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Тел.: 8 (7172) 26-61-29

Қазақстан Республикасы Ақпарат
және коммуникациялар министрлігі
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19, С-блогы, 306-каб., тел.: 8 (7172) 26-61-22
www.zqai.kz, E-mail: instzak-kz@mail.ru
institutzakonodatelstva@gmail.com

Редакция бағанасы..... 7

Конституциялық және әкімшілік құқық

Р.К. СӘРПЕКОВ Конституциялық реформа
Қазақстанның саяси жүйесін қайта бастаудың
негізгі нүктесі ретінде 13

Б.К. НҰРҒАЗИНОВ, А.Н. ОСПАНОВА
Қазақстан Республикасында мемлекеттік
қызметке кіру кезіндегі кейбір ұсыныстар 22

Л.Т. ЖАНҰЗАҚОВА Нормативтік құқықтық
актілердің иерархиясы туралы..... 32

Е.С. ӘБІЛҒАЗИН, Қ.Т. МУРЗАШЕВ
Қазақстан Республикасы азаматтарының төлем
қабілеттілігін және банкроттықты қалпына
келтіру мәселесіне..... 40

В.И. ОЛЕЙНИК, Б.А. АМАНЖОЛОВА
Қазақстан Республикасында заң білімін жетілдіру 47

А.Қ. ҚҰРМАНОВА Генетикалық ақпаратты
пайдаланудың қолданыстағы заңнаманың
нормаларымен регламенттеудің құқықтық мәселелері 57

Азаматтық және азаматтық-процестік құқық

Р.М. ЖАНҒАРАШЕВ Біріккен Корольдіктің
корпоративтік басқару кодексінде «сақта
немесе түсіндір» қағидатының тиімділігін
қалай арттыруға болады? 67

Е.Г. КОМИССАРОВА (Пермь қ., РФ),
С.К. ЫДЫРЫШЕВА, Т.В. КРАСНОВА
(Тюмень қ., РФ) Өгей әке мен өгей баланың
жеке мүліктік емес қатынастары: құқықтық
мәндерін іздеу..... 73

М.Қ. ЖҮСІПБЕКОВА, Э.О. ТОЙЛЫБЕКОВА,
К.Ж. ЖАРЕКЕЕВ Қазақстан Республикасында
аграрлық секторды тамақ және азық-түлік
қауіпсіздігін қамтамасыз етудің шарты
ретінде дамыту 86

Р.Г. НҰРМАҒАМБЕТОВ, С.М. ШОНАЕВА
Қазақстан Республикасында еңбекті қорғау
саласындағы білім беру қызметтерінің баға
демпингін теориялық-құқықтық еңсеру туралы
мәселеге: қатынастарды реттеу қағидаттарын
бекітудегі шет елдердің тәжірибесі 95

Ш.У. БУРАШОВ, Б.А. ТАЙТОРИНА,
Д.Н. БЕКЕЖАНОВ Қазақстан Республикасындағы
білім беру қызметтерін тұтынушылардың құқықтары:
тұжырымдамалау мәселелері және заңнаманы
жаңғырту сұрақтары 104

А.Қ. ҚАЙШАТАЕВА, Р.Т. БАЯЗИТОВА Еңбек құқық қатынастарындағы стандарттар: теориялық-құқықтық талдаудың кейбір аспектілері.....	116
А.Қ. ҚАЛДЫБАЕВ Компаниялардың қатысу үлестерін (акцияларын) иеліктен шығару туралы шарттарда және корпоративтік шарттарда шетелдік заңнаманы қолдану.....	125
Қылмыстық құқық және қылмыстық процесс	
С.С. ҚАРЖАУБАЕВ Алқабилер сотының соттылығын кеңейту: заңнама мен құқықтық техниканың тұрақтылығы мәселелері	134
М.Ш. ҚҰРМАНҒАЛИ, Ж.Ю. САЙЛИБАЕВА Әлеуметтік желілердегі судьялық этика: халықаралық стандарттар және шетелдік тәртіптік тәжірибе.....	142
А.Қ. ҚАНАТОВ, М.А. ШӘКЕНОВ Қазақстандағы адам құқықтары жөніндегі уәкіл институты (заң шығарудағы иммерсивті ұстаным)	152
Ж.Ө. ӨМІРӘЛІ, Б.Қ. ИЛЬЯСОВА Сот билігінің егемендігі.....	163
Халықаралық құқық және салыстырмалы құқықтану	
А.М. ҚАРАТАЕВА, Д.Б. МАХАМБЕТСАЛИЕВ АҚШ-тағы атқарушы биліктің конституциялық-құқықтық реттелуі	175
А.А. АХМЕТОВА, К. ЭСПЛЮГЕС (Валенсия қ., Испания), З.М. БАЙМАҒАМБЕТОВА Дүниежүзілік сауда ұйымының келісімдерін астық саудасы жөніндегі дауларда қолдану практикасы.....	185
Құқықтық мониторинг	
С.И. КЛИМКИН, А.Ғ. ҚАЗБАЕВА Коммерциялық емес ұйымдарды заңнамалық реттеудің тиімсіздігі туралы мәселесіне.....	195
А.Ө. ҚАЛИЕВА «Кәсіптік одақтар туралы» Қазақстан Республикасы Заңының ақаулары туралы мәселеге (кәсіподақтар саласындағы заңнаманы талдау нәтижелері).....	204
Мемлекеттік тілдегі заңшығармашылық практикасынан	
Н.М. ПРИМАШЕВ Терминдер қорының жай-күйі және оны жетілдірудің кейбір жолдары (әскери іс саласы мысалында)	213
Жас ғалым мінбері	
Е.Б. АХМЕТОВ, М.К. ЖҮРҮНОВА Қазақстан Республикасының әкімшілік сот ісін жүргізу және әкімшілік рәсімдердің қағидаттарын жіктеу мәселесіне.....	223
Т.А. МАЗУРОВА (Минск Қ., БР) Професионалды спорт саласындағы қызметті жүзеге асыратын қызметкерлермен еңбек шартын тоқтата тұрудың кейбір құқықтық проблемалары (Беларусь Республикасы мен Ресей Федерациясының заңнамасы бойынша)	234
М.А. АЛДИЯРХАН Қазақстан Республикасы қылмыстық заңнамасы бойынша түзеу жұмыстарын қолданудың әлеуетін арттыру мәселелері	244
Р.Ж. БӘЙШЕВ Тұтынушылық несиелеуді реттеудің салыстырмалы-құқықтық талдауы (Еуропа, Ресей және Қазақстан тәжірибесі).....	254
Е.К. ТОРСЫҚБАЕВ Өндіріп алушы талаптары көлемінің және мәжбүрлеп орындату шараларының арақатынасы қағидатын сақтау.....	263
«Жаршынын» архивтегі беттері	
А. Б. ШАЙКЕНОВА Жаңартылатын энергия көздерін пайдалануды нормативтік реттеуді жетілдіру мәселелері туралы Е. А. Дүйсеновтың, А. К. Лямбекованың ғылыми жарияланымна қайта оралғанда, №3(48)-2017 Нравится17.....	271
Р.К. СӘРПЕКОВ Ұлы ұстазды еске алу	277



ВЕСТНИК

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Редактор – **Колтубаева Г.Б.**
Верстка – **Тасирова А.С.**
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Адрес: Республика Казахстан, 010000,
г. Нур-Султан, пр. Кабанбай батыра, 19,
блок С, каб. 306, тел.: 8 (7172) 26-61-22
www.zqai.kz, E-mail: instzak-kz@mail.ru
institutzakonodatelstva@gmail.com

Колонка редакции	9
Конституционное и административное право	
Р.К. САРПЕКОВ Конституционная реформа как основной поинт перезапуска политической системы Казахстана	13
Б.К. НУРГАЗИНОВ, А.Н. ОСПАНОВА Некоторые предложения при поступлении на государственную службу в Республике Казахстан	22
Л.Т. ЖАНУЗАКОВА Об иерархии нормативных правовых актов	32
Е.С. АБУЛГАЗИН, К.Т. МУРЗАШЕВ К вопросу о восстановлении платежеспособности и банкротстве граждан Республики Казахстан	40
В.И. ОЛЕЙНИК, Б.А. АМАНЖОЛОВА Совершенствование юридического образования в Республике Казахстан	47
А.К. КУРМАНОВА Правовые вопросы регламентации использования генетической информации по действующему законодательству	57
Гражданское и гражданско-процессуальное право	
Р.М. ДЖАНГАРАШЕВ Каким образом можно повысить эффективность принципа «соблюдай или разясняй» в кодексе корпоративного управления Соединенного Королевства	67
Е.Г. КОМИССАРОВА (г. Пермь, РФ), С.К. ИДРЫШЕВА, Т.В. КРАСНОВА (г. Тюмень, РФ) Личные неимущественные отношения отчима и пасынка: в поисках юридических сущностей	73
М.К. ЖУСУПБЕКОВА, Э.О. ТОЙЛЫБЕКОВА, К.Ж. ЖАРЕКЕЕВ Развитие аграрного сектора как условие обеспечения пищевой и продовольственной безопасности в Республике Казахстан	86
Р.Г. НУРМАГАМБЕТОВ, С.М. ШУНАЕВА К вопросу о теоретико-правовом преодолении ценового демпинга образовательных услуг в сфере охраны труда в Республике Казахстан: опыт зарубежных стран в закреплении принципов регулирования отношений	95
Ш.У. БУРАШОВ, Б.А. ТАЙТОРИНА, Д.Н. БЕКЕЖАНОВ Права потребителей образовательных услуг в Республике Казахстан: проблемы концептуализации и вопросы модернизации законодательства	104

СОДЕРЖАНИЕ

А.К. КАЙШАТАЕВА, Р.Т. БАЯЗИТОВА

Стандарты в трудовых правоотношениях: некоторые аспекты теоретико-правового анализа 116

А.К. КАЛДЫБАЕВ Применение иностранного права в договорах по отчуждению долей участия (акций) компаний и в корпоративных договорах 125

Уголовное право и уголовный процесс

С.С. КАРЖАУБАЕВ Расширение подсудности суда присяжных: проблемы стабильности законодательства и юридической техники 134

М.Ш. ҚҰРМАНҒАЛИ, Ж.Ю. САЙЛИБАЕВА Судейская этика в социальных сетях: международные стандарты и зарубежная дисциплинарная практика 142

А.К. КАНАТОВ, М.А. ШАКЕНОВ Институт Уполномоченного по правам человека в Казахстане (иммерсивный подход в законотворчестве) 152

Ж.Ө. ӨМІРӘЛІ, Б.Қ. ИЛЬЯСОВА Суверенитет судебной власти 163

Международное право и сравнительное правоведение

А.М. КАРАТАЕВА, Д.Б. МАХАМБЕТСАЛИЕВ Конституционно-правовое регулирование исполнительной власти в США 175

А.А. АХМЕТОВА, К. ЭСПЛЮГЕС (г. Валенсия, Испания),
З.М. БАЙМАГАМБЕТОВА Практика применения соглашений Всемирной торговой организации в спорах по торговле зерном 185

Правовой мониторинг

С.И. КЛИМКИН, А.Г. КАЗБАЕВА К вопросу о неэффективности законодательного регулирования некоммерческих организаций 195

К.У. КАЛИЕВА К вопросу о дефектах Закона Республики Казахстан «О профессиональных союзах» (результаты анализа законодательства в сфере профсоюзов) 204

Из практики законотворчества на государственном языке

Н.М. ПРИМАШЕВ Состояние фонда терминов и некоторые пути его совершенствования (на примере сферы военного дела) 213

Трибуна молодого ученого

Е.Б. АХМЕТОВ, М.К. ЖУРУНОВА К вопросу о классификации принципов административного судопроизводства и административных процедур Республики Казахстан 223

Т.А. МАЗУРОВА (г. Минск, РБ) Некоторые правовые проблемы приостановления трудового договора с работниками, осуществляющими деятельность в сфере профессионального спорта (по законодательству Республики Беларусь и Российской Федерации) 234

М.А. АЛДИЯРХАН Вопросы повышения потенциала применения исправительных работ по уголовному законодательству Республики Казахстан 244

Р.Ж. БАИШЕВ Сравнительно-правовой анализ регулирования потребительского кредитования (опыт Европы, России и Казахстана) 254

Е.К. ТОРСЫКБАЕВ Соблюдение принципа соотносимости объема требований взыскателя и мер принудительного исполнения 263

Архивные страницы «Вестника»

А.Б. ШАЙКЕНОВА Возвращаясь к научной публикации Дюсенова Е.А., Лямбековой А.К. о вопросах совершенствования нормативного регулирования использования возобновляемых источников энергии, №3(48)-2017 271

Р.К. САРПЕКОВ Памяти великого учителя 277



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www.zqai.kz, e-mail: instzak-kz@mail.ru
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Editorial 11

Constitutional and Administrative Law

- R.K.SARPEKOV** Constitutional reform as the main point of restarting the political system of Kazakhstan 13
B.K. NURGAZINOV, A. N. OSPANOVA Some proposals for entering public service in the Republic of Kazakhstan 22
L.T. ZHANUZAKOVA On the hierarchy of normative legal acts 32
E.S. ABULGAZIN, K.T. MURZASHEV To the question of restoration of solvency and bankruptcy of citizens of the Republic of Kazakhstan 40
V.I. OLEINIK, B.A. AMANZHOLLOVA Improvement of legal education in the Republic of Kazakhstan 47
A.K. KURMANOVA Legal issues of regulation of the use of genetic information by the norms of the current legislation 57

Civil and Civil Procedure Law

- R.M. JANGARASHEV** How can the effectiveness of the «comply or explain» principle in the UK corporate governance code be improved? 67
E.G. KOMISSAROVA (Perm, Russia),
S.K. IDRYSHEVA, T.V. KRASNOVA (Tyumen, Russia) Personal non-property relationships of the step-father and stepson: in search of legal entities 73
M.K. ZHUSUPBEKOVA, E.O. TOYLYBEKOVA, K.ZH. ZHAREKEEV Development of the agricultural sector in the Republic of Kazakhstan as a condition for ensuring food and food security 86
R.G. NURMAGAMBETOV, S.M. SHUNAEVA To the question of theoretical and legal overcoming of educational services price dumping in the sphere of occupational safety in the Republic of Kazakhstan: experience of foreign countries in consolidation of the principles of regulation of relations 95
SH.U. BURASHOV, B.A. TAITORINA, D.N. BEKEZHANOV Rights of consumers of educational services in the Republic of Kazakhstan: problems of conceptualization and issues of modernization of legislation 104
A.K. KAISHATAYEVA, R.T. BAYAZITOVA Standards in labor relations: some aspects of theoretical and legal analysis 116

CONTENT

A. KALDYBAYEV The application of foreign law in agreements on the alienation of participation interests (shares) of companies and in corporate agreements	125
--	-----

Criminal law and Criminal procedure

S.S. KARZHAUBAYEV Expanding the jurisdiction of the jury: problems of stability of legislation and legal technology	134
M. KURMANGALI, ZH. SAILIBAYEVA Judge ethics in social networks: international standards and foreign disciplinary practice	142
A.K. KANATOV, M.A. SHAKENOV Institute of the commissioner for human rights in Kazakhstan (immersive approach to lawmaking)	152
ZH. OMIRALI, B.K. ILYASOVA Sovereignty of the judiciary	163

International law and Comparative law

A.M. KARATAYEVA, D.B. MAKHAMBETSALIYEV Constitutional legal regulation of the executive branch in the United States.....	175
A.A. AKHMETOVA, C. ESPLUGUES (Valencia, Spain), Z.M. BAIMAGAMBETOVA The practice of applying World Trade Organization agreements in grain trade disputes	185

Legal monitoring

S.I. KLIMKIN, A.G. KAZBAYEVA To the question of inefficiency of legislative regulation of non-commercial organizations.....	195
K.Y. КАЛИЕВА К вопросу о дефектах Закона Республики Казахстан «О профессиональных союзах» (результаты анализа законодательства в сфере профсоюзов)	204

From the lawmaking practice in the official language

N.M. PRIMASHEV The state of the fund of terms and certain ways to improve it (on the example of the sphere of military affairs)	213
--	-----

Young researchers' tribune

Y.B. AKHMETOV, M.K. ZHURUNOVA On the classification of the principles of administrative proceedings and administrative procedure of the Republic of Kazakhstan.....	223
T.A. MAZUROVA (Minsk, RB) Some legal problems of suspension of an employment contract in the field of professional sports (under the legislation of the Republic of Belarus and the Russian Federation).....	234
M.A. ALDIYARKHAN Issues of increasing the potential for the use of correctional labor in the criminal legislation of the Republic of Kazakhstan	244
R. BAISHEV Legal comparative analysis of consumer lending regulation (experience of Europe, Russia and Kazakhstan).....	254
E.K. TORSYKBAEV Compliance with the principle of correlation of the volume of the claimant's claims and enforcement measures	263

The archive pages of the «Bulletin»

A.B. SHAIKENOVA Returning to the scientific publication of Dyussenov Ye.A., Lyambekova A.K. on the issues of improving regulation of the use of renewable energy sources, №3(48)-2017	271
R.K. SARPEKOV To the memory of a great teacher.....	277

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TO THE QUESTION OF INEFFICIENCY OF LEGISLATIVE REGULATION OF NON-COMMERCIAL ORGANIZATIONS

Klimkin Sergey Ivanovich

*Chief researcher of Institute of Legislation and Legal Information
of the Republic of Kazakhstan, Narxoz University professor,
candidate of juridical sciences,
Almaty, Republic of Kazakhstan, e-mail: sergklimkin@mail.ru*

Kazbayeva Assel Gabidenovna¹

*Deputy director of the Institute of Legislation
and Legal Information of the Republic of Kazakhstan,
candidate of juridical sciences,
Nur-Sultan, Republic of Kazakhstan, e-mail: kazbaeva.a@zqai.kz*

Abstract. *In accordance with the first part of Article 1 of the Law of the Republic of Kazakhstan “On non-commercial organizations” dated January 16, 2001 No. 142, the subject of regulation of the Law are relations arising in connection with the creation, activities, reorganization and liquidation of non-commercial organizations.*

Aspects of the legal status, establishment, activities, reorganization and liquidation of political parties, trade unions, certain types of institutions, public associations, consumer cooperatives, religious associations, the National chamber of entrepreneurs of the Republic of Kazakhstan, other organizational and legal forms of non-commercial organizations are regulated by special laws. The Law consists of 43 articles combined into 6 chapters. It stands to mention that since the adoption of the Law, it has been amended and supplemented 45 times by the laws of the Republic of Kazakhstan.

Moreover, in 2021, the Ministry of Information and Social Development of the Republic of Kazakhstan, in pursuance of the Decree of the Head of State “On further measures of the Republic of Kazakhstan in the field of human rights” and in order to increase the effectiveness of interaction with non-governmental organizations, began to develop a regulatory policy advisory document to the draft Law of the Republic of Kazakhstan “On non-commercial organizations”. At the same time, this draft law is planned to be developed in a new edition through the absorption of the Law of the Republic of Kazakhstan dated May 31, 1996 No. 3-I “On public associations”.

Given this circumstance, as well as the problems of interaction between the authorities and non-governmental organizations in the Republic of Kazakhstan, and in general the division of legal entities, we believe that the information presented for your review will be timely and appropriate. The article was prepared based on the analysis of the effectiveness of the Laws of the Republic of Kazakhstan “On non-commercial organizations” and “On public associations”.

Key words: *public monitoring of normative legal acts, analysis of the effectiveness of legislation, shortcomings of the law, legal entities, non-commercial organizations, non-governmental organizations, legal monitoring.*

КОММЕРЦИЯЛЫҚ ЕМЕС ҰЙЫМДАРДЫ ЗАҢНАМАЛЫҚ РЕТТЕУДІҢ ТИІМСІЗДІГІ ТУРАЛЫ МӘСЕЛЕСІНЕ

Сергей Иванович Климкин

*Қазақстан Республикасы Заңнама және құқықтық институтының
бас ғылыми қызметкері, «Нархоз университеті» КеАҚ профессоры,
заң ғылымдарының кандидаты,
Алматы қ., Қазақстан Республикасы, e-mail: sergklimkin@mail.ru*

¹ Author for correspondence

Әсел Габиденқызы Қазбаева

Қазақстан Республикасы Заңнама және
құқықтық институты директорының орынбасары,
заң ғылымдарының кандидаты,
Нұр-Сұлтан қ., Қазақстан Республикасы, e-mail: kazbaeva.a@zqai.kz

Аннотация. «Коммерциялық емес ұйымдар туралы» Қазақстан Республикасының 2001 жылғы 16 қаңтардағы № 142 Заңының 1-бабының бірінші бөлігіне сәйкес коммерциялық емес ұйымдардың құрылуына, қызметіне, қайта ұйымдастырылуына және таратылуына байланысты туындайтын қатынастар Заңның реттеу нысаны болып табылады.

Саяси партиялардың, кәсіптік одақтардың, мекемелердің жекелеген түрлерінің, қоғамдық бірлестіктердің, тұтыну кооперативтерінің, діни бірлестіктердің, Қазақстан Республикасының Ұлттық кәсіпкерлер палатасының, коммерциялық емес ұйымдардың өзге де ұйымдық-құқықтық нысандарының құқықтық жағдайының, құрылуының, қызметінің, қайта ұйымдастырылуының және таратылуының ерекшеліктері арнайы заңдармен реттеледі. Осы Заң 6 тарауға біріктірілген 43 баптан тұрады. Заң қабылданған күннен бастап оған Қазақстан Республикасының заңдарымен 45 рет өзгерістер мен толықтырулар енгізілгенін.

Бұдан басқа, 2021 жылы Қазақстан Республикасы Ақпарат және қоғамдық даму министрлігі Мемлекет басшысының «Қазақстан Республикасының Адам құқықтары саласындағы одан әрі шаралары туралы» Жарлығын орындау үшін және үкіметтік емес ұйымдармен өзара іс-қимылдың тиімділігін арттыру мақсатында «Коммерциялық емес ұйымдар туралы» Қазақстан Республикасы Заңының жобасына реттеушілік саясаттың консультативтік құжатын әзірлеуге кірісті. Сонымен қатар, бұл заң жобасын «Қоғамдық бірлестіктер туралы» Қазақстан Республикасының 1996 жылғы 31 мамырдағы № 3-І Заңын қосып алу арқылы жаңа редакцияда әзірлеу жоспарлануда.

Осындай мән-жайды, сондай-ақ Қазақстан Республикасындағы билік пен үкіметтік емес ұйымдардың өзара іс-қимылының мәселелерін және тұтастай алғанда заңды тұлғалардың бөлінуін ескере отырып, сіздің көз алдыңызға ұсынылған мәселе уақтылы әрі орынды болады деп пайымдаймыз. Мақала Қазақстан Республикасының «Коммерциялық емес ұйымдар туралы» және «Қоғамдық бірлестіктер туралы» Заңдарының тиімділігін талдау нәтижелері бойынша дайындалды.

Түйін сөздер: нормативтік құқықтық актілердің қоғамдық мониторингі, заңнаманың тиімділігін талдау, заңның кемшіліктері, заңды тұлғалар, коммерциялық емес ұйымдар, үкіметтік емес ұйымдар, құқықтық мониторинг.

К ВОПРОСУ О НЕЭФФЕКТИВНОСТИ ЗАКОНОДАТЕЛЬНОГО РЕГУЛИРОВАНИЯ НЕКОММЕРЧЕСКИХ ОРГАНИЗАЦИИ

Климкин Сергей Иванович

г.н.с. Института законодательства и правовой информации
Республики Казахстан, профессор НАО «Университет Нархоз»,
кандидат юридических наук,
г. Алматы, Республика Казахстан, e-mail: sergklimkin@mail.ru

Казбаева Асель Габиденовна

Заместитель директора Института законодательства
и правовой информации Республики Казахстан,
кандидат юридических наук, г. Нұр-Сұлтан,
Республика Казахстан, e-mail: kazbaeva.a@zqai.kz

Аннотация. В соответствии с частью первой статьи 1 Закона Республики Казахстан «О некоммерческих организациях» от 16 января 2001 года № 142 предметом регулирования Закона являются отношения, возникающие в связи с созданием, деятельностью, реоргани-

защитой и ликвидацией некоммерческих организаций.

Особенности правового положения, создания, деятельности, реорганизации и ликвидации политических партий, профессиональных союзов, отдельных видов учреждений, общественных объединений, потребительских кооперативов, религиозных объединений, Национальной палаты предпринимателей Республики Казахстан, иных организационно-правовых форм некоммерческих организаций регулируются специальными законами. Настоящий закон состоит из 43 статей, объединенных в 6 глав. Стоит отметить, что со дня принятия Закона в него - законами Республики Казахстан вносились 45 раз изменения и дополнения.

Более того, в 2021 году Министерство информации и общественного развития Республики Казахстан во исполнение Указа Главы государства

«О дальнейших мерах Республики Казахстан в области прав человека» и в целях повышения эффективности взаимодействия с неправительственными организациями приступило к разработке Консультативного документа регуляторной политики к проекту Закона Республики Казахстан «О некоммерческих организациях». Вместе с тем, этот законопроект планируется разработать в новой редакции посредством поглощения Закона Республики Казахстан от 31 мая 1996 г. № 3-І «Об общественных объединениях».

Учитывая такое обстоятельство, а также проблемы взаимодействия власти и неправительственных организаций в Республике Казахстан, да и в целом делению юридических лиц полагаем, что представленная на ваше обозрение будет своевременной и уместной. Статья подготовлена по результатам анализа эффективности Законов Республики Казахстан «О некоммерческих организациях» и «Об общественных объединениях».

Ключевые слова: общественный мониторинг нормативных правовых актов, анализ эффективности законодательства, недостатки закона, юридические лица, некоммерческие организации, неправительственные организации, правовой мониторинг.

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Introduction

In accordance with the Law of the Republic of Kazakhstan “On non-commercial organizations”, the subjects of regulated public relations are: institution, public association, fund, consumer cooperative, religious association, non-commercial joint-stock company, autonomous educational organizations, autonomous cluster fund, notary chambers, bar associations, law firms, National Chamber of Entrepreneurs, The Chamber of forensic experts of the Republic of Kazakhstan, the Republican chamber of private enforcers, the Arbitration chamber of Kazakhstan, professional audit organizations, cooperatives of apartment owners, associations of property owners of multi-apartment residential buildings, other non-commercial organizations, an association of individual entrepreneurs and (or) legal entities in the form of an association (union), bodies of state registration of legal entities, licensors, founders (participants) of a non-commercial organization, management bodies of a non-commercial organization and other self-regulatory organizations, interested parties, creditors, staff members of a non-commercial organization, state bodies, authorized body in the field of statistics, state

revenue authorities, foreign states, international and foreign organizations, foreigners and stateless persons, authorized body in the field of interaction with non-governmental organizations, court, prosecution authorities.

Before proceeding to the results of the analysis and answering the question about the effectiveness of the legislative regulation of non-commercial organizations, we note that the Law adopted 21 years ago caused heated discussion, and sometimes resentment among civil scientists. Of course, the very concept of the draft law on non-commercial organizations can not be found in open sources, but the statements of scientists regarding this draft law are enough to draw such conclusions. In particular, doctors of sciences, professors Suleimenov M.K. and Basin Y.G. gave a negative opinion on the draft law, since it basically repeated the provisions of the Civil Code of the Republic of Kazakhstan, and often there was a textual discrepancy between the rules of this Code and the draft law, creating unnecessary disagreements in regulating the activities of non-commercial organizations [1].

As professor Klimkin S.I. notes, from the point of view of legal technique, duplication of the norms of the Civil Code and the relevant

legislative act regulating non-commercial legal entities is unacceptable. In such a situation, the Civil Code simply loses its significance, since it literally becomes unnecessary for law enforcement practice [2]. Therefore, the issue of developing and adopting such a law already at that time produced indignation and questions about its expediency and effectiveness in law enforcement practice.

Moreover, on September 02, 2019, the Head of State Tokayev K-Zh.K in his Address to the people of Kazakhstan drew attention to the need to support and strengthen civil society, to involve it in the discussion of the most pressing national problems in order to solve them. Public dialogue, openness, prompt response to the needs of people are defined by him as the main priorities in the activities of state bodies. By that, the President of the country points out the need to increase the authority of non-governmental organizations in order to form an active civil society. In this regard, the Concept for the development of civil society until 2025 should be developed and adopted in the near future [3]. On August 27, 2020, this Concept was approved by the Decree of the President of the Republic.

We add that the instruction arose due to difficulties in implementing the analyzed Law in terms of the lack of mechanisms for the development of such forms of non-commercial organizations and the ensuing legislative restrictions on them as a result of discussions of the VIII Civil Forum of Kazakhstan [4]. Thus, non-governmental organizations should become a driver for promoting high standards of quality of life. The five social initiatives he announced should be implemented in close cooperation with non-governmental organizations [5].

In view of the foregoing, it can be stated that the issues raised by the authorized body on improving the scope of legal regulation of non-commercial organizations and resolving issues related to non-governmental organizations are timely and consistent with the strategic goals of the country.

The methodological basis of a scientific article is the method of systematic study of an object in its interrelations, dynamics of development, as well as such general scientific methods as the method of abstraction, the method of analysis and synthesis. Also, such private-scientific methods were used as:

comparative-legal, technical-legal methods and formal-legal analysis. To complete the study of the problems, it was necessary to turn to the interpretation of the rules of law, as well as to the collection and processing of factual data of law enforcement practice.

Discussion

According to subparagraph 3) of paragraph 17 of the Rules for conducting legal monitoring², there is a requirement to use the results of the analysis of the effectiveness of legislation (analysis of regulatory legal acts). Thus, in 2020 and 2022, the Institute conducted an analysis of the Laws of the Republic of Kazakhstan “On non-commercial organizations” and “On public associations”. Furthermore, on September 24, 2021, they took part in a round table on the topic: “Conceptual issues of legal regulation of non-commercial organizations”, as a result of which the authorized state body focuses on the development of a law on non-commercial organizations in a new edition.

Moreover, in the Concept of legal policy until 2030, albeit briefly, but attention is drawn to the need to improve the legislation on non-commercial legal entities, we consider it necessary to disclose in this article the following questions:

1. on the division of legal entities into commercial and non-commercial;
2. on organizational and legal forms of non-commercial legal entities;
3. about the definition of “non-commercial organization” and “non-governmental organization”.

General considerations

We began to deal with the issue of dividing legal entities into commercial and non-commercial back in 1998, when the first publication directly on this topic was published [6]. In the future, the study of the issue was continued [7].

As a result of our research, we came to the conclusion that none of the two features that Article 34 of the Civil Code lays down as the basis for such a division is absolute. Thus, on the one hand, non-commercial legal entities do not have income extraction as the main goal of their activities, on the other hand, they can engage in entrepreneurial activities, since this corresponds to their statutory goals. That is, the extraction of income is an inherent characteristic

² Decree of the Government of the Republic of Kazakhstan dated August 29, 2016 No. 486 “On approval of the Rules for conducting legal monitoring” // Internet source <https://adilet.zan.kz/rus/docs/P1600000486/history>

of both types of legal entities.

Next. On the one hand, non-commercial organizations do not distribute the net income received among the participants, on the other hand, governmental enterprises do not distribute it either. He is taken from them. Therefore, this principle is peculiar not only to one type of legal entities.

Continuing this topic, we note that, in our opinion, the formulation of the question of the distribution or non-distribution of net income as a sign of this or that type of legal entity is frustrated. Let's illustrate this question on the example of a paid non-governmental educational (medical, cultural, sports, etc. social) institution. Formally, in order for this legal entity to be registered in the form of an institution, it must have two of the indicated features, that is, it must not have the goal of extracting income from its activities and not be able to distribute the net income received among the participants. As we have already pointed above, the first sign knows an exception: entrepreneurial activity for non-commercial organizations is allowed if this corresponds to its statutory goals. Therefore, such an institution has the right to extract income from its activities, directing it later to improve the quality of services provided. The second sign is more difficult, but this problem also has a solution. In simple terms, net income is the income remaining at the disposal of a legal entity after deducting costs and settlements with the budget and other funds. It is clear that its size is the smaller, the greater the cost of providing. Under current legislation, salary without any restrictions is included in the costs. Therefore, by increasing salary, the amount of income of a legal entity can be practically reduced to zero. In this way, when deciding to increase salary, the founders at the same time solve the problem using the net income of this institution: there is no need for its distribution; it simply does not exist, since it, without even becoming "income" from the point of view of tax legislation, is directed to consumption.

And one more confirmation of this thesis. All income received from the provision of paid services can be used to improve this process (purchase of literature, equipment and technology, real estate, etc.), and not be distributed among the participants. And such use of income increases the value of this institution, and, accordingly, the value of the shares of its founders. Thus, the commercial orientation of the actions of the founders when creating a non-state institution can also be shown in obtaining the final result, that is, in the distribution of

property left after the liquidation of this legal entity.

In this regard, there is reason to generally critically estimate the categorical division of legal entities into commercial and non-commercial.

However, the positive aspects of such a division are obvious. Thus, with the establishment of an exclusive list of organizational and legal forms of commercial legal entities, a known order has been cleaned up in this matter. Anyone who remembers the situation in the early 1990s will agree with us. Another thing is that the quality side of the regulation of their legal status leaves much to be desired.

But the situation with the organizational and legal forms of non-commercial organizations is different. In particular, the first part of paragraph 3 of Article 34 of the Civil Code defines six forms of non-commercial legal entities in the most general terms, and also names a joint-stock company.

However, this contains a clause "and other forms provided for by legislative acts".

In this way, the list of organizational and legal forms of non-commercial legal entities is not closed by the Civil Code, although it is limited by other legislative acts. In other words, it is "half-open".

It is noteworthy that the special Law "On non-commercial organizations", naming fourteen other organizational and legal forms at the moment, contains the clause "and other commercial organizations".

As for the quantitative ratio of various organizational and legal forms of non-commercial organizations, here in April 25, 2022, the picture is as follows.

Of the 56,347 registered non-commercial organizations, there are (in descending order):

- government institutions – 34,99%,
- public associations – 20,37%,
- funds – 12,42%
- consumer cooperatives – 7,49%
- institutions – 5,5%
- cooperative of apartment owners – 4,09%,
- associations of legal entities (associations) – 2,75%
- religious institutions – 1,7%
- housing construction cooperative – 1,07%,
- joint-stock companies – 1,02%,
- other organizations – 8,49%.

At the same time, the BIN National Registry, unfortunately, does not contain a split of the last (extreme) position.

It is obvious, that "other" should be understood as mass non-commercial organizations (for

example, notary chambers, bar associations, lawyer offices, professional audit organizations) and “piece” (for example, the National chamber of entrepreneurs of the Republic of Kazakhstan, “Nazarbayev University”, “Nazarbayev Fund”, Arbitration chamber of Kazakhstan, Republican Collegium of legal advisers, etc.). In relation to some of them, independent laws have even been adopted, which we call “laws of one person” [8].

At various times, we have made attempts to count the number of organizational and legal forms of non-commercial organizations, and at the beginning of this year it reached twenty-three [9]. But at the same time, they always made a cautious reservation “no less than”.

The explanation for this is simple: often an independent organizational and legal form is invented for a specific situation with a specific subject. Whether this is justified and expedient is another question. But this is allowed by the Civil Code, so it is legal.

For the sake of objectivity, we note that in the case of the National chamber of entrepreneurs, an incident occurred when, by the decision of its Presidium of October 8, 2013 (Protocol No.2), the Model Charter of the Chamber of entrepreneurs of the region (city of republican significance, capital) was approved.

In accordance with paragraphs 2.1 - 2.4 of the Model Charter, the Regional chamber is created in a different organizational and legal form of a non-commercial organization, the specifics of the legal status of which are regulated by the Law “On the National chamber of entrepreneurs of the Republic of Kazakhstan” and other legislative acts of the Republic of Kazakhstan. The regional chamber is a legal entity, owns separate property, is liable with this property for its obligations, can acquire and exercise property and personal non-property rights and obligations on its own behalf, be a plaintiff and defendant in court. The regional chamber has an independent balance sheet, settlement and other accounts in national and foreign currencies in banks, an emblem registered in the prescribed manner, a flag, a seal, a stamp and letterheads indicating its name in the state and russian languages, as well as in the state and english languages. The single founder of the Regional Chamber is the National chamber of entrepreneurs of the Republic of Kazakhstan “Atameken” (hereinafter the National Chamber). Decisions related to the competence of the Single Founder of the Regional Chamber are taken by the National Chamber alone and are drawn up in writing.

But at the same time, the legal status (organizational and legal form) of the regional chamber is not defined by the Law on the National chamber of entrepreneurs. We believe, therefore, the Presidium of the National chamber of entrepreneurs of the Republic of Kazakhstan introduced a new organizational and legal form into the system of non-commercial organizations - “The Chamber of entrepreneurs of the region (city of republican significance, capital)”, which violated the requirement of the first part of paragraph 3 of Article 34 of the Civil Code of the Republic of Kazakhstan (General Part) and paragraph 3 of Article 17 of the Law of the Republic of Kazakhstan “On non-commercial organizations” on the possibility of creating non-commercial legal entities in other organizational and legal forms provided only at the level of legislative acts.

There is a confusion between the definition of “non-commercial organization” and “non-governmental organization”.

And if the term “non-commercial organization” has a very clear legal design, then “non-governmental organization” is interpreted, for example, in the Law of the Republic of Kazakhstan dated April 12, 2005 “About the state social order, grants and awards for non-governmental organizations in the Republic of Kazakhstan” as a non-commercial organization (with the exception of political parties, trade unions and religious associations), created by citizens and (or) non-governmental legal entities on a voluntary basis to achieve their common goals in accordance with the legislation of the Republic of Kazakhstan. Based on this, it follows that such a definition does not carry a semantic and effective load.

The specified Law, as well as the Rules for providing information about their activities by non-governmental organizations and the formation of a database about them, approved by order of the Minister of Culture and Sports of the Republic of Kazakhstan dated February 19, 2016 No. 51, contain an indication of the areas of activity of non-governmental organizations:

- education and science,
- information,
- physical culture and sport,
- protecting the health of citizens, promoting a healthy lifestyle,
- environmental protection,
- support for youth policy and children's initiatives,
- assistance in solving family-demographic and gender issues,
- support for socially vulnerable segments of

the population,

- assistance to orphans, children from single-parent and large families,
- assistance in ensuring employment of the population,
- protection of the rights, legitimate interests of citizens and organizations,
- development of culture and art,
- protection of historical and cultural heritage,
- strengthening public harmony and national unity,
- assistance to probation services in providing social and legal assistance to persons registered with them,
- conducting public monitoring of the quality of public services,
- promoting the development of civil society, including increasing the efficiency of non-governmental organizations,
- assistance to a person (family) in a difficult life situation,
- other socially significant areas that do not contradict the legislation of the Republic of Kazakhstan.

As we can see, the legal fields in which non-commercial organizations operate, on the one hand, and non-governmental organizations, on the other, are different. Therefore, a specific non-commercial organization created in a certain organizational and legal form, pursuing certain goals and carrying out certain types of activities may correspond to the characteristics of a non-governmental organization. Or maybe not match.

Considering the above, it should be concluded that their possible identification is erroneous, as it often happens in practice, and, for example, took place at the SIILI Inc. organized by the Representative Office of the American Bar Association round table on the topic "Conceptual issues of legal regulation of non-commercial organizations" on September 24, 2021, where thoughts were voiced on the abolition of the Law on non-commercial organizations and the adoption of its replacement Law on public organizations.

It is notable that even the Concept of the Legal Policy of the Republic of Kazakhstan until 2030, approved by the Decree of the President of the Republic of Kazakhstan dated October 15, 2021 No. 674, states that "the role of non-commercial organizations in the life of society can hardly be overestimated. In the course of their activities, such organizations participate in the resolution of social issues".

Thus, there is an obvious emphasis on the

goals of the activities of non-commercial organizations.

This is the most cursory overview of the current state of non-commercial regulation. Within each of the forms, including non-commercial joint-stock companies, there are issues that need to be considered.

But this is a topic for separate publications.

Conclusion

Based on the results of the analysis, it follows that due to the absence of its goal and its (goal) intended result in the Law, it is not possible to determine the degree of effectiveness of the Law, since for this it is necessary to compare the actual result of the Law with the expected result of its goal. We believe that this circumstance caused the Law to duplicate the provisions of the Civil Code and other laws in an excessively large number, and also contains an excessively large number of blanket norms. In this regard, the Law does not have its own base, since it is not the primary source of law, most of its norms are devoid of legal and semantic meaning.

In ad entrepreneurs tion, the Law is marked as unstable, as it has an increase in the growth of the coefficient of instability of the Law by almost two and a half times. The largest number of laws that introduced amendments and additions to the Law were adopted in 2011, 2015 and 2018 (5-6 laws each year). At the same time, the period of stability of the Law in the minimum value is not even 1 day, since the Law was amended on the same day (December 28, 2011) by two laws.

The lack of a logical classification of public associations and non-governmental organizations affects the income of a non-commercial organization, regardless of whether they are received free of charge, from entrepreneurial activity, or, on other grounds provided for by legislative acts, should be directed to the implementation of statutory goals.

From this it follows that the need for legislative consolidation of criteria for the compliance of entrepreneurial activities of non-commercial organizations with its statutory goals, the absence of which creates in practice the possibility of carrying out full-fledged entrepreneurial activities that do not provide for a publicly beneficial goal as the main one, in the organizational and legal form of a non-commercial organization. It is also appropriate to fix the assessment of the contributions of the founders of non-commercial organizations, since they distribute incomes among

themselves. Therefore, we can conclude that, other shortcomings of the Law that do not in general, the Law showed the inefficiency of contribute to its effectiveness. its implementation, while the analysis revealed

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