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Urgent problems of civil law: a call for a modernization / reform of the institution of legal entities

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Main content / Key aspects

- Development of the civil-law institution of legal entities: needs and main trends; the Civil Code as the main source of law on legal entities.
- Rejection of the state enterprise as an organizational legal form.
- Introduction of the concept of legal entities of public law into a national legal system.
- Modernization of corporate (company) law.
- Need for the reform of the law on non-commercial organizations.
- Legal framework for social economy and a legal status of social enterprises.

Development of the institution of legal entities: needs and main trends

- Codification of Civil law (*the CIS Model Civil Code and civil codes of the CIS member states; codifications in Georgia, Moldova and Estonia*).
- Needs for modernization of the Civil Code (*the new CC of Moldova; the experience of a review and update of the CC in Uzbekistan and re-codification of civil law in Ukraine*).
- Regulation by norms of the Civil Code of legal forms of participation of the State in business sphere (*the need for precisely re-codification of legislation on legal entities; the Civil Code (not an Economic or Entrepreneurial Codes) to be the basis of such legislation; the form of state enterprise is the Soviet-time legacy; alternatives*).
- The problem of regulation of rights in relation to a legal entity (*about the suitability and inadequacy of the classification of participants' rights in relation to property of a legal entity; about organizations in respect of whose property their founders have no rights*).
- Grounds for emergence, change and termination of civil rights in relation to or in connection with the activities of legal entities (*decisions of meetings; decisions and actions of the bodies of a legal entity*).
- Organizational structure and representation of legal entities (*the concept of bodies of a legal entity and regulation of the status of the general meeting of participants / shareholders*).
- Corporate relations as an object of civil-law regulation; creation of a basis for the corporate-law framework by norms of the Civil Code (*problems of legal definitions for concepts of "corporate relations" and "corporation"; problems of classifications of types and forms for corporate-type legal entities*).
- Fundamentals of the law of non-profit organizations in the norms of the Civil Code (*the problem of determining non-profit organizations and their classifications*).
- Creation of legal foundations of the social economy (*a content and limits of regulation in the norms of the Civil Code*).

Introduction of the concept of legal entities of public law

- About the concept of legal entities of public law in foreign legal systems / jurisdictions (*use of the notion of the LEPL in the OECD participating states; relevant legislative experience in Azerbaijan, Georgia, Moldova and Estonia; trends /tasks of re-codifications in Uzbekistan and Ukraine*).
- Attempts of introduction of the concept of legal entities of public law in Kazakhstan (*analysis of foreign states' experience; analysis of Kazakhstani law and a concept of such introduction; attempts to preserve so called quasi state sector and incorrect understanding of the task of its reformation as an obstacle to convergence with the law of economically developed democratic states*).
- Prerequisites and conditions for creation and operation of legal entities of public law (*see: Karagussov F. A Legal Entity of Public Law: the Notion and Perspectives for Introduction of the Concept into the Legislation of the Republic of Kazakhstan. Presentation (in Russian) / Web-resource: <https://katpartners.kz/Articles/PublicEntities.pdf>*).
- Specifics of the legal status of a legal entity of public law.
- A concept of a legislative framework for legal entities of public law in Kazakhstan.
- The need of introduction [or: advantages of the introduction] of the concept of legal entities of public law (*separation of a business / economic activities of the State from the state administration; protection of public / common / communal property and ownership rights; justification of conducting entrepreneurial or other economic activity by the State; protection of the State's property and ownership rights from ineffective use in the course of its economic activity; protection of the market from unfair and unreasonable competition of the State with private entrepreneurs; formation of sustainable class of professional corporate directors and managers in Kazakhstan; more effective organization of the fight against corruption; raising the level of self-awareness, legal culture and responsibility for their decisions among citizens*).

Modernization of corporate (company) law

- Development of the best/good practice of corporate governance (*public consultations within the process of revisions of the G20/OECD Principles of Corporate Governance: web-resource https://www.oecd.org/corporate/review-oecd-g20-principles-corporate-governance.htm?mc_cid=0e862a4053&mc_eid=53d28899b3*).
- The Civil Code as the main / basic source of corporate legislation (*corporate relations as a type of civil / private-law relations; special mechanisms for coordinating wills of interacting persons are provided for by corporate law which differ from those existing within other institutions / sub-branches of civil law; if definitions of terms “corporation” and “corporate relations” are appropriate to be included into the Civil Code, and what should they be (if appropriate)?*).
- Classification of corporations in civil law. Significance of identification and declaration of a goal of the company’s creating and operating (*specifics of emergence of the notion of stakeholders and a limitation of capitalist interest when investing in the capital of a commercial corporation*).
- Corporate legislation is the law of business entities (company law); economic partnerships are regulated by the Civil Code and are not subject to regulation by corporate law. The place of a country Code of corporate governance within the system of regulation of corporate relations.
- A business company is a commercial organization with an authorized capital based on the separation of participation in the company from its management and a limited liability of its participants (*managing the company at responsibility of its bodies; formation of the company’s bodies by way of election*).
- Specifics of development of Kazakhstani corporate legislation (*an importance of new approaches to disclosure of information about the company and transparency, recognition of existence of stakeholders and the need to interact with them, as well as the institution of liability of corporate officials*).
- Regulation of the corporate structure (*monistic and dualistic models; modern requirements for the corporate structure model by borrowing the features of both models; reporting vs. subordination; strategic leadership and supervision separated from management (governance / management); distribution of competence and responsibility*). The General Meeting of Shareholders / Participants is not a body of a business company.
- Transformation and liquidation of business companies (*available forms of reorganization; admissibility of interspecific transformations; lack of property as a condition for the mandatory termination of the company’s voluntary liquidation and initiation of its forced liquidation*).

Reforming the legislation on non-commercial organizations

- Corporate legislation should not regulate non-commercial organizations.
- The problem of criteria of non-commercial organizations (if a criterion of a purpose of the organization is important, *or whether a restriction of an organization's net profit distribution among its participants / members / founders shall be sufficient?*).
- Classification of non-commercial organizations and the problem of determination of existence (or a nature) of rights of a founder of a non-corporate non-commercial organization in respect of its property.
- Should non-profit organizations be classified into types? Sufficiency of classification of non-profit organizations into associations and foundations. An institution as a kind of a foundation / fund. .
- Can the principle of *numerus clausus* be applied in regulating the organizational and legal forms of non-commercial organizations?
- Is the existence of the organizational and legal form of a non-commercial joint-stock company (NJSC) expedient? Is there corporate governance in the NJSC and non-commercial associations of other organizational and legal forms?
- Is it permissible for a non-commercial organization to participate in commercial organizations; if so, should there be limits on such participation?
- Applicability of organizational and legal forms of non-commercial organizations for legal entities of public law and social enterprises.
- The problem of use of the capital and net profit of non-commercial organizations engaged in profitable economic activities, both in the field of exclusive activities and in a competitive market with the participation of competing entrepreneurs (*on the example, Kazakhstani NAOs which are infrastructure organizations*). The problem of applying entrepreneurial and antimonopoly legislation to such non-commercial organizations.

Legal framework for social economy and a legal status of social enterprises

- Definition of the term “social economy”: totality of social enterprises or a sphere of operation of social enterprises? If those entities which are not social enterprises can be participants of social economy?
- Social entrepreneurship means an entrepreneurial activity of persons recognized as social enterprises which is purported to achieve certain socially significant goals out of those determined as such by the law. It is a regular entrepreneurial activity and not an undertaking of a separate short-term projects.
- The term “social entrepreneurship” and the notion of “social responsibility of business” are two different types of activities by their nature and orientation.
- Social significance of social entrepreneurship is in provision of social and/or labor integration of people who are acknowledged in accordance with legislation to belong to vulnerable categories of population or recognized to be marginalized persons.
- Legal significance of recognition of a person as the social enterprise: tax preferences, incentives related to acquisition of certain categories of property, simplified access to participation in state procurement, state measures of organizational support, relaxed / simplified access to means of promotion of their services / goods / works as well as other way of encouragement for social entrepreneurship.
- The status of social entrepreneur must be regularly re-confirmed: metrics, reporting and external assessment / evaluation.
- Should a social enterprise be recognized as a separate type of legal entities? Is it necessary to regulate special / separate organizational legal forms for social entrepreneurship?
- Problems of determining the legal framework for social entrepreneurship in Kazakhstan (*provisions of the Entrepreneurial Code do not take into account provisions of the Civil Code on legal entities and entrepreneurship; the need for further regulation at the level of laws and creation of the necessary regulatory environment; importance of maintaining a balance of interests in the development of the legislative regulatory framework for regulating social entrepreneurship*).

Назарларыңызға рахмет

Thank you for your attention

Дякую за увагу