

МЕМЛЕКЕТ ЖӘНЕ ҚҰҚЫҚ ТЕОРИЯСЫ МЕН ТАРИХЫ ТЕОРИЯ И ИСТОРИЯ ГОСУДАРСТВА И ПРАВА THEORY AND HISTORY OF STATE AND LAW

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Peculiarities of subordinate lawmaking in the conditions of digitalization

The problematics of this paper is determined by the increasing role of informatization and digital technologies in the modern legal process. The relevance of the topic under consideration is explained by the insufficient study of legal aspects of informatization and digital technologies in both domestic and international jurisprudence. Digital technologies have deeply entered the everyday life of our society. Digital technologies have greatly simplified and diversified forms of human activity. Lawmaking is no exception. The purpose of this paper is to identify the features and opportunities of information and digital technologies at different stages of the law-making process. The methods of formal logic and SWOT-analysis are used as the main methodological tools. Subordinate lawmaking differs significantly from lawmaking, as it includes more legal and organizational-legal actions carried out with the use of digital technologies. The main purpose of the article is to analyze the peculiarities of subordinate lawmaking in the conditions of digitalization, as well as to study the impact of digital technologies on the improvement of this process. The paper substantiates the necessity of normative formalization of the order of application of digital technologies in lawmaking activities. The novelty of the proposed approaches lies in the systematic study of strengths and weaknesses, as well as the potential of the use of digital technologies in lawmaking, and the analysis of possible threats to the security of institutions of law-making, subordinate lawmaking, legal regulation and law enforcement activity in the context of a new mechanism of lawmaking, corresponding to the modern needs of legal regulation of Kazakhstan.

Keywords: lawmaking, normative legal act, law, mechanism of lawmaking, “electronic government”, “electronic akimat”, gateway of “electronic government”, electronic digital signature, digital document, digital technologies, information system, Internet portal of open normative legal acts, lawmaking relations, by-laws, subjects of lawmaking.

Introduction

The Kazakhstan 2030 strategy emphasizes that a key factor for the country’s further progress is the creation of quality conditions for the formation of an information society. Kazakhstan is actively involved in the implementation of the Information Superhighway project, which aims to accelerate telecommunication links between Europe and such regions as China, Japan and South-East Asia [1]. According to the results of a study conducted by the company “Boston Consulting Group” (BCG), it is noted that by the level of digitalization of the economy Kazakhstan is on the 50th place among 85 states and belongs to the group of countries with developing digital economy [2]. In the translation of Henry Kissinger’s Book “World Order”, published in 2015, the chapter “World Order and digital technologies” is highlighted in the section called “cyberspace of the world community”. It focuses on the role of digital technologies in the process of forming the infor-

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mation space. The author writes that human activity is quantitative and that it “must be quantified and analyzed”, and that the processes of Information Technology Development are correct. According to the author, by the beginning of the third decade, the number of devices accessing the internet will increase to fifty billion. “Each site will be connected to the Internet and programmed to communicate with a central server and other network equipment” [3]. According to the politician, this will be a true cultural revolution in relations between states and will have a serious impact on inter-state relations. It should be noted that in recent years there has been a tendency for developing countries to lag behind developed countries in digitalization.

In the current conditions of the next stage of administrative reform, the entire administrative system of the Republic of Kazakhstan is being improved. For the successful implementation of all planned activities, a quality information infrastructure is required. The development of conditions for information security is facilitated by measures that provide for the creation of a list of functions and powers of state bodies and their synchronization. This requires a fundamental change in the functions and powers of government bodies and the creation of effective algorithms of interaction and communication. As the most important function of state bodies, along with the provision of public services, rulemaking remains a priority in the list of functions of sectoral and departmental management bodies. However, for the effective implementation of rule-making it is necessary that the information and communication systems of public authorities function.

The above factors have had a significant impact on the formation of the national legal system and are reflected in the legal policy concept of the Republic of Kazakhstan until 2030. Creation of subordinate legal acts is one of the forms of realization by executive authorities of their managerial competences. However, executive authorities, as a rule, act through officials. Officials of executive power bodies mostly fulfil their functions on their own. This applies to akims of all levels, ministers, chairmen of committees. The exception is the Government [4]. The idea that the opportunities and advantages of modern digital technologies should be used to improve lawmaking activities is a red thread in the Concept.

Materials and methods

In the course of the research we applied dialectical, historical, analytical-synthetic, logical-legal, comparative-legal, systemic, structural-functional, scientific interpretation, methods of combined approach, general and special methods of formal-descriptive, linguistic, systemic, concrete-sociological recognition. Formal-legal methods were used to analyse the legal nature of the category “digital documents”. The structural-functional method was used to study the ways of structuring legal information used in the preparation of drafts of subordinate normative legal acts; the SWOT-analysis method was used as a general method in the study of the role of digital technologies in the law-making process. Comparative-legal and systemic methods were used to compare the rules for the development of bylaws of a legal nature.

The methodological and material basis of the study was taken from the information of such domestic and foreign scientists as S.V. Polenina, B.K. Karypov, I.S. Barzilova, G. Kissinger, as well as state programs and conclusions, devoted to the problems of the peculiarities of law-abiding lawmaking in the context of digitalization.

Discussion

The legal and regulatory systems of modern states are very heterogeneous. This is explained by the peculiarities of each country's form of government, the centuries-old traditions of each state, and other factors. However, most legal systems are based on the level of legal force. The subordination of other normative acts follows from the characterisation of the law as a legal act with greater legal force and the requirement of the rule of law. As S.S. Alekseev emphasized, compliance with legal provisions does not mean that they are less restrictive, but that they have the necessary legal force. This means that they have the necessary legal force. The important thing is not that their legal effect is universal, but only that the essential primacy of law places it above all other normative acts [6; 86]. The legal documents of the lower levels are very diverse and have different legal consequences, forming a rather complex hierarchical system. The legal acts of each lower level state agency must comply not only with the law but also with the legal acts of the higher level state agency. For example, the actions of the Ministry of Health must comply not only with the law but also with the normative actions of the President and the Government, as well as the actions of agencies that have inter-ministerial importance due to their powers, such as the actions of the Ministry of Health according to the documents of the Ministry of Health and the documents of the Ministry of Finance.

A.A. Sokolova proposed the concept according to which in the process of law formation there are three stages. The first stage is the determination of objective needs in the legal regulation of social relations and

the possibility of adopting real legal norms. The second stage is the creation of legal norms, i.e. lawmaking itself. The third stage is the socialization of legal norms, i.e. awareness of possible legal consequences by the participants of social communication and potential legal relations [7; 80].

Z.Ch. Chikhiva divides legislation into the following types depending on the importance of the object of legislation: legislation, delegated legislation, subordinate legislation [8; 20].

Legal policy must reflect the changing structure of modern society. Today, industrial society is replaced by post-industrial society. For example, S.V. Polenina stated in his speech: "Post-industrial society is characterized first of all by the innovative nature of productive activity, the dispersion of production and population, the rapid speed of information exchange, diversified activities, the integration of production and consumption, the ecological transformation of the economy, the autonomous political system..." [9; 171].

According to S.V. Fedorchenko, there is a time lag between the effects of "technological overlap", i.e. the introduction of law enforcement practice and the introduction of extensive information technology developments into everyday life [10; 161]. Namely, it is designed to provide services in electronic form on the basis of automation and optimization of government functions. To ensure the functioning of this structure, in 2016, the unit for integrating e-government services was organized — a legal entity identified by the Government of the Republic of Kazakhstan and assigned the function of methodological support for the development of the e-government architecture and the Architecture of the e-Akimat model. According to the resolution of the Government of the Republic of Kazakhstan, the joint-stock company "Zerde" was identified as the integrator of e-government services [11].

Among other functions, it is entrusted with ensuring the security of "electronic government" information systems. According to paragraph 6 of clause 1 of Article 14 of the Law "On Informatization" of the Republic of Kazakhstan, the functions of the State Technical Services Agency include ensuring the access of "e-Government" to the Internet [12].

The Law of the Republic of Kazakhstan "On electronic documents and electronic digital signatures" defines them as documents in which information is presented in electronic digital form and certified by an electronic digital signature, as well as a set of electronic digital symbols generated by an electronic computer digital signature and confirmation of the authenticity, ownership and immutability of the content of electronic documents [13]. Article 23 provides for the protection of information about the owner of the registration certificate, private and public keys of the electronic digital signature.

The peculiarity of the development of draft regulations and legal documents by competent authorities at one level is that they can be developed and, if necessary, approved by several competent authorities. In this case, they are jointly developed and approved by the parties in the form of common legal documents signed by the head of the competent authority. This practice is widely used in the legislative activities of the Ministry of the Interior and the Ministry of Foreign Affairs when issuing many regulations and instructions on visa policy issues and citizenship documents. The Ministry of Health and the Ministry of Finance use this method to regulate relations to the issue of social welfare allocation and payment to various categories of citizens. For legal acts, the important stage is the coordination stage of the project with interested government agencies and organizations. Agreements on legal acts and regulations are possible. The bill is coordinated with interested government agencies in cases decided by the President. The Government approves the list of government agencies that must coordinate in drafting the regulation. When drafting the regulation, the Internet is actively used. So, for example, about a draft resolution of social significance, an additional press release is published on the Internet resource (website) in Russian, and if necessary, in other languages. The provisions on approval and drafting of legal normative documents determine the procedure for drafting legal normative documents by local executive agencies. The draft legal normative document prepared will be submitted for approval to the concerned government agencies and organizations.

For approval, the derivative type of the draft legal normative document and the draft of the main legal normative document approved will be submitted for approval. The coordination of the drafting legal normative document with the concerned government agencies and organizations is carried out according to their competence, while the interest in approving the draft legal normative document is established on the basis of the thematic issues considered. The draft regulatory text is sent for approval to all relevant national authorities and is accompanied by a cover letter in electronic document format with electronic signature.

The developer of the body at the same time sending the draft regulatory act for approval to the interested government agencies publishes a full set of documentation on the Internet, which includes the draft regulation itself, detailed explanations and additional materials related to the conclusion, execution, modification or termination of international agreements of the RK in both languages — Kazakh and Russian.

The term for coordination in drafting normative legal documents is determined, as a rule, 3, 5 and 10 days.

After reviewing the draft decree (order), the state coordination body will send the developer one of the following response options:

- The head of the state agency approves the project in electronic form using the EDS and the project can also be approved without comments;

- The project can be approved on condition that the existing comments are deleted. At the same time, the coordination body publishes the comments, which must necessarily include a proposal for deletion and be signed by the head of the state coordination body using the EDS. The investor then publishes a revised version of the project and sends it back to the government agencies for approval;

- The project approval can be rejected. In this case, the state coordination body marks the state coordination body's IP CS certificate of the rejection of coordination with the reason for the rejection of coordination and is certified by the EDS of the head of the state coordination body.

In case of comments, a final version of the draft Code, if necessary, is prepared by the Office that prepared the draft Code, and the Office responsible for preparation submits the final version of the draft Code, signed by the First Deputy Secretary of the National Authority or the Administrator's EDS, to the IS GC and resubmits it to the relevant National Authority for approval.

After coordination, the state agency development agency submits the draft resolution to the Prime Minister together with the conclusions of the coordinating state agencies and relevant appendices in hard copy form of electronic documents and in electronic form through the Unified Electronic Document Management System of the state agency. As we can see, the approval procedure established by the Regulation is cumbersome and impractical. This is why we believe that it should be optimized and automated. Law-making activity of local public administration bodies has a number of peculiarities conditioned by the nature and legal nature of the system of local public administration. The main peculiarity of law-making activity of local government bodies stems from the so-called dual nature of the system of local public administration in almost all countries, and consists in the fact that local governance is carried out by local government bodies, as well as by bodies representing the central government. The Republic of Kazakhstan is no exception in this matter. The difficulties of local subordinate lawmaking are caused by the fact that the possibilities of high-speed broadband Internet are not available in our country to all rural administrative-territorial units. Employees of not only aul, but also district akimats often complain about the low speed of the Internet, or even the absence of Internet connection, which does not allow at the appropriate level not only to carry out lawmaking using digital technologies, but also in general to perform the functions of direct management. This is also pointed out by researchers from neighboring countries [14; 211]. At the same time, it is noted that digitalization can be used for feedback between the local public administration body and the population, which can make proposals for the adoption of local legal acts without making long trips to the district center [15; 128]. Although, the program "Digital Kazakhstan" is no longer in force, but work continues to provide remote areas with access to broadband Internet. Digital technologies in law-making, which are a set of algorithms and codes, will help improve law-making activities.

Results

The Law on Access to Information stipulates that the concepts of draft laws and draft legal documents must be published on the Internet portal "Open NPA" so that people and mass associations can participate in discussions [5]. However, the actual operation of this Internet portal shows that people's participation in discussions is very low. There is not much activity from state agencies. We believe that it is necessary to develop effective mechanization of information interaction between drafters of legal documents and the public.

The development of draft legal documents is always based on a large amount of complete and objective data (Big Data). The principle of evidence-based legal policy, set out in the Concept, assumes the application of legal decisions based on the analysis of large databases. These data are usually stored in the databases of executive bodies at the central and local levels. This can be data on economic, statistical, tax, judicial, investigative, administrative and other reports, i.e. information on a very diverse list of issues. In this regard, in the process of developing subordinate laws, great attention should be paid to the security of the collection, storage, processing and analysis of these volumes of information.

The current legislative situation is characterized by an increasing number of laws aimed at introducing advanced digital technologies. However, this is not fully reflected in the law. Therefore, it is necessary to add

provisions to the Law on Legal Documents related to the digitalization of the legislative process and the systematization of the law.

Internal factors of the law-making process include technologies that affect the law-making process. To form this idea, it is necessary to take into account the goals and objectives of a legal act by all means and methods acting at the stage of its preparation and adoption, public opinion, all the reforms that are being carried out in the state [16; 59].

When creating subordinate legal acts, it is necessary to take into account the importance of the public relations regulated and, depending on this, choose the form of subordinate legal acts to regulate these relations, as well as maintain a balance between legal provisions, regulations and subordinate legal provisions. The legislature must adhere to the following principles: Laws regulate the most basic and general issues of the country's life.

The development of subordinate laws of the President, the Government and other executive power bodies is characterized by a number of features. First, there is a correlation with legal regulations. Analysis of the process of coordinating draft legal documents in the current system of executive agencies shows that this procedure is very cumbersome and time-consuming. Despite the fact that the current coordination rules stipulate the use of digital technology in the form of EDS by the head of the coordinating agency, this process must be optimized and automated.

The role of computerization in the process of systematizing subordinate legal documents is increasing. Analysis shows that paragraph 32 of the Government Regulation has inaccuracies in the use of terminology and the replacement of the concepts of “development agency” and “authorized agency”. Thus, according to Article 1, paragraph 34 of the Land Code of the RK, the competent authority is the state body and the officials of the Republic of Kazakhstan who have the right to take legal actions within their competence. According to Article 34, paragraph 1, the competent authority is the state body of the Republic of Kazakhstan and the officials who have the right to take legal actions within their competence. For example, they include the President of the Republic of Kazakhstan, the Government of the Republic of Kazakhstan, central and local executive bodies. The development agency, according to the provisions of Clause 1, Article 1 of the Law, is a state body, representative body and local executive body, which develops legal documents in accordance with its competence. Thus, the development agency is an organization that develops a draft law but does not have the authority to adopt this law. The competent authority is authorized to adopt this legal act, but does not necessarily have to be the one who develops it.

Conclusions

Information and communication technologies have significantly increased the efficiency of all areas of public administration and accelerated the process of management decision-making. As a collective body with executive power, it issues resolutions, which are collective creative acts. This means that before a decree is adopted at a government meeting, its text must undergo several stages of discussion and consensus among government members. Unlike collective bodies, legal acts of individual bodies are often adopted by joint decisions of several central bodies. For example, the Ministries of the Interior and Foreign Affairs, the Minister of Health and the Minister of Labor and Social Protection often issue joint orders.

The principles of the legal system working with legal information form the scope of information regulation, in which the tools and forms of general information law are implemented using elements of all ICT tools. To ensure the security of legal information, it is necessary to centralize legal acts and information, unify the conceptual apparatus and use digital technology to classify laws and other legal acts.

Analysis of the text of legal normative documents of local executive bodies shows that the content of the adopted regulations, provisions, instructions almost always includes the text of the documents of the higher executive bodies that they were adopted during their implementation. Such duplication is detrimental to more detailed legal regulations, taking into account the specifics of a given administrative-territorial unit. Therefore, we believe that there should be legal regulations strictly prohibiting the copying of legal normative content as the main document of local administrative legal normative documents.

The creation of legal documents under administrative agencies requires perfection in the aspect of synthesizing all legal documents regulating the legislative activities of these agencies into a single system. Subordinate legal documents include technical and legal standards and rules to build legal documents of the Government and central executive agencies, which are expressed in many legal normative documents of different types, legal natures and legal areas. It should be noted that the legal framework includes the provisions of the Government approving the rules for drafting legal documents, regulations on registration

and conditions for interaction of central administrative bodies in implementing legal provisions. The system of legal documents itself also differs in drafting rules depending on the subjects of legislative activity — the Government, central administrative bodies and local administrative bodies.

The procedure for harmonizing regulations using digital technology is simpler and less time-consuming. As a rule, harmonization takes place in the case of different ministerial directives. For example, some instructions of the Ministry of Water Resources and Irrigation are coordinated with the Ministry of Energy and the Ministry of Agriculture. The harmonization procedure usually takes place in the form of an exchange of electronic messages through the e-government portal using EDS. However, it should be noted that at the central government level there are no barriers to the use of digital technology due to high-speed Internet. But in remote areas, where high-speed internet access is not always available, coordination in drafting general instructions and orders at the district level is a cumbersome and time-consuming procedure. Perfecting the law-making mechanism of the executive branch is an objective need to have an effective impact on economic, social, cultural and other processes in society.

Creation of subordinate legal acts is one of the forms of realization by executive authorities of their managerial competences. In principle, administrative bodies act through their officials. In most cases, officials of administrative bodies perform their functions independently. This applies to akims of all levels, ministers, chairmen of committees. The exception is the Government. As a collegial body of executive power, it issues resolutions, which are acts of collective creativity. This means that before a decree is adopted at a meeting of the Government, its text goes through several stages of discussion and agreement among the members of the Government. In contrast to collegial bodies, legal acts of single-personal bodies are often approved by joint decisions of several central bodies. For example, the Ministry of Internal Affairs and the Ministry of Foreign Affairs, the Minister of Health and the Minister of Labour and Social Protection often issue joint orders.

The procedure for harmonizing bylaws using digital technologies is much simpler and less time-consuming. As a rule, harmonization takes place in case of adoption of various departmental instructions. For example, some instructions of the Ministry of Water Resources and Irrigation are coordinated with the Ministry of Energy and the Ministry of Agriculture. The procedure of harmonization usually takes place in the form of exchange of electronic messages through the e-government gateway using EDS. However, it should be noted that at the central government level, the use of digital technologies has no obstacles due to the high-speed internet. But in remote areas, where there is not always access to broadband Internet, such coordination in the preparation of joint instructions or orders at the district level is a painful procedure that takes up a lot of working time.

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Цифрландыру жағдайындағы заңға тәуелді құқықшығармашылығының ерекшеліктері

Мақаланың мәселелері қазіргі заманғы құқықшығармашылық процестерінде ақпараттандыру мен цифрлық технологиялардың күшейіп келе жатқан рөліне негізделген. Қарастырылып отырған тақырыптың өзектілігі отандық ғана емес, шетелдік заң ғылымында да ақпараттық-цифрлық технологиялардың құқықтық аспектілерінің жеткіліксіз зерттелуімен түсіндіріледі. Цифрлық технологиялар біздің қоғамның күнделікті өміріне ғана терең сіңіп қойған жоқ. Олар адам қызметінің нысандарын айтарлықтай жеңілдетті және әртараптандырды. Құқықшығармашылық саласы да бұдан қалыс қалмайды. Мақаланың мақсаты құқықшығармашылық процестің түрлі кезеңдерінде ақпараттық-цифрлық технологиялардың ерекшеліктері мен мүмкіндіктерін анықтау. Негізгі әдіснамалық құралдар ретінде формальды логика және SWOT-талдау әдістері пайдаланылды. Заңға тәуелді құқықшығармашылығы заң шығармашылығынан айтарлықтай ерекшеленеді, бұл жерде сандық технологиялардың көмегімен жасауға болатын заңдық және ұйымдық-құқықтық әрекеттер көп. Мақаланың негізгі мазмұны цифрландыру жағдайында заңға тәуелді құқықшығармашылығының ерекшеліктерін, сондай-ақ заңға тәуелді құқықшығармашылығы процесін жетілдіруге сандық технологиялардың әсерін анықтау. Авторлар құқықшығармашылық қызмет процесінде цифрлық технологияларды пайдалану тәртібін нормативтік бекіту қажеттігін негіздеген. Бұл тәсілдердің жаңашылдығы құқықшығармашылығында цифрлық технологияларды пайдаланудың әлеуетін, күшті, әлсіз жақтарын, сондай-ақ қазіргі заманғы Қазақстанның құқықтық реттеу қажеттіліктеріне барабар жана заң шығару тетігі шеңберінде құқықтық білім беру, заңға тәуелді нормашығарушылық, құқықтық реттеу және құқық қолдану қызметі институттарының қауіпсіздігіне төнетін ықтимал қатерлерді жүйелі зерттеуден тұрады.

Кілт сөздер: электрондық үкімет, электрондық әкімдік, электрондық үкімет шлюзі, электрондық цифрлық қолтаңба, цифрлық құжат, цифрлық технологиялар, ақпараттық жүйе, ашық нормативтік құқықтық актілердің интернет-порталы, құқықшығармашылық қатынастары, заңға тәуелді актілер, құқықшығармашылық субъектілері, құқықшығармашылық, нормативтік құқықтық акт, құқық, құқықшығармашылық тетігі.

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Особенности подзаконного правотворчества в условиях цифровизации

Проблематика статьи обусловлена усиливающейся ролью информатизации и цифровых технологий в процессах современного правотворчества. Актуальность рассматриваемой темы объясняется недостаточной исследованностью правовых аспектов информационно-цифровых технологий не только в отечественной, но и в зарубежной юридической науке. Цифровые технологии глубоко проникли не только в повседневную жизнь нашего общества, но и значительно упростили и разнообразили формы человеческой деятельности. Не является исключением и сфера правотворчества. Цель статьи — выявление особенностей и возможностей информационно-цифровых технологий на различных этапах правотворческого процесса. В качестве основных методологических инструментов использованы методы формальной логики и SWOT-анализ. Подзаконное правотворчество существенно отличается от законотворчества хотя бы тем, что здесь больше юридических и организационно-правовых действий, которые можно совершать с помощью цифровых технологий. Основное содержание статьи заключается

в выявлении особенностей подзаконного правотворчества в условиях цифровизации, а также влияния цифровых технологий на совершенствование процесса подзаконного правотворчества. Авторами обоснована необходимость нормативного закрепления порядка применения цифровых технологий в процессе правотворческой деятельности. Новизна этих подходов состоит в системном исследовании сильных и слабых сторон, потенциала использования цифровых технологий в правотворчестве, а также возможных угроз безопасности институтов правообразования, подзаконного нормотворчества, правового регулирования и правоприменительной деятельности в рамках нового, адекватного потребностям правового регулирования современного Казахстана правотворческого механизма.

Ключевые слова: электронное правительство, электронный акимат, шлюз электронного правительства, электронная цифровая подпись, цифровой документ, цифровые технологии, информационная система, интернет-портал открытых нормативных правовых актов, правотворческие отношения, подзаконные акты, субъекты правотворчества, правотворчество, нормативный правовой акт, право, механизм правотворчества.

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