sohranit', ne pritesnjajafermera [Soil fertility: to save without oppressing the farmer]// Jelektronnyjresurs: https://agbz.kz/pochvennoe-plodorodie-sohranit-ne-pritesnyaya-fermera/

Shajtura S.V., Sumzina L.V., Tomashevskaja N.G., Filimonov S.L., Minitaeva A.M. Agrarnyjsektor v kontekstеglobal'nogoiz menenijaklimata [Agriculturalsectorinthecontextofglobalclimatechange]// VestnikKurskojgosudarstvennojsel'skohozjajstvennojaka demii. (2021). №4.

Xie H, Zhang Y, Wu Z, Lv T. A Bibliometric Analysis on Land Degradation: Current Status, Development, and Future Directions. Land. 2020; 9(1):28. https://doi.org/10.3390/land9010028

4-бөлім

ҚЫЛМЫСТЫҚ ҚҰҚЫҚ ЖӘНЕ ПРОЦЕСС, КРИМИНАЛИСТИКА

Section 4

CRIMINAL LAW AND PROCESS, FORENSICS

Раздел 4

УГОЛОВНОЕ ПРАВО И ПРОЦЕСС, КРИМИНАЛИСТИКА

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THE CONCEPT OF SUBSTANDARD (FALSIFIED AND POOR QUALITY) INDUSTRIAL PRODUCTS AND ITS TYPES

The purpose of the article is to analyze the concept of substandard products (substandard goods) as an important element of the conceptual apparatus that provides legal regulation of trade and trade law.

The article examines the concept of substandard products (substandard goods), which, according to the author, does not have proper legislative regulation and, in fact, has a complex structure. Based on the analysis of approaches that been developed in practice, the author proposes to understand substandard and poor-quality goods, the actual characteristics (properties) of which do not correspond to those declared in accordance with the requirements of regulatory legal acts or regulatory documentation.

It is proposed to refer to the types of substandard products: 1) falsified products, i.e. products declared in accordance with the requirements of regulatory legal acts or regulatory documentation, composition of which has been consciously (deliberately) changed; 2) low-quality products – the composition of which was subjected to change due to negligence.

As the main research method, we should designate the comparative legal method, as well as the method of situational synthesis, which allows us to distinguish between concepts based on real differences, the subtleties of which are not taken into account when developing and using concepts in real situations.

The author substantiates the need to distinguish between the illegal circulation of substandard products (products with a changed composition) and the illegal circulation of conditioned products, the composition of which meets the requirements stated in accordance with regulatory legal acts and regulatory documents, but the circulation of such products is carried out in violation of exclusive rights, requirements for its registration and certification.

Key words: industrial products, substandard products, counterfeit products, substandard products, Eurasian Economic Union.

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Кондициялық емес (жалған және сапасыз) өнеркәсіп өнімі ұғымы және оның түрлері

Мақаланың мақсаты – сауда мен сауда құқығын құқықтық реттеуді қамтамасыз ететін тұжырымдамалық аппараттың маңызды элементі ретінде сапасыз өнім (substandard goods) ұғымын талдау.

Мақалада сапасыз өнім (substandard goods) ұғымы қарастырылады, авторлардың пікірінше, тиісті заңнамалық реттеу жоқ және іс жүзінде күрделі құрылымға ие. Практикада әзірленген тәсілдерді талдау негізінде авторлар нақты сипаттамалары (қасиеттері) нормативтік құқықтық актілердің немесе нормативтік құжаттаманың талаптарына сәйкес мәлімделгенге сәйкес келмейтін сапасыз тауарларды түсінуді ұсынады.

Сапасыз өнімнің түрлеріне мыналарды жатқызу ұсынылады: 1) жалған өнім, яғни құрамы саналы түрде (қасақана) өзгертілген нормативтік құқықтық актілердің немесе нормативтік құжаттаманың талаптарына сәйкес мәлімделген өнім; 2) сапасыз өнім – құрамы ұқыпсыздықтан өзгертуге ұшыраған өнім.

Зерттеудің негізгі әдісі ретінде салыстырмалы құқықтық әдісті, сондай-ақ нақты айырмашылықтар негізінде тұжырымдамалар арасындағы айырмашылықты анықтауға мүмкіндік беретін ситуациялық синтез әдісін белгілеу керек, олардың нәзіктіктері нақты жағдайларда тұжырымдамаларды әзірлеу мен қолдану кезінде ескерілмейді.

Авторлар сапасыз өнімнің (құрамы өзгертілген өнімнің) заңсыз айналымының және құрамы Нормативтік құқықтық актілер мен нормативтік құжаттарға сәйкес мәлімделген талаптарға сәйкес келетін кондицияланған өнімнің заңсыз айналымының ара-жігін ажырату қажеттілігін негіздейді, бірақ мұндай өнімнің айналымы ерекше құқықты, оны тіркеуге және сертификаттауға қойылатын талаптарды бұза отырып жүзеге асырылады.

Түйін сөздер: өнеркәсіп өнімі, сапасыз өнім, контрафактілік өнім, сапасыз өнім, Еуразиялық экономикалық одақ.

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Понятие некондиционной (фальсифицированной и недоброкачественной) промышленной продукции и ее виды

Цель статьи заключается в анализе понятия некачественного товара как важного элемента понятийного аппарата, обеспечивающего правовое регулирование торговли и торгового права.

В статье рассматривается понятие некачественной продукции (substandard goods), которое, по мнению авторов, не имеет должного законодательного регулирования и, по сути, имеет сложную структуру. На основе анализа методов, выработанных на практике, авторы предлагают понимать некачественный товар, как товар конкретные характеристики (свойства) которого не соответствуют заявленным в соответствии с требованиями нормативных правовых актов или нормативной документации.

К видам некачественной продукции предлагается отнести: 1) фальсифицированную продукцию, т.е. продукцию, заявленную в соответствии с требованиями нормативных правовых актов или нормативной документации, состав которой был сознательно (умышленно) изменен; 2) некачественную продукцию, т.е. продукцию, состав которой был подвергнут изменениям из-за небрежности.

В качестве основного метода исследования следует обозначить сравнительно-правовой метод, а также метод ситуационного синтеза, который позволяет проводить различие между концепциями на основе реальных различий, тонкости которых не учитываются при разработке и использовании концепций в реальных ситуациях.

Авторы обосновывают необходимость разграничения незаконного оборота некачественного товара (товара, состав которого изменен) и незаконного оборота кондиционного товара, состав которого соответствует требованиям, заявленным в соответствии с нормативными правовыми актами и нормативными документами, но оборот такого товара осуществляется с нарушением специальных прав, требований к его регистрации и сертификации.

Ключевые слова: промышленная продукция, некачественная продукция, контрафактная продукция, некачественная продукция, Евразийский экономический союз.

Introduction

The concept of substandard industrial products (substandard goods) currently does not have a legislative definition, although it is used in many regulatory legal acts (Order of the Ministry of Energy of the Russian Federation), in special literature (Sarah 2019), as well as in documents of international organizations (https://www.who.int/medicines/regulation/ssffc/publications/gsms-report-sf/en/). One of the first to legalize the concept of substandard products as a generic one in relation to the concepts of counterfeit, falsified and substandard medicines was D.N. Shevyrev. At the same time, it is proposed to classify as substandard such counterfeit, falsified and substandard drugs, the substandard of which arose, among other things, as a result of violation of the requirements established by regulatory legal acts for the processes of production and circulation of drugs (Maksimov 2019).

Definitions of the concepts of substandard, falsified and low-quality industrial products are formulated to fix them as terms in an additional special protocol to the Treaty on the EAEU.

Material and methods

In our opinion, in this definition, two different types of illegal circulation of products (goods) turned out to be mixed: 1) illegal circulation of actually substandard, i.e. falsified and substandard products (goods), which is completely prohibited except for mandatory actions prescribed by law (as a rule, we are talking about mandatory storage or transportation at the direction of authorized officials (for example, for the purposes of criminal proceed-

ings) or the destruction of such products) ; 2) turnover of conditioned (i.e., high-quality goods that meet all regulatory requirements) (Efremova 2000) goods carried out in violation of the established procedure for such turnover (for example, the sale of conditioned patent-protected products without the permission of the copyright holder (for example, without concluding a license agreement), sale of unregistered conditioned medical devices or medicines or non-certified radio-electronic equipment, smuggling of conditioned alcoholic beverages or tobacco products) (https://www.gost.ru).

This conclusion is confirmed, in particular, by the analysis of lexicographic literature. According to the literal meaning, the concept of "condition" (from the Latin conditio -condition) means a norm, standard, quality, which, according to a contract or a regulatory legal act, must comply with an object (in particular, a product) (Komlev 2000). In any case, the property of conditionality refers to the object itself, and not to the method of its manufacture (production) (http://www.slovorod.ru/dic-krysin/krys-k.htm).

In contrast to the concept of substandard products, the concepts of such types as "counterfeit products" ("falsified goods") and poor-quality products ("poor-quality goods") are defined in the legislation of the EAEU member states in relation to certain types of products.

The WHO operates with such concepts as:

Poor quality products, also referred to as "substandard". Such medical products are authorized, but do not meet either quality standards or specifications, or neither.

Unregistered/unlicensed medical products. These are medical products that have not been evaluated and/or approved by a national or regional regulatory authority for the market in which the product is marketed/distributed or used, under acceptable conditions in accordance with national or regional regulatory requirements.

Falsified medical products. Medical products accompanied by deliberately false information about their nature, composition or origin (https://www.who.int/ru/news-room/fact-sheets/detail/substandard-and-falsified-medical-products).

Types of illegal circulation of substandard industrial products

As already noted, substandard industrial products, including two types of products, the actual characteristics (properties) of which do not correspond to those declared in accordance with the requirements of regulatory legal acts or regulatory documentation.

The first type of illegal circulation of substandard industrial products, taking into account the previously formulated definitions of the concepts of illegal circulation and substandard products, should include illegal circulation of counterfeit (counterfeit) industrial products (counterfeit goods).

So, in accordance with the Federal Law of January 2, 2000 No. 29-FZ (as amended on December 27, 2019) "On the Quality and Safety of Food Products" to falsified food products (including biologically active additives – dietary supplements) , materials and products include such food products (including dietary supplements), materials and products that have been intentionally altered (forged) and (or) have hidden properties and quality, information about which is deliberately incomplete or unreliable (hereinafter – Federal Law No. 29) (Collection of legislation of the Russian Federation).

A similar definition was used by the legislator of the Republic of Kazakhstan to define the concepts of counterfeit medicine and counterfeit medical device. In accordance with par.50 of Art.1 of the Code of the Republic of Kazakhstan dated September 18, 2009 No. 93-IV "On the health of the people and the healthcare system", such medicines and medical devices are recognized as falsified, which were "illegally and intentionally" provided with "inaccurate information and a fake label about their composition or configuration and (or) manufacturers" (hereinafter referred to as the Health Code of the Republic of Kazakhstan) (http://adilet.zan.kz).

A similar definition is used in relation to counterfeit medicines by the legislator of the Republic of Belarus. According to Article 1 of the Law of the Republic of Belarus dated July 20, 2006 No. 161-З "On Medicines" (as amended and supplemented by the Law of the Republic of Belarus dated November 17, 2014 No. information about its composition and (or) manufacturer" (National register of legal acts of the Republic of Belarus 2006).

A significantly different definition of the concept of counterfeit products is provided for in Part 12 of Article 38 of the Federal Law of November 21, 2011 No. 323-FZ "On the Basics of Protecting the Health of Citizens in the Russian Federation" in relation to medical devices. According to this regulation, a falsified medical device is understood as a device "accompanied by false information about its characteristics and (or) manufacturer (manufacturer)" (hereinafter – Federal Law No. 323) (Collection of legislation of the Russian Federation).

A similar definition is provided for in paragraph 32 of Article 4 of the Federal Law of April 12, 2010 No. 61-FZ "On the Circulation of Medicines" in rela-

tion to medicines (hereinafter – Federal Law No. 61) (Collection of legislation of the Russian Federation).

The main drawback of these definitions in comparison with the definition of the concept of a falsified food product (Federal Law No. 29) and the definition of "counterfeit medical devices and medicines" (the Code of the Republic of Kazakhstan on Health), in our opinion, is that they allow both deliberate application of false information about the composition and (or) the manufacturer of the medical device and medicinal product, as well as careless.

This uncertainty creates formidable obstacles to distinguish between falsified products with a modified composition and substandard (low-quality) products. The falsification of the composition of products (in particular, the composition of medical devices and medicines) can, as correctly stated in the definition of the concept of a falsified food product in Federal Law No. 29, be carried out only intentionally (consciously) or intentionally, as specified in the Code of the Republic of Kazakhstan on Health.

In addition, the definitions of the concepts of counterfeit medicines and medical devices, which are given by the legislators of Kazakhstan and Belarus, are purely formal and, in our opinion, allow an incorrect understanding of the essence of falsification (i.e. counterfeit) of products, reducing such falsification to the deliberate placement of unreliable information about its composition or manufacturer. In fact, product falsification is, first of all, a deliberate change in its proper (usually, normatively defined) composition.

The placement of unreliable information about the composition of industrial products on a product, and even more so on its packaging, should, in our opinion, be considered only as a secondary sign of falsification, in fact, as a consequence of the actual falsification of products.

The importance of this circumstance, in our opinion, lies in the fact that the correctness of determining the moment of completion of the corresponding crime depends on it. If falsification of products consists in placing unreliable (false) information on the product (on its primary packaging), then the moment of the end of the relevant act should be considered from the moment the relevant information is posted.

In this case, the stage of actual intentional change of the composition of the product (for example, replacing the normative ingredient with another cheaper one) can only be considered as preparation for placing the corresponding false information on the packaging, since the actual change in the composition of the product cannot be considered as actions to put false information on the packaging.

Thus, if the falsification of a particular type of product, according to the national criminal legislation of a member state of the EAEU, is classified as a crime of medium gravity (i.e., the maximum punishment for a crime does not exceed 5 years in prison), then the actual falsification of such products (up to causing a false information on the packaging) cannot be subject to criminal prosecution under the Criminal Code of the Republic of Kazakhstan (part 2 of article 24), the Criminal Code of the Kyrgyz Republic (part 2 of article 38), the Criminal Code of the Russian Federation (part 2 of article 30).

In Armenia, not only preparation for crimes of small and medium gravity, but also an attempt to commit a crime of these categories is not subject to criminal liability. A different (more stringent) approach is proposed by the legislator of Belarus. According to the Criminal Code of the Republic of Belarus, criminal liability does not arise for preparing only for a crime that does not pose a great public danger (part 2 of article 13).

From this, for example, it follows that in Russia the actual production of counterfeit medicines or medical devices until the moment when false information is printed on their packaging without aggravating circumstances (the commission of a crime by a group of persons by prior agreement or by an organized group) should not formally be considered as a completed crime, since the act provided for by part 1 of Art.238 of the Criminal Code of the Russian Federation belongs to the category of crimes of medium gravity (Collection of legislation of the Russian Federation).

An analysis of the relevant judicial practice shows that the relevant issues do not receive a proper criminal law assessment. Thus, the Leninsky District Court of Krasnoyarsk No. 1-257 / 2017 dated April 4, 2017, under Part 2 of Art. 238 of the Criminal Code of the Russian Federation "Circulation of counterfeit, substandard and unregistered medicines, medical devices and circulation of counterfeit biologically active additives" sentenced to imprisonment for a period of 5 years suspended with a probationary period of 3 years with a fine of 1 million rubles, the director of "Trade House Fakel" JSC and V.M. Kleshkov, the director of the Chemical Plant, a branch of "Krasmash" OJSC, for the production and sale of counterfeit medicines and illegal production and sale of unregistered medicines on a large scale. V.M. Kleshkov "certainly knowing that the manufacturer of medical gaseous oxygen is "Fakel Trade House"JSC, in order to hide information from

the hospital staff about the actual manufacturer of the medicinal product, instructed the subordinate employees of the Chemical Plant, who were not aware of him and Dubovik P.K. criminal intent, to issue quality passports for the manufactured batch of the medicinal product, in which the manufacturer of medical gaseous oxygen indicated Krasmash JSC, which they carried out by transferring these documents to the employees of Fakel Trade House LLC (http://medbrak.ru/news.php?ID=3269). At the same time, the actual falsification, i.e. production of a medicinal product – medical gaseous oxygen, which does not meet the requirements of regulatory documentation, has not been subjected to any criminal law assessment. In this way,

At the same time, it should be taken into account that the Criminal Code of the Russian Federation for today provides for a separate liability in a separate article for misrepresenting information about the manufacturer of medicines and medical devices.

Yes, Art. 327 of the Criminal Code of the Russian Federation provides for liability for counterfeiting (falsification) of both primary and secondary packaging of medicines and medical devices, which forms an independent corpus delicti (part 2 of article 327 of the Criminal Code of the Russian Federation). In this regard, the law enforcer was actually forced to:

1) refuse to use the definition of a counterfeit medicine, which is given in Federal Law No. 61, and a similar definition of the concept of a counterfeit medical device, which is given in Federal Law No. 323, since the manufacture of packaging for these types of products is equated to their production according to these definitions;

2) in all cases of detection of medicinal or medical products with information already applied to them about their characteristics or manufacturers, to qualify the deed at the same time as a crime under the relevant part of Art. 238 of the Criminal Code of the Russian Federation, and as a crime under Part 2 of Art. 327 of the Criminal Code of the Russian Federation (an ideal set of crimes).

Similar problems arise, in our opinion, in the interpretation of Art. 323 of the Criminal Code of the Republic of Kazakhstan "Handling counterfeit medicines or medical devices".

With regard to dietary supplements, as already noted, this problem is absent for the Russian law enforcer for two reasons: 1) for dietary supplements as a type of food product, a different ("material") definition of the concept of counterfeit products should be applied, which is given in Federal Law No. 29; 2) criminal liability for the manufacture of fake packaging of dietary supplements by special rules that would be provided for in the Criminal Code of the Russian Federation is not provided.

In our opinion, it is difficult to find reasonable explanations for such "asymmetry", given that one of the most common forms of counterfeiting dietary supplements is the illegal inclusion of pharmaceutical substances in their composition, which makes them no less, if not more dangerous in comparison with counterfeit drugs (Federal Law 2016).

For law enforcement officers of other EAEU member states, this problem is absent due to the lack of special rules on liability for the circulation of dietary supplements in the criminal legislation.

The EAEU Treaty does not use or define the concept of "falsified products" ("falsified goods"). Only in the Agreement on Uniform Principles and Rules for the Circulation of Medicines within the Eurasian Economic Union dated December 23, 2014, the concept of a falsified medicinal product is used (without definition).

An analysis of the considered definitions of the concepts of certain types of counterfeit products allows us to formulate a definition of the concept of counterfeit products, which, in our opinion, can be proposed for fixing in an additional special protocol to the Treaty on the EAEU:

"Falsified industrial products (goods) – industrial products (goods), the composition of which (physical, organoleptic, ethical, temporary, ergonomic, functional properties), determined in accordance with an international treaty within the Union, regulatory legal acts of the Member States and (or) other regulatory documents adopted in accordance with and were intentionally illegally changed (forged).

The second type of substandard products, as already noted, is low-quality products (low-quality goods).

The basic category for the concept of poor-quality goods (poor-quality products) is the category of "goods quality", which is quite deeply and comprehensively developed in the special scientific literature (Azgaldov 1982) and provided for in civil law and various standards.

So, according to V.Yu. Ogvozdin (whose views are one of the most common points of view in science), product quality should be considered "a set of properties and characteristics objectively inherent in a product, the level or variant of which is formed when a product is created in order to meet existing needs" (Ogvozdin 2009).

Thus, product quality is not limited to the objective properties of products, but includes the

ability to satisfy consumer needs, i.e. ability to be useful (McConnell 2009).

At the same time, the main elements that determine product quality include a defect, which is understood as "a separate non-compliance of products with the requirements established by regulatory and technical documentation" and defect which is usually understood as a defective unit of production (Razumov 2010).

Thus, from the consumer point of view, a product defect is expressed in a decrease in the usefulness of a product, and a defect is expressed in the loss of usefulness (uselessness) of a product (product).

The civil legislation of the EAEU member states as a whole corresponds to the prevailing theoretical ideas about the content of the concept of "goods quality". According to Article 469 of the Civil Code of the Russian Federation, the quality of a product is its properties that determine the compliance (suitability) of the product with the goals for which (to achieve which) it is usually used (Civil Code of the Russian Federation dated November 30, 1994). A similar definition of product quality is given in Article 422 of the Civil Code of the Republic of Kazakhstan (CC RK) (http://adilet.zan.kz), similar articles of the civil codes of other EAEU member states.

Same approach with some differences is used in the International Standard "ISO 9000:2015. Quality management systems. Basic provisions and vocabulary", according to clause 3.6.2 of which quality (quality) is the degree of compliance of the totality of the characteristics inherent in an object (physical, organoleptic, ethical, temporal, ergonomic, functional) with the established requirements, i.e. a need or expectation that is established, usually assumed or obligatory) (https://www.iso.org/obp/ui/#iso:std:iso:9000:ed-4:v1:ru:term:3.6.4.).

The concept of low-quality (poor-quality) products (goods), as well as the concept of falsified products (goods), although it is used in the legislation of the EAEU member states and supranational regulation of the EAEU definitions only in relation to certain types of industrial products.

The most common of them, apparently, is the definition of the concept of "poor-quality material (product)", which is given in the Rules for consumer services approved by the Decree of the Council of Ministers of the Republic of Belarus of December 14, 2004 No. 1590 (as amended by the Decree of the Council of Ministers of the Republic of Belarus April 2, 2015 No. 268). Such is recognized as "a material (product), the totality of the characteristics of which does not allow the contractor to satisfy the needs of the consumer in the provision of household services" .

The preamble of the Law of the Russian Federation of February 7, 1992 No. 2300-1 (as amended on July 18, 2019) "On the Protection of Consumer Rights" contains only an indirect definition of the concept of poor quality (poor quality) goods, which should be understood as such goods that have shortcomings (including significant ones), which are manifested in the non-compliance of the goods with "mandatory requirements provided for by law or in the manner prescribed by it, or the terms of the contract (in their absence or incompleteness of the conditions with the usual requirements), or the purposes for which the goods (work, service) of this kind is usually used, or for the purposes of which the seller (executor) was informed by the consumer at the conclusion of the contract, or the sample and (or) description when selling goods according to the sample and (or) according to the description "(Collection of legislation of the Russian Federation 1996).

The principle of double non-compliance should be considered as distinctive feature of the above definitions of the concept of low-quality products (goods): 1) non-compliance with the formal requirements of regulatory legal acts or contracts; 2) non-compliance with consumer needs.

A different, formal approach to the definition of the concept of poor-quality products is reflected, for example, in paragraph 38 of Article 4 of the Federal Law on the Circulation of Medicines, a poor-quality drug is understood to be a drug that does not meet the "requirements of a pharmacopoeial article or, in the absence of it, the requirements of regulatory documentation or normative document.

A similar definition of the concept of poor-quality products is contained in Part 13 of Article 38 of the previously mentioned Federal Law No. 323, according to which "a medical device that does not meet the requirements of the regulatory, technical and (or) operational documentation of the manufacturer (manufacturer) or, in the absence of it, the requirements of another regulatory documentation" (Federal Law of December 31,).

At the same time, it should be noted that the legal limits of the concept of a poor-quality medical device are significantly less certain in comparison with the legal boundaries of the concept of a poor-quality medicinal product. If a pharmacopoeial monograph is "a document approved by an authorized federal executive body and containing a list of quality indicators and quality control methods for a medicinal product" (paragraph 19 of Article 4 of the Federal Law on the Circulation of Medicines),

i.e. normative legal act, then the regulatory, technical and (or) operational documentation of the manufacturer (manufacturer) is produced by the latter, albeit in compliance with the requirements established by the authorized federal executive body.

An analysis of the considered definitions of concepts allows us to formulate a definition of the concept of low-quality products, which, in our opinion, can be proposed for fixing in an additional special protocol to the Treaty on the EAEU:

"Poor-quality (poor-quality) industrial products (goods) – industrial products (industrial goods) whose composition (physical, organoleptic, ethical, temporary, ergonomic, functional properties) do not meet the requirements established in accordance with an international treaty within the Union, regulatory legal acts of states -members and (or) other regulatory documents adopted in accordance with them, except in cases where such properties were intentionally illegally changed (forged).

The reservation contained in the proposed definition that products of poor quality (poor quality) should not include products that have been counterfeited is aimed at preventing unreasonable confusion (identification) of illegal circulation of counterfeit products, as the most dangerous form of illegal circulation of products, and illegal circulation of poor-quality products.

Conclusions

1. Under substandard industrial products (substandard goods), for the purpose of combating its illegal circulation in the EAEU, it is proposed to understand falsified and poor-quality industrial goods, the actual characteristics (properties) of which do not correspond to those declared in accordance with the requirements of international treaties concluded within the framework of the EAEU, regulatory legal acts of the Member States and (or) adopted in accordance with them by other regulatory documents.

2. It is expedient to refer to substandard industrial products (industrial goods) ass follows: 1) counterfeit products, i.e. products whose composition (physical, organoleptic, ethical, temporary, ergonomic, functional properties), declared in accordance with the requirements of regulatory legal acts or regulatory documentation, has been consciously (intentionally) changed; 2) poor-quality products, the composition of which does not meet the relevant regulatory requirements, except in cases where such properties have been intentionally illegally changed (forged).

The definitions of the relevant concepts should be provided for in an additional special protocol to the Treaty on the EAEU.

3.In the interests of ensuring scientifically based differentiation of responsibility for forms of illegal circulation of industrial products that differ in degree of public danger, it is inappropriate to attribute to substandard industrial products: 1) counterfeit, uncertified and unregistered industrial products, the composition of which (physical, organoleptic, ethical, temporary, ergonomic, functional) corresponds to the declared according to regulatory requirements; 2) industrial products, the composition of which corresponds to the declared according to regulatory requirements, but which was produced or handled in violation of the rules established by regulatory legal acts for production processes.

Illegal circulation of these types of industrial products should also be subject to legal liability, however, the nature and severity of the relevant liability measures, as well as other legal consequences of such violations, should differ from the measures of the state response to the illegal circulation of substandard industrial products.

In particular, the withdrawal from circulation and destruction of industrial products, the composition of which (all essential characteristics) correspond to those declared in accordance with regulatory legal acts, in our opinion, can be applied only in exceptional cases (for example, in the interests of national security or in the presence of an international obligation, ratified by national law).

The proposed criterion for distinguishing between illegal circulation of industrial products, in our opinion, can be useful in implementing a risk-based approach to state control over compliance with the rules for the circulation of various types of industrial products (Maksimov 2019).

References

Order of the Ministry of Energy of the Russian Federation dated June 19, 2003 No. 231 "On approval of the Instruction for monitoring and ensuring the preservation of the quality of petroleum products in oil product supply organizations" (p. 10.1) // Bulletin of normative acts of federal executive authorities. 10/13/2003. No. 41; Order Acting Minister of Energy and Mineral Resources of

the Republic of Kazakhstan dated December 5, 2006 No. 321 “On approval of the Instructions for the application of the Classification of reserves to deposits of precious metals (gold, silver, platinum)”

Sarah M. Beargie, Colleen R. Higgins, Daniel R. Evans, Sarah K. Laing, Daniel Erim, Sachiko Ozawa. The economic impact of substandard and falsified antimalarial medications in Nigeria // PLOS.2019. August 15th //https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0217910. Date of access: 04/10/2022.

WHO Global Surveillance and Monitoring System for substandard and falsified medical products.Reports and executive summary //https://www.who.int/medicines/regulation/ssffc/publications/gsms-report-sf/en/Date of access: 04/10/2022.

Maksimov S.V., Shevyrev D.N. Terminological problems of the implementation of the Medicrim Convention in Russian legislation // Medical Law. – 2019. No. 3. – P. 49-50.

Efremova T. F. New Dictionary of the Russian Language. Explanatory derivational. In 2 vols. T. 1. – M.: Rus. yaz., 2000. – 1210 p.

GOST R 58636-2019 “System of protection against falsification and counterfeit. Traceability of product turnover. General requirements”; GOST R 58635-2019 “System of protection against falsification and counterfeit. Methods for ensuring control of the authenticity of products and documents. General Provisions”; GOST R 58637-2019 “System of protection against falsification and counterfeit. Criteria for the effectiveness of authentication solutions used to combat counterfeit products” //https://www.gost.ru. Date of the application. 04/10/2022.

Komlev N. G. Dictionary of foreign words. – M.: EKSMO-Press, 2000. – S. 531.

Krysin L.P. Explanatory dictionary of foreign words L. P. Krysina. – M.: Rus. language, 1998. – 846 p. //http://www.slovorod.ru/dic-krysin/krys-k.htm. Date of access: 04/10/2022

Substandard and counterfeit medical products // https://www.who.int/ru/news-room/fact-sheets/detail/substandard-and-falsified-medical-products

Collection of legislation of the Russian Federation. 01/10/2000. No. 2. St. 150.

Code of the Republic of Kazakhstan dated July 7, 2020 No. 360-VI “On the health of the people and the healthcare system” (as amended and supplemented as of March 7, 2022) http://adilet.zan.kz

National register of legal acts of the Republic of Belarus. 2006. No. 122. 2/1258.

Collection of legislation of the Russian Federation. 28.11.2011. No. 48. Art. 6724.

Collection of legislation of the Russian Federation. 04/19/2010. No. 16. Art. 1815.

http://sud-praktika.ru/precedent/298885.html. Date of access: 04/10/2022.

The problem of falsification of dietary supplements is relevant for all countries of the world //http://medbrak.ru/news.php?ID=3269Date of access: 04/10/2022.

Federal Law of January 31, 2016 No. 5-FZ “On Ratification of the Agreement on Uniform Principles and Rules for the Circulation of Medicines within the Eurasian Economic Union” // Collected Legislation of the Russian Federation. 02/01/2016. No. 5. St. 557.

Azgaldov G.G. Theory and practice of assessing the quality of goods (basics of qualimetry). – M.: Economics, 1982. – 256 p.

Ogvozdin V. Yu. Quality management. Fundamentals of theory and practice. – Tutorial, 6th ed. – M.: Publishing house: “Business and Service”, 2009. – S. 497.

McConnell, Campbell R. Economics: principles, problems, and policies / Campbell R. McConnell, Stanley L. Brue, Sean M. Flynn. – 18th ed. – New York: Published by McGraw-Hill/Irwin, a business unit of The McGraw-Hill Companies, 2009. – P. 135-140; 416-418.

Razumov V.A. Quality management: Tutorial for students of higher educational institutions studying in the specialty 080507 “Organization Management” / V. A. Razumov. – M.: INFRA-M, 2010. – P. 28.

Civil Code of the Russian Federation dated November 30, 1994 No. 51-FZ. Adopted by the State Duma on October 21, 1994 // Collected Legislation of the Russian Federation. 5.12. 1994 No. 3. St. 3301.

Civil Code of the Republic of Kazakhstan (Special Part) dated July 1, 1999 No. 409-I (with amendments and additions as of 01/01/2022)

ISO 9000:2015Quality management systems – Fundamentals and vocabulary //

https://www.iso.org/obp/ui/#iso:std:iso:9000:ed-4:v1:ru:term:3.6.4. Date of access: 04/10/2022.

Protocol on the implementation of a coordinated policy in the field of consumer protection (clause 2, clause 3, section II of Appendix No. 13 to the Treaty on the Eurasian Economic Union) // Treaty on the Eurasian Economic Union. Signed in Astana on May 29, 2014. (Official website of the Eurasian Economic Commissionhttp://www.eurasiancommission.org. 06/05/2014).

National register of legal acts of the Republic of Belarus. – 2005. No. 1. 5/15304.

Collection of legislation of the Russian Federation. 15.01.1996. No 3. St. 140.

Federal Law of December 31, 2014 No. 532-FZ “On Amendments to Certain Legislative Acts of the Russian Federation in Part of Counteracting the Turnover of Counterfeit, Counterfeit, Substandard and Unregistered Medicines, Medical Devices and Counterfeit Dietary Supplements” // Collected Legislation of the Russian Federation. 01/05/2015. No 1 (Part I). Art. 85.

Order of the Ministry of Health of Russia dated January 19, 2017 No. 11n (as amended on April 22, 2019) “On approval of the requirements for the content of technical and operational documentation of the manufacturer (manufacturer) of a medical device” // Official Internet portal of legal information (www.pravo.gov.ru) March 13, 2017. Date of access: 04/10/2022.

Maksimov S.V., Rudaya T.Yu., Utarov K.A. Risk-Based Approach and Pharmaceutical Compliance in the Sphere of State Supervision of Illegal Circulation of Medical Products // Russian Journal of Legal Research. – 2019. V. 6. No. 2. – S. 150-157.

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VICTIMOLOGICAL APPARATUS FOR THE STUDY OF INTRA-FAMILY VIOLENCE

The study of victims of domestic violence is an urgent issue. To eradicate intra-family violence, we must investigate not only the identity of the perpetrator, but also the identity of the victim, we must not forget. Since the victim and the perpetrator of intra-family violence have a close relationship and connections with each other.

Analyzing victims of domestic violence, it is possible to classify them by age; gender; role status; moral and psychological characteristics; the severity of the crime from which the victim suffered; the degree of guilt of the victim; the nature of the victim's behavior. Persons at risk of being victims of domestic violence behave in different ways: aggressively or in another provocative way; passively, yield to violence; show a complete misunderstanding of the tricks of criminals or elementary carelessness.

The conceptual basis of the victimological apparatus consists of such concepts as "victim" or "victim", "victimogenic factors", "victimization", "victim behavior", "victimization", "victimological situation", "victimological prevention".

In order to prevent domestic violence, it is necessary to approve an anti-discrimination policy against women in society, introduce psychological assistance and rehabilitation programs for women in family crisis situations, as well as a system of psychological and practical measures aimed at correcting personal victim qualities and preventing victim behavior of women.

Key words: victimological apparatus, criminal personality, victim behavior, victim, family.

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Отбасы ішіндегі зорлық-зомбылықты зерттеудің виктимологиялық аппараты

Отбасындағы зорлық-зомбылық құрбандарын зерттеу өзекті мәселе болып табылады. Отбасылық зорлық-зомбылықты жою үшін біз қылмыскердің жеке басын ғана емес, сонымен бірге жәбірленушінің жеке басын да ұмытпауымыз керек. Себебі, жәбірленуші мен отбасы ішіндегі зорлық-зомбылық қылмысының бір-бірімен тығыз байланысы және арақатынасы бар.

Отбасындағы зорлық-зомбылық құрбандарын талдай отырып, оларды жасына, жынысына, рөлдік мәртебесіне, адамгершілік-психологиялық белгілеріне, жәбірленуші зардап шеккен қылмыстың ауырлығына, жәбірленуші кінәсінің дәрежесіне, жәбірленуші мінез-құлқының сипатына қарай жіктеуге болады. Отбасындағы зорлық-зомбылықтың құрбаны болу тәуекелі бар адамдар өзгеше әрекет етеді: агрессивті немесе басқа арандатушылық жолмен, пассивті, зорлық-зомбылықтан төмен, қылмыскерлердің айла-амалдарын толық түсінбеушілік немесе қарапайым немқұрайлылық танытады.

Виктимологиялық аппараттың тұжырымдамалық негізін «жәбірленуші» немесе «құрбан», «виктимологиялық факторлар», «виктимологиялық мінез-құлық», «виктимизация», «виктимологиялық дағдарыс», «виктимологиялық оңалту» сияқты түсініктер құрайды.

Отбасындағы зорлық-зомбылықтың алдын алу мақсатында қоғамда әйелдерге қатысты кемсітушілікке қарсы саясатты бекіту, отбасылық дағдарыстық жағдайларда әйелдерге психологиялық көмек көрсету және оңалту бағдарламаларын енгізу, сондай-ақ әйел құрбандардың жеке қасиеттерін түзетуге және құрбан болған мінез-құлықтың алдын алуға бағытталған психологиялық-практикалық іс-шаралар жүйесінің болуы қажет.

Түйін сөздер: виктимологиялық аппарат, қылмыскердің жеке басы, виктимологиялық мінез-құлық, құрбан, отбасы.

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Виктимологический аппарат исследования внутрисемейного насилия

Исследование жертв насилия в семье является актуальным вопросом. Для искоренения внутрисемейного насилия мы не только должны исследовать личность преступника, но и про личность жертвы не должны забывать, так как потерпевший и преступник внутрисемейного насилия имеют тесные отношение и связи между собой.

Анализируя жертвы насилия в семье, можно классифицировать их по возрасту, половой принадлежности, ролевому статусу, нравственно-психологическим признакам, тяжести преступления, от которого пострадала жертва, степени вины жертвы, характеру поведения потерпевшего. Лица, рискующие оказаться жертвами насилия в семье, ведут себя по-разному: агрессивно или иным провоцирующим образом; пассивно, уступают насилию; проявляют полное непонимание уловок преступников или элементарную неосмотрительность.

Концептуальную основу виктимологического аппарата составляют такие понятия, как «потерпевший» либо «жертва», «виктимогенные факторы», «виктимность», «виктимное поведение», «виктимизация», «виктимологическая ситуация», «виктимологическая профилактика».

В целях предупреждения домашнего насилия необходимо утверждение в обществе антидискриминационной политики в отношении женщин, внедрение программ психологической помощи и реабилитации женщин в кризисных семейных ситуациях, а также наличие системы психолого-практических мероприятий, направленных на коррекцию личностных виктимных качеств и профилактику виктимного поведения женщин.

Ключевые слова: виктимологический аппарат, личность преступника, виктимное поведение, жертва, семья.

Introduction

The increase in the number of victims of domestic violence during the Covid-19 pandemic has once again proved that the study of victims of domestic violence is an urgent issue.

Firstly, it is essential to understand the concept of violence itself. It is best described by Y. Antonyan, who claims that violence is an intentional and harmful physical or mental impact on someone. Hence it is an action, where the potential impact/ harm is simply ignored (Y. Antonyan 2021).

According to L.Kolpakova, criminal violence is classified as a deliberate criminal act, expressed in the impact on the body of someone, affecting the mentality or leaving them in conditions dangerous to life or health. Furthermore, criminal violence can be expressed against the will and aimed at causing harm to life, health, bodily integrity, physical or mental suffering, restriction of freedom or serving as a means of coercion to commit undesirable actions (inactions) for a given person.

There are also several types of domestic violence classified by Kolpakova. She believes, that a deliberate criminal act can be both expressed in physical and mental means. The former one is described as an action against or in addition to the latter's will and aimed at causing harm to his life, health, bodily integrity, physical or mental suffering, restriction of freedom, or serving as a means of coercion to commit undesirable actions (inaction) for this person, expressed in physical impact on another person's body or leaving him/her in conditions dangerous to life or health.

Whereas the latter one defined as a deliberate criminal act that involves influencing the psyche of another person against or against that person's will, with the intent of causing harm to that person's life, health, physical or mental suffering, restricting freedom, or serving as a means of coercion to commit undesirable actions (inactions) (L.Kolpakova, 2007).

Sources and methods

General scientific, chronological, statistical, institutional, system-structural, and other methodologies applied in jurisprudence were used in the preparation of this work. The study of documentary sources; comparative legal method of consideration and analysis of international legal documents and normative legal acts of national legislation; and comparative legal method of analysis of international legal documents and normative legal acts of national legislation are all used in this work.

Results and discussion

Domestic violence should be highlighted in the context of the statistics on committed crimes of violent influence. Domestic violence is the unlawful physical or mental influence of one member of the family over another, which frequently escalates and is intended to cause physical, moral, or other harm (L. Kolpakova, 2007).

According to the Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan, the number of cases of domestic abuse against women has increased immensely (see table below). In 2000, for instance, there have been 22,367 incidents of domestic violence against women in the country. In 2013, there was a threefold increase in the number of domestic violence, with 137,336 reported incidents. We may expect a drop in domestic violence cases in 2020, with a total of 63447 cases (Statistical statistics from the Kazakhstan Republic's Agency for Strategic Planning and Reforms' Bureau of National Statistics) (Figure 1).

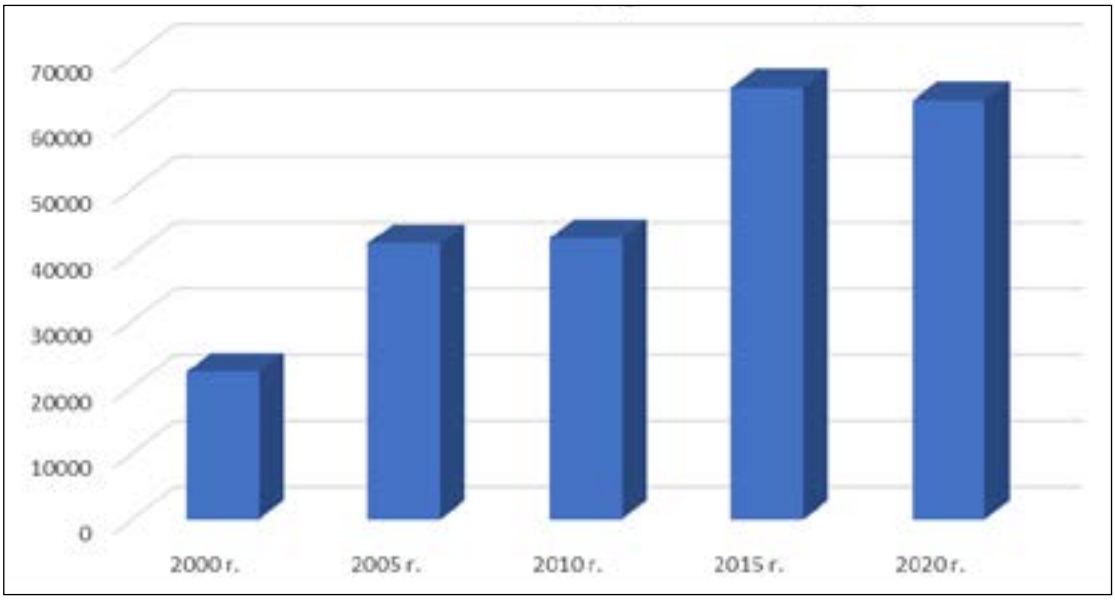

Figure 1 – Number of cases of violence (registered crimes) against women from 2000 to 2020.

As per the table, we can see the elements of the increment in abusive behaviour at home violations.

These figures demonstrate the presence of a worldwide issue, which is normally called "abusive behaviour at home" (Mishina 2019). Yet, the issue of such violations lies in the way that they, generally speaking, are of a "shut sort", which is related to the eccentricity of this point: for this situation, the person in question and the "criminal" are close individuals related by blood or other family relationship, regarding which there is the assessment that it isn't customary to "wash dirty linen in public". Therefore, an enormous amount of incidents of domestic violence has been kept secret and remain unknown to law enforcement agencies.

Domestic violence is most commonly perceived in society as a man's (husband, father) use of aggressive acts against weaker family members – wife, children. And the victim of such violence must inevitably be the perpetrator of the crime. The reason for such a definite conclusion is because, before the twentieth century, lawyers and criminologists focused solely on the criminal and ignored the victim's actions. Only in the 1960s and 1970s did the first works devoted to the role of the victim, i.e. the study of victimhood, gain traction. The victimological method to analyzing domestic violence and the conduct of victims of domestic abuse is the focus of this study.

The number of crimes involving domestic violence grew by 4.7 per cent at the end of 2020. Deputy Chairman of the Administrative Police Committee of the Ministry of Internal Affairs of the Republic of Kazakhstan, Alexey Milyuk, made the announcement during a press conference at the CCS.

The situation has gotten worse amid quarantine and severe isolation, according to the Ministry of Internal Affairs. According to their research, wom-

en account for over half of domestic abuse victims, with kids accounting for another 6.4 per cent. Milyuk emphasized that, on average, half of these crimes are done when inebriated. 81 per cent of the family rowdies who were prosecuted did not have a job.

One of the methods used by the Ministry of Internal Affairs to exert influence on offenders is a protective order, which can prevent violators from contacting potential victims for up to one month. Last year, almost 78 thousand protection orders were issued, according to the results (the official website of the Ministry of Internal Affairs of the Republic of Kazakhstan).

The government has taken significant steps to combat the problem of domestic violence over the last ten years. Domestic violence prevention legislation was passed, the number of State crisis centres was raised, and the Standard for Providing Special Social Services to Domestic Violence Victims was established. However, domestic violence continues to be a severe threat to women. Furthermore, it has not yet been designated as a separate offence in the legislation.

Criminals' behaviours are sometimes influenced to some extent by the behaviour and personal attributes of those who are damaged as a result of the crime (Rivman 1973).

Also, according to D. V. Rivman, the victim is a component of both pre-criminal and directly criminal situations. It often relies on the situation in which the criminal finds himself: assisting in the commission of a crime or preventing the commission of a crime (Rivman 1973).

Often the victim acts as a co-author and even the author of situations provoking the criminal.

A crime is the result of a victim's contact with a criminal, in which the victim can help or impede the perpetration of the crime. Persons at danger of being victims of crime react in a variety of ways, according to I. G. Malkina-Pykh: violently or in another provocative manner; passively submitting to violence; displaying a complete misunderstanding of criminal tactics or basic imprudence. Their actions may be legal or, on the other hand, delinquent and even criminal, and their contribution to the criminal system can be minor or, in some cases, decisive (Malkina-Pykh 2006).

We must not forget that in order to eradicate intra-family violence, we must investigate not only the identification of the perpetrator but also the identity of the victim. Because the victim and perpetrator of intra-family violence have such a deep relationship and links. The role of victims in intra-family crimes, according to their criminological judgment, is more substantial than in regular crimes. The circle of everyday social communication (family, kinship, connections, systematic home contact) binds the criminal and the victim in the category of crimes under discussion (Petrovsky 2005).

The proclivity to become a victim of crime is known as victimhood. Being a victim of circumstances, crimes more frequently than other people, or under settings that are neutral for the majority is a stable property of a person (Zyryanova, 2017).

Victimhood, according to A.L. Repetskaya, is a "unique property" of a person that causes her "greater vulnerability" in criminal terms. Victimization can be classified into two categories: personal and role-based. Personal victimization, on the other hand, is separated into two categories: victimization owing to objective personality qualities (age (sex and age) victimization, victimization – pathology, stress victimization) and victimogenic deformation (Figure 2).

It is inappropriate to establish your own victimological apparatus in the study of domestic abuse against kids; instead, it is more legitimate to look to what has already been developed.

The victimological apparatus' conceptual foundation includes terms like "victim" or "victim," "victimogenic variables," "victimization," "victim conduct," "victimization," "victimization," "victimological scenario," and "victimological preventive."

In this study, the above concepts are used in the following interpretation. The key concept of victimology is "victim of crime".

Analyzing the domestic legislation, we come to the conclusion that there is no concept of "victim of a crime" in it, the concept of "victim" is used instead.

The use of the concept of "victim" is quite acceptable in victimological research, but it should not be associated with the fact of the procedural recognition of a citizen as such. In this study, the terms "victim of a crime" and "victim of a crime" when describing the results of the study are used precisely as identical, taking into account the above.

As already mentioned, victimization or victimogenicity is acquired by a person physical, mental and social traits and signs that can make him predisposed to becoming a victim (crime, accident, destructive cult, etc.). Victimization is the process of acquiring victimhood, or, in other words, it is the process and result of turning a person into a victim. Victimization thus combines both dynamics (realization of victimhood) and statics (realized victimhood).

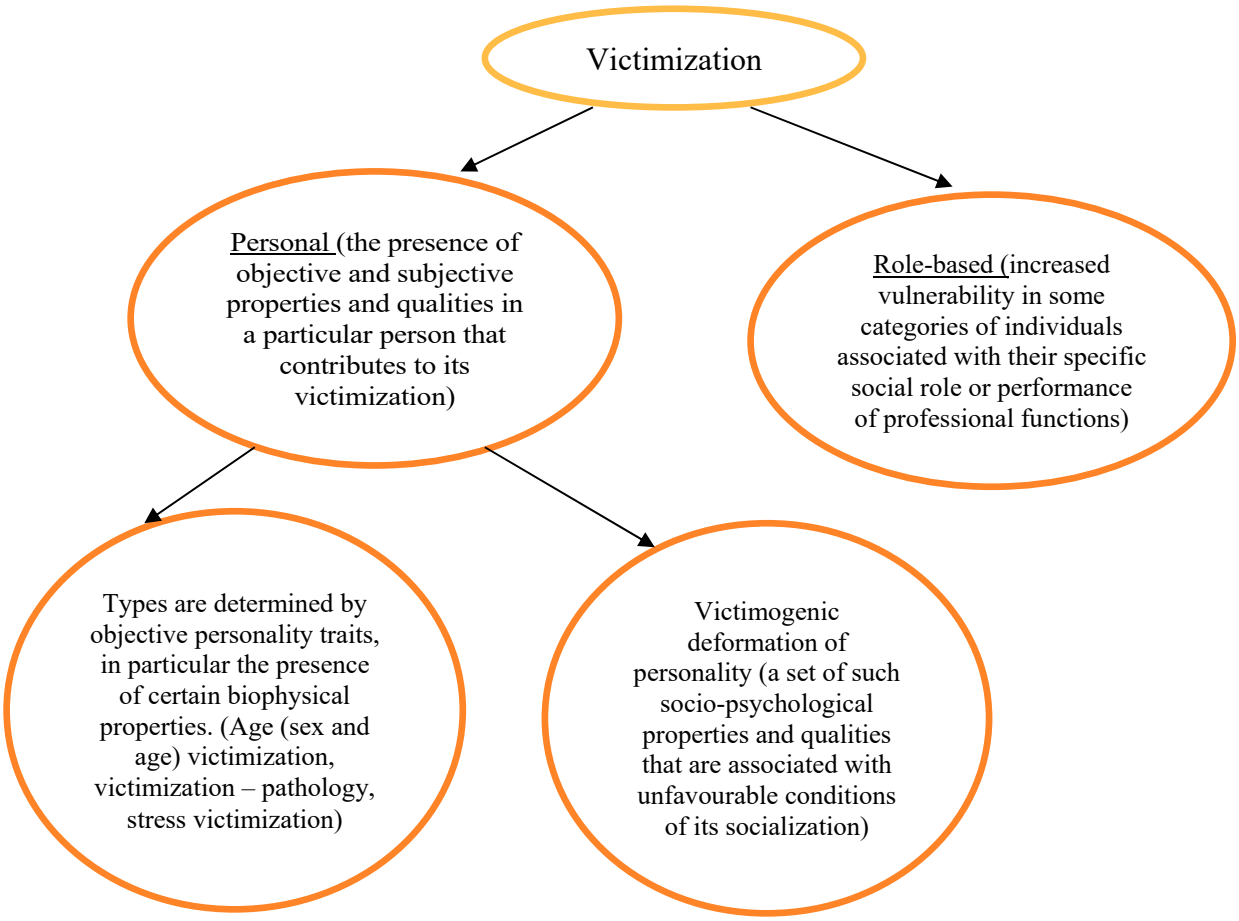

Figure 2 – description of victimization

L. V. Frank suggested considering four levels of victimization:

1. direct victims, i.e. individuals;
2. families;
3. collectives, organizations;
4. The population of districts, regions (Frank, 1977; Rivman, Ustinov 2000).

The victim in this guide is primarily a person who has been personally harmed. Surprisingly, there has never been a clear definition of the term "victim."

In the literature, the term "victim conduct" is frequently employed, which properly speaking means "victim behaviour." However, this term is most commonly used to describe inappropriate, careless, immoral, provocative, and other types of behaviour. Victimization is often referred to as the personality itself, implying that it might become a victim of a crime as a result of its psychological and social features.

In certain instances, people's typical behavior is a reflection of their inner

The victim of a crime (victim) as a socio-psychological type is defined by the fact that it is the carrier of internal psychological causes of victim behavior, which can manifest in such behavior on the basis of both negative and positive motives under particular external circumstances.

Currently, there are several classifications of crime victims developed by domestic researchers. However, a unified classification has not yet been developed. For example, B. C. Minskaya, classifying the forms of behaviour of the victim, notes that in most cases of violent crimes, the behaviour of the victim was essentially a provocation of these crimes. In the author's studies of murders and infliction of bodily injuries due to the negative behaviour of victims, it was found that immediately before the commission of the crime, a quarrel occurred between the victim and the criminal in the vast majority of cases (95%).

B. C. Minskaya provides a classification based on the behaviour of the victims immediately before the crime or at the time of its commission: physical

violence; insult; attempt to use physical violence; mental violence – the threat of physical violence, destruction or damage to property to the perpetrator; unjustified refusal to pay for household services, to vacate the dwelling; forcible expulsion of the subject from his home; unreasonable property claims of the victim; theft (Minsk 1974).

Analyzing victims of domestic violence, it is possible to classify them by age; gender; role status; moral and psychological characteristics; the severity of the crime from which the victim suffered; the degree of guilt of the victim; the nature of the victim's behaviour. Persons at risk of being victims of domestic violence behave in different ways: aggressively or in another provocative way; passively, yield to violence; show a complete misunderstanding of the tricks of criminals or elementary carelessness. Based on their situationally oriented roles, aggressive, active, initiative, passive, uncritical and neutral victims are distinguished in this classification.

Let us turn to the typology of victim behaviour proposed by D. V. Rivman, interpreting it in the context of the characteristics of the behaviour of victims in the family.

The aggressive type of victim. It assumes an increased conflict of the victim, which can become a trigger for the aggressive behaviour of the criminal. In our opinion, this type is practically not typical for domestic crimes against minors. This is primarily due to the physical and mental weakness of minors in comparison with the mature personality of the aggressor, as well as often with financial and psychological dependence on them.

The active type of victim. The victim's behaviour here is generally not conflictual, while she herself creates a conflict situation. This behaviour is characteristic of an immature (underage) person who, due to the age characteristics of mental and intellectual development, is not able to correctly assess the consequences of his actions.

Initiative type of victim. In this case, the victim behaves non-confrontational, but his activity (talkativeness, desire to advise, be useful, necessary) is capable of causing aggression on the part of the criminal. In our opinion, this type is fully applicable to minors, especially at an early age, when they still lack the experience to correctly understand what kind of psycho-emotional state the potential aggressor is in and, based on this, choose the right behaviour tactics.

The passive type of victim. Victims of this type are persons who do not resist, counteract the criminal for various reasons: due to age, physical weakness, helpless condition (stable or temporary), cowardice, etc.

The type of victim in question fits perfectly with the characteristics of the personality and behaviour of a minor. In this case, there is also a physical weakness, fear of an older aggressor, helplessness due to a lack of understanding of what is happening and what should be done in a particular situation, including the fear of being misunderstood by others, etc.

The uncritical type of victim is characterized by carelessness and the inability to correctly assess the situation. This type of victim also characterizes minor victims quite well. The degree of uncriticism, in this case, is inversely proportional to age. The situation is aggravated even more if we are talking about a minor with mental development defects.

The neutral type of victim presupposes behaviour that did not cause criminal actions and did not contribute to them to the extent that it depended on the victim. This type is well suited for describing the behaviour of minors in a situation of domestic crimes. Neutrality is here directly (Rivman 2002). it is connected with the ability to perceive meaningfully what is happening around and react to it.

A.I. Savelyev proposes to supplement the classification of victims proposed by D.V. Rivman with another type – "unpredictable" victims (Savelyev 2012), who are characterized by generally neutral or even positive behaviour, but when committing illegal actions against them, they are capable of unexpectedly active resistance in self-defence, and causing harm to the aggressor. This type of victim is largely characteristic of underage victims of domestic violence, who react affectively to violent acts committed against them, often by close relatives.

Conclusion

The doctrine of victim behaviour of the victim has sufficient grounds and evidence to be used to determine the determinants of crime. The victim and her behaviour, as well as the person who uses violence, plays an important role in the conflict. An assessment of the causes of domestic violence, studying only the behaviour of the subject of the crime, is insufficient to create a "complete picture" of the problems. Society perceives the victim, as well as the "rapist", as a possible culprit of the conflict. Unfortunately, the number of victims of violence is growing, which indicates the ineffectiveness of the state's policy in resolving this issue. The public says that the problem lies in the mentality of the victim: unwillingness to contact law enforcement agencies, blunted instinct of self-

preservation against the background of social and economic status – all these force the victim to stay with the rapist, giving him the opportunity to repeat the act of violence. In our opinion, these methods of solving this problem can be effective only in a complex: both the state, society, and an individual should take an active part in the fight against domestic violence (Kiselyov 2019).

The analysis of psychological studies suggests that the prerequisite for the formation of victim behaviour of women are such features of early socialization as the undifferentiated personality of the members of the parental family, the scarcity of relationships, the prohibition of the manifestation of the needs or interests of the child and the difficulties of their imaginal pleasure from the poverty of fantasy as a mechanism of psychological projection.

The prerequisites for the formation of victimized behaviour of women in the family can also be the consequences of violence experienced in childhood. Considering this issue, A.N. Elizarov (Elizarov 2006) notes the development of such qualities in people who have experienced violence in childhood as loyalty to their tormentors, readiness for self-sacrifice, a tendency to choose a negative person as a leader, as well as traits of a codependent personality (the desire to help others to the detriment of themselves, taking on guilt and responsibility, dependence on the environment, etc.).

A woman in situations of domestic violence lives in a system of contradictions and mutually exclusive beliefs: "I have done nothing to deserve your attitude" and "I am to blame for what is happening," but the idea that she herself can change a lot by learning to define reasonable boundaries of what is allowed is not available to her. So, the issue of restrictions and setting the boundaries of what is permissible is one of the most difficult for such people. Restrictions are determined by most people almost automatically, which they learn in childhood based on modelling of the corresponding restrictions by adults from their significant environment. The basis for determining the correctness of their contacts with other people is the parental attitude to the needs of the child. But in dysfunctional families, parents themselves do not feel their boundaries and cannot teach this to children.

One of the main motives for the behaviour of women who are victims of domestic violence is the fear of the reaction and behaviour of other people in general, and men are the aggressor especially because women are constantly waiting for a flurry of new insults. When making a choice or making a decision, they are not able to ask themselves what they would like, but they are attentive to the desires and requests of the abusive husband. They have already developed an instinctive ability to assess the feelings and desires of others. It is worth noting that the more women try to appease them, the more dissatisfaction they cause. This fear of causing disapproval, irritation, anger and abandonment is the basis of the behaviour of such women. People who have been accustomed to conditioned love since childhood focus their energy on "earning" it and getting approval by fulfilling the desires of others. Such women live in anticipation of their husband's negative reaction, adapting for years to a sharp change in his mood. Fear makes women an easy target for manipulation, the aggressor will easily win if he begins to intimidate or threaten.

Fear progressively increases, especially in women who have suffered since childhood, and can develop into a state of despair, anxiety about the future. They become unable to make any decisions for fear of making mistakes. Scientists note as a characteristic feature – the inability of such women to make decisions even in cases where the fate of themselves or their children depends on them (Moskalenko 1991). And the fear of loneliness, which is one of the strongest for such women, keeps them in an abusive situation by believing that they will not be able to cope without an abuser.

The courts, when considering cases of juvenile crimes, must strictly comply with the requirements of Article 481 of the CPC, establish their living conditions and upbringing, the degree of intellectual, volitional and mental development, character and temperament characteristics, needs and interests.

The presence in the family of such household problems as lack of material prosperity, lack of comfortable housing, drunkenness and drug addiction of parents (maybe teenagers themselves), scandals and fights in the family, divorces of spouses, disorganized leisure of minors, etc. negatively affects minors who first become victims of domestic violence, and then commit violent offences and crimes themselves. All this should be taken into account by the courts both when deciding on the application of punishment or other measures of criminal legal influence to minors, and when making private decisions on the facts of domestic violence in the family of a minor or improper attitude of parents or persons replacing them to their responsibilities for the upbringing of a child in order to apply appropriate measures of influence to the perpetrators.

The courts should carefully consider, in accordance with article 109 of the CPC, complaints of

victims of domestic violence filed against the inaction of the domestic violence prevention authorities (refusal to accept an application, refusal to initiate criminal proceedings), and take appropriate decisions to eliminate the identified violations of the law, the rights and freedoms of the applicant (https://adilet.zan.kz/rus/docs/T090000214_).

To prevent domestic violence, society must adopt an anti-discrimination policy against women, implement psychological assistance and rehabilitation programs for women in family crisis situations, and create a system of psychological and practical measures aimed at correcting personal victim qualities and preventing female victim behaviour.

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References

Antonyan Y.M. Domestic violence. – Prospect, 2021. – 232 p.

Kolpakova, L. A. Domestic violence (victimological aspect, issues of differentiation of responsibility and legislative technique) [Text] / L. A. Kolpakova. – Yaroslavl, 2007. – 232 p.

http://www.dslib.net/kriminal-pravo/nasilie-v-seme-viktimologicheskij-aspekt-differenciacija-otvetstvennosti-i-voprosy.html

Statistical data of the Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan https://stat.gov.kz/

Mishina V. Family violence will be treated with prevention [Electronic resource] V. Mishina // Kommesant. – [Moscow], 2017. – No. 242. – URL: https://www.kommersant.ru/doc/3509147. – (04. 02. 2019).

Official website of the Ministry of Internal Affairs of the Republic of Kazakhstan https://www.gov.kz/memleket/entities/qriim?lang=kk https://kz.kursiv.media/2021-04-01/na-47-vozroslo-kolichestvo-bytovykh-prestupleniy-v-kazakhstane-za-god/

Rivman D. V. Victimological factors and crime prevention // Jurisprudence. – 1973. No. 4. – P. 57.

Malkina-Pykh I. G. Psychology of victim behavior. M., 2006. p. 27. General psychology: words. / edited by A.V. Petrovsky. – M.: Per Se; St. Petersburg.: Speech, 2005. – 250 p. – (Psychological lexicon: encyclopedia. words. in 6 vols.)

Yu.V. Zyryanova dissertation (Criminological characteristics of violence against minor family members and its prevention (based on the materials of the South Siberian region)) 2017.

Victimological characteristics of regional crime and its prevention / edited by prof. A. L. Repetskaya. – M., 2009. – P. 12.

Minskaya V.S. The identity of the victim and its criminological significance // Victim of a crime. –Vladivostok: Publishing House of the Far East. un-ta, 1974. – Pp. 81-9.

Frank, 1977; Rivman, Ustinov 2000 Frank L. V. Victimology and victimhood. – Dushanbe, 1972.

Rivman D. V. Criminal victimology. – St. Petersburg, St. Petersburg, 2002

Commentary to the Law of the Republic of Kazakhstan "on the prevention of domestic violence" https://adilet.zan.kz/rus/docs/T090000214_

Savelyev A.I. Juvenile victims of crimes as an object of victimological research / A. I. Savelyev // Psychopedagogy in law enforcement agencies. – 2012. No. 1 (48). – Pp. 61-65.

Elizarov A.N. Socio-psychological assistance to a family suffering from violence // Psychology of maturity and aging. Quarterly scientific and practical journal. – 2006. No. 4 (36). – Pp. 32-48.

Moskalenko V.D. Wives of alcoholism patients. Questions of psychology. – 1991. No. 5. – pp. 91-97.

Kiselev, V. S. Victim behavior of victims of domestic violence / V. S. Kiselev, D. D. Homlyuk. – Text: direct // Young scientist. – 2019. – № 28 (266). – Pp. 126-128. – URL: https://moluch.ru/archive/266/61630 / (accessed: 09.02.2022).

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ОТВЕТСТВЕННОСТЬ ЗА НАРУШЕНИЕ ПРАВИЛ БЕЗОПАСНОСТИ ПРИ ВЕДЕНИИ ГОРНЫХ ИЛИ СТРОИТЕЛЬНЫХ РАБОТ (СТАТЬЯ 277 УК РК)

Статья посвящена юридическому анализу статьи 277 Уголовного кодекса РК об ответственности за нарушение правил безопасности при ведении горных или строительных работ. Исследование показало, что общественная опасность этого деяния на фоне целого ряда неблагоприятных факторов (организационных, правовых, технических и др.), низкой эффективности предпринимаемых мер профилактики неуклонно возрастает. В работе приводится динамика этого вида нарушения правил охраны труда за последние пять лет, отмечается важность, теоретическая и практическая значимость установления вида проводимых работ и конкретного пункта нарушенных правил безопасности для правильной квалификации этого деяния. С учетом доктрины уголовного права и на примерах из судебной практики указываются наиболее характерные виды нарушения правил безопасности при ведении горных или строительных работ, признаки субъекта уголовного правонарушения, его отличие от других смежных составов уголовных правонарушений.

Цель исследования: дать юридический анализ ст. 277 УК РК и определить правовые критерии для правильной квалификации этого уголовного правонарушения, позволяющие отличать его от других сходных составов уголовного правонарушения. Методы исследования: статистический, формально-юридический, сравнительно-правовой, аналитический и логический.

Ключевые слова: нарушение правил безопасности, горные и строительные работы, уголовная ответственность, правовая регламентация.

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Responsibility for violation of safety rules during mining or construction works (Art. 277 of the Criminal code of the Republic of Kazakhstan)

The article is devoted to the legal analysis of Art. 277 of the Criminal Code of the Republic of Kazakhstan on liability for violation of safety rules during mining or construction work. The study showed that the public danger of this act in the presence of a number of unfavorable factors (organizational, legal, technical, etc.), the low effectiveness of the preventive measures taken is steadily increasing. The paper presents the dynamics of this type of violation of labour protection rules over the past five years, the importance, theoretical and practical significance of establishing the type of work carried out and the specific point of the violated safety rules for the correct qualification of the act is noted. Taking into account the doctrine of criminal law and examples from judicial practice, the most characteristic types of violation of safety rules during mining or construction work, signs of the subject of criminal law violation and its difference from other related criminal law violations are indicated.

Key words: violation of safety rules, mining and construction work, criminal liability, legal regulation.

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Тау-кен немесе құрылыс жұмыстарын жүргізу кезінде қауіпсіздік ережелерін бұзғаны үшін жауапкершілік (ҚР ҚК 277 бап)

ҚР Қылмыстық кодексінің 277-бабы тау-кен немесе құрылыс жұмыстарын жүргізу кезінде қауіпсіздік ережелерін бұзғаны үшін жауапкершілік туралы заңды талдауға арналған. Зерттеу көрсеткендей, бірқатар қолайсыз факторлар (ұйымдастырушылық, құқықтық, техникалық және т.б.), алдын алу шараларының тиімділігі төмен болған кезде бұл әрекеттің әлеуметтік қауіптілігі

тұрақты түрде артып келеді. Жұмыста соңғы бес жылдағы еңбекті қорғау ережелерін бұзудың осы түрінің динамикасы келтірілген, іс-әрекетті дұрыс саралау үшін жүргізілетін жұмыс түрін және бұзылған қауіпсіздік ережелерінің нақты тармағын белгілеудің маңыздылығы, теориялық және практикалық маңыздылығы атап өтілген. Қылмыстық құқық доктринасын ескере отырып және сот практикасынан алынған мысалдарда тау-кен немесе құрылыс жұмыстарын жүргізу кезінде қауіпсіздік ережелерін бұзудың неғұрлым тән түрлері, қылмыстық құқық бұзушылық субъектісінің белгілері, оның қылмыстық құқық бұзушылықтың басқа аралас құрамдарынан айырмашылығы көрсетіледі.

Түйін сөздер: қауіпсіздік ережелерін бұзу, тау-кен және құрылыс жұмыстары, қылмыстық жауапкершілік, құқықтық регламенттеу.

Введение

Общественная опасность уголовного правонарушения заключается в том, что нарушение виновным правил безопасности при ведении горных или строительных работ влечет аварии с многочисленными людскими жертвами, причинение существенного материального ущерба. Достаточно вспомнить взрывы на карагандинских шахтах «Шахтинская» в 2004 г. и «Ленинская» в 2006 г., унесшие жизни 64 горняков. По данным Министерства труда и социальной защиты населения Республики Казахстан, наибольшее количество погибших традиционно приходится на промышленное и гражданское строительство (11,6 %), горную и металлургическую отрасли (20,2 %) (https://www.gov.kz/memleket/ entities/lspm/activities/292?lang=ru). Закон РК «О гражданской защите» от 11 апреля 2014 года справедливо относит предприятия, в которых ведутся горные, геологоразведочные, буровые, взрывные работы, работы по добыче полезных ископаемых и переработке минерального сырья, работы в подземных условиях, к опасным производственным объектам (п. 3 ст. 70) (https://adilet. zan.kz/rus/ docs/Z1400000188). Соответственно, это деяние встречается в судебной практике довольно часто, занимая в структуре преступности в сфере охраны труда третье место после нарушения правил охраны труда (ст. 156 УК РК) и нарушения требований пожарной безопасности (ст. 292 УК РК).

Динамика числа этой категории уголовных правонарушений за последние пять лет достаточно стабильна: в 2017 г. зарегистрировано 26 случаев, в 2018 г. – 26, в 2019 г. – 24, в 2020 г. – 29, но в 2021 г. наблюдается его резкий скачок – 81 случай. Как поясняет Министерство труда и социальной защиты населения Республики Казахстан, это происходит, в первую очередь, из-за необеспечения безопасных условий труда (20,6 %), непроведения обучения работников безопасности труда (12,1 %), необеспечения средствами индивидуальной и коллективной защиты, специальной одеждой и специальной обувью (6,1 %), отсутствия на предприятии службы безопасности или ответственного лица по охране труда (1,5 %). При этом 370 тыс. чел., или каждый четвертый *(22 %),* заняты во вредных и опасных условиях труда (https://www.gov.kz/ memleket/ entities/lspm/activities/292?lang=ru).

Законодатель относит уголовное правонарушение, предусмотренное ч. 1 ст. 277 УК, к деяниям небольшой степени тяжести, уголовные правонарушения, предусмотренные ч. ч. 2 и 3 статьи, – к деяниям средней тяжести.

Цель исследования

Цель исследования: дать юридический анализ ст. 277 УК РК и определить правовые критерии для правильной квалификации этого уголовного правонарушения для отграничения его от сходных составов уголовного правонарушения.

Методы исследования: статистический, формально-юридический, сравнительно-правовой, аналитический и логический.

Результаты

Родовым объектом деяния, предусмотренного ст. 277 УК РК, выступает общественная безопасность. Непосредственным объектом – отношения, обеспечивающие безопасные для людей условия для ведения горных или строительных работ. Дополнительным объектом являются здоровье, жизнь потерпевших и сохранность имущества. Такой вывод вытекает из названия и текста самой нормы, позволяющих заключить, что цель законодателя при конструировании нормы заключается в предотвращении опасных последствий в виде смерти или вреда здоровью не только рабочих, но и любых других лиц. К потерпевшим относятся не только работники по трудовому договору, но и лица, с которыми он не заключался либо не был оформлен (напри-

мер, выполнение работ с ведома либо по устному распоряжению работодателя или его представителя).

Объективная сторона уголовного правонарушения включает в себя следующие обязательные признаки: а) деяние (действие либо бездействие) в виде нарушения правил безопасности при производстве горных или строительных работ; б) вредные последствия, предусмотренные уголовным законом; в) причинную связь между деянием и наступившими вредными последствиями.

К горным работам относятся строительство, реконструкция, техническое перевооружение, эксплуатация и ремонт буровых установок, шахт, рудников, приисков, карьеров по добыче полезных ископаемых, выемка горных пород подземным или открытым способом, строительство и ремонт подземных сооружений (метрополитена, каналов, тоннелей), а также геологоразведочные работы. Правила безопасного ведения горных работ в настоящее время регламентируются Законом РК «О гражданской защите» от 11 апреля 2014 года, Правилами обеспечения промышленной безопасности для опасных производственных объектов, ведущих горные и геологоразведочные работы от 30 декабря 2014 года (https://adilet.zan.kz/ rus/docs/V1400010247) и др.

К строительным работам относятся возведение, монтаж, демонтаж, ремонт, реконструкция и реставрация промышленных, гражданских, сельскохозяйственных, гидротехнических, энергетических, транспортных объектов и сооружений связи, а также работы по консервации строительства незавершенных объектов и ликвидации объектов, выработавших свой ресурс. К ним относятся также земляные, изоляционные, кровельные, электромонтажные, отделочные, санитарно-технические, погрузочно-разгрузочные работы, ремонт и прокладка линий связи, коммуникаций теплоснабжения, газоснабжения, водоснабжения, канализации и других инженерных сетей, кроме работ, относящихся к горным. В этой связи исследователи справедливо отмечают, что строительные работы – родовое понятие для группы специализированных работ» (Безбородов 2014: 17). Правила безопасного ведения строительных работ регламентируются Техническим регламентом «Требования к безопасности зданий и сооружений, строительных материалов и изделий» от 17 ноября 2010 года (https://adilet.zan.kz/rus/docs/P1000001202), Строительными нормами РК от 12 июля 2016 года (https://adilet.zan.kz/rus/docs/V1600014083), Законом РК «Об архитектурной, градостроительной и строительной деятельности в Республике Казахстан» от 16 июля 2001 года (https://adilet.zan.kz/rus/docs/ Z010000242_) и др.

Диспозиция нормы бланкетная и для установления признаков уголовного правонарушения необходимо обратиться к нормативным актам, регламентирующим правила безопасности при ведении упомянутых видов работ. Это упомянутые выше Закон РК «О гражданской защите» от 11 апреля 2014 года, Закон РК «Об архитектурной, градостроительной и строительной деятельности в Республике Казахстан» от 16 июля 2001 года, Правила обеспечения промышленной безопасности для опасных производственных объектов, ведущих горные и геологоразведочные работы от 30 декабря 2014 года, другие типовые правила и инструкции (ГОСТы). При квалификации деяния органы следствия и суд обязаны не только сослаться на пункт правил безопасности, нарушение которого повлекло причинение вреда, но и указать, в чем конкретно выразилось это нарушение, и указать это в соответствующих процессуальных документах.

Дать исчерпывающий перечень нарушений, образующих объективную сторону уголовного правонарушения, предусмотренного ст. 277 УК РК, сложно практически. Они разнообразны настолько, насколько многочисленны требования, содержащиеся в соответствующих нормативных актах. Вместе с тем, можно выделить следующие основные требования к безопасности при ведении горных и строительных работ, указанные в законе РК «О гражданской защите», нарушение которых приводит к авариям, травмам и смерти людей:

1) установление и выполнение требований промышленной безопасности, являющихся обязательными, за исключением случаев, установленных законодательством Республики Казахстан;

2) допуск к применению на опасных производственных объектах технологий, взрывчатых веществ и изделий на их основе, соответствующих требованиям промышленной безопасности;

3) допуск к применению на территории Республики Казахстан опасных технических устройств, соответствующих требованиям промышленной безопасности;

4) декларирование промышленной безопасности опасного производственного объекта;

5) государственный надзор, а также производственный контроль в области промышленной безопасности;

6) экспертиза промышленной безопасности;

7) аттестация юридических лиц на право проведения работ в области промышленной безопасности;

8) мониторинг промышленной безопасности;

9) проведение профилактических и горноспасательных, газоспасательных, противофонтанных работ на опасных производственных объектах профессиональными аварийно-спасательными службами в области промышленной безопасности;

10) проведение монтажа, технического обслуживания, технического освидетельствования лифтов, эскалаторов, траволаторов, а также подъемников для лиц с ограниченными возможностями (инвалидов) в соответствии с национальными стандартами;

11) своевременное обновление и техническое перевооружение опасных производственных объектов (ст. 69).

Анализ судебной практики показывает, что наиболее характерными видами нарушения правил ведения горных работ являются превышение допустимого уровня загазованности в лаве, эксплуатация горнопроходческих, строительных, грузоподъемных, транспортных машин, механизмов и оборудования, не соответствующих требованиям безопасной эксплуатации, нахождение и работа в местах, состояние которых представляет опасность для людей, ненадлежащее состояние устройств опор и крепежей либо их отсутствие, непроведение инструктажа по технике безопасности и т. п.

Так, судом Зерендинского района Акмолинской области по ч. 2 ст. 277 УК РК к двум годам лишения свободы были осуждены начальник рудника открытых горных работ К., начальник участка М. и горный мастер И. за то, что в нарушение п. 1791 Правил промышленной безопасности перед началом работ не внесли в Паспорт ведения забоев допустимые размеры рабочих площадок, углов откоса, высоты уступа, призмы возможного обрушения породы. В процессе погрузки руды в самосвал произошел обвал горной массы, повлекший смерть машиниста экскаватора Т. (Дело №1156-19-00-1/13).

Ряд криминалистов говорит о необходимости различать горные работы от работ вообще в горной промышленности. Так, И.П. Лановенко отмечает, что горные работы – это центральная, но лишь составляющая часть работ, выполняемых в горной промышленности. Выделение горных работ из всего механизма работ в горной промышленности обусловлено усиленной охраной их безопасности средствами уголовного права (Лановенко, Чангули 1986: 187). Иными словами, в судебной практике следует отличать правила безопасности при ведении горных работ от правил безопасности ведения иных видов работ в горной промышленности. На этом основании А.В. Курсаев считает, что нарушение правил безопасности при ведении горных работ на объектах атомной энергетики должно квалифицироваться по ст. 215 УК РФ (ст. 276 УК РК – прим. автора). Если же при проведении горных работ лицо, используя специальные самоходные строительные машины, нарушило правила дорожного движения, что повлекло по неосторожности причинение тяжкого вреда здоровью человека или его смерть, то такое деяние квалифицируется по ст. 264 УК РФ (ст. 345 УК РК – прим. автора) как нарушение правил дорожного движения и эксплуатации транспортных средств (Курсаев 2019:35).

Это мнение мы разделяем, но с уточнениями: как правило, нарушение правил безопасности в процессе погрузочно-разгрузочных, ремонтных и других работ с использованием специальных самоходных машин (трактора, экскаватора и др.), даже если оно было допущено во время их движения, должно квалифицироваться по ст. 277 УК РК. Квалификация уголовного правонарушения по ст. 345 УК РК возможна лишь в случае, если лицо еще не приступало к работам (например, машинист экскаватора перед началом погрузки руды совершил наезд на человека при движении задним ходом). По этому пути идет и судебная практика. Так, Верховный суд РК в нормативном постановлении «О практике применения уголовного законодательства по делам об уголовных правонарушениях, связанных с нарушением правил дорожного движения и эксплуатации транспортных средств» от 29 июня 2011 года по этому поводу указал, что «действия лиц, управляющих транспортными средствами при выполнении работ, не связанных с дорожным движением (например, производство погрузочно-разгрузочных работ, ремонт и заправка транспортных средств, производство строительных, дорожных, сельскохозяйственных и других нетранспортных работ), повлекшие наступление указанных статьями 345, 346 УК последствий, в зависимости от конкретных обстоятельств дела, подлежат квалификации по статьям УК, предусматривающим ответственность за нарушение правил производства определенных работ, правил безопасности либо за уголовное правонарушение против личности» (п. 4).

Нарушение правил ведения строительных работ может выражаться в неустановлении специального ограждения с обозначением опасных участков, в пределах которых ведутся работы, непроведении инструктажа на рабочем месте перед выполнением работы, эксплуатации технически неисправных строительных машин и механизмов (например, строительных кранов, смесительных, дробильных и сортировочных устройств), допуске к работе неподготовленных лиц, неправильной установке лесов, подмостей и других средств, отсутствии контроля за организацией и способами ведения электрогазосварочных, погрузочно-разгрузочно, монтажных и иных видов строительных работ, необеспечении рабочих индивидуальными защитными средствами, и т. д. Местом уголовного правонарушения может быть определенная строительная площадка или другие территории, где ведутся работы по подведению или ремонту различных коммуникаций для поставки воды, тепла, газа, электричества и т. д.

Так, приговором суда г. Рудный Костанайской области работники ТОО «Рудненские теплосети» главный инженер Б. и мастер участка К. были осуждены по ч. 2 ст. 277 УК РК к трем годам лишения свободы за то, что в процессе ремонта инженерных сетей на проезжей части дороги нарушили пункт 5.1.4 Национального стандарта Республики Казахстан №2607-2015 «Технические средства организации движения в местах производства дорожных работ. Основные параметры. Правила применения», согласно которому места производства работ обустраиваются временными ограждениями, сигнальным освещением в темное время суток, устанавливаются предупредительные дорожные знаки. Нарушение этого пункта правил безопасности повлекло причинение тяжкого вреда здоровью мотоциклиста К. и смерть его пассажирки У., которые на полном ходу упали в вырытый котлован (Дело № 3924-21-00-1/106).

Указанные в диспозиции ст. 277 УК РК виды работ при их ведении, как правило, характеризуются использованием источников повышенной опасности, а также сопряжены опасными для человека условиями (работа под землей, высотные работы, рытье и устройство котлованов и т.д.). Вместе с тем, некоторые авторы считают, что если выполняемая работа не связана с риском для жизни и здоровья человека, то нарушение правил ее производства, даже если оно повлекло приведенные в статье последствия, не образует состава данного преступления. В этом случае нарушитель отвечает за неосторожное причинение вреда (Тер-Акопов 1996: 377). С таким мнением согласиться нельзя. Ведение горных или строительных работ независимо от характера нарушенных правил само по себе чревато опасными последствиями, связано с постоянным риском для жизни и здоровья людей. В Правилах безопасности в угольных шахтах от 25 сентября 2000 г. указывается: «Угольная шахта (в т.ч. шахто-углестроительные и монтажные управления и другие предприятия (организации), ведущие работы в подземных условиях шахт) представляет собой уникальную сложную производственную систему с особо опасными условиями (взрывоопасность, пожароопасность, выбросоопасность, опасность по обвалам и прорывам воды и газов), предприятие, где непредвиденные и внезапные изменения геологических условий или природных сил, несоблюдение настоящих Правил или неправильные действия даже одного работника могут повлечь катастрофические последствия для людей» (https://adilet.zan.kz/rus/docs/V000001301_). Указанные отрасли экономики априори являются опасными для человека видами производства, в связи с чем вопрос о наличии или отсутствии в каждом конкретном случае каких-либо рисков для работников этой сферы труда не может возникать вообще. Поэтому такие рекомендации противоречат задачам эффективной охраны труда, снижают предупредительные и охранительные функции ст. 277 УК РК. Таким образом, для квалификации совершенного деяния по этой статье достаточно установить факт преступного нарушения лицом правил безопасности ведения горных или строительных работ, повлекшего по неосторожности вредные последствия, предусмотренные законом.

Состав преступления материальный, оконченным признается с момента наступления хотя бы одного из перечисленных в ст. 277 УК общественно опасных последствий: тяжкого или средней тяжести вреда здоровью человека (ч. 1), смерти человека или иных тяжких последствий (ч. 2), смерти двух или более лиц (ч. 3).

Степень тяжести причиненного вреда здоровью потерпевшего или причины его смерти определяет судебно-медицинская экспертиза, проводимая в соответствии с Законом РК «О судебно-экспертной деятельности» от 10 февраля 2017 г. и Правилами организации и производства судебных экспертиз и исследований в органах судебной экспертизы от 27 апреля 2017 г.

Признаки тяжкого и средней тяжести вреда здоровью человека указаны в пп. 11 и 12 ст. 3 УК.

Под иными тяжкими последствиями в смысле ч. 2 ст. 277 УК РК следует понимать причинение тяжкого или средней тяжести вреда здоровью двух или более потерпевших, ухудшение состояния здоровья населения и окружающей среды; наступление техногенного или экологического бедствия, чрезвычайной экологической ситуации, причинение крупного или особо крупного ущерба организациям, учреждениям либо отдельным гражданам, длительную остановку производства, повреждение или выход из строя ценного оборудования и т. п.

Наступившие вредные последствия должны находиться в причинной связи с допущенными виновным нарушениями правил безопасности при ведении горных или строительных работ. Отсутствие такой связи исключает уголовную ответственность лица по ст. 277 УК РК.

Субъективная сторона уголовного правонарушения характеризуется неосторожной формой вины в виде самонадеянности либо небрежности. Субъект самонадеянности предвидит возможность наступления общественно опасных последствий своих действий (бездействия), но без достаточных к тому оснований легкомысленно рассчитывало на предотвращение этих последствий. Например, руководители организаций, их замы, главные инженеры не предпринимают мер к устранению заведомо известного им нарушения правил безопасности или дают указания, противоречащие этим правилам. Субъекта небрежности характеризует не предвидение возможности наступления общественно опасных последствий своих действий (бездействия), хотя при должной внимательности и предусмотрительности он должен был и мог предвидеть эти последствия.

Субъектом уголовного правонарушения является любое вменяемое физическое лицо, достигшее 16-летнего возраста. Им может быть руководитель предприятия, главный инженер или мастер, управляющий работами, механик, энергетик, начальник участка, рядовой работник (крановщик, шахтер, машинист экскаватора, рабочий и т.п.), чья постоянная или временная деятельность связана с выполнением горных или строительных работ, соблюдением соответствующих правил или требований. Субъектами деяния могут быть также работники иной организации или специалисты, привлекаемые по гражданско-правовому договору, обязанные обеспечивать безопасность и охрану труда при ведении горных или строительных работ.

Если вредные последствия стали результатом совместных, но не согласованных нарушений правил безопасности, то каждый из субъектов должен нести уголовную ответственность с учетом степени значимости и объема нарушенных правил безопасности, а также роли в причинении вреда. Лицо, не имеющее отношения к производству горных или строительных работ (например, случайный прохожий), субъектом уголовного правонарушения быть не может, так как не знакомо с правилами безопасности ведения специальных видов работ. В случае причинения вреда оно несет ответственность по ст. 114 РК УК (Неосторожное причинение вреда здоровью).

Нарушение правил безопасности при ведении горных или строительных работ в определенных случаях может сочетаться с нарушением правил охраны труда (ст. 156 УК РК), нарушением требований пожарной безопасности (ст. 292 УК РК), нарушением правил безопасности на взрывоопасных объектах (ст. 281 УК РК). Как подчеркнул Верховный суд РК, ст. 156 УК РК как общая норма должна применяться только тогда, когда действия виновных не подпадают под признаки специальных составов. Если же деяние подпадает под признаки двух норм, например, ст. 156 УК РК и ст. 277 УК РК, предпочтение отдается последней как специальной норме, поскольку законодатель, вводя ее в уголовный закон, имеет в виду усиление борьбы с конкретным видом нарушений (https://office.sud.kz/courtActs/lawsuitList.xhtml). В случаях, когда нарушение правил безопасности не охватывается правилами ведения горных или строительных работ, то возможно применение совокупности норм – ст. ст. 156 и 277 УК РК. На практике возможна ситуация, когда в результате нарушения правил безопасности при ведении строительных работ потерпевшими оказались потребители услуги. В этом случае действия виновных образуют признаки ст. 306 УК РК (Выпуск или продажа товаров, выполнение работ либо оказание услуг, не отвечающих требованиям безопасности).

Заключение

На основании вышеизложенного, следует прийти к следующим выводам:

- уголовное правонарушение, предусмотренное ст. 277 УК РК, на фоне организационных, правовых, технических и других недостатков

в сфере охраны труда приобретает распространенный характер. В структуре неосторожной преступности в сфере охраны труда это деяние в настоящее время занимает третье место;

- для правильной квалификации уголовного правонарушения следует установить конкретный пункт нарушенных лицом правил безопасности при ведении горных или строительных работ, повлекший причинение по неосторожности вредных последствий;

- уголовное правонарушение, предусмотренное ст. 277 УК, следует отличать от других сходных составов уголовных правонарушений: нарушения правил охраны труда (ст. 156 УК РК), нарушения правил безопасности на взрывоопасных объектах (ст. 281 УК РК), нарушения требований пожарной безопасности (ст. 292 УК РК). Отличия заключаются в основном в характере нарушенных правил безопасности при ведении определенных видов работ.

Литература

Архив суда Зерендинского района Акмолинской области за 2019 год. Дело 1156-19-00-1/13.

Архив суда г. Рудный Костанайской области за 2021 год. Дело № 3924-21-00-1/106.

Безбородов Д.А. О некоторых особенностях применения уголовного закона в случае нарушения правил безопасности при ведении строительных или иных работ // Криминалистъ. – 2014. – №2. – С. 17- 21.

Безопасность и охрана труда 2020 год // https://www.gov.kz/memleket/ entities/lspm/activities/292?lang=ru.

Закон Республики Казахстан «О гражданской защите» от 11 апреля 2014 года // https://adilet.zan.kz/rus/ docs/Z1400000188.

Закон РК «Об архитектурной, градостроительной и строительной деятельности в Республике Казахстан» от 16 июля 2001 года // https://adilet.zan.kz/rus/ docs/ Z010000242_

Комментарий к Уголовному кодексу Российской Федерации / Под ред. Михлина А.С. и Шмарова И.В. – М., 1996. – 647 с.

Курсаев А.В. Норма, предусматривающая ответственность за нарушение правил безопасности горных, строительных или иных работ: технико-юридическая конструкция // Право: история и современность. – 2019. – №1. – С. 28-43. doi: 10.17277/pravo.2019.01. pp.028-043.

Лановенко И.П., Чангули Г. И. Уголовно-правовая охрана трудовых прав граждан. – Киев: Наук. думка, 1989. – 280 с.

Обобщение судебной практики рассмотрения судами Республики Казахстан уголовных дел о преступлении, предусмотренном ст. 277 УК РК // https://office.sud.kz/courtActs/lawsuitList.xhtml.

Правила безопасности в угольных шахтах от 25 сентября 2000 г., утвержденные совместным приказом Министра энергетики, индустрии и торговли Республики Казахстан от 25 сентября 2000 года № 327 и Председателя Агентства Республики Казахстан по чрезвычайным ситуациям от 13 октября 2000 года № 235. // https://adilet.zan.kz/rus/docs/V000001301_.

Правила обеспечения промышленной безопасности для опасных производственных объектов, ведущих горные и геологоразведочные работы от 30 декабря 2014 года // https://adilet.zan.kz/ rus/docs/V1400010247.

Строительные нормы Республики Казахстан, утвержденные приказом Председателя Комитета по делам строительства, жилищно-коммунального хозяйства и управления земельными ресурсами Министерства национальной экономики Республики Казахстан от 12 июля 2016 года // https://adilet.zan.kz/rus/docs/V1600014083.

Технический регламент «Требования к безопасности зданий и сооружений, строительных материалов и изделий», утвержденный постановлением Правительства Республики Казахстан от 17 ноября 2010 года № 1202 // https:// adilet.zan.kz/ rus/docs/P1000001202.

References

Archive of the court of Zerendinsky district of Akmola region for 2019. Criminal case №1156-19-00-1/13.

Archive of the Rudny court of Kostanay region for 2021. Criminal case № 3924-21-00-1/106.

Bezborodov, D.A. (2014). O nekotoryh osobennostyah primeneniya ugolovnogo zakona v sluchae narusheniya pravil bezopasnosti pri vedenii stroitel'nyh ili inyh rabot [About some features of the application of the criminal law in case of violation of safety rules during construction or other work]. *Kriminalist.* №2. 17- 21. [in Russian].

Bezopasnost' i ohrana truda 2020 [Occupational safety and health]. Retrieved from https://www.gov.kz/ memleket/ entities/ lspm/activities/292?lang=ru. [in Russian].

Zakon Respubliki Kazahstan «O grazhdanskoj zashchite» [About civil protection] // https://adilet.zan.kz/rus/docs/Z1400000188. [in Russian].

Zakon RK «Ob arhitekturnoj, gradostroitel'noj i stroitel'noj deyatel'nosti v Respublike Kazahstan» [The Law of the Republic of Kazakhstan "On Architectural, urban planning and construction activities in the Republic of Kazakhstan"] // https://adilet.zan.kz/ rus/ docs/ Z010000242_[in Russian].

Mihlin, A.S., Shmarov, I.V. (Eds). (1996). *Kommentarij k Ugolovnomu kodeksu Rossijskoj Federacii [Commentary on the Criminal Code of the Russian Federation].* Moscow. [in Russian].

Kursaev, A.V. (2019). Norma, predusmatrivayushchaya otvetstvennost' za narushenie pravil bezopasnosti gornyh, stroitel'nyh ili inyh rabot: tekhniko-yuridicheskaya konstrukciya [The norm providing for liability for violation of the safety rules of mining,

construction or other works: technical and legal design]. *Pravo: istoriya i sovremennost'*. №1. 28-43. doi: 10.17277/pravo.2019.01.pp.028-043. [in Russian].

Lanovenko, I.P., Changuli, G.I. (1989). *Ugolovno-pravovaya ohrana trudovyh prav grazhdan [Criminal and legal protection of labour rights of citizens]*. Kiev: Nauk. dumka. [in Russian].

Obobshchenie sudebnoj praktiki rassmotreniya sudami Respubliki Kazahstan ugolovnyh del o prestuplenii, predusmotrennom st. 277 UK RK [Generalization of judicial practice of consideration by the courts of the Republic of Kazakhstan of criminal cases on a crime under Article 277 of the Criminal Code of the Republic of Kazakhstan] // https://office.sud.kz/courtActs/lawsuitList.xhtml. [in Russian].

Pravila bezopasnosti v ugol'nyh shahtah [Safety rules in coal mines] // https://adilet.zan.kz/rus/docs/V000001301_. [in Russian].

Pravila obespecheniya promyshlennoj bezopasnosti dlya opasnyh proizvodstvennyh ob"ektov, vedushchih gornye i geologorazvedochnye raboty [Rules for ensuring industrial safety for hazardous production facilities conducting mining and geological exploration] // https://adilet.zan.kz/rus/docs/V1400010247.

Stroitel'nye normy Respubliki Kazahstan [Building regulations of the Republic of Kazakhstan] // https://adilet.zan.kz/rus/docs/V1600014083. [in Russian].

Tekhnicheskij reglament «Trebovaniya k bezopasnosti zdanij i sooruzhenij, stroitel'nyh materialov i izdelij" [Technical regulations "Requirements for the safety of buildings and structures, building materials and products"] // https adilet.zan.kz/rus/docs/P1000001202. [in Russian].

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SOME ISSUES OF POPULATION VICTIMIZATION

The protection of the rights and legitimate interests of victims of criminal offenses and victims of crimes is considered as one of the priority areas for observing law and order in the Republic of Kazakhstan. Part 2 of Article 13 of the Constitution of the Republic of Kazakhstan states: "Everyone has the right to judicial protection of his rights and freedoms." In this regard, the relevance of ensuring the rights of a person who has received moral, material or physical harm from a crime is very high. As stated in Part 3 of Article 12 of the Code of Criminal Procedure of the Republic of Kazakhstan, "The State provides everyone with access to justice and compensation for damage caused in cases and procedure established by law." In this regard, it is known that victimology develops scientific provisions and practical recommendations for the protection of the rights and interests of victims of crimes.

To develop scientific provisions and practical recommendations, it is necessary to study the state of crime, the amount of harm caused to crime, or the level of victimization of the population to determine the assessment of crime. In this aspect, it is very important to develop measures to organize victimological prevention, identify shortcomings in prevention measures, and increase the effectiveness of preventive measures.

Key words: victimization; criminalization; crime, latency, victim, injured, criminological case.

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Халықтың виктимизациялануының кейбір сұрақтары

Қазақстан Республикасында заңдылық пен құқықтық тәртіпті сақтаудың басым бағыттарының бірі ретінде қылмыстық құқық бұзушылықтардан жапа шеккендердің немесе қылмыс құрбандарының құқықтары мен заңды мүдделерін қорғау қарастырылады. Қазақстан Республикасының Конституциясының 13 бабының 2 бөлігінде: «Әркімнің өз құқықтары мен бостандықтарының сот арқылы қорғалуына құқығы бар», – деп көрсетілген. Осы тұрғыдан алып қарағанда, қылмыстың жәбірленушісінің, яғни қылмыстан моральдық, материалдық немесе физикалық зиян шеккен тұлғаның құқықтарын қамтамасыз етудің өзектілігі жоғары. ҚР ҚПК 12 бабының 3 бөлігінде: «Мемлекет заңда белгіленген жағдайларда және тәртіппен әркімнің сот төрелігіне қол жеткізуін және оған келтірілген залалдың өтелуін қамтамасыз етеді», – деп көрсетілген. Осыған байланысты, қылмыс құрбандарының құқықтары мен мүдделерін қорғауға байланысты ғылыми ережелер мен тәжірибелік ұсыныстарды виктимология әзірлейтіні баршамызға мәлім.

Ғылыми ережелер мен тәжірибелік ұсыныстарды әзірлеу үшін қылмыстылықтың жай-күйін, қылмыстылықпен келтірілген зиянның мөлшерін немесе қылмыстылықтың бағасын анықтау үшін халықтың виктимизациялану деңгейін зерделеу қажет. Осыған байланысты, виктимологиялық алдын алуды ұйымдастыру, алдын алу қызметіндегі кемшіліктерді айқындау, алдын алу шараларының тиімділігін арттыруға байланысты шараларды әзірлеу аса маңызды болып табылады.

Түйін сөздер: виктимизация, криминализация, қылмыстылық, латенттік, құрбан, жәбірленуші, криминологиялық жағдай.

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Некоторые вопросы виктимизации населения

В качестве одного из приоритетных направлений соблюдения законности и правопорядка в Республике Казахстан рассматривается защита прав и законных интересов пострадавших от уголовных правонарушений и жертв преступлений. В части 2 статьи 13 Конституции Республики Казахстан указано: «Каждый имеет право на судебную защиту своих прав и свобод». В этой связи очень высока актуальность обеспечения прав личности, получившей моральный, материальный или физический вред от преступления. Как гласит часть 3 статьи 12 УПК РК: «Государство обеспечивает каждому доступ к правосудию и компенсацию причиненного ущерба в случаях и порядке, установленных законом». В связи с этим, известно, что виктимология разрабатывает научные положения и практические рекомендации по защите прав и интересов жертв преступлений.

Для разработки научных положений и практических рекомендаций необходимо изучить состояние преступности, объем причиненного преступностью вреда или уровень виктимизации населения для определения оценки преступности. В данном аспекте очень важно разработать меры по организации виктимологической профилактики, выявлению недостатков в мерах профилактики, повышению эффективности профилактических мер.

Ключевые слова: виктимизация, криминализация, преступность, латентность, жертва, пострадавший, криминологический случай.

Introduction

The effectiveness of victimological crime prevention in many respects depends on advanced scientific research of issues like the study of the process with the aid of reasons and conditions that contribute the crimes, as well as the study of the identity of the victim, the study of crime mechanism.

Victimogenic factors are the circumstances that create the victim of the crime and contribute to their victimization. Therefore, many researchers note an important role of the study of the victimization process and the factors that form victimity, which determine passing from "victimal potential" to "victimal determinism".

Victimization is a central victimological concept. It has a dual meaning. Firstly, it means the transformation process of a potential victim into real victim, and secondly, the final and cumulative result of damage caused in its different types (Rivman 1975:47).

Victimization – the process of transformation of potential victim in real one and final cumulative result of damage caused in its different types. It is not only the process of transformation of certain person into a victim of crime, but also of a certain community of people (Kuri 1993:47-54).

Said another way, the term "victimity" is linked with the high ability ("disposition") of a person to became a victim in a certain circumstances, and the terms "victimization" stands for determination of process of such transformation, the final and cumulative result of that process on a single and mass levels.

As the results of crimes committed in the specific place, victimology analyzes data on he types of crimes, on injured persons, on place and time, on crime method and other features of victimization process. In the large scale, such approach gives opportunity to calculate victimization coefficients and indices (damage from crime), that show quantitative and qualitative characteristics of the persons affected and factors that contribute to their victimization.

Literature review

Victimological issues, generally, including the problems of protection of crime victims, have always caused interest and attracted the attention of domestic scientists in the field of criminal law and criminology, criminal process. It gave an opportunity to consider different applied aspects of victims' problems from this perspective accordingly, to build domestic doctrine of crime prevention, to form gradually approaches to solving problems that are linked to victims' problematic (latent crome, the problem of victim's guilt, crime prevention, punishment purposes, compensation of harm, etc.). In this context, it is hard to overestimate scientific researches and publications of S.B. Alimov, A.D. Boykov, P.S. Dagel, V.P. Kono-

valov, N.F. Kuznetsova, V.S. Minskaya, D.V.Rivman, V.Ya. Rybalskaya, S.P. Sherba, L.V.Frank, R.E. Djansarayeva, that contributed to the development of named problems.

Methodology

The research methodology based on the harmonization of the requirements of general scientific and private scientific methodologies. The general scientific methodology considers onjective and subjective factors of social development, cause-and-effect relations, their institutionalization and subordimation. Private scientific methods includes formal-legal, structural-systematic analysis, methods of comparative legal, logical, social analysis and synthesis.

Main part

Victimization plays a role of integral part of crime that has its own specific parameters and qualitative features, with the help of which these categories are not coinciding. Victimization differs from crime in that it shows the complex of processe of becoming victims (Konovalov 1982: 22). The reasons of crime and victimity often come across. The scientists – representatives of different directions interpret them in various way.

Criminologists of biological direction try to explain the reasons of crime by the special genetic disposition of not only the criminal, but also the victim of his criminal actions, by biological nature of the relationships between affected person and offender.

Another direction considers the victim's behavior as one of the conditions that has impact on occurrence and implementation of criminal intent, which no way linked with genetic code. Of course, heredity has an effect on the characteristics of human nervous system, his temperament and other psychological features of the person, but substantial side of individual's actions cannot be inherited, it can form during the social life of society and environment where he lives, works and express himself as a social being. In addition, if specific people become victims of any type of crime more often than others do, this can be explained not by some biological disposition but by particular features of expression of their inherent properties and personal qualities in a certain situation of life.

In the last few years, together with criminalization, society has been victimized: people in the society are socially badly protected from the offenders.

Revolutionary social changes that happened related to transition to a market economy caused a feeling of insecurity in most people.

Conditions of a market economy postpone the interests of civil society and crime victims to the last place, and ignore guarantees that ensure public interests, this situation significantly reduces the effectiveness of the fight against crime. Higher view of crime as a factor of social destabilization makes it possible to highlight what eventually unites all or almost all varieties of crime: these are the consequences of criminal infrigements in the form of crime victims. There are millions of crime victims, and taking into account the latency and low efficiency of the criminal justice bodies – there are hundreds of thousands who need protection and do not get it. The feeling of their own unprotectedness undermines citizens' confidence in state power, does not contribute to the use of public potential in the establishment of law and order.

In the face of the population poverty, an increase in unemployment, homelessness and other deprivation, poor protection of citizens from crime, corruption most of people does not trust law enforcement bodies and the state.

It stands to mention that the processes of self-organization of population part flows on an illegal, including criminal basis. There are increased number of facts of reprisals with criminals by the victims: either personally, or through acquaintances, close people, or even on the basis of paid services of an appropriate nature.

In the modern era, there are an avalanche-like increase in the conflict situation along with an increase in the instability of our statehood, which is generated by the economic crisis, by the inefficiency of the legislative mechanism regulating the fight against crime, by the unclarity of the political situation in the country. The crimes (victims) become the method of resolving such conflict situation. Increasingly, people use ways of resolving conflicts that are fully contrary to the law.

The escalation of criminal violence is connected with the weakening of the state control mechanism, single option elimination of the social control system (people's troops, prevention councils, law enforcement control stations, community courts, public control posts) and the active participation of public forces in the prevention of crimes.

There are some factors affecting the decision of the victim not to contact law enforcement bodies:

1) dissatisfaction of people with the response in law enforcement bodies to their statements and measures taken (or not taken) in connection with this;

2) reasons related to the nature of the incident itself (seriousness of the crime, lack of evidence, limited competence of the police);

3) the ability to solve the problem without the participation of law enforcement bodies (independently);

4) a negative attitude towards law enforcement bodies (they cannot do anything, they do not want to do anything). The police are often not interested in or are not able to meet the needs and expectations of the victim (most likely, the victim himself is not so protected from encroachment by organized crime). The ability to deal with the problem individually (with the help of family, friends and alternative organizations) becomes an alternative to official response measures.

In the result of the study, S.G. Voitenko concluded: "In recent years, there has been a sudden increase in cases of reprisals against persons who are called "family debauchers". Here we can talk about the formation of social phenomenon that was not observed before – the prevention of criminal behavior by criminal means within the framework of small social groups of the population: this is criminal self-regulation of the social body, an attempt to improve internal life, interpersonal communication with the help of criminal violence "(Voitenko 2009:41).

According to the results of the study, only 37% of the harmed persons reported to law enforcement bodies about the fact of crime. The rest part did not consider it necessary to inform law enforcement bodies about the criminal infirgements that had occurred under different excuses. They explained the motives for such act as follows: "we will figure it out" – 22%, "insignificant harm" – 19%, fear of revenge – 12%, other motives – 7%, uncertainty about the ability of law enforcement bodies to provide appropriate help.

To the question of the questionnaire: "How many chances out of 100 does a citizen have that his statement to the police about the theft will receive a legal move?" the most optimistic answer was given by 4%, an extremely pessimistic answer – 19% of those surveyed.

The problem of victim latency is inseparably connetced with the current procedural order for recognizing a person as a victim. The solution to this issue depends entirely on the discretion of the investigator. If he admits that there is no crime, then there are no victims either. We are in an mistery spot – until a person is recognized as a victim in the case, he cannot exercise his rights and, the first thing, present evidence that he became a victim. Until he will prove this, he will not be recognized as a victim.

If the criminal case is dismissed, for example, due to the lack of corpus delicti, the victim, basically, will not even receive those insignificant rights that he/she seems to have under the law, although the fact of the crime has been established. The simplest example is car theft: until the person who committed this antisocial act is found, the investigating boodies do not recognize the owner as a victim. A similar situation for other categories of crimes, when the guilty was not found. In short, there is a "de facto" victim, but he/she is not recognized as a victim in a criminal case. There are thousands of such cases.

In the conditions of a continuous increase in crime, it becomes obvious that in the republic, in particular, there is a process of victimization of the population, which is developing in connection with the criminalization of society. Victimization and criminalization are processes of social interaction.

The transition to a new system of public relations was quite difficult. In this respect, the destroying of the legal education system and legal education of the population also became harmful. Low awareness of the procedures and rules for making transactions and other business operations has caused a significant increase in the victimity of the population in relation to economic crimes and offenses, and a decrease in the level of protection of property of citizens.

One of the significant reasons for victimization is the conflict in the family and the increasing tension in the relationship between its members (as a result of the deterioration of the financial situation), which often takes aggravated and extremely ugly forms.

At all times the family has been and remains a center that radiates warmth and calmness. In modern conditions, when many moral values collapse and the main dangers to a person come from the "big world", he seeks protection and salvation in the "small world" of his immediate environment and, first of all, in the family.

Undoubtedly, children need care and attention the most. Unfortunately, children are currently one of the most socially vulnerable segments of the population. Many are practically not protected from the abuse of adults, from the harmful influence of the criminogenic environment, forced to live in families leading an immoral lifestyle. Meanwhile, increased victimity often develop in the family as a result of the negative effect of adults on their psyche, which ultimately leads to the victimization of children.

There is a tendency of an increase in the number of disadvantaged families, victimized families, in which the aggressive nature of relationships is due to psychological incompatibility (Nadtoka, 1999:12). In such families, there is a gross disregard for the basic needs of the child, abuse – his obvious rejection, with insults, the non-manifestation of basic care for him. The child is constantly humiliated, beaten, not fed and even reproached with a piece of bread, thrown out of the house. Often, children are admitted to medical institutions with injuries sustained as a result of illegal actions of their parents. Escaping from abuse and violence, children and adolescents commit suicide, try to get rid of their offenders.

Thus, in adult crimes, the number of victims-relatives in murder cases is twice as low as in juvenile crimes.

Так, в преступлениях взрослых количество жертв-родственников по делам об убийстве в два раза ниже, чем в преступлениях несовершеннолетних.

In every fourth family, these persons (victims) systematically terrorized a minor and other loved ones, drunken and provoked a crime themselves.

These families established immorality, a cult of violence in interpersonal relationships as a way of communication. As a result, mutual disrespect, rudeness, cruelty, outright cynicism have become the norm of behavior and children. This phenomenon is largely due to the fact that many children come to this world unwanted. Their uselessness is often programmed even before the birth of everyday instability, illness and failure of parents, unsure of themselves and in their future, and therefore experiencing acute anxiety and anxiety.

"Unplanned" children are born to underage mothers, and in recent years it is not uncommon for young mothers.

There is a tendency for the growth of single-parent families: in the overwhelming number of cases, these are the families of single mothers, divorced women. In such families, the mother often broadcasts her problems, loneliness to the child, unknowingly avenges him for her broken fate.

"Random" children for life may remain unloved, rejected, discarded. The bitterness in children against parents persists for life, they themselves are extremely hardened, become cynical, rude, aggressive, emotionally deaf, do not reckon with the interests and feelings of other people.

Aggravation of the situation in the family is often the result of actions not only of the future criminal, but also of the behavior of the potential victim. Because the behavior of the potential victim is the most important part of certain prerequisites that is needed for arising and realizations of actions of criminal. The situation in families in which crimes were committed was characterized by periodic or intensely growing conflicts, fights, short or long-term breaks in family ties, adultery, joint drunkenness or drunkenness of one of the spouses. Increased victimity of a teenager very often is formed in the family as a result of the negative effect of adults on his psyche, which, ultimately, leads to the development of an anti-social personality in a minor.

In some cases victims become criminals. There is an increased risk of deviant forms of sexual behaviour in sexually abused children. Seduced adolescents later often committed sexual acts with younger children themselves (Tsentrov 1971:82). There is a link between the victim's role in the past and his further unlawful behaviour: criminal-victim, victim-criminal.

There are an opposite process too – victimization of the criminal, which can be shown schematically as follows: victimity – crime (ability to crime); crime – victimity; victimization – criminalization; criminalization – victimization.

One of the reasons for victimization is the alcoholization of the microsocial environment (in the spheres of life, leisure, actual marriage relations, the use of alcohol as payment for work or service performed, etc.), some groups of the population, especially young people. It has a sustained criminogenic influence on the dynamics and structure of crime, as well as on the dynamics of victimity.

Alcoholism in the system of factors can be attributed not only to crime in general, but also to victimity of victims. The study of crimes committed with particular cruelty showed that at least 36-40% of them were associated with alcohol intoxication of victims (Statistics for 2020-2022 of the Committee on Legal Statistics and Special Accounts of the Prosecutor General's Office of the Republic of Kazakhstan). Criminological studies of the dynamics of crime have uncovered tendencies in its rejuvenation depending on alcohol consumption. It was noted that a significant proportion of crimes are committed against victims who were intoxicated.

All this indicates that the formation of the victim can occur not only suddenly, due to occasion, but also be a special victimization process. For example, children with an initially subordinate position towards adults, including their own parents, form a victimized group. As a result of which abuse of them in principle is only part of a broader victimological problem.

In addition to socio-ethnic factors, the moral and psychological atmosphere in society plays a significant role both criminologically and victimologically.

In recent years, a gap has been planned between the growth of the material state and the spiritual maturity of man. Today it is clearly visible: many difficulties of the transitional period are born of a lack of culture and morality in its broadest sense.

The behavior of the victim may not only be wrong, but also immoral. The immorality of the victim is also key to the problem of the causes of crime and to understanding the mechanism of criminal behavior.

In addition to the immoral behavior of the victim, the presence in the structure of his personality of a special combination of various negative personal properties can be a conflictogenic factor. On this occasion, G.I. Chechel writes: "If in its mass the behavior of people is due to social reasons and that it finds its explanation only in them, then in the behavior of each individual person, his personal unique, only inherent qualities and features, including psychophysical, play a significant role. In order to more fully understand the reasons and conditions that entailed certain actions, the situation in which they are committed, the form of behavior of this person, it is necessary to find out all the features that characterize him: age, gender, marital status, education, labor, level of culture, previous criminal records, moral and psychological, psychophysical features, etc. " (Chechel 1985:184).

It is not a secret that recently the share of illiterate among victims has been growing (as, indeed, among convicts). However, the level of education itself (after all, among the victims who created the victimological situation, there are many who had higher, incomplete higher or secondary special education), taken in isolation, without taking into account the level of general culture, cannot significantly affect the choice of one or another behavior option, since there is no direct dependence between it and the form of human behavior. Therefore, the process of education involves the worldview, moral formation of the person.

Many victims have such features as touchiness, bitterness, aggressiveness, indecency, leading a parasitic lifestyle, abuse of alcohol, i.e. the same negative personal characteristics that are characteristic of convicts. Some of the victims in certain circumstances could have committed the crime themselves or were completely to blame for the encroachment committed on them.

The reason is the nature of the relationship between the victim and the criminal. The relationship between the future criminal and the future victim can be very different in nature: from good or indifferent, neutral to hostile, openly hostile.

It is noteworthy that a significant number of crimes are committed against neighbors. Moreover, often these are persons of advanced age, who are characterized by a reckless, grumpy character. Often they are the initiators of a conflict (usually about loud music, incorrect, from their point of view, the exploitation of common areas, etc.). Living in the same apartment, where there are no normal living conditions, contributes to the creation of conflict situations not only with neighbors, but also with close relatives (brothers, sisters, parents, mother-in-law, father-in-law). Most of these families are characterized by a lack of mutual tolerance and courtesy in personal contacts, the habit of resolving controversial issues in an offensive form, and sometimes with the use of physical or psychological abuse.

A significant characteristic reflecting the victimization process of the victim is its dynamics. The greatest information on the dynamics of victimization can be provided by an analysis of various variants of its structural-dynamic development, which, according to the main laws of dynamic characteristics, have been described earlier by many researchers. Specific sociological studies of the following categories of persons studied this process: a long-term interval survey of students of 3 and 4 courses of the Faculty of Law, a survey and questionnaire of pupils of special schools; a review and context analysis of the press materials was carried out, as well as materials obtained using the included observation.

The questionnaire structurally looks like this: introductory questions: family composition, age, financial situation, type of activity, attitude to crime (fear) and questions directly related to various types of crimes. The survey results indicate a noticeable increase in the level of victimity of the population in recent years. Moreover, this applies to almost all types of crimes (including violent).

If a survey of law students suggests that only half of them can become victims, then questionnaires among students in special schools indicate a 98% probability of becoming victims of various crimes (mainly violent). We were interested in whether they themselves or their family members, or close relatives, or friends, had become victims of crime over the past eight years; whether they contacted law enforcement bodies about this and what are the results of these appeals. For conducting mass surveys, students of the Faculty of Law specializing

in the Department of Criminal Law, Criminal Procedure and Criminalistics of Al-Farabi KazNU (45 students of 3 and 4 courses) were involved. All of them were previously instructed on the methodology and features of this study. They were each tasked with interviewing at least twenty individuals about whether they themselves or their close relatives, friends, had been victims of criminal trespass over the past eight years, and what their reaction to that was, in particular, whether they had gone to law enforcement on the matter. In total, 400 citizens were interviewed using this method. 297 questionnaires turned out to be suitable for study. 161 of them contained affirmative answers to the question posed. At the same time, the most common types of criminal manifestations were consumer deception – 40% and theft from various objects (dwellings, summer cottages, cars; pickpocketing, etc.) – 41%; robberies amounted to 11%, hooligan manifestations – 8%, bodily harm of various degrees – 15%, other crimes – 14%. In 11% of cases, the same persons became victims of criminal encroachments three times, in 22% of cases – twice. In addition to the fact of the crime, the questions concerned the circumstances of its commission. Questions were asked about fear of crime, about attitudes towards the use of legal drugs. A significant part of the questions concerned demographic data.

36% of people of the total number of respondents answered to the question: whether you have become a victim of any crime over the past five years like that: they have became a victim at least one time within five years. In other words, the victimization rate is approximately 36%. Mental state is the reason for becoming a victim of crime. In most cases, fear, pain and moral, mental suffering caused by the encroachment are components of mental states. Therefore, an integral part of victimological research is to take into account such a factor as the fear of crime of the population.

Studies of foreign victimologists have shown, in particular, that even with a relatively different reaction of different groups of the population in different countries and regions to an increase in crime, the average indicator of the total number of people experiencing fear of victimization quite accurately reflects the level of crime in the region. In other words, the prevalence of fear in public psychology and in the mass consciousness is one of the important objective indicators of the criminological situation. The older the respondents, the greater their fear of crime. As for the place of residence, we can show that the larger the number of settlements, the higher the estimated level of insecurity of the territory of residence and a larger number of citizens avoid some streets and places at night, as they feel in danger. It also indicates that fear of crime increases in proportion to the size of the area of residence. The predominant part of the victims became victims of criminals at their place of residence.

When asked, “Do you feel confident on the street at night being alone there?” show that “very confident” and “quite confident” are predominantly those aged 21 to 29. Among 30-49-year-olds, the feeling of uncertainty decreases, and starting from the age of 50 and older, they again increase.

Victimogenic situations arise mainly in large cities. When a person walks along a city street in the late night hours, he finds himself in a victimogenic situation, that is, in a situation fraught with the risk of becoming a victim of a crime for her.

The standard of living is in a nonlinear dependence on victimity. The most victimized are those with low incomes and too wealthy. The middle class is the least victimized. In terms of studying the prospect of victimization, we analyzed the relationship between the possibility of becoming a victim of a crime and fear of crime in two aspects: on the one hand, we studied the type of victimization, and on the other, how much the respondent became a victim of crime. The study aimed to test the relationship between fear of crime and the extent of harm caused to the victim. Touching on the problem concerning the victimization hypothesis, we proceeded from the premise: the victim’s fear of crime is higher than the harder harm caused to her.

The results of the studies confirm that in cities the fear of victims of crime increases depending on the type of crimes the victim became. For example, victims of property crimes have less fear of crime than victims of violent crimes.

Based on the results, we concluded that the very assumption of the possibility of becoming a victim of crime leads to fear of crime, which increases when the victim realizes his vulnerability from violent crime.

Conclusion

Based on the obtained data on victimization, the following conclusions were made:

The atmosphere of fear is an essential element of the analysis of the criminological situation at the macro level of the phenomenon, and at the individual or group level – the assessment of a criminal or post-criminal situation, one way or another related to the commission of a specific crime, its consequences,

including the possible threat of “secondary” victimization. Therefore, the problem of fear has always entered the orbit of victimological research and in this sense was considered as a category not only psychological, but also victimological, which is important for the organization of victimological prevention.

The fear of becoming a victim is growing in society. That conclusion is beyond doubt.

Fear of crime should also be considered against the background of the general standard of living, which is characterized by fear and a sense of uncertainty about the loss (absence) of work, the situation in the family, financial security.

Литература

Ривман Д.В. Виктимологические факторы и профилактика преступлений. – Л., 1975. – 193 с.

Кури Х. Международное сравнительное исследование виктимизации населения // Сборник материалов международного семинара «Латентная преступность: познание, политика, стратегия». – М.: ВНИИ МВД России, 1993. – С. 47-54.

Коновалов В.П. Изучение потерпевших с целью совершенствования профилактики правонарушений. – М., 1982. – 231 с.

Преступления против нравственности. – Вильнюс, 2009. – 315 с.

Надтока В.С. Виктимологические аспекты профилактики насильственных преступлений: Автореф. дис. канд. юрид. наук. – Краснодар, 1999. – 31 с.

Центров Е.Е. Специфика взаимоотношений преступника и потерпевшей по делам о половых преступлениях // Вопросы личности преступника. – М., 1971. – С. 82-94.

Статистические данные за 2020-2022 гг. комитета по правовой статистике и специальным учетам Генеральной прокуратуры РК. // http://prokuror.gov.kz.

Чечель Г.И. Виктимологические вопросы особо опасных преступлений против личности // Правовые вопросы борьбы с преступностью. – Томск, 1985. – С. 184-196.

References

Rivman D.V. Viktimologicheskie faktory i profilaktika prestuplenij. – L., 1975. – 193 s.

Kuri X. Mezhdunarodnoe sravnitel’noe issledovanie viktimizacii naseleniya // Sbornik materialov mezhdunarodnogo seminara «Latentnaya prestupnost’: poznanie, politika, strategiya». – M.: VNII MVD Rossii, 1993. – S. 47-54.

Konovalov V.P. Izuchenie poterpevshih s cel’yu sovershenstvovaniya profilaktiki pravonarushenij. – M., 1982. – 231 s.

Prestupleniya protiv nravstvennosti. – Vil’nyus, 2009. – 315 s.

Nadtoka B.C. Viktimologicheskie aspekty profilaktiki nasil’stvennyh prestuplenij: Avtoref. dis. kand. yurid. nauk. – Krasnodar, 1999. – 31 s.

Centrov E.E. Specifika vzaimootnoshenij prestupnika i poterpevshej po delam o polovyh prestupleniyah // Voprosy lichnosti prestupnika. – M., 1971. – S. 82-94.

Statisticheskie dannye za 2020-2022 gg. komiteta po pravovoj statistike i special’nym uchetam General’noj prokuratury RK. // http://prokuror.gov.kz.

CHechel’ G.I. Viktimologicheskie voprosy osobo opasnyh prestuplenij protiv lichnosti // Pravovye voprosy bor’by s prestupnost’yu. – Tomsk, 1985. – S. 184-196.

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SOME ISSUES OF ANALYSIS OF CAUSES AND CONDITIONS OF CRIME IN THE SPHERE OF DOMESTIC RELATIONS

The concept of the legal policy of the Republic of Kazakhstan until 2030 states: "The balance of punitive, restorative and preventive means of criminal law regulation is important. In this context, the maximum focus of criminal legislation on the restoration of violated rights, the prevention of new offenses by both convicts and other persons will increase. When forming sanctions of criminal law norms, the principle of their proportionality of the degree of public danger and the nature of the offense should be strictly observed. "

Nevertheless, as life shows, the measures taken by the state in the framework of the implementation of the concept are not enough to protect the family from spiritual and moral decay. If you open any news site, you will face data on violence against minors, women in the family in different parts of the country.

Despite the adoption of the Law of the Republic of Kazakhstan of December 4, 2009 N 214-IV "On the Prevention of Domestic Violence" and its entry into force, the problem of domestic violence is still an acute, urgent topic (Law of the Republic of Kazakhstan of December 4, 2009 N 214-IV "On the Prevention of Domestic Violence").

Preventive activities of law enforcement agencies, various public organizations, non-profit organizations, centers do not produce appropriate results.

According to 150 independent services, over 15 years they made 2.5 million calls. In 2020, 3377 domestic violence calls were received on the line. In 2021, the number of calls amounted to 226,455 units, of which 7184 calls came from children under 18 years old. (EL.KZ: https://el.kz/ru/news/obshestvo/kak_zashchitit_detey_ot_nasiliya_/).

Key words: domestic violence, family, domestic relations, crime, cause, situation, prevention, system of measures, conflict of interest, social situation, market economy, etc.

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Отбасылық-тұрмыстық қатынастар аясындағы қылмыстылықтың себептері мен шарттарын талдаудың кейбір сұрақтары

ҚР құқықтық саясатының 2030 жылға дейінгі тұжырымдамасында: «Қылмыстық-құқықтық реттеудің жазалау, қалпына келтіру және алдын алу құралдарының теңгерімділігі маңызды болып табылады. Осы тұрғыда қылмыстық заңнаманың бұзылған құқықтарды қалпына келтіруге, сотталғандар тарапынан да, өзге адамдар тарапынан да жаңа құқық бұзушылықтардың алдын алуға барынша бағытталуы артатын болады. Қылмыстық-құқықтық нормалардың санкциясын қалыптастыру кезінде олардың қоғамдық қауіптілік дәрежесі мен құқық бұзушылық сипатына мөлшерлес болу қағидаты мүлтіксіз сақталуға тиіс» (ҚР құқықтық саясатының 2030 жылға дейінгі тұжырымдамасы).

Тұжырымдаманы жүзеге асыру шеңберіндегі мемлекет тарапынан жүргізіліп жатқан шараларға қарамастан, отбасын рухани-өнегелік азғындаудан қорғаудың жеткіліксіз екендігін өмір айқындап беріп отыр. Кез келген жаңалықтар сайтын ашсаңыз, еліміздің түкпір-түкпірінде жасы толмағандарға, әйелдерге қатысты отбасы ішінде жасалып жатқан зорлық-зомбылық іс-әрекеттерімен кездесесіз.

Тұрмыстық зорлық-зомбылық профилактикасы туралы Қазақстан Республикасының 2009 жылғы 4 желтоқсандағы N 214-IV Заңының қабылданып, күшіне енуіне қарамастан тұрмыстық зорлық-зомбылық мәселесі әлі күнге дейін өткір, өзекті мәселелердің қатарынан түскен жоқ (Тұрмыстық зорлық-зомбылық профилактикасы туралы Қазақстан Республикасының 2009 жылғы 4 желтоқсандағы N 214-IV Заңы). Құқық қорғау органдарының, әртүрлі қоғамдық ұйымдардың, коммерциялық емес ұйымдардың, орталықтардың алдын алу қызметі тиісті нәтижелерге қол

жеткізіп отырған жоқ. 150 тәуелсіз қызметтің мәліметі бойынша, 15 жылда аталған қызметке 2,5 млн. қоңырау шалынған. 2020 жылы линияға тұрмыстық зорлық-зомбылық бойынша 3377 қоңырау түскен. 2021 жылғы қоңыраулардың саны 226 455-бірлікті құрайды, олардың 7184-і 18 жасқа дейінгі балалардан түскен (EL.KZ: https://el.kz/ru/news/obshestvo/kak_zashchitit_detey_ot_nasiliya_/).

Түйін сөздер: тұрмыстық зорлық-зомбылық, отбасы, отбасылық-тұрмыстық қатынастар, қылмыстылық, себеп, жағдай, алдын алу, шаралар жүйесі, мүдделер қақтығысы, әлеуметтік жағдай, нарықтық экономика және т.б.

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Некоторые вопросы анализа причин и условий преступности в сфере семейно-бытовых отношений

В концепции правовой политики РК до 2030 года отмечено: «Важным является сбалансированность карательных, восстановительных и превентивных средств уголовно-правового регулирования. В данном контексте будет возрастать максимальная направленность уголовного законодательства на восстановление нарушенных прав, предупреждение новых правонарушений как со стороны осужденных, так и иных лиц. При формировании санкций уголовно-правовых норм должен неукоснительно соблюдаться принцип их соразмерности степени общественной опасности и характеру правонарушения».

Но как показывает жизнь, принимаемые со стороны государства меры в рамках реализации концепции недостаточны для защиты семьи от духовно-нравственного разложения. Если вы откроете любой новостной сайт, то столкнетесь с данными о насилии по отношению к несовершеннолетним, к женщинам в семье в разных уголках страны.

Несмотря на принятие Закона Республики Казахстан от 4 декабря 2009 года N 214-IV «О профилактике бытового насилия» и вступления его в силу, проблема бытового насилия все еще остается острой, актуальной темой (Закон Республики Казахстан от 4 декабря 2009 года N 214-IV «О профилактике бытового насилия»).

Профилактическая деятельность правоохранительных органов, различных общественных организаций, некоммерческих организаций, центров не дает соответствующие результаты.

По данным 150 независимых служб, за 15 лет им было совершено 2,5 млн звонков. В 2020 году на линию поступило 3377 звонков по бытовому насилию. В 2021 году количество звонков составило 226 455 единиц, из них 7184 звонка поступило от детей до 18 лет. (EL.KZ: https://el.kz/ru/news/obshestvo/kak_zashchitit_detey_ot_nasiliya_/).

Ключевые слова: бытовое насилие, семья, семейно-бытовые отношения, преступность, причина, ситуация, профилактика, система мер, конфликт интересов, социальное положение, рыночная экономика и т.д.

Introduction

According to article 4 of the Law of the Republic of Kazakhstan “On the Prevention of Domestic Violence”, domestic violence can be expressed not only in the form of physical or psychological violence, but also in the form of sexual and (or) economic violence.

According to the United Nations, around 400 women are killed each year by domestic violence in Kazakhstan. According to the Kazakh authorities, the number of complaints of domestic violence in 2019 increased by 104 percent compared to 2015. According to 2018 statistics, 17 percent of women aged 18 to 75 have experienced physical or sexual abuse by a husband or partner, including exes. The state of the already established picture in 2020 was further worsened by the sudden global problem – “coronavirus infection (COVID-19)”. After the introduction of quarantine, factors of domestic violence against women became more frequent. Moreover, this situation, according to the United Nations, has developed around the world. ‘It’s a worrying sign. Women and girls are not able to reach organizations that can support them. Perhaps they do not have access to a mobile phone, computer or the Internet, since they can be under the supervision of the criminal and other members of his family, “the UN noted. In addition, UN representatives noted that... “Epidemics exacerbate existing inequality, including those based on economic status, abilities, age, and gender. In the post-crisis period, violence

against women will be accompanied by unemployment, financial difficulties. Women facing violence during a crisis find it harder to save themselves".

The numbers we face are appalling and they clearly require concrete action. Today, the current situation can be called – "epidemic of domestic violence". As for the legal regulation of these illegal actions, there are significant gaps and shortcomings. If before 2017 the aggressor who committed violence against a woman could be prosecuted; then after the decriminalization of the articles "beatings" and "intentional infliction of minor harm to health," which were most often used to investigate and prosecute the facts of domestic violence, this possibility is excluded.

Methodology

The research methodology is based on the harmonization of the requirements of general scientific and private scientific methodologies. The general scientific methodology includes accounting for objective and subjective factors, cause and effect relations and relationships, their institutionalization and subordination. As private scientific methods, the following were used: methods of formal-legal, structural-system analysis, methods of logical, social analysis and synthesis.

Main part

To explain the emergence and development of crime, it is primarily necessary to analyze the causes and conditions of crime, its determinants, and the factors that generate crime. In this regard, the study of the causes of crime is one of the important problems of criminological science. Therefore, identifying the causes of crime makes it possible to build an effective crime prevention system.

Many scholars consider the phenomena and processes of public life as the causes of crime (Criminology, 1998).

The conditions that contribute to the commission of crimes are both specific natural and social or technical factors that do not in themselves generate crimes, but help their implementation and implementation. The causes of crime and the conditions that contribute to it are united by the general term "determination of crime," that is, its objective dependence on other phenomena of nature and society.

Currently, political, economic and social phenomena that determine domestic crimes also attract attention when considering the common causes of crimes of one type or another.

Modern family-household relations in themselves should not lead to negative manifestations of social relations. In this regard, they should not cause social contradictions directly related to the family. Complex social relations arising from domestic relations give rise to problems in the life and actions of people that do not have a solution and subsequently lead to crimes of other offenses. Apparently, it is still impossible to get rid of such contradictions in domestic relations. At present, it is impossible not to notice the family differences between the old and new, past and future, which meet the modern requirements of the development of society. That is, there are still active contradictions in domestic relations. This provides evidence of criminal negatives manifesting "within" the family. As a result, the crime (its causes and conditions, the factors that gave rise to the crime), having appeared "inside" the family, actually acquires a family character. In connection with these circumstances, such types of life as a criminal lifestyle appear and operate in the system of family relations. This is nothing more than a contradiction between private family and social interests. This contradiction will not disappear on its own. On the contrary, it more often develops into the form of another, more negative state, including family conflicts, clearly manifesting "criminal conflicts". Such conflicts usually lead to negative manifestations of family relations – family crimes. In other words, social contradictions in the family are most often "resolved" by committing a crime. Of course, this cannot be avoided. However, in family and domestic relations, it is necessary to see all the opposite.

By studying the social contradictions inherent in family and family relationships, it is necessary to determine their connection to crime, as well as their causes and conditions. These are, first, contradictions of a negative nature. They usually occur between individuals on domestic grounds. Therefore, they are limited to special, that is, family-household relations and cannot "extend" to other areas. Family disagreements, as well as contradictions in general, arise as a result of violation of moral and legal norms, and, of course, have no absolute solution. Here, the types of contradictions mean opposite relations to each other and are solved to a comparative extent. Most often, they are constant and do not find a solution, generate either "criminal" conflicts, or the causes and conditions of the crime. Therefore, the negativity of these contradictions arises for the above reason. Scientists write about this as follows: "since social disagreements have always expressed relations between people and influenced their inter-

ests, crimes can also be considered a manifestation of contradiction, limiting the view of actual real possibilities carried out with the objective interest of society and criminals to solve contradictions in an optimal way for society" (Buchholz, 1975:68). Here, in fact, we are talking about criminal social contradictions. The basis of their manifestation is family members, family and household relations between relatives. The fact is that in the family people are trying to resolve disagreements between themselves according to their interests. This, in turn, most often leads to crimes and other offenses.

D.A. Shestakov systematizing family criminogenic cases distinguishes the following links: marital conflicts; conflicts between the older and younger generation; conflicts related to other kinship relationships and characteristics (Shestakov 1976:129).

When studying crimes in the field of family and family relations, it is necessary to rely on the fact that a conflict, namely a family conflict, is a prerequisite for the commission of such crimes.

A family-domestic conflict should be understood as a conflict (contradiction) of the views, aspirations and personal interests of people associated with marriage, family, family, related, friendly, close or neighboring relations, realized by these people. As we noted, the conflict, being a social defect, is inherent in almost all household relationships. In addition, it is in family and domestic relations that control over the behavior of citizens by state and public bodies is rather weak. Here we are talking about social control, which is extremely important in the prevention of crimes, including family crimes.

Many works of leading criminologists are devoted to the concepts of conflict, conflict situations (Kudryavtsev 1976:18). Thus, Y.M. Antonyan understands the conflict situation as a contradiction of interests, views, the opposite of aspirations, complex disagreements between the parties, causing a complex form of struggle (Antonyan 1974:73). Such characteristics of conflicts and conflict situations are often found in the legal literature. In this case, conflicts are classified into collision stages (initial stage, formation of conflict relations, apogee and final stage). Psychologists define "their" specific groups of conflict situations. They distinguish between conflicts between representatives of different groups. For example, V.V. Petrov distinguishes between the following three groups of contradictions that can cause the emergence and development of conflict situations in domestic relations: intergroup, group and interpersonal (Petrov, 1981:26). We are interested in conflicts that arise between people in certain relationships, in particular, in domestic relationships.

During the study of domestic crimes, E.P. Kim, when considering conflicts, divides them into types of crimes in accordance with the stages of hostile relations between the victim and the criminal. According to E.P. Kim, family and domestic crimes are mainly characterized by conflicts that lasted more than three months (Kim 2002:221). However, the classification of conflicts by type of crime does not affect preventive measures. Since it is impossible to determine which type of crime in the family has the greatest conflict. In this regard, conflicts in time are considered only in relation to relations between family members.

It is safe to say that crimes in the family cannot occur without conflict. However, conflicts in domestic relations necessarily require a solution, but in order to neutralize conflicts, it is necessary to know what factors influence the occurrence of conflicts in domestic relations. This makes it possible to get a criminological characterization of domestic relations.

There are factors that influence the commission of a crime in the family. The mechanism of influence of factors on crimes in domestic relations is extremely complex. Sometimes the criminogenicity or anticriminogenicity of the influence of any factors on the occurrence of collisions can only be spoken conditionally.

Given the fact that the scope of factors that influence crime is very broad, we will limit ourselves to looking at factors that influence crimes in domestic relationships. In addition, here we are talking about factors inherent in the relationship between specific family members.

The first factor covers demographic, socio-economic (material, housing, medical), cultural, educational and educational elements.

The above factors do not affect the relationship between family members and relatives who do not live with them. Demographic factors affecting family conflicts in family relationships need to be considered. This is due to the particular relevance of defining regional differences in demographic processes.

Demographic factors. This factor is closely related to family-household relations.

This factor is especially important, since, as criminological literature shows, the population has a certain impact on the growth of migration crimes throughout the country. Of course, the migration process is mainly determined by the location of new jobs in Kazakhstan.

As you know, this is due to family-household relations, contradictions and conflicts in such relations, and also affects the criminological characterization of this area, crimes committed in the family-household sphere.

Demographic factors include birth, marriage and divorce (Avdeev 1999:29). The latter is inherent in the family and household sphere. They should be considered in the system of relevant relationships.

Socioeconomic factors. According to research, everyday disagreements most often arise not because of deep, unsolvable contradictions, but because of many life difficulties, needs and shortcomings. Therefore, there is a need to study socio-economic factors, that is, the level of material existence, the degree of satisfaction with housing and other household needs. When studying criminal cases, it became known that material difficulties give rise to acute domestic conflicts; as a result, the nature of domestic crimes was determined.

The group of socio-economic factors also includes dissatisfaction with housing conditions in regions with an average provision of housing per resident. According to research, unsatisfactory living conditions largely cause negative social contradictions in everyday life and everyday conflicts. Crimes related to this fact are also frequent.

We want to draw attention to such factors as the provision of members of society with consumer goods and food. As you know, this element is closely related to everyday life.

About 80% of the disagreements that arise in the family and turn into family and household conflicts are associated with a low level of well-being of the population. To the question: "What exactly is the family-household conflict connected with?" the following answers were received:

- poor living conditions – 50%;
- low level of material provision – 60%;
- insufficient provision of consumer goods – 15%;
- low level of food supply – 40%;
- low level of provision of the population with household appliances – 10%;
- unsettled work on repair work in apartments – 35%

In addition, the free time from study and work of members of society, especially adolescents and minors, the improper organization of free time, etc., affect the growth of crime. There is a psychological violation or, as scientists write, a social "explosion" in domestic relations. It is no coincidence that 80% of disagreements for the above reasons are turned into family crimes.

Educational factors. Among the factors playing a criminal role in the spread of domestic crimes, special attention should be paid to such factors as the lack of educational work.

In recent years, weak educational work has been noticed in public life, this leads to the generation in society of non-aligned views and traditions, the revival in the minds of people of old foundations and beliefs.

The current situation in this direction can be defined as a stage of struggle between a system of outdated values with significant shortcomings and a new system. The shortcomings of educational work affect the preservation of a low cultural level of the population. For example, some people, especially young people, do not know how to spend their free time and what interesting types of leisure activities can be found. "The beautifully wrapped culture of exchange, the product of popular culture, the real preaching of the" new missionaries "of the West and East, various and often contradictory political, ideological and religious ideas and myths are actively promoted among young people" (Buldenko 1999:12; Popov 1988:76). This is one of the reasons for clashes in everyday life, leading to various kinds of crimes. Another reason is the lack of youth employment due to the lack of jobs.

More than half of the victims of crimes within the framework of family and household relations, as well as more than half of those who committed family and household crimes noted that the reason for domestic contradictions was the lack of the opportunity to spend free time in cultural institutions. Also, many categories of people noted that they do not want to spend their leisure time in clubs (in urban and rural areas), since in such places free time is not spent with elements such as lectures, reports that affect the increase in education of the population. We want to say that today at the institutional and substantive levels; educational work is undergoing a crisis. In particular, the commercialization of cultural processes in society leads to a significant deviation from high cultural norms and values towards a mediocre example of aggressive pop culture, obviously manifested in electronic media. This all negatively affects the ideals of the younger generation. In addition, the shortcomings of educational work are complicated by the preservation in some part of the population of outdated traditions, unfavorable customs and ways. As criminological literature, a backward lifestyle, urban and rural traditions, formed views, do not always pass without negative consequences. As it turned out because of systemic calculations,

contradictions occurring in many places exacerbate and increase the criminogenic effect (Goryainov 1985:115). In this regard, we would like to dwell in more detail on such a phenomenon as alcoholism. The negative value of such traditions and customs as the "washing" of an event (seeing off in the army, hiring, having a child, buying a certain thing, etc.) is the "coverage" of such a phenomenon of all groups, from younger to older, men and women. This is directly related to the relationship system, especially the system of leisure and domestic relations. In criminology, an attempt was made to analyze the traditions and customs of drinking in connection with the study of crimes committed in everyday life. About 50% of domestic conflicts and about 12% of crimes are related to the traditions and customs of washing (in fact, all of them are crimes). This is all based on domestic alcoholism.

Traditional alcoholism in modern society continues even after the eradication of the historical conditions that gave rise to it. It can be noted that there is a process of turning the use of alcoholic beverages into the usual way of daily life. In the domestic relations of our society, these processes are certainly much more dangerous than the development of the tradition of drinking alcohol. "Drinking alcoholic beverages in each repeated case of meeting with relatives, friends familiar from familiar communication develops into a physiological habit. After such changes, alcohol turns from an addition to communication between relatives and loved ones into an invitation to drink alcohol for a drunken conversation. The joy of human communication is lost and alcoholism appears", said I.V. Sukhanov (Sukhanov 1976; 91). Alcoholism turns into the cause of conflicts that develop into a crime. For example, 85% of cases of domestic hooliganism in the family were committed while intoxicated.

Many people perceive the traditional drinking of alcoholic beverages as any other behavior of a person, as a common phenomenon, without thinking about the meaning of such behavior, about its harmful consequences. As a result, under the influence of various reasons in most people who drink alcoholic beverages, such "drunkenness" in the family turns into a tradition and develops into alcoholism. Thus, according to G.G. Zaigraev, 61% of 932 experts named among the factors affecting the predisposition to drink alcoholic beverages the traditions and customs of drinking that have developed in everyday life (Zaigraev 1980:38). Therefore, considering the traditions and customs of drunkenness as one of the factors of alcoholism, it is safe to say that they occupy one of the first places in the emergence of illegal actions in everyday life. The systematic observance of the habit of drinking alcohol leads to negative changes in the social characteristics of alcoholics. For example, the range of their social needs and interests is significantly narrow, as well as the prospects for the existence of such people are limited by the expectation and search for reasons for drinking alcohol, as a result, the positive qualities of a person weaken and behavior alien to society. Subsequently, this may turn into one of the factors of the appearance of contradictions in everyday life, which flow into everyday crimes.

Factors affecting the emergence of conflicts in the family and household sphere. It should be noted that they have a number of features. Considering family-household relations as a special form of relationships, it can be noted that it is at this level that the behavior of all traditional views in family-household relationships is intertwined, including the process of their interaction.

Violence in family and domestic relationships manifests itself in the following forms: propaganda of the dictate of violence; the formation of behaviors that are impossible without violence among young people, including rural youth; the influence of illegal traditions and customs in all spheres of family and household relations; negligence on the part of state institutions and non-state structures to ensure the stable functioning and life of the family.

As studies show, among those who committed crimes, there are a lot of people who grew up as children as only children (mainly without a father) or without parents. Once again, we want to note that this is closely related to conflicts between spouses, parents, children, relatives and, after all, affects the growth of crime in families.

Conflicts can arise on the basis of adultery. According to sociological studies, most facts of divorce are based on non-preservation of marital fidelity.

Conflicts in domestic relations can also arise in connection with disagreements in the upbringing of children, jealousy of one of the spouses, incompatibility of characters, failure to fulfill family duties on the basis of different views. Consequently, family and domestic conflicts, offenses, and even crimes arise.

Factors that influence the emergence of conflicts between various relatives who do not live together in the same house, in the same apartment are of interest. In the process of such a relationship, various excesses occur, leading to conflicts between relatives. An analysis of crimes committed by family

members showed that crimes were committed due to the lack of a common culture of behavior between relatives. It is no secret that there are relatives scandalizing on any, even minor occasion, and even reaching the fight. Most often, this is due to the low culture of one or even two relatives, that is, each of them.

The criminogenic factors of such kinship relations include the difference between the psychological characteristics of the character and temperament of relatives that is, psychological incompatibility, unfriendly and contradictory relations, the excessive density of the place of residence and the resulting objective obligation of constant "forced communication." Outdated traditions and customs that lead to family-household conflicts contribute to the emergence of conflicts between relatives who do not live together. About 30% of conflicts between relatives are related to such traditions and customs. Most of them turn into crimes or other offenses.

Crimes between relatives who do not live together include deliberate destruction of property, harm to health, and even murder. The reason for such a crime is due to the "debt" of revenge for the grievances caused.

Sometimes all factors are intertwined and can manifest themselves in any relationship between people in family or other relationships.

Conclusion

What necessary steps we see today in solving these problems of domestic violence prevention, in addition to fundamental study of foreign experience and awareness of the importance of preserving our own family values and traditions in determining the role of the state and society in strengthening the institution of the family. Of course, the state and society should play an important role in resolving this issue, but only from the point of view of a comprehensive study of the problem, from the point of view of wide discussion among the public of possible measures by the state to strengthen the institution of the family and exclude their negative impact on the family, parenthood, existing family values and traditions. The main role of the state should be to provide legal support and create all social conditions for the family to fulfill its social functions, including the birth and upbringing of children. We should only talk about the prevention by the state and society of a decrease in the quality and level of family well-being (economic, psychological and other social), it should consist primarily in:

- promoting the development of legal, psychological literacy of parents, children,
- providing an affordable assortment of leisure and sports activities for children,
- the development of preventive measures for social and psychological assistance, taking into account the needs of not only disadvantaged families, but of various families (young, large families who find themselves in difficult life situations, having children with special needs, children in specialized institutions),
- ensuring the availability of the activities of crisis and other rehabilitation centers, providing assistance for families, persons who find themselves in a difficult life situation,
- increasing the level of organizational and managerial support for the activities of the state and civil society institutions on family strengthening, solving personnel issues in institutions working with families, parents, children, etc.

Литература

Об утверждении Концепции семейной и гендерной политики в Республике Казахстан до 2030 года: Указ Президента Республики Казахстан от 6 декабря 2016 года № 384. // [Электронный ресурс] https://online.zakon.kz/Document/?doc_id=37778759#pos=0;0&sdoc_params=tex.

О профилактике бытового насилия: Закон Республики Казахстан от 4 декабря 2009 года № 214-IV[Электронный ресурс] https://adilet.zan.kz/rus/docs/Z090000214_/z090214.htm.

Как защитить детей от насилия // EL.KZ: https://el.kz/ru/news/obshestvo/kak_zashchitit_detey_ot_nasiliya_/

Криминология: Учебно-методические материалы и альбом схем. – М., 1998. – 263 с.

Бухгольц Э., Лекшас Д., Хартман Р. Социалистическая криминология / Пер. с нем. – М., 1975. – 612 с.

Шестаков Д.А. Конфликтная семейная ситуация как криминогенный фактор: Дис. на соиск. учен. степ. канд. юрид. наук. – Л., 1976. – 236 с.

Кудрявцев В.Н. Причины правонарушений. – М., 1976. – 268 с.

Антонян Ю.М. Роль конкретной жизненной ситуации в совершении преступлений. – М., 1974. – 196 с.

Петров В.В. Криминологические проблемы предупреждения преступлений, совершаемых в сфере бытовых отношений: Автореф. дис... канд. юрид. наук. – М., 1981. – 29 с.

Ким Е.П. Преступность в сфере бытовых отношений и ее предупреждение. Проблемы теории и практики. – Смоленск: ЮИ МВД РФ, 2002. – 268 с.
Авдеев А.А. Браки и разводы в России // Народонаселение. – 1999. – №1. – С. 22-43.
Булденко К.А. Культура и субкультура: Учеб. пособие. – Хабаровск: ДВЮИ МВД РФ, 1999. – 236 с.
Попов В.Т. Молодежь в сфере криминогенного влияния // Социологические исследования. – 1988. – № 5. – С. 72-79.
Горяинов К.К., Силаев А.И. Криминологическая обстановка и ее региональные особенности. – М., 1985. – 194 с.
Суханов И.В. Обычаи, традиции и преемственность поколений. – М., 1976. – 164 с.
Заиграев Г.Г. Проблемы профилактики пьянства. – М., 1980. – 236 с.

References

Antonjan Ju.M. Rol’ konkretnoj zhiznennoj situacii v sovershenii prestuplenij. M., 1974. 196 s.
Avdeev A.A. Braki i razvody v Rossii. Narodonaselenie. 1999. №1. S. 22-43.
Buhgol’c Je., Lekshas D., Hartman R. Socialisticheskaja kriminologija / Per. s nem. M., 1975. 612 s.
Buldenko K.A. Kul’tura i subkul’tura: Ucheb. posobie. Habarovsk: DVJuI MVD RF, 1999. 236 s.
Gorjainov K.K., Silaev A.I. Kriminologicheskaja obstanovka i ee regional’nye osobennosti. M., 1985. 194 s.
Kudrjavcev V.N. Prichiny pravonarushenij. M., 1976. 268 s.
Kak zashhitit’ detej ot nasilija. EL.KZ: https://el.kz/ru/news/obshestvo/kak_zashchitit_detey_ot_nasiliya_/
Kriminologija: Uchebno-metodicheskie materialy i al’bom shem. M., 1998. 263s.
Kim E.P. Prestupnost’ v sfere bytovyh otnoshenij i ee preduprezhdenie. Problemy teorii i praktiki. Smolensk: JuI MVD RF, 2002. 268 s.
Ob utverzhdenii Koncepcii semejnoj i gendernoj politiki v Respublike Kazahstan do 2030 goda: Ukaz Prezidenta Respubliki Kazahstan ot 6 dekabrja 2016 goda № 384. [Jelektronnyj resurs] https://online.zakon.kz/Document/?doc_id=37778759#pos=0;0&s-doc_params=tex.
O profilaktike bytovogo nasilija: Zakon Respubliki Kazahstan ot 4 dekabrja 2009 goda № 214-IV[Jelektronnyj resurs] https://adilet.zan.kz/rus/docs/Z090000214_/z090214.htm.
Petrov V.V. Kriminologicheskie problemy preduprezhdenija prestuplenij, sovershaemyh v sfere bytovyh otnoshenij: Avtoref. dis... kand. jurid. nauk. M., 1981. 29 s.
Popov V.T. Molodezh’ v sfere kriminogennogo vlijanija. Sociologicheskie issledovanija. 1988. № 5. S.72-79.
Shestakov D.A. Konfliktnaja semejnaja situacija kak kriminogennyj faktor. Dis. na soisk. uchen. step. kand. jurid. nauk. L., 1976. 236 s.
Suhanov I.V. Obychai, tradicii i preemstvennost’ pokolenij. M., 1976. 164 s.
Zaigraev G.G. Problemy profilaktiki p’janstva. M., 1980. 236 s.

5-бөлім

ХАЛЫҚАРАЛЫҚ ҚАТЫНАСТАР ЖӘНЕ ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ

Section 5

INTERNATIONAL RELATIONSHIPS AND INTERNATIONAL LAW

Раздел 5

МЕЖДУНАРОДНЫЕ ОТНОШЕНИЯ И МЕЖДУНАРОДНОЕ ПРАВО

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ОСНОВНЫЕ ХАРАКТЕРИСТИКИ НОТАРИАЛЬНОЙ СИСТЕМЫ ТУРЦИИ

В Турции нотариат является публичной (государственной) службой. Но тем не менее нотариус имеет уникальный статус. С одной стороны, хотя нотариусы по некоторым параметрам относятся к государственным служащим, с другой стороны, они относятся к числу самозанятых, имеют право нанимать и увольнять работника, распоряжаться полученным доходом, выступать в суде от своего имени, самостоятельно оплачивают налоги. При этом нотариальные расходы государством не покрываются.

Наступление ответственности нотариуса Турции согласно статье 162 Закона «О нотариате» не привязано к вине. Даже если это сделали стажеры, секретари и кандидаты в секретари, нотариусы несут ответственность за тех, кто пострадал из-за того, что работа не была выполнена или выполнена неправильно или неполно. Здесь получается, что условиями наступления ответственности нотариуса являются незаконная нотариальная деятельность нотариуса или его стажеров, секретаря и кандидата в секретари и причинно-следственная связь между незаконной нотариальной деятельностью и вредом. Ответственность отпадает только в случае, если нотариус докажет, что нет причинно-следственной связи между нотариальной деятельностью нотариуса и возникшим ущербом. В статье излагаются основные характеристики нотариальной системы Турции. В Турции нотариусы играют важную роль в правовой системе. Функция нотариусов – это удостоверение документов, являющихся бесспорными доказательствами. То есть, пока не доказано иное, нотариально удостоверенные документы относятся к бесспорным доказательствам.

Ключевые слова: нотариус, статус нотариуса, уникальность статуса нотариуса, ответственность нотариуса, невиновная ответственность нотариуса.

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The main characteristics of the notary system of Turkey

In Turkey, the notary is a public (state) service. But nevertheless, the notary has a unique status. On the one hand, although notaries by some parameters belong to civil servants, on the other hand, they are self-employed, have the right to hire and dismiss an employee, dispose of the income received, appear in court on their own behalf, pay taxes independently. At the same time, notary expenses are not covered by the state.

The onset of the responsibility of the notary of Turkey according to Article 162 of the Law on the Notary is not tied to the fault. Even if it was done by interns, secretaries and candidates for secretaries, notaries are responsible for those who suffered because the work was not done or was done incorrectly or incompletely. Here it turns out that the conditions of the notary's responsibility are the illegal notarial activity of the notary or his trainees, the secretary and the candidate for secretaries and the causal relationship between illegal notarial activity and harm. Liability disappears only if the notary proves that there is no causal relationship between the notary's notarial activity and the damage that has occurred. The article describes the main characteristics of the notary system of Turkey. In Turkey, notaries play an important role in the legal system. The function of notaries is to certify documents that are indisputable evidence. That is, until proven otherwise, notarized documents are indisputable evidence.

Key words: notary-notary-notary status-uniqueness of notary status, notary's responsibility, notary's innocent responsibility.

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Түркияның нотариаттық жүйесінің негізгі сипаттамалары

Түркияда нотариус мемлекеттік қызмет болып табылады. Соған қарамастан нотариустың бірегей мәртебесі бар. Бір жағынан нотариустар кейбір жағынан мемлекеттік қызметші болғанымен, екінші жағынан қызметкерді жұмысқа алуға және жұмыстан шығаруға, алынған кірісті басқаруға, сотта өз атынан сөйлеуге, еңбекақы төлеуге құқылы, дербес салықтарды төлейтін өзін-өзі жұмыспен қамтығандар болып табылады. Осымен бірге мемлекет нотариаттық шығындарды өтемейді.

Нотариат туралы заңның 162-бабына сәйкес Түркиядағы нотариустың жауапкершілігі кінәға байланбаған. Тәжірибеден өтушілер, хатшылар және хатшыларға кандидаттар мұны істеген болса да, жұмыс жасалмаған немесе дұрыс немесе толық орындалмағандықтан зардап шеккендер үшін нотариустар жауапты.

Бұл жерде нотариустың жауапкершілігінің басталуының шарттары нотариустың немесе оның стажерының, хатшы мен хатшыға кандидаттың заңсыз нотариаттық іс-әрекеттері бар екенімен заңсыз нотариаттық іс-әрекеттер мен зиянның арасындағы себепті байланыс болып табылады. Нотариустың нотариаттық іс-әрекеті мен келтірілген залал арасында себеп-салдарлық байланыстың жоқтығын дәлелдеген жағдайда ғана жауапкершілік жойылады.

Түйін сөздер: нотариус-нотариус-нотариус мәртебесі, нотариус мәртебесінің бірегейлігі, нотариустың жауапкершілігі, нотариустың кінәсіз жауапкершілігі.

Введение

Нотариат в Турции – это нотариат латинского типа. Союз нотариусов Турции стал членом Международного Союза нотариата (прежнее наименование Международный союз Латинского нотариата) в 1972 году. Основными профильными нотариальными законодательными актами являются Закон «О нотариате» (Закон № 1512 «18.01.1972 года), Положение нотариального закона (Официальная газета Турции от 13.07.1976 года, № 15645). Нотариат в Турции является государственным. Согласно статье 1 Закона Турции «О нотариате» за № 1512 от 18.01.1972 года «Нотариат – это публичная услуга. Нотариусы оформляют, удостоверяют действия и выполняют другие возложенные законом обязанности в целях обеспечения правовой безопасности и предотвращения споров».

Материалы и методы

В доктрине Турции является дискуссионным вопрос о правовом статусе нотариусов. «В турецком законодательстве, как и в большинстве европейских стран, нотариальная служба является государственной службой, а профессия нотариуса является самозанятостью в соответствии с ее характером. Другими словами, нотариусы являются самозанятыми членами государственной службы». По мнению М.О. Батмаз, профессия нотариуса – это свободная профессия. В доказательство он приводит следующие доводы:

- заработную плату нотариусам государство не платит,
- нотариусы сами определяют свои рабочие места и обеспечивают все их обустройство за свои деньги,
- все расходы покрываются самим нотариусом,
- после вычета всех расходов от чистого дохода выплачивают налоги,
- не бывает принудительных назначений в нотариат» (Батмаз 2015).

В пользу этой точки зрения Онар Сыддык Сами приводит следующее: «Нотариусы работают вне постоянного организационного штата государства и работают не по найму. Они берут плату за свои услуги» (Kurt 2014).

«В законодательстве нет четкого положения о правовом статусе нотариусов. При условии разрешения и контроля со стороны Министерства юстиции во многих вопросах, касающихся нотариусов, трудно сказать, что они являются представителя свободной профессии» (Топчуоглу 2000). «По вопросам назначения, увольнения, ухода в отпуск, приостановления деятельности нотариусов уполномоченным является Министерство юстиции. (ст.ст. 27, 57, 123 Закона «О нотариате»). Статья 66 Закона о подоходном налоге признает нотариуса как работников свободной профессии. Однако это признание касается

только вопроса налогов, поэтому из этого положения нельзя делать вывод о том, что нотариус является работником свободной профессии.» Однако есть взгляды о том, что именно тот факт, что нотариусы согласно Закона о подоходных налогах являются работниками свободной профессии, укрепляет мнение о нотариате как о свободной профессии.

Обсуждения и результаты

«Кроме полномочий Министерства юстиции в отношении нотариусов, невозможность осуществления нотариусом иной деятельности (статья 50 Закона «О нотариате»), обязанность соблюдения рабочего времени государственных учреждений (ст. 51 Закона «О нотариате») являются аспектами деятельности нотариуса, схожими с государственными служащими. Однако законодатель в связи с тем, что нотариусы не получают заработную плату от государства, квалифицировал их как государственных служащих только в некоторых случаях» (Курт 2014)

Из смысла статей 151 и 152 Закона «О нотариате» нотариусы относятся к государственным служащим. «Нотариусы, временные уполномоченные помощники нотариуса, доверенные лица нотариуса, клерки (секретари) нотариуса и кандидаты в клерки (секретари), а также нотариусы, работающие в органах нотариата, считаются государственными должностными лицами с точки зрения применения Уголовного кодекса Турции в связи с их обязанностями в нотариальной конторе» (статья 151 Закона «О нотариате»). «В отношении лиц, перечисленных в вышеуказанной статье, они считаются государственными должностными лицами с точки зрения применения Уголовного кодекса Турции в отношении преступлений, совершенных при исполнении своих служебных обязанностей или в связи с ними» (статья 152 Закона «О нотариате»).

Однако в соответствии со статьей 162 Закона «О нотариате» «даже если это сделали стажеры, секретари и кандидаты в секретари, нотариусы несут ответственность за тех, кто пострадал из-за того, что работа не была выполнена или выполнена неправильно, или неполно.» То есть, из этой статьи понимается, что нотариус несет ответственность за ущерб, причиненный в результате действий его сотрудников, а также за ущерб, возникший в результате его собственных действий. «В статье ни слова о вине. В этом случае в ответственности нотариуса не ставится вопрос о вине» (Догу 1979).

«В статье 162 Закона «О нотариате» «не выполнение работы, ошибочное или неполное выполнение», даже если и подразумевает, но не содержит в себе понятие вины. Потому что положение рассматривает, без разницы какое, неправильное или неполное нотариальное действие как основание для ответственности. По этой причине ответственность нотариуса за свои действия является ответственностью без вины»

Здесь получается, что условиями наступления ответственности нотариуса являются незаконная нотариальная деятельность нотариуса или его стажеров, секретаря и кандидата в секретари и причинная-следственная связь между незаконной нотариальной деятельностью и вредом. Ответственность отпадает только в случае, если нотариус докажет, что нет причинно-следственной связи между нотариальной деятельностью нотариуса и возникшим ущербом.

Есть мнение о том, что нотариус обладает «уникальным правовым статусом». «Если он не может считаться самозанятым и в то же время государственным служащим, принято считать, что нотариусы имеют уникальный (sui generis) правовой статус.» (Ulukapi/atali 2000)

Этой точки зрения и мы придерживаемся, хотя в статье 1 Закона «О нотариате» их статус определен как публичная служба, тем не менее, из анализа законодательства Турции мы видим двойственный характер статуса нотариуса.

Надо отметить, что положения об ответственности без вины четко определены в Кодексе Турции «Об обязательствах». Среди них нет ответственности нотариусов без вины. По мнению Унал Мехмета, ответственность нотариуса наступает при наличии вины и ответственность персонала наступает при наступлении правовых последствий для третьих лиц по их вине (Унал 1992).

Говоря об ответственности, следует остановиться вкратце на дисциплинарной ответственности нотариусов.

Такие дисциплинарные взыскания, как предупреждение, порицание, штраф, временное отстранение от работы, увольнение, предусмотренные статьей 126 Закона «О нотариате», в зависимости от характера положения и уровня тяжести, с целью оказания нотариальных услуг должным образом, налагаются на тех, кто действует против достоинства и чести профессии, на тех, кто не выполняет свои обязанности или совершает виновные действия, или кто действует таким образом, что подрывает доверие к профессии нотариуса.

Согласно статье 128 Конституции Турции государственными должностными лицами являются «наемный персонал по договору, рабочие и временные работники», однако нотариусы не входят ни в одну из этих категорий. При этом не являясь ни самозанятым, ни государственным служащим принято считать, что нотариусы имеют уникальный (sui generis) правовой статус». Несмотря на то, что нотариусы назначаются на должность государственным органом – Министерством юстиции, делается это по согласованию с Союзом нотариусов Турции. Эти два органа являются органами контроля за деятельностью нотариусов. Хотя нотариусы и действуют от имени государства, они не получают никакой заработной платы от государства. Нотариусы Турции получают прибыль только от совершенных ими нотариальных действий. В соответствии со статьей 2 Закона Турции «О нотариате» в каждом суде первой инстанции и отдельном мировом суде создается государственный нотариус с правом осуществлять деятельность нотариуса в рамках юрисдикции этого суда. Однако, если юрисдикция суда первой инстанции распространяется более чем на один округ, при необходимости нотариальные конторы могут быть учреждены и в других округах. До сих пор, если в границах муниципалитета провинции имеется более одного нотариуса, каждый нотариус уполномочен выполнять все нотариальные действия в границах муниципалитета провинции, не ограничиваясь юрисдикцией суда первой инстанции, к которой он относится. Продолжается деятельность нотариальных контор первого, второго и третьего классов в районах, где упразднен суд первой инстанции. В этих местах может быть учреждено более одного нотариата.

Однако это не означает, что нотариусы в Турции подчиняются судам. Только территория, где находится нотариальная контора, привязана к месту расположения суда. Следующей особенностью нотариальных контор Турции является их деление на четыре класса. В соответствии со статьей 4 Закона Турции «О нотариате» государственные нотариальные конторы первого, второго и третьего классов классифицируются Министерством юстиции на основании мнения Союза нотариусов Турции. В этой классификации за основу взяты численность, загруженность и доходы нотариуса в пределах юрисдикции каждого нотариуса. Как правило, нотариусы одного суда считаются представителями одного класса. Министерство юстиции проверяет статус государственных нотариальных контор каждые четыре года и объявляет о реклассификации в Официальном вестнике. Если невозможно назначить нотариуса на вакантную должность нотариуса третьего класса, то этот нотариус низводится Министерством юстиции до четвертого класса без применения положения о классификации, предусмотренной в вышеуказанной статье 4 Закона «О нотариате» (ст. 31 Закона «О нотариате»).

Согласно статье 4/а Закона «О нотариате» нотариусы в Турции делятся на три класса. Служба третьего класса начинается со дня приема на работу для тех, кто поступает в нотариат, будучи впервые назначенным нотариусом третьего класса. Минимальный срок службы нотариуса второго и третьего классов составляет четыре года. По истечении этого периода повышение класса нотариуса зависит от положительного заключения в документе об окончательном статусе, выданном инспектором юстиции. Повышение класса нотариуса не влияет на класс нотариуса.

В случаях, когда нотариус, работающий в нотариальной конторе, чей класс повышен, не завершил стаж работы в предыдущем классе, на момент истечения этого срока, если в окончательной справке о статусе, выданной инспектором юстиции до этой даты, указано, что он не может быть переведен в более высокий класс, он начинает выполнять услуги более высокого класса у того же нотариуса со дня выдачи статусного документа, который свидетельствует о положительном заключении. Согласно статье 56 Закона «О нотариате» по достижении нотариусами 65-летнего возраста на них распространяются возрастные ограничения. Положения Закона о пенсионном фонде Турецкой Республики применяются по аналогии при исчислении возраста.

Никакие услуги и должности не могут совмещаться нотариусом; но это не касается научной деятельности, руководства и членства в благотворительных фондах, арбитражах и исполнений завещаний (статья 50 Закона «О нотариате»).

Поскольку нотариус является государственной службой, нотариусы не вправе играть в биржевую игру, вести бизнес по смыслу пункта 1 статьи 28 Закона о государственных служащих № 657, выступать поручителем, делать любые скидки из их дохода, быть посредником, участвовать в рекламной или конкурентной деятельности, заключать между собой устное или письменное соглашение о вознаграждении нотариуса.

Повседневная работа у нотариуса начинается в то же время, что и в других государственных учреждениях. Рабочее время у нотариусов может быть на один час больше, чем в других государственных учреждениях, расположенных в том же месте. Нотариус не может работать вне рабочего времени.

Кроме того, особенностью является то, что они могут удостоверять в выходные дни и в обеденное время рабочего дня только завещания. При этом они обязаны на документе указать причину работы в нерабочее время и при наступлении рабочего дня указать в реестровом журнале первым номером удостоверенное в нерабочее время нотариальное действие (статья 52 Закона «О нотариате»).

Отличительной особенностью в нотариальной деятельности Турции является возможность использования вместо подписи или вместо знака, нарисованного рукой, печати или отпечатка пальца. Так, согласно статье 75 Закона «О нотариате», если заинтересованное лицо, свидетель, переводчик и эксперт не могут расписаться, то вместо подписи или знака, сделанного рукой, то при наличии могут поставить печать, если нет, то большой палец левой руки, если нет, нажимается один из других пальцев и пишется какой палец нажимался. Несмотря на то, что нотариальное действие было подписано или на нем был поставлен знак руки, если заинтересованное лицо просит об этом, или если нотариус сочтет это необходимым с точки зрения характера сделки, статуса и личности лица, подписавшего или поставившего знак, за исключением людей с нарушениями зрения, то в соответствии с вышеуказанной процедурой берутся отпечатки пальцев заинтересованного лица, свидетеля, переводчика или эксперта. В случае, если используется печать, то проставление отпечатка пальца является обязательным.

Остановимся на важной роли нотариата с точки зрения права Турции. Слово *нотариус* происходит от латинского слова notarius и означает делать заметки, писать, что до сих пор имеет под собой основу. Можно сказать, что основная работа нотариуса связана с ведением записей, перепиской. В современном обществе нотариус в Турции имеет особый статус, а его нотариальные действия носят особый характер. Можно сказать, что от качества работы нотариуса зависит нормальное функционирование гражданского общества, его эффективность в защите имущественных и законных интересов граждан и юридических лиц. Нотариус делает документы официальными от имени государства, используя некоторые публичные полномочия. Согласно статье 1 Закона «О нотариате» № 1512 Турецкой Республики «Нотариусы оформляют сделки и выполняют другие обязанности, возложенные законом, в целях обеспечения правовой безопасности и предотвращения споров». В этом контексте документы, удостоверенные нотариусом, предотвращают передачу споров в судебные органы и обеспечивают более быстрое разрешение споров. Потому что нотариально заверенные документы считаются неопровержимыми доказательствами, если не доказана их ложность (ГПК ст. 204-(1)).

До недавнего времени оказание квалифицированной юридической помощи традиционно ассоциировалось с профессией адвоката. Однако сейчас значимость нотариата достаточно велика и можно сказать, что она растет из года в год. Нотариус играет важную роль в оказании квалифицированной юридической помощи. Любое нотариальное действие, совершаемое нотариусом по заявлению обратившегося к нему лица, по существу является реализацией права этого лица на получение квалифицированной юридической помощи. Таким образом, нотариус сводит к минимуму необходимость обращения в суд. Эта роль заключается не только в удостоверении сделок, но и в представлении доказательств, удостоверении согласий, подлинности подписи на документах и т.д.

Как досудебный институт нотариус играет важную роль не только в предотвращении обращения граждан и юридических лиц в суд, но и в процессе судебного рассмотрения и разрешения споров в случаях, когда вопрос отнесен к компетенции судебных органов.

Нотариус может значительно упростить и ускорить процесс разрешения дел судами, способствовать более тщательному исследованию обстоятельств дела, обеспечению конституционного права человека и гражданина на судебную защиту. Кроме того, как орган превентивный, нотариус обеспечивает исполнение обязательств без обращения в суд.

Как видно, нотариусы выполняют также функцию предотвращения споров между отдельными лицами в целом, помогают системе правосудия, способствуя скорейшему прекращению возникшего конфликта, и помогают системе правосудия, облегчая нагрузку на суд.

Эти функции нотариусов показывают, что они выполняют функцию, аналогичную функции судов. Потому что первая функция судов – раз-

решать споры, а вторая – предотвращать споры как естественное следствие первой функции. Первая функция нотариуса заключается в предупреждении возникновения споров, а вторая функция – в обеспечении разрешения возникающего конфликта.

Можно констатировать, что функция судов – исправительно-охранительная (фиксирующая), а функция нотариусов – содействие исправительно-охранительной функции. Иными словами, в отличие от суда, нотариус выполняет функции, направленные на юридическое закрепление гражданских прав и предотвращение их нарушений в будущем. В отличие от судебной деятельности, предметом деятельности нотариуса являются только бесспорные дела, и можно сказать, что нотариус является институтом предварительного правосудия. Кроме того, роль нотариуса еще больше возросла в наше время, когда нотариус перенес электронный учет всех нотариальных сделок в Единую информационную систему нотариуса, которая носит название Информационная система Союза нотариусов Турции. Помимо безопасности и защищенности юридически значимых сделок, создана мощная электронная инфраструктура для обеспечения скорости и качества нотариальных услуг по принципу «одного окна».

Положение о проведении нотариальных операций в электронном виде в Турции вступило в силу 1 марта 2016 г. Положение подготовлено на основании статьи 198/A Закона «О нотариате» от 18.01.1972 г. под номером 1512.

В соответствии со статьей 2 вышеуказанного Положения «Положение определяет нотариальные сделки, которые могут совершаться в электронной среде с использованием защищенной электронной подписи в присутствии или в отсутствие нотариуса, а также нотариальные сделки, требующие использования временной метки, которое определено в Законе об электронной цифровой подписи за № 5070 от 15.01.2004 года обработку, хранение, отправку в электронном виде заинтересованным и другим лицам или учреждениям нотариальных действий, определенных статьей 61 и иными статьями Закона «О нотариате»». Охватывает процедуры и принципы, касающиеся технических и административных требований, необходимых для осуществления нотариальных действий в иностранных государствах в электронном виде.

Согласно пунктам 1, 2, 3 статьи 5 Положения «Сделки, предусмотренные законодательством, также могут осуществляться в электронной среде с использованием защищенной электронной подписи. Во всех нотариальных операциях с защищенной электронной подписью используется отметка времени. Но в то же время, нотариальные действия, требующие законом удостоверения в специальной форме, и договоры гарантии не могут быть заключены с помощью электронной цифровой подписи».

Таким образом, во всех нотариальных действиях с защищенной электронной подписью используется отметка времени. Нотариальные действия, требующие оформления в виде упорядычевания и действия, в которых необходимо проведение процедуры по получению волеизъявлений, осуществляются в присутствии нотариуса. В таких случаях подготовительные работы, к примеру подготовка проекта нотариального действия, высылка для этого необходимых документов, могут начинаться при помощи электронно-цифровой подписи через Информационную систему Союза нотариусов Турции, однако нотариальное действие должно быть совершено в присутствии нотариуса. Сделки, которые не требуют формы упорядычевания или не требуют заявления о волеизъявлении перед нотариусом, могут быть инициированы и завершены с помощью безопасной электронной подписи через Информационную систему Союза нотариусов Турции. Все этапы, включая выдачу документа, осуществляются в электронном виде. Сделка завершается взиманием нотариальных сборов, налогов, пошлин и других расходов.

В соответствии со статьей 6 вышеупомянутого Положения следующие действия могут быть совершены без присутствия нотариуса, с защищенной электронной подписью через Информационную систему Союза нотариусов Турции:

1) свидетельствование верности переводов,
2) процедуры регистрации,
3) действия по установлению,
4) свидетельствование копии и выписок,
5) утверждение тетради решений,
6) уведомление и уведомление без подтверждения подписи.

Так как нотариат Турции является нотариатом латинского типа, то в своей нотариальной деятельности нотариусы руководствуются принципами латинского нотариата. С одной стороны, нотариус – это представитель государства, который наделил его полномочиями на совершение нотариального действия, а с другой – нотариус несет личную имущественную ответственность за совершение им и его уполномоченными на подпись работниками нотариального действия.

Нотариусы обязаны в своей деятельности соблюдать принципы беспристрастности (статья 37 Закона «О нотариате») и законности (статья 53 Закона «О нотариате»), тайны нотариальной деятельности (статья 54 Закона «О нотариате»). Особенностью при принятии на должность нотариуса является дача клятвы в соблюдении принципов нотариальной деятельности в соответствии со статьей 37 Закона «О нотариате».

Заключение

Слово *нотариус* происходит от латинского слова *notarius* и означает делать заметки, писать, что до сих пор имеет под собой основу. Можно сказать, что основная работа нотариуса связана с ведением записей, перепиской. В современном обществе нотариус в Турции имеет особый статус, а его нотариальные действия носят особый характер. Можно сказать, что от качества работы нотариуса зависит нормальное функционирование гражданского общества, его эффективность в защите имущественных и законных интересов граждан и юридических лиц. Нотариус, удостоверяя документы, выступает от имени от имени государства, используя некоторые публичные полномочия, но в то же время нотариус в Турции является самозянятой профессией. Согласно статье 1 Закона «О нотариате» № 1512 Турецкой Республики «Нотариусы удостоверяют действия и выполняют другие обязанности, возложенные законом, в целях обеспечения правовой безопасности и предотвращения споров». В этом контексте документы, удостоверенные нотариусом, предотвращают передачу споров в судебные органы и обеспечивают более быстрое разрешение споров. Сейчас в Турции активно внедряется и электронный нотариат, предусмотрено удаленное совершение нотарильных действий. Однако даже с его введением большая часть нотарильных действий совершается в нотариальной конторе нотариусом, так как требует проведения определенных процедур при нотариусе.

В работе изложены некоторые отличительные особенности наступления ответственности нотариуса Турции. В целом статья, по нашему мнению, может быть полезной для изучения нашими правоведами.

Литература

BATMAZ, M.O. Noterlerin Hukuki Sorumluluğu, İstanbul, 2015, s.205/ Правовая ответственность нотариусов. – Стамбул, 2015. – 205 стр.

BİLGE, M.Muhsin/BOZKURT, Hüseyin, U.İ.N.L. 1995 Berlin Kongresi 1.Tema Noterliğin Ulusal ve Toplumsal İşlevi, TNBHD, S:86, 15 Mayıs 1995, s. 39-50 / 1995 г. Берлинский конгресс 1. Тема «Национальная и социальная функция нотариуса» // Правовой журнал Нотариального Союза Турции. – № 86, 15 мая 1995 г. – С. 39-50.

DELİDUMAN, S. Medeni Usul ve İcra İflas Hukukunda Noter Senetleri, Ankara 2001, s. 32/ Нотариальные векселя в гражданско-процессуальном и исполнительном праве, а также закон о банкротстве. – Анкара, 2001. – С. 32.

Doğu, E. Noterlerin Hukuki Sorumluğu ve Güvence, TNBHD, S.24, 15 kasım 1979, s.579-610/ Правовая ответственность нотариусов и доверие // Правовой Журнал Союза нотариусов Турции. – № 24, 15 ноября 1979 г. – С. 579-610.

4.Закон № 1512 «О нотариате» от 18.01.1972 года, Официальная газета Турции от 05.02.1972 года, № 1490

KURT L. M. «NOTERLERİN HUKUKİ SORUMLULUĞU», Gazi Üniversitesi Hukuk Fakültesi Dergisi C. XVIII, Y. 2014, № 2, s.85-119/ Правовая ответственность нотариусов // Журнал юридического факультета Гази. – том 18, 2014 год, № 2. – С. 85-119 /https://webftp.gazi.edu.tr/hukuk/dergi/18_2_3.pdf

OKTAY ÖZDEMİR, Saibe, Yargıtay Uydulaması Işığında Noterlerin Hukuki Sorumluluklarının Dayandığı Esas ve Sorumluluğunun Koşulları, İstanbul, Alkim, 2007, s. 693-714/ Принципы и условия ответственности нотариусов в свете решения Верховного суда. – Стамбул: Алким, 2007. – С. 693-714.

ONAR, Sıddık Sami, İdare Hukukunun Umumi Esasları, 2.Cilt ,3.Baskı, İstanbul, İsmail Akgün Matbaası, 1966/ Общие принципы административного права, том 2. – 3-е издание. – Стамбул, типография Исмаила Акгюн, 1966.

PULAŞLI, H., Türk ve Alman Hukuklarında Noterlerin Hukuki Sorumluluğu , TNBHD., s.39, Y/ Юридическая ответственность нотариусов в турецком и немецком праве // Правовой журнал Нотариального Союза Турции. – С. 39,

TANRIVER, Süha, Avrupa Birliği Ülkelerinde Noterlik ve Noterlik Kanununda Değişiklşk Yapılmasına Dair Kanun Taslağının Getirdikleri,Prof.Dr.Baki Kuru Armağanı, Ankara, y.y.,2004, s.580, v.d./ Государственный нотариус в странах Европейского Союза и проект закона о внесении изменений в закон о нотариате, в память проф. д-р Баки Куру Гифт. – Анкара, 2004. – С. 580, и др.

TOPÇUOĞLU, M. Noter İle İş Sahibi (İlgili) Arasındaki İlişkinin Niteliği, BATİDER, 2000, C. XX, Sa. 4, s.191-213/ Отношения между нотариусом и работодателем. – BATİDER, 2000, Том XX, №. 4. – С.191-213.

ULUKAPI/ATALI, Noterlik Hukuku, Konya 1994/ Нотариальное право. – Кония, 1994.

ULUKAPI, Ö. Nöterlik Mesleği Noterlik Hak ve Yükümlülükleri, 2 Baskı, Konya 2010/Профессия нотариуса, права и обязанности. – 2 издание. – Кония, 2010.

Noterlik İşlemlerinin Elektronik Ortamda Yapılması Hakkında Yönetmelik, Yayımlandığı Resmî Gazete'nin sayısı 29413 tarihi 11.7.2015/ Положение о проведении нотариальных действий в электронном виде // Официальная газета. – № 29413 от 11.7.2015.

15/1/2004 tarihli ve 5070 sayılı ELEKTRONİK İMZA KANUNU/ Resmî Gazete Tarihi: 23.01.2004 Resmî Gazete Sayısı: 25355/ЗАКОН ОБ ЭЛЕКТРОННОЙ ПОДПИСИ от 15.01.2004 под номером 5070 // Официальная газета. – Дата: 23.01.2004 Номер 25355.

Noterlik Kanunu Yönetmeliği, RG.,T.13.07.1976, S.15645/ Положение Закона «О нотариате» // Официальная газета Турции от 13.07.1976 года, № 15645.

No 6100 Hukuk Usulü Muhakemeleri Kanunu: RG.,T.04.02. 2011, Sayı 27836/Гражданско-процессуальный кодекс № 6100 // Официальная газета. – 04.02.2011, № 27836.

References

BATMAZ, M.O. Noterlerin Hukuki Sorumluluğu, İstanbul, 2015, s.205/ Pravovaja otvetstvennost' notariusov, Stambul, 2015, 205 str.

BİLGE, M. Muhsin/BOZKURT, Hüseyin, U.İ.N.L. 1995 Berlin Kongresi 1. Tema Noterliğin Ulusal ve Toplumsal İşlevi, TNBHD, S:86, 15 Mayıs 1995, s.39-50/ 1995 g. Berlinskij kongress 1. Tema «Nacional'naja i social'naja funkcija notariusa», Pravovoj zhurnal Notarial'nogo Sojuza Turcii, № 86, 15 maja 1995 g., str. 39-50.

DELİDUMAN, S. Medeni Usul ve İcra İflas Hukukunda Noter Senetleri, Ankara 2001, s.32/ Notarial'nye vekselja v grazhdansko-processual'nom i ispolnitel'nom prave, a takzhe zakon o bankrotstve, Ankara, 2001 g., str. 32.

Doğu, E. Noterlerin Hukuki Sorumluğu ve Güvence, TNBHD, S.24, 15 kasım 1979, s.579-610/ Pravovaja otvetstvennost' notariusov i doverie, Pravovoj Zhurnal Sojuza notariusov Turcii., № 24, 15 nojabrja 1979 g., str. 579-610.

4.Zakon № 1512 «O notariate» ot 18.01.1972 goda, Oficial'naja gazeta Turcii ot 05.02.1972 goda, № 1490

KURT L. M. «NOTERLERİN HUKUKİ SORUMLULUĞU», Gazi Üniversitesi Hukuk Fakültesi Dergisi C. XVIII, Y. 2014, № 2, s.85-119/ Pravovaja otvetstvennost' notariusov, Zhurnal juridicheskogo fakul'teta Gazi, tom 18, 2014 god, № 2, str.85-119 / https://webftp.gazi.edu.tr/hukuk/dergi/18_2_3.pdf

OKTAY ÖZDEMİR, Saibe, Yargıtay Uydulaması Işığında Noterlerin Hukuki Sorumluluklarının Dayandığı Esas ve Sorumluluğunun Koşulları, İstanbul, Alkim, 2007, s.693-714/ Principy i uslovija otvetstvennosti notariusov v svete reshenija Verhovnogo suda, Stambul, Alkim, 2007 g., str. 693-714.

ONAR, Sıddık Sami, İdare Hukukunun Umumi Esasları, 2. Cilt, 3. Baskı, İstanbul, İsmail Akgün Matbaası, 1966/ Obshhie principy administrativnogo prava, tom 2, 3-e izdanie, Stambul, tipografija Ismaila Akgjun, 1966 g.

PULAŞLI, H., Türk ve Alman Hukuklarında Noterlerin Hukuki Sorumluluğu, TNBHD., s.39, Y/ Juridicheskaja otvetstvennost' notariusov v tureckom i nemeckom prave, Pravovoj zhurnal Notarial'nogo Sojuza Turcii, str. 39,

TANRIVER, Süha, Avrupa Birliği Ülkelerinde Noterlik ve Noterlik Kanununda Değişiklşk Yapılmasına Dair Kanun Taslağının Getirdikleri, Prof. Dr. Baki Kuru Armağanı, Ankara, y.y.,2004, s.580, v.d./ Gosudarstvennyj notarius v stranah Evropejskogo Sojuza i proekt zakona o vnesenii izmenenij v zakon o notariate, v pamjat' prof. d-r Baki Kuru Gift, Ankara, god izdanija 2004 g., str. 580, i dr.

TOPÇUOĞLU, M. Noter İle İş Sahibi (İlgili) Arasındaki İlişkinin Niteliği, BATİDER, 2000, C. XX, Sa. 4, s.191-213/ Otnoshenija mezhdu notariusom i rabotodatelem, BATİDER, 2000, Tom XX, №. 4, str.191-213.

ULUKAPI/ATALI, Noterlik Hukuku, Konya 1994/ Notarial'noe pravo, Konija 1994.

ULUKAPI, Ö. Nöterlik Mesleği Noterlik Hak ve Yükümlülükleri, 2 Baskı, Konya 2010/Professija notariusa, prava i objazannosti, 2 izdanie, Konija 2010.

Noterlik İşlemlerinin Elektronik Ortamda Yapılması Hakkında Yönetmelik, Yayımlandığı Resmî Gazete'nin sayısı 29413 tarihi 11.7.2015/ Polozhenie o provedenii notarial'nyh dejstvij v jelektronnom vide, Oficial'naja gazety, gazeta № 29413 ot 11.7.2015.

15/1/2004 tarihli ve 5070 sayılı ELEKTRONİK İMZA KANUNU/ Resmî Gazete Tarihi: 23.01.2004 Resmî Gazete Sayısı: 25355/ZAKON OB JeLEKTRONNOJ PODPISI ot 15.01.2004 pod nomerom 5070 / Oficial'naja gazeta Data: 23.01.2004 Nomer 25355

Noterlik Kanunu Yönetmeliği, RG., T.13.07.1976, S.15645/ Polozhenie Zakona o notariate, Oficial'naja gazeta Turcii ot 13.07.1976 goda, № 15645.

No 6100 Nukuk Usulü Muhakemeleri Kanunu: RG., T.04.02. 2011, Sayı 27836/Grazhdansko-processual'nyj kodeks № 6100: Oficial'naja gazeta, 04.02.2011, № 27836

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ALTERNATIVE DISPUTE RESOLUTION METHODS IN TURKISH LAW AND MEDIATION

One of the priority directions of legal reform at the present stage of development is the improvement of the system of application of alternative means of dispute resolution, designed to effectively and promptly ensure the resolution of disputes arising in civil law and related spheres of society in the process of building a democratic rule of law. To resolve the issues of the dispute, the subjects, the participants must come to a compromise in order to satisfy the requirements for each other. This issue is relevant for all countries of the world, which, to a greater or lesser extent, carry out transformations of civil justice systems for various periods of time. In this regard, it is obvious that today, both in developed and developing countries, significant experience has been formed and accumulated in reforming this area, which can form the basis of similar transformations in Turkey and significantly contribute to facilitating ongoing reforms by avoiding other people's mistakes and using mechanisms to obtain positive results.

Key words: reform, disputes, civil law, subject, mediation.

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Түрік құқығындағы дауларды шешудің балама әдістері және медиация

Дамудың қазіргі кезеңіндегі құқықтық реформаның басым бағыттарының бірі демократиялық құқықтық мемлекет құру процесінде азаматтық құқықта және қоғам өмірінің сабақтас салаларында туындайтын дауларды тиімді және жедел шешуді қамтамасыз етуге арналған дауларды шешудің балама құралдарын қолдану жүйесін жетілдіру болып табылады. Дау мәселелерін шешу үшін субъектілер, қатысушылар бір-біріне қойылатын талаптарды қанағаттандыру үшін ымыраға келуі керек. Бұл мәселе әлемнің барлық елдері үшін өзекті болып табылады, олар азды-көпті әртүрлі уақыт кезеңдерінде азаматтық сот ісін жүргізу жүйелерін қайта құруды жүзеге асырады. Осыған байланысты, бүгінгі таңда дамыған және дамушы елдерде Түркиядағы осындай өзгерістердің негізін құрайтын және басқа адамдардың қателіктерін болдырмау және оң нәтиже алу тетіктерін пайдалану арқылы жүргізіліп жатқан реформаларды жеңілдетуге айтарлықтай ықпал ететін осы саланы реформалаудың айтарлықтай тәжірибесі қалыптасып, жинақталғаны анық.

Түйін сөздер: реформа, даулар, азаматтық құқық, субъект, медиация.

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Альтернативные методы разрешения споров в турецком праве и посредничество

Одним из приоритетных направлений правовой реформы на современном этапе развития является совершенствование системы применения альтернативных средств разрешения споров, призванной эффективно и оперативно обеспечить разрешение споров, возникающих в гражданском праве и смежных сферах жизни общества в процессе построения демократического правового государства. Для разрешения вопросов спора субъекты, участники должны прийти к компромиссу, чтобы удовлетворить требования к друг другу. Этот вопрос является актуальным для всех стран мира, которые в большей или меньшей степени в течение различных по продолжительности периодов времени проводят преобразования систем гражданского судопроизводства. В этой связи очевидно, что на сегодняшний день как в развитых, так и в развивающихся странах сформирован

и накоплен значительный опыт реформирования данной области, который может лечь в основу аналогичных преобразований в Турции и существенно способствовать облегчению проводимых реформ за счёт избегания чужих ошибок и использования механизмов получения положительных результатов.

Ключевые слова: реформа, споры, гражданское право, субъект, медиация.

Introduction

The term "Alternative Dispute Resolution" or "ADR" implies a wide range of dispute resolution mechanisms that are alternative to the consideration of disputes in the courts.

This term can be used to refer to various dispute resolution mechanisms, ranging from negotiations to reach a settlement agreement (facilitated settlement negotiations), in which the parties to the dispute are encouraged to conduct direct negotiations before resorting to other legal dispute resolution mechanisms, and to arbitration, which can be very similar to litigation.

The system of alternative dispute resolution (ADR) is a set of tools and mechanisms that form the procedures for resolving and out-of-court settlement of disputes arising between the subjects of legal relations. At the same time, the ultimate goal of using APC is to resolve the conflict at the lowest cost for all its participants.

In this regard, the ADR system grows out of the correlation of three basic positions of conflict resolution in conflictology – power, rights and interests.

The position of power assumes that the interests of one side are suppressed due to the power advantage of the other side. It can be physical strength, numerical or technical superiority, finances or status, etc. This approach provides a quick solution to the problem and ensures the achievement of results.

The trial initially involves a confrontation between the parties and often further disrupts the relationship between them. Often, the issuance of a court decision does not mean a valid resolution of the conflict, but on the contrary, it can provoke its escalation. Not only the loser, but also the winning side is not satisfied with the result achieved.

The interest-based approach assumes that in order to resolve a dispute, the parties try to determine what was the basis for the dispute and, if possible, satisfy those interests that were infringed.

In the modern world, ADR is most common in commercial law, but in a number of countries these mechanisms are also used in civil proceedings. ARS are a less formal procedure compared to the procedure for considering cases in courts, they allow to significantly relieve the judicial system, while resolving the conflict that has arisen.

The main prerequisites for the use of ADR are:

- the parties to the conflict have a desire to preserve the existing relations between them by resolving the dispute through negotiations,
- the legal framework for conflict resolution does not make it possible to resolve the conflict in such a way that the solution is final and satisfactory for all parties,
- there is a need to resolve the conflict by the least painful means due to the need to preserve or terminate long–term relationships (for example, in family conflicts, conflicts with neighbors, in partnerships, etc.),
- between the parties to the conflict have multiple procedures or the conflict is complex,
- the situation requires a high level of confidentiality or separate discussion between the parties,
- the conflict affects the interests of more participants than only the direct parties to the conflict in the judicial process,
- the need to reduce the costs of dispute resolution,
- the parties want to resolve the conflict less formally,
- the parties want to resolve the conflict faster.

The position of law works where there is an application of the law in court, arbitration or arbitration court, any instructions, regulations, rules. In addition, this approach may include exerting pressure using the procedure of enforcement proceedings, business traditions, professional and ethical standards. In recent years, various countries have been working to create a uniform mediation model that can be applied in international child abductions. These countries continue these activities through some of their organizations and create mediation projects in accordance with The Hague Child Abduction Convention. We can show examples of these projects as the Reunite Project in the United Kingdom (https://www.reunite.org/) and the MiKK project in Germany (https://www.mikk-ev.de/). Thanks to these projects, mediation in disputes related to child abduction and, in some

cases, online mediation we see that the process is being operated.

Indeed, it is obvious that there are numerous benefits of using technology in mediation91. Online mediation brings them closer to each other rather than putting a distance between the parties. Decoupling between the parties, online mediation brings them closer to each other. Considering that the distances are determined according to the personal location of the parties, online mediation will provide or offer electronic proximity to the parties instead of putting a distance between the parties. Dec. Thus, the existence of the parties in different countries as the subject of disputes related to international child abductions is geographical the distance can be eliminated with the contribution of online communication tools. It is natural that concerns arise when negotiations are conducted online. Due to these concerns, online mediation has been criticized from many angles.

Currently, the geographical distance between the countries where the parties are located Decisively as it increases, it is seen that even those who are skeptical about the contribution of online communication tools take a step back in some cases92.Since the adoption of the Law on Mediation in Legal Disputes No. 6325 of 22/6/2012 in Turkish legislation, alternative dispute resolution methods, in fact, and when they find their place in practice, do not enter into any competition with state judicial authorities, do not act in the function of interference with the right to judicial proceedings, do not create such functions as an exception, they continue to act as a method of dispute resolution (Pekcanıtez 2015). In this sense, the current state of alternative dispute resolution methods is a well-established procedure, since the State provides funds in various and flexible ways that accompany the judicial proceedings without hindering the judicial application, sometimes even at a certain level.

Thus, mediation, which is common in the framework of alternative dispute resolution methods, is sometimes an additional adjective in terms of the nature of dispute resolution. Another point of view related to this is that, as the main goal and area of best practice of alternative dispute resolution methods, the absence of public order creates the possibility of decommunization, especially the will of the parties, in which more disputes can be resolved between the parties without increasing the presence and disagreements, as well as without increasing the burden of the court (Pekcanıtez 2015).

Thus, procedural activity is provided for in accordance with article 3/1 of the Law on Mediation in Legal Disputes, in which the parties can freely apply to the mediator, as well as refuse him at will, as well as in accordance with article 5/1 of the Rules of the Law on Mediation in Legal Disputes. Another basic principle of mediation is equality. About this HUAC M.3/2 and the Law on Mediation in Legal Disputes

His ruling mentions that he has equal rights throughout the 5/2 process. In the doctrine of alternative dispute resolution methods, some authors recognize as “types of solutions”. Somehow, if we sort them, it looks like this;

In the doctrine of alternative dispute resolution methods, some authors also recognize ‘solution types 3’. Somehow, if we list them, it is as follows;

1. Negotiation
2. Unbiased preliminary assessment,
3. Detection or detection of cases,
4. Short hearing,
5. Mediation-Arbitration.

Negotiation

By observing a common interest, the negotiation is carrying out the necessary communications to obtain the maximum benefit at the request of the stakeholders through the persons representing the parties. Rather, when a certain result is reached, negotiations are available in all alternative dispute resolution methods.

It is understood that the parties meet directly or with the contribution of their representatives, and a third person cannot contribute to such a meeting.

Unbiased preliminary assessment

In order to achieve a solution to the dispute, the parties, by a third party independent at the beginning of the dispute, the formation and subsequent development kayidedece about him and reaching an agreement on the patrol carried out by the presidency on a third party objective and the method of envisioning experienced alternative dispute resolution neutral pre-assessment method says .This method provides information and documents submitted by the parties in fact, the emergence of the dispute, the development and the future situation of what kind of process should be followed and how it can be met with, presented by an expert in the evaluation and preparation of a report for resolution. For this reason, the two parties have a new perspective on the dispute and come to a decision about the direction and method that they should follow.

Detection or detection of cases

In the method of detection or detection of cases, the case detectorist listens to the information submitted by the parties, evaluates and analyzes them.

In addition, if additional information is required from the parties and witnesses, October conducts separate interviews, undertakes to deepen, research and study the problem, and at the end of the activity also keeps a report with or without recommendations and presents it to the interested parties.

Short hearing

A short trial, impartial and independent third-party with the participation of Representatives binding supplies won't find a solution or a solution in a way to improve the function of mismatch, it's a problem almost internalizing and privacy to further review and evaluation with emphasis on an alternative method of conflict resolution.

Mediation-Arbitration

There is an opinion that this method has a mixed structure. The peculiarity of this method, which includes both mediation and arbitration, is that the parties first apply to mediation, and if the mediation process does not achieve the desired expectation (if it does not bring success), the dispute will now proceed by arbitration to resolve the dispute. For this reason, "mediation-arbitration" is the definition of a system in which mediation and arbitration are applied together.

The person who acts as a mediator during the dispute may then become the person who decides on the dispute as an arbitrator.

Results

In this article, I wrote (AUÇ/ADR-Alternative Dispute Resolutions), it was understood that mediation as an Alternative Dispute Resolution method in Turkish Law is a voluntary procedure for the parties as a rule, it is not binding and does not eliminate its burden in the state judicial system and does not compete with it if it is not satisfied. Although in a short time, since the law No. 6325 HUAK was adopted, it should be recognized that there is a new legal procedure that is developing even from day to day and decisively needs constant use among both real and legal persons. Although this process has been on the agenda in developed states since the 1960-1970 century, we can say that this system has developed quite rapidly in a very short time in Turkish law. At this time, the point I have emphasized is that alternative Dispute Resolution methods such as Negotiation, Impartial preliminary assessment, Determination or determination of cases, Short hearing, Mediation-Arbitration are evaluated during a dispute and contribute to the dispute resolution function. The main mediation is that the AUC is the most effective and most widely functioning during this time.

Mediation is the provision of the necessary activities and communication by a third party to the opposing parties in order to offer their own solutions and their own production by bringing together the parties who encounter disputes, aiming to keep in touch and negotiate, to understand each other Decisively.

Thus, the ADR procedures in the current doctrine constitute the following benefits:

1. To calculate the time of the parties with court costs during the case.
2. To contribute in reducing the workload of the court.
3. Increase the confidence of the parties in the justice system.
4. To provide appropriate solutions on the requests of individuals.
5. Continuation of values in business contacts and relations of the parties engaged in other relations.
6. To introduce to society the existence of practices in dispute resolution or a more efficient alternative to litigation.

It is an important development that some statements about the operation of the online mediation process are included in the Guide. Although it is not detailed, the fact that the issue is addressed under many headings and the use of this route is considered as an option depending on the nature of the concrete event shows that an approach that encourages the central authorities of the states to use this route has been adopted in the Manual. Considering the statements made on this subject, the Guide recommends that the parties meet face-to-face in the same environment, if possible, as many expert mediators have indicated references.

However, it concluded that if it is "appropriate and impossible" for both parties to be physically present at the mediation session, the possibility of long-distance, i.e. online, mediation or indirect mediation may also be considered.

We can understand the expression "if it is not appropriate and possible" for both parties to be physically present at a mediation session contained in the guide as follows: Face-to-face mediation may not be "appropriate" in terms of time or expense, as well as in terms of the circumstances of the concrete event it may not be "possible". That is to say, Mediation negotiations can be carried out by electronic mail, video call over the Internet, phone call, so that the process is more it will progress quickly. The rapid progress of the process will eliminate the uncertainty associated with the child's

condition. If the parties urgently agree on the return of the child to his habitual residence, the child will be able to return without achieving social integration with the place where he was abducted, or if the parties agree that he will stay in that place, the child will be able to achieve social integration more quickly and establish his habitual residence in the country where he was abducted. Shortening the process by using online mediation instead of extending the process with face-to-face negotiations, it will serve to protect the superior benefit of the child, which is also the main purpose of the contract.

In the online mediation process, additional cost items such as accommodation, meals, domestic transportation arising from the face-to-face mediation process are not included.

References

https://www.reunite.org/

https://www.mikk-ev.de/

Kucinski, Using Technology in Mediating, s. 313 vd. 92 Bkz. Cunha, s. 173; Martin, s. 400; Van Arsdale, Suzanne: "User Protection in Online Dispute Resolution", Harv. Negot. L. Rev. 2015, vol. 21, no. 1, s. 110; Bu konuda

Pekcanıtez H., s. 15; Tanrıver S., Sosyolojik Bir Bakış, s. 821 vd; Tanrıver S., Alternatif, s.152; Özekes M., Pekcanıtez, H. Usûl, C.III s. 2806; Özekes M., Arabulucu, s. 42; Özbek S., Alternatif, s.191 vd.; Özbek S., Adalete Ulaşma, s. 137 vd.; Kaplan Y., s.116; Kekeç K., s.13; Taşpolat Tuğsavul, s. 24; Ildır G., s. 26 vd.; Biçkin İ., s. 35.

Pekcanıtez H., s.15; Tanrıver S., Sosyolojik Bir Bakış, s.822; Özekes M., Arabulucu. s. 42. Yazıcı Tıktık, s. 6;

Ekmekçi Ö, Özekes M., Atalı M., Seven V., s.8.

Ekmekçi Ö., Özekes M., Atalı M., Seven V.: Hukuk Uyuşmazlıklarında

Arabuluculuk, Bası, İstanbul 2019.

Kekeç E.K.: Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel

Aşamalar ve Taktikler, 3 B., Ankara 2016.

Özbek S.: Alternatif Uyuşmazlık Çözümü, Ankara, 2004.

Ildır G.: Alternatif Uyuşmazlık Çözümü, Ankara, 2003.

Pekcanıtez H.: Alternatif Uyuşmazlık Çözümleri (HPD., 2005/5, s.12-16).

Tanrıver S.: Medeni Usûl Hukuku, C. I,2. B, Ankara 2018. (Tanrıver-Usûl).

HUAK: 6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu.

МАЗМҰНЫ – CONTENTS – СОДЕРЖАНИЕ

5-бөлім Халықаралық қатынастар және халықаралық құқық	Section 5 International relationships and international law	Раздел 5 Международные отношения и международное право