

On the Systematization of Entrepreneurial Legislation in the Republic of Kazakhstan: Implementation Challenges

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Abstract: This paper deals with a detailed analysis of the systematization problems and prospects of entrepreneurial legislation in the Republic of Kazakhstan. The article presents the views of domestic and foreign experts about possible problems that may arise when codifying entrepreneurial legislation. Authors revealed the status and the development prospects of entrepreneurial legislation in the Republic of Kazakhstan and gave recommendations on solving the problems related to the implementation of entrepreneurial code concept.

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1. Introduction

Systematization issues of entrepreneurial legislation of Republic of Kazakhstan are today extremely relevant in the light of the Legal Policy Concept for the period from 2010 to 2020 [1]. In September 2012 the Institute of Legislation of the Ministry of Justice of the Republic of Kazakhstan held an International conference entitled "Systematization of legislation in the field of entrepreneurship: status and prospects". The conference discussed the draft entrepreneurial code of the Republic of Kazakhstan, as well as possible forms and methods for systematization of entrepreneurial legislation.

Currently entrepreneurship is regulated by the Civil Code of the Republic of Kazakhstan (CC RK) and other regulatory legal acts, including the following laws: the Law "On private entrepreneurship", "On business partnerships", "On the production cooperatives", "On limited and additional liability companies", "On natural monopolies and regulated markets", "On trademarks, service marks and appellations of origin", "On joint-stock companies", "On licensing", "On competition", etc.

Above listed laws are based on the norms of the Civil Code of the Republic of Kazakhstan and itemize it. With the accumulation of a significant number of fragmentary regulatory acts, the task of legislation systematization is becoming increasingly important. In this regard, the question is raised concerning the development of the Concept and the draft Entrepreneurial Code of the Republic of Kazakhstan.

In some foreign countries, in addition to the Civil Code and special legislation, there are also

commercial codes [2, 3]. For example, in the USA there is the Uniform Commercial Code, which regulates the entrepreneurial relations [4, 5].

In France, Commercial Code holds since 2000 [6].

In countries with a dualistic system of private law, holds the legislative act that contains special provisions relating to entrepreneurship. Commercial Code exists in France (since 1807) [7], Germany (1897) [8], Poland (1935) [9], and the Czech Republic (1991).

The concept of draft Entrepreneurial Code is prepared to implement paragraph 10 of the Action Plan for 2011 on the implementation of the Legal Policy Concept of the Republic of Kazakhstan for the period from 2010 to 2020, paragraph 6 of the Prospective Plan on Law-Drafting Activities of the Government of the Republic of Kazakhstan for 2013-2014, as well as pursuant of the instructions of Deputy Head of the Presidential Administration of the Republic of Kazakhstan T.S. Donakov #51-11.30 issued on January 13, 2011 [10].

When determining the vector of future legislative activity in the systematization of entrepreneurial legislation, there are certain issues of scientific-theoretical and practical nature that have not been yet solved.

Thus, M.K. Suleimenov believes that the adoption of the Entrepreneurial Code will lead to a collapse not only in civil legislation, but also in the entire system of national law [11]. He notes: "Entrepreneurial legislation should be understood in two ways. In a narrow sense, entrepreneurial legislation, undoubtedly, is a part of the civil law. Entrepreneurial activity is a variety of civil action. At the same time, entrepreneurial legislation can be

understood in a broad sense as a complex industry, unifying standards of various branches of law (civil, administrative, financial, labor and other). However, both civilized concept and complex industries concept are strongly opposed to the adoption of the Entrepreneurial Code, recognizing dominant and decisive role of Civil Code in the regulation of entrepreneurial relations. The mainstream development of entrepreneurial legislation concludes in building of complex legislative decrees, like the Law on Private Entrepreneurship and the Law on State Assets, based on the Civil Code" [12]. Professor believes that instead of adopting the entrepreneurial code, better to adopt two laws: the Law on Commercial Legal Entities and the Law on Entrepreneurship. Thus, improving the legislation can be done not only through its systematization but through other possible ways as well.

However, A.T. Peruashev notes quite the opposite. Thus, he writes: "The urgency and necessity of Entrepreneurial Code, in our opinion, is not in doubt, since its adoption will allow one to codify the regulations on implementation and organization of entrepreneurial activity in the form of generalizing law, and eliminate both the awkwardness and unsystematic legislation that regulates entrepreneurial activity, as well as to cover both private law and public law elements of legal regulation" [13]. He also believes that today there is no need to raise the question on the expediency or in expediency in developing this Code, since there is a direct order of the President to the Government of the Republic of Kazakhstan to develop the draft codifying statute" [13].

The main argument of A.T. Peruashev is that, in his opinion, entrepreneurial legislation should serve the interests of entrepreneurs and not lawyers.

Kuznetsova N.S. notes that contemporary entrepreneurs need quality entrepreneurial legislation, rather than its form [14].

Karagusov F.S. assumes that the draft entrepreneurial code is incorrect. It focuses on three types of entrepreneurial relations, including corporate entrepreneurial relations. In his opinion, such relations do not exist at all and cannot exist in principle [15]. There is a corporate law that needs to be improved. National legislation still has no concept of the corporation and there is nothing that regulates corporation. Instead of including countless types of businesses into the Entrepreneurial Code, we need to modify its forms. There is nothing to "borrow" from the Civil Code. Entrepreneurial Code must regulate those legal organizational forms of business that are not included in the Civil Code.

Belykh V.S. agrees with this position and notes the following: Entrepreneurial Code should not and

cannot have a common part. It should include only those aspects, which are not covered by the Civil Code. At that, he believes that the state should intervene into the entrepreneurial relationships, though grounds and limits of such interventions must be specified in a Code [16]. We tend to agree with F.S. Karagusov and V.S. Belykh. Here we assume that the civil law contracts should not be transferred to Entrepreneurial Code; the latter should include the unnamed entrepreneurial agreements, which are concluded in practice, but not regulated by legislation.

Kaudyrov T.E. notes the following. Three considerations could cause the adoption of a decision, taken by government body of the Republic of Kazakhstan, on development of the Entrepreneurial Code:

A) Economy development peculiarities of the Republic of Kazakhstan.

Study of a modern market economy features of our country leads to the conclusion that this economy is plural in terms of subject matter of its participants (from individual entrepreneurs to multinational companies), and is characterized not only by this fact, but also by a significant government influence on all the main aspects of economic development.

Even in times of economic crisis, Kazakhstan's economy was developing quite rapidly due to the implementation of indicative planning and a policy, based on every possible encouragement of entrepreneurship development. At the same time, there are no uniform "game rules" for all entrepreneurs and primarily for the beginners. The adherence to basic corporate social responsibility principles is not encouraged; the dominant ruling principle is "profit by any means", which often makes consumers suffer [16].

B) The status and development trends of the country's economic legislation.

Currently the entrepreneurial legislation represents a huge array of regulatory legal acts in various industrial branches. At the same time, there is no legislative limit and warranty to restrict its further growth. It is impossible to satisfy every kind of new industry or business by its "own" law. Here we have a disintegration process, and segmentation of law objects [16].

The problem of systematization of this vast array arose in all its relevance; we need a unified conceptual and methodological basis for all regulatory legal acts that regulate entrepreneurial activities and entrepreneurial relationships.

Since this problem yet has not been solved, the most advanced centers of business suggest their ideas concerning codification of agency-level legislation. Spheres, adjustable by two or three specialized laws

tend to develop their "own" codes. Only low quality of a developed Transport Code of the Republic of Kazakhstan did not allowed its adoption two years ago; Financial Code of the Republic of Kazakhstan is practically developed and will be submitted for discussion in a little while; information appears about the development of the Agrarian (or agricultural, according to other sources) Code and the Energy Code of the Republic of Kazakhstan; statements are made that the existing Water Code does not regulate water use and drainage issues and there is a need to start developing an appropriate new code. Adoption of codes by industry sectors, in our opinion, is a perfectly acceptable way of codifying legislation where it has to be targeted to the right direction. Though the question arises whether this way is the most economic? Possibly, it would be better to take into account the global processes and unify regulation of issues, common to all economy sectors, in a combined regulatory legal act [16]?

C) Change the contents of the Civil Code of the Republic of Kazakhstan (hereinafter CC RK) and its role in the consolidation of the legislation of the Republic of Kazakhstan.

Some researchers try to prove that to regulate the total variety of economic relations it is enough to have just one CC RK. This approach denies complexity and differentiation of the relations in the contemporary economy, as well as ignores the experience in legislative regulation of the economy in developed countries. Most of them are properly regulated right on the basis of two codes rather than just one. At that, the Commercial and Trading Codes of a number of countries (the USA, Japan, France, etc.) show a distinct tendency of increasing the proportion of the public entrepreneurial legislation norms.

The CC RK, which was designed to be the core for entire private law including entrepreneurial legislation, gradually ceases to perform this function. This is evidenced by the rapid growth of specialized laws regulating entrepreneurial activity.

The legislation development trends are such that some areas of the market economy, which formally fall under regulation of Civil Code, in fact are governed only by special acts, not always by the laws, usually by subordinate-acts; these are such economy sectors as banking, construction, transport, etc. [16].

Over time, these economy sectors may be excluded from the scope of regulation by the Civil Code, if codified laws, such as Financial Code, the Urban Planning Code, Transport Code, etc. will be adopted; the issues on their necessity are already considered by relevant authorities.

At the same time, CC RK is appended by the rules, not related to private law, such as, for example, paragraph 1-1 of section 3 of the Civil Code entitled "Financial Instruments". Earlier the CC included the disapplications related to the banks and cereal-receiving stations. Inherently, now CC is not an instrument of private law in the full sense of the term, and became a kind of complex legal act. By definition, the CC RK should not include the rules, governing the interaction between entrepreneurs and the state, stimulating public-private partnership, forms and direction of business regulation, the launch of the business associations, etc.

Entrepreneurial legislation of the Republic of Kazakhstan is matured for quality upgrades. A global law on "transformation of quantity into quality" becomes actual as there is a critical mass of entrepreneurial legislation, sufficient for qualitatively new round of rulemaking. This requires a legal act of higher rank, such as Code or other codified law [16].

Summarizing all the above, we believe that the adoption of the Entrepreneurial Code of the Republic of Kazakhstan is necessary, though with the above mentioned disapplications.

Thus, we need to carry out a stagewise improvement of legal regulation of entrepreneurial relations by means of the following:

- an additional inventory of national legislation in the field of entrepreneurship, including determination of the list of normative legal acts that are covered by systematization, establishing regulations to be adopted or eliminated, as well as the identification of judicial conflicts and gaps;
- identification and analysis of the social relations in the field of entrepreneurship, which are not regulated by the applicable law and are subject to regulation;
- definition of conceptual approaches to the scope of the future draft Entrepreneurial Code and its regulatory form;
- clear delimitation between the legal regulation subject of CC and the corresponding draft providing the identification of their parity;
- establishing and developing the necessary sub-legal framework for future draft.

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