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Public-legal and private-legal regulation of entrepreneurial activity in the Republic of Kazakhstan

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Abstract

The purpose of the scientific article is to describe the problem of legal support of the balance of public-legal and private-legal regulation in the Republic of Kazakhstan in conditions of the market economy via formal-logical, historical-legal and systemic-analytical research methods. As a result, a competitive legal system attracts more business and investment under its jurisdiction, contributes to the implementation of bold and advanced ideas. In conclusion, the

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Entrepreneurial Code should become a guarantor of ensuring the balance of public and private interests in carrying out entrepreneurial activity by establishing at the normative level generally binding rules of conduct (prescriptions).

Keywords: Entrepreneurial activity, Public-legal, Private-legal, Regulation.

Regulación público-legal y privada-legal de la actividad empresarial en la República de Kazajstán

Resumen

El presente artículo describe el problema del apoyo legal del equilibrio de la regulación público-legal y privada-legal en la República de Kazajstán en condiciones de economía de mercado a través de los métodos de investigación formal-lógica, histórica-legal y sistémica-analítica. Como resultado, un sistema legal competitivo atrae más negocios e inversiones bajo su jurisdicción, contribuye a la implementación de ideas audaces y avanzadas. En conclusión, el Código Empresarial debería convertirse en un garante del equilibrio de los intereses públicos y privados en el desempeño de la actividad empresarial mediante el establecimiento a nivel normativo de normas de conducta generalmente vinculantes.

Palabras clave: Actividad emprendedora, Público-legal, Privado-legal, Regulación.

1. INTRODUCTION

Roman jurist Ulpian uttered the following: "Huius studii duae sunt positions, publicum et privatum. Publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem" (SULEYMENOV, 2019: 14). However, the division of law on public and private, inherent in the Romano-German legal family, which includes the legal system of the Republic of Kazakhstan, does not exist

in the Anglo-Saxon legal family, where judicial precedent is the main source of law.

The conceptual understanding of the definition of a public and private in-law, established as early as in the Roman State, has been survived at the present time, although over many centuries different criteria for their differentiation have been developed. They can be a model of the national economy, attitude to property, state-territorial structure, historical-legal, political-legal aspects, etc. At the same time, there have been cases in world practice when in the country, belonging to the Romano-German legal family, the division of law into public and private was ignored (LENIN, 2000).

An example is the socialist economic system of the Soviet Union, with the clear prevalence of state ownership on the means of production and the complete dominance of the monopolistic planned-distribution maintaining of the economy. At the same time, powers of authority of the Communist Party completely extended to economy. In these circumstances, the distinction between public and private law was not relevant, which was confirmed by the leader of the Communists of the Soviet Union, LENIN (2000):

We do not recognize anything private, for us everything in the field of economy is public-legal, not private. We allow capitalism only as a state, hence – it is necessary to expand the application of state intervention in private-legal relations; to expand the right of the state to cancel private treaties (SULEYMENOV, 2019: 14).

Consequently, in the Soviet Union, there were no conditions for the existence of dualism of public and private law at the full nationalization of the economy, the absence of private entrepreneurial initiative, except for the short-term period of the beginning of the 20th years of XX century. At the same time, the total control of the state over the economy, the basis of which was made by the national (state) ownership on the means of production, gradually led to systemic stagnation of the production sphere (KOZHABERGENOVA ET AL, 2018).

Thus, one of the leading experts on the developing economies, professor of the Cambridge University CHANG (2017) emphasized that the problems of economy of the socialist countries were already well known: difficulties in planning the increasingly diverse economy, the problems of stimulation arising from weak links between labor productivity and remuneration, and widespread politically defined inequality in the supposedly equal society (JUSTIN & EVANS, 2013).

ILYASOVA (2011) rightly noted that attempts to adopt a market economy approach have not always been successful. Privatization has been abused by powerful groups. Deregulation of financial markets has increased risks to poor citizens in a number of countries without necessarily delivering sustained growth. More than a decade of market reforms in Latin America has yet to show significant positive results in many countries. Most parts of the former Soviet Union have seen living standards decline for a decade. African incomes have slid backward for several decades. More-successful

economies have been remorselessly shaken by a series of financial crises. It is now clear that market reform and privatization alone are not enough (CHANTAL & STEL, 2000).

The collapse of the Soviet Union, the formation of independent States, including the Republic of Kazakhstan, the dismantling of socialist administrative-command management of the economy, the transition to the market economy and the rejection of the previous legal model, had the decisive impact on the formation of the fundamentally new legal system. During this period, the post-Soviet countries adopted the policy of self-regulation of market relations without state intervention, accompanied by a lack of necessary experience in conducting the entrepreneurial activity in the competitive environment. As a result, there was a real threat of disproportion of the private and public interests that prevented the emergence of the market economy. In such situation, the solution is to develop the optimal balance in the public-legal and private-legal regulation of entrepreneurial activity (BARRY & POLLMAN, 2016).

The personal contribution of authors to the research of this problem consists in the analysis of the theory and practice of regulation of entrepreneurial activity, statement of the problem on the correlation of public-legal and private-legal methods of regulation of public relations in the sphere of entrepreneurship in Kazakhstan (CESARE, 2002).

2. METHODOLOGY

The following scientific methods were used in the research: formal-logical, historical-legal and systemic-analytical. The formal-logical method is based on the study of the internal structure of legal norms and national law, analysis of sources (forms of law), methods of systematization of normative material. The authors analyzed the Kazakh legislation regarding the identification of the norms aimed at providing balance in the private-legal and public-legal regulation of entrepreneurship.

The historical-legal method allowed to reveal the process of transition of quantitative changes into qualitative (improvement of the norms and institutions that consolidate and regulate relations in the sphere of entrepreneurship) taking into account a certain period of time. The systemic-analytical method opens up possibilities for systematizing and building the classification of various legal phenomena, for example, systematization of the norms governing relations in the sphere of entrepreneurial activity.

3. RESULTS

The research purpose is a brief overview of the state of the entrepreneurial legislation of Kazakhstan, assessment of compliance of the existing norms of the Kazakhstan legislation regulating the sphere

of entrepreneurship to the principle of balance in the private-legal and public-legal regulation.

The role of the State in the market economy and the regulation of economic processes is one of the most fundamental problems in modern science.

The Nobel Prize laureate in economics, Joseph Eugene Stiglitz, expressed the fruitful idea that the markets are not always uninterruptedly organized by themselves, and therefore they cannot solve all problems alone and will always need the state as an essential partner.

At the initial stage of Kazakhstan's transition to the market relations, the Kazakhstan's civilian Basin warned that freedom of entrepreneurship without state regulation can lead to the monopoly position of some of the entrepreneurs and their associations, to restriction of competition and to other negative consequences, which eventually violate the interests of consumers (UDARTSEV, 2018).

Agreeing with the judgment of the author, at the same time, we consider that it is necessary to add with the fact that the forms of State presence in the sphere of entrepreneurship are not limited only to the protection of the interests of consumers in its broadest sense. The State, by introducing nationalization, establishing legal, investment, managerial and other conditions for effective entrepreneurial activity,

ensures the protection of national and private interests. Proceeding from it, there was a natural revival in the post-Soviet space of interest in the classical theory of public and private in law.

According to S.S. Alekseev, the public and private law in many cases are mixed in practical life: the diversified elements are quite often present in life relations, some of which relate to private law, others to public law (public contracts in civil law - contracts of retail trade, public transport, communications, and others, where there are public-legal elements) (KORSHUNOV, 2005).

LENIN (2000) emphasized that in general-theoretical aspect the question of differentiation of public and private law is the question of the delimitation of the state intervention in the sphere of private interests of its citizens. Such intervention can not become comprehensive, unlimited and arbitrary, and the public authorities have no right to consider themselves the sole and genuine spokesman and defender of any interests of their citizens.

Kazakhstan's civilian MOLDABAYEV (2014) confirms that the boundaries between public and private law are not granite and immutable. They are extremely mobile, which is often connected with historical and social and economic conditions. There is the interpenetration of public and private law. The contract begins to be applied not only in the international public law but also in the national state law. The elements of public law are applied in private law, for

example, in the public contract, the contract of accession, the employment contract.

SHCHENNIKOVA (2014), justifying the exceptional importance of the public interest in civil law, believes that it is necessary not to protect civil law from the penetration of public interest into it, not to draw the dividing line between it and private interest. On the contrary, for civil law, it is important to unite interests, their optimal and effective combination.

Therefore, it is understandable that over time the theory of convergence of private and public law was developed, suggesting their free interpenetration and interaction. As it is noted in the literature, both private and public law in the process of convergence do not dissolve in each other, do not form the new legal phenomenon, but retain their legal essence.

Thus, it is possible to come to the conclusion from the given judgments that at present the division of the law into public and private retains its essence and legal destination in the Romano-Germanic legal family. However, it is necessary to consider at their differentiation that the private and state interests in real legal practice are so interdependent and interconnected, especially in the sphere of entrepreneurship, that the recognition of the theory of convergence of public and private law is expanded. At the same time, the internal ratio

of such convergence in entrepreneurial activity can be various depending on the reasons for objective and subjective character.

It was expressed the point of view in the literature that the analysis of all the starting elements, underlying the division of law into private and public (interest, subject matter, method of legal regulation), within the framework of entrepreneurial law, gives the grounds to claim that they include both private and public beginnings. At the same time, there is the problem of optimization of the ratio of private and public regulation, building models of their convergence and interpenetration.

According to MOLDABAYEV (2014), the correct assessment of the expenses and benefits from conducting administrative regulation of entrepreneurial activity, being in the form of establishment of obligatory licensing, certification, sanitary standards, fire safety requirements or other administrative barriers, is extremely important for the development of the economy, although they constrain turnover and entrepreneurial activity. But, on the other hand, such measures to some extent remove risks of infliction of harm to the interests of other persons (including consumers), ecology, etc. Another extreme – is the model of private-legal control. It would be extremely dangerous to apply such the control model to the regulation of airlines, nuclear and military industries, and it is equally foolish to introduce licensing of activity of ordinary resellers.

We agree with MOLDABAYEV (2014), who notes that the ratio of public and private interests at the legal regulation of entrepreneurial activity has to be expressed in the stimulating effect, which gives the possibility for business entities to develop effectively and, at the same time, provides the government needs for financial resources.

The Entrepreneurial Code has the lack of the elements relating to the convergence of the public and private law in the studied segment of economic relations. At the same time, it should be emphasized that the Entrepreneurial Code of the Republic of Kazakhstan, without affecting in any way the foundations of civil legislation, has its own range of the legal regulation of social relations, arising from the interaction between business entities and the State.

Thus, the Entrepreneurial Code is the system-forming legal act that carries out management activities of the authorized state bodies and non-profit associations of business entities in the economic relations in the entrepreneurial activity, in order to protect the rights and interests of entrepreneurs and the State.

The special literature of Kazakhstan has no full scientific-based methodological approach to assessing the effectiveness of entrepreneurial legislation, there are not enough scientific researches, taking into account the researches of foreign scientists; there is no complete, comprehensive analysis of the institutional environment of

entrepreneurship. At the same time, it is required the scientific development and formation of an effective instrumentarium for stimulating the entrepreneurial activity, the formation of theoretical and methodological foundations on the providing balance in the methods of economic activity regulation for effective use of the potential of entrepreneurial initiative in RK.

Our conducted research has scientific novelty, as it attempts to overcome the opposition between two methods of regulation - public-legal and private-legal, on the example of entrepreneurship.

The fundamental difference of the ideas of this work from the existing analogs is consisted in the direction on establishing the optimal balance in the regulation of entrepreneurial activity, as well as assessing the current Entrepreneurial Code of RK.

4. CONCLUSIONS

Proceeding from the aforesaid, it is possible to highlight the following main conclusions, as well as the prospects of legal regulation of entrepreneurship in the Republic of Kazakhstan:

- At the current stage of Kazakhstan’s development, the Entrepreneurial Code should become the guarantor of ensuring the balance of public and private interests at the implementation of the

entrepreneurial activity by establishment of the obligatory rules of conduct (regulations) on the normative level;

- We consider inexpedient the inclusion of the norms of investment legislation in the Entrepreneurial Code of the Republic of Kazakhstan, as firstly, the investment relations have more civil-legal character, and secondly, they are the subject of regulation of the independent complex branch of law - investment law;

- It is necessary to adopt the consolidated law On investments, including in it the whole range of issues related to investments in various spheres of the economic and social life of the State and society;

- It is suggested to strengthen the guarantee of stability of the legislation in the entrepreneurial legislation: in case of change of the legislation, regulating foreign investment, within 5 years from the moment of investment at the request of the foreign investor, there can be applied the legislation which in force at the time of implementation of the investments, as this is the significant guarantee for attracting investments.

Thus, Kazakhstan's legal system has to be capable to compete on equal terms in the questions of convenience of application and reliability of protection of the rights with the legislation of developed countries of the world. A competitive legal system attracts more

business and investment under its jurisdiction, contributes to the implementation of bold and advanced ideas, and then, these results will be used all over the world, bringing dividends to the country in which these ideas are implemented.

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