

The notion and essence of the codification as a form of systematizing of the law

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Abstract. The subject of this article is the notion and essence of such form of systematizing of the law, as codification, which is often typical for the sectoral legislations. Codification as the most radical form of systematizing stirs up disputes in the scientific communities. An attempt to analyse the researches relating to the codification and practice of its implementation in the law of Kazakhstan and foreign countries has been made in this article. The positive and negative aspects of codification as compared with the other forms of systematizing the law are detected. The aspects of unifying the private international law in the form of a codified act are reflected.

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Introduction

In the foreign civil law a special monograph by the French legal scholar R. Cabrillac, in which the concepts of "codification" and "Code" are limited, is devoted to a detailed study of codification [1]. Under codification the scientist means "the activity on giving the legal rules such form [2], in which they are integrated", and under the Code - "a set of incomplete legal rules which have been integrated" [3].

The Belgian legal historian and comparatist J. Van der Linden associates the concept of the Code with three elements: 1) a holistic form, which is the result of combining previously completely separated parts; 2) a content, covering the law as a whole or an integral part of its sources or its branches; 3) attributes which facilitate the access to the content of the Code [4].

In the private international law the mandatory attributes of the codified act include: 1) the completeness of the legal regulation covering the wide range of the most important cross-border private-law relations; 2) the common guidelines; 3) the integrity of the form achieved by the special order of presenting the legal material; 4) the common conceptual and categorical framework. These features - are the result of implementing the fundamental principles of any codification: the principle of consistency, completeness, ensuring the intelligibility and specification of the legal regulation, as well as ease of using the act [5].

In the public international law the essence of the concept of "codification" is revealed through its "dual" understanding: 1) as a statement of the applicable law, and 2) as the development of new rules of the international law [3]. In this case, the first aspect of codification is manifested in a special form of systematizing the law: regulating and registering

the customary rules of the international law. According to scientist C. Rousseau: "In the international legitimacy the term of codification represents the laconversion of the customary rules into a set of the coordinated and systematic written rules which are binding on the States Parties to the document in which they have been legislated". This approach has been enshrined in the Art. 15 of the UN Statute of the International Law Commission (1947), which means under codification "more precise formulation and systematization of the rules of the international law in those fields where the extensive public practice, test cases and doctrines have already been" [4].

The similar meaning of the term "codification" (in the context of the public international and European law) is represented in the "Law Dictionary": "The concerted efforts for drafting the legal rule, previously being a custom ...". Upon capturing the customary rules in the international treaty the "dual legal basis for its legal force" occurs: from then onward the codified international rules have been the customary rules mandatory for their states which recognize it, and the conventional rules binding on States - parties to the agreement [5]. The object of the codification activity in the public international law is widely recognized rules of the international law, international customs and customary business practices, legal cases and scientific concepts.

The second aspect of codification in the field of the public international law is closely related to the concept of "progressive development of the international law". The explanation of this term has been given by the UN International Law Commission in one document only. In the prepared Commission's report for the UN General Assembly in 1956, "progressive development of the international law"

was considered as "preparing the conventions on those issues which have been not regulated by the international law yet or for which the law has been still insufficiently developed in the practice of the certain countries". As A.P. Movchan has noted, the distinction between the terms "codification" and "progressive development of the international law" is technical in nature and is carried out for "ease" only [6]. However, it points out directly to one more aspect of the codification process in the international law - the legal regulation of new areas in the international relations.

In the European law the concept of "codification" is applied in the meaning typical for the public international law and intended to draw the results of the European Union (hereinafter referred to as - EU) lawmaking into one unified act. The European law unification provides the systematization of the European legal customs and rules, the policy of the EU courts, the European law doctrine.

In addition, in the European law the concept of "codification" takes a special meaning, which reflects the specifics of the codification process in EU - it is "a type of the highly formal codification which is to combine in a single act the framework act and the acts, which amend and supplement it, without changing the content of such acts by promulgating a new uniform act and abolishing all previous acts; the operation, which unlike a reform, eliminates any change in the content of the legal rules, but is of the law-making and official nature, what distinguishes it from the simple consolidation". In fact, the codification process in EU is a specific type of unifying the law which, as a rule, does not result in the emergence of the new legal rules. During the formal unification of the European law a new legal act, which combines the rules being still relevant and supersedes the systematized original acts is formed out of the available legal rules [7]. In the international law understanding of codification outlines the concept of the main methods to develop the unified international act, which while passing the implementation procedure, becomes one of the sources of national PIL. In the context of the national legitimacy such act will be the centrepiece because of its international legal nature and legal significance, as well as it will be the basis for codifying PIL. Correct understanding of codification in the context of the international law is a prerequisite for the effective implementation of the uniform rules during the national codification [8].

In the Kazakhstan Republic codification, going beyond the simple systematization actively performs the law-creating functions. It is carried out parallel to the post-Soviet law-making, and represents its form. The role of codes in establishing the structural elements of the post-Soviet legal system is

invaluable, especially in emerging the new branches of the law and legislation. The post-Soviet codes have become the overriding laws in the relevant legislation branch, and its supremacy - is the the pledge of embodiment of the constitutional statehood values.

At the same time in the context of intensive lawmaking the issues of the quality and efficiency of the laws and ensuring its supremacy have become particularly urgent. On the one hand, the adoption of an enormous number of the codified acts in the form of codes, charters and regulations at short notice - is the evidence of the great importance of codification as a form of lawmaking. But, on the other hand, the urgency of the issues associated with the quality of the codified acts and the efficiency of the current legislation, is not only taken off from the agenda, but has become increasingly important.

The active codification activity has become one of the determining trends in the legal reform conducted in the Kazakhstan Republic. It has determined the importance and relevance of scientifically analysing the practice of carrying out the codification activity in the Kazakhstan Republic and developing the recommendations for its improvement.

The new conditions, targets and trends in the social development, in which modification is carried out, its new forms and trends, the importance of the information and communication, integrative role of codification in the modern society, as well as the intensive lawmaking and the associated requirement for ensuring the quality of the codified acts, especially the codes, its supremacy in the legal system have contributed to the emergence of the several new urgent issues of the codification theory and practice, which need to be solved.

Because of the development of the Kazakhstan Republic legislation the legislation revision has become particularly important. Revision is an integral part of the legislation systematization, its necessary tool. As follows from its content, it to a large extent coincides with the activity on bringing the laws and regulations to the conformity with the hereinafter passed legislative acts, but there are differences between these activity types. Bringing the laws and regulations to the conformity with the new legislative acts - is a continuous, ongoing process; adopting a new legislative act involves the need for bringing the previously issued legal acts to the conformity with it. Meanwhile in its usual sense revision is an occasional event and has limited timing. The term "legislation revision" is appropriate while executing major, outstanding events, related to the preparation of various collections of the legislation, its sectoral codification while preparing the Code [9].

The legislation, regulated through systematization and consistent in its integral parts will

appropriately reflect the realities of the social life, the economic and social processes taking place in it, meet the needs of the social development. These objectives could be achieved while increasing the qualitative level of the legislation systematization, applying the advanced techniques and methods of its implementation. The activity on carrying out codification - is a field which is simultaneously both a part of lawmaking and an important element of the legislation systematization. It makes lawmaking kin with the legislation systematization. The latter in that its part, which is outside the codification (the entirety of incorporation and a considerable part of consolidation) is not properly lawmaking, but it is intended to provide it with its own specific methods and means, to continue its initiated procedure, to contribute to solving the tasks which face it. At the same time, touching on different "slices" of the legal systems structure, the activity on systematizing considers various degrees of flexibility and dynamism of the legal system and the legislative system [10]. Codification, being the form of lawmaking, has played an important role in establishing the legal system of nations. So it has been for more than one hundred years, as M.N. Marchenko says: "Codification was symbolic of the final completion of establishing the Romance and Germanic legal system as a holistic phenomenon" [11]. The same was said by Rene David: "Codification was a great tool for distributing the Romance and Germanic legal system both in Europe and outside it" [12]. Nowadays the codes, along with the other laws and regulations are the key legal sources in the Romance and Germanic legal system.

In the Kazakhstan Republic the codified laws, codes and governmental resolutions, etc. are one of the common types of laws and regulations. Codification plays an immense role in developing the legislation as an independent and stable system. Therefore, while starting the preliminary codification works we have gradually enlarged the standards while drawing more and more new levels and sectors of the legislation in the codification process.

Codification is a way to improve and to develop the legislation. It is the codification in which the role of improving the law and the legislation has been increased, unlike the other forms of

systematization, such as the incorporation and the consolidation.

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