


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

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The National Preventive Mechanism is a legal institution for the protection of human rights in the Republic of Kazakhstan

The article discusses the legal regulation issues in the National Preventive Mechanism in the Republic of Kazakhstan. The activities of the National Preventive Mechanism are considered a legal institution of great importance for torture prevention, as well as cruel treatment and punishment, conditioned by international standards implemented in national legislation. The research purpose is to analyze the legal institute's "National Preventive Mechanism", identifying legal regulation problems in its activities and developing ways to overcome them. The research is carried out through general scientific and special legal methods, using analysis and theoretical provisions and legal norms generalization and the implementation practice. Based on the comparative legal process, the main trends in developing the National Preventive Mechanism Institute are currently being identified. The analysis of the specifics of the National Preventive Mechanism in Kazakhstan and its consolidation in legal acts and international standards is carried out. Main result of the research is the provision on the need to improve legal measures aimed at harmonizing national legislation in the prevention of torture with international standards in this area. The conclusions suggest the development and improvement of legal norms that specify the procedure for conducting preventive visits by members of the National Preventive Mechanism, as well as the procedure for financing and ensuring the independence of the human rights institution activities.

Keywords: Kazakhstan, prevention, human rights, torture, punishment, legislation, legal norms, legal status, international standards

Introduction

The relevance of the research topic underlies in the fact that effective human rights protection requires a legal institution system that complements each other. In the human rights activities field, cooperation between government institutions and civil society institutions is important. Such institutions include the National Preventive Mechanism, activities of which are aimed at preventing torture and other inhuman, cruel, or degrading treatment or punishment. The human rights institution activities have a significant socio-political importance. At the same time, the legal regulation of the institution's activities and its participants is very important as well. The organization procedure, the participant's rights and obligations, legal responsibility, and other aspects of the activity are fixed in national legislation. All legal norms that regulate the activities of the National Preventive Mechanism and its participants constitute an interdisciplinary legal institution. The legal institution's peculiarity is that it is found in various legal acts, which creates problems in the implementation of rights and obligations for various parties who enter into legal relations concerning human rights.

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The legal norms that form part of this legal institution are contained in penal enforcement and administrative legislation, social security laws and other legislative acts. In our opinion, the National Preventive Mechanism, as a human rights institution, is insufficiently institutionalized within the legal framework.

The research purpose is aimed to study the legal norms governing the activities of the National Preventive Mechanism as a legal and human rights institution.

The main research objectives are the analysis and generalization of the following provisions:

- Study of legal norms for the definition of the intersectoral legal institute “National Preventive Mechanism”.
- Conducting a comparative institution legal analysis with similar institutions in other countries.
- Procedure consideration for conducting preventive visits by participants of the National Preventive Mechanism and proposals development for improving this process.
- Research on the role and importance of the National Preventive Mechanism as a human rights institution.
- Research development for improving the financing mechanism activities of participants and ensuring the independence of its activities.

Currently, it is important to highlight the conflicts between legal theory and law enforcement practice. Based on the legal approach to classifying subjects of legal relations, four distinct categories are identified: individuals, legal entities, administrative-territorial units, and the state. However, as legal norms are developed and implemented, gaps often arise — specifically, the absence of legal norms that define the legal status of certain subjects. From the author’s perspective, the National Preventive Mechanism is included among these institutions. Current legislation does not define the legal status of participants in the National Preventive Mechanism. On one hand, the participants act in a personal capacity, engaging in human rights activities. On the other hand, their actions constitute the National Preventive Mechanism, which serves as a human rights institution but is neither an individual nor a legal entity. It has no separate property, seal, or bank account. Furthermore, participants of the National Preventive Mechanism do not have an employment relationship and do not enter into civil contracts when carrying out their activities. Consequently, a clear definition of the participants’ status within this human rights institution is essential.

The uncertainty surrounding the legal status of the participants and the mechanism should be regarded as gaps in national legislation, positioning this issue as a theoretical problem. Research on the varying legal statuses of different subjects in law does not permit a clear classification of the relationships that arise between the participants of the National Preventive Mechanism and other subjects within the framework of traditional legal relations. Therefore, it is essential to examine and consider the different approaches among various legal schools, as they classify subjects in legal relations in diverse ways.

The author’s perspective in reviewing the literature and other sources highlights the insufficient theoretical development surrounding the definitions and classifications of legal subjects and legal relations. Currently, social institutions are emerging that society recognizes as subjects of legal relations, yet they remain inadequately institutionalized within the legal framework. This situation creates conflicts in the regulation of specific legal relations. The lack of theoretical research aimed at determining the legal status of these new subjects of legal relations hinders a clear understanding of the legal status of the National Preventive Mechanism. Consequently, this generates legal practices that cannot be adequately explained using the existing tools of modern legal theory.

Methodology and research methods

To achieve objectivity, completeness, and comprehensiveness in the research results, a combination of general scientific and specialized cognitive methods was employed. This approach is driven by a systematic framework that addresses the challenges of improving Kazakhstan’s legislation in the human rights sphere.

The methodological basis of the research is a scientifically grounded approach to examining the issues related to the legal regulation of the human rights activities of the institution known as the “National Preventive Mechanism”, as well as the definition of the set of legal norms governing these public relations as a legal institution.

The research employs both general scientific and specialized scientific methods. The examination of legal norms related to the intersectoral legal institution “National Preventive Mechanism” is conducted through analysis and generalization of these norms. The comparative legal method is utilized to compare similar legal norms from different countries. Based on this analysis and generalization, a study is being conducted on the procedures for carrying out preventive visits by the participants of the National Preventive Mechanism. Ad-

ditionally, legal hermeneutics is applied to develop new approaches to legal terminology that define the legal status of the National Preventive Mechanism as a whole and its participants in particular. Through observation, analysis, and generalization, the research identifies shortcomings in the legal regulation of human rights in Kazakhstan, particularly regarding public and state control over the observance of human and civil rights in the country.

Results

As a result, the following provisions were identified, which were obtained through the author's observation. The author's observation was carried out during his activities as a participant in the National Preventive Mechanism for the Karaganda region in the period 2023-2024. During his observation, shortcomings in the legal regulation of the institute activities were identified. These are the following provisions:

1) The legal norms set governing the activities of the National Preventive Mechanism is dispersed across various legal acts. Many provisions that are found in different legal acts are duplicated. This is inconvenient for using the text of legal acts in practice.

2) A comparative institution provisions legal analysis with similar institutions in other countries shows the need for additional regulation of the procedure for preventive visits, as well as guarantees for the participants activities in this mechanism.

3) The necessity for legal regulation financing activities in the National Preventive Mechanism has been identified: travel and transportation expenses reimbursement.

The scientific research results are as follows:

1) Based on the research conducted, the National Preventive Mechanism should be considered as a social institution that carries out human rights activities in the human rights field and torture prevention. At the same time, this institution is insufficiently legally institutionalized. At the same time, it seems necessary to consider the emerging legal relations as an interdisciplinary legal institution, which is united by a common legal regulation subject. The modern system of legal norms that forms this legal institution was determined by the Law of the Republic of Kazakhstan "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the establishment of a national preventive mechanism aimed at preventing torture and other cruel, inhuman or degrading treatment or punishment" dated July 2, 2013. Amendments and additions were made to the Code of Criminal Procedure; the Penal Enforcement Code; the Code of the Republic of Kazakhstan on Administrative Offenses; The Code "On the Health of the People and the Healthcare System"; The Law "On compulsory treatment of patients with alcoholism, drug Addiction and substance Abuse"; The Law "On the procedure and conditions of detention of persons in special institutions providing temporary isolation from society"; The Law "On the Rights of the Child"; The Law "On the Prevention of Juvenile Delinquency and the Prevention of Child Neglect and homelessness" [1]. In all these acts, the National Preventive Mechanism is defined as a system for the torture prevention, which operates through the participants activities. The mechanism participants are: The Human Rights Commissioner, as well as participants who are selected by the Coordinating Council from the public monitoring commissions members and public associations that carry out activities to protect human rights, lawyers, social workers, doctors [1]. At the same time, the organizational and legal form in which the National Preventive Mechanism operates is not defined. It seems necessary to determine the relationship of the participants with the Commissioner for Human Rights (the National Center for Human Rights) through an employment contract or a civil law contract. Additionally, consideration should be given to life and health insurance when participants exercise their powers within the National Preventive Mechanism. This is necessary to ensure the labor and civil rights of the participants in this mechanism.

2) During the comparative legal analysis in this institution with similar human rights institutions in other countries, the following was revealed. A similar mechanism exists in the countries of Asia and the Pacific, Central Asia, Africa, America, and Europe. The National Center for Human Rights has studied the work experience of one hundred and nine accredited in the Global Alliance of National Human Rights Institutions of foreign countries. At the same time, it is necessary to conclude that the National Preventive Mechanism, from perspective of organization, is part of a larger state institution of the Commissioner for Human Rights in the Republic of Kazakhstan. The working body is the National Center for Human Rights. Currently, the Commissioner Institute is accredited in the Global Alliance of National Human Rights Institutions of Foreign Countries with the status of "B" [2; 10]. This status means that Kazakhstan's national human rights institutions, headed by the Commissioner for Human Rights, do not fully comply with the Paris Principles. These principles are based on criteria such as: broad human rights powers based on universal international stand-

ards; independence from government agencies, which is guaranteed by law; the availability of different approaches in the human rights field; sufficient resources and powers for investigation [3]. Thus, it is necessary to conclude that it is necessary to improve the national human rights institutions system in order to bring them in line with the Paris Principles. At the same time, these principles should be considered as programmatic goals for improving Kazakhstan's human rights mechanism.

3) The procedure for conducting preventive visits by participants of the National Preventive Mechanism is regulated by the Rules of Preventive Visits by groups formed from participants in the national preventive mechanism as amended by the Decree of the Government of the Republic of Kazakhstan dated 02/16/2023. These Rules determine the procedure for preventive visits by National Preventive Mechanism participants [4]. At the same time, in order to visit a closed institutions number, participants are also required to comply with the rules for visiting these facilities. For example, the Rules for visiting institutions of the Penal correction System of August 20, 2014, disclosed the procedure for access control, the procedure for visiting penal correction system institutions, including for participants of the National Preventive Mechanism in connection with the exercise of their powers. Currently, these rules have become invalid by order of the Minister of Internal Affairs dated April 12, 2017 in connection with the new Rules approval for visiting penitentiary system institutions dated April 12, 2017 No. 63 [5]. These rules are labeled "For official use" and are not available in open databases. Accordingly, the lack of access to the rules that participants must follow when visiting these institutions does not allow them to be observed in accordance with the legal norms enshrined in them. It seems necessary to remove the label "For official use" for these rules, as it was before, or to develop additional rules that are open to all persons who legally visit institutions of the penal correction system.

4) The National Preventive Mechanism role and importance as a human rights institution in the national human rights institutions system is quite significant. In 2023, 474 sites of concern were monitored. These are institutions of the following ministries: education — 113; social protection of the population — 66; health — 45; defense — 2; Internal Affairs — 246; National Security Committee — 2. A total of 461 preventive visits were carried out: 163 periodic visits; 259 interim visits; 33 special visits; 6 thematic visits. As a result of the monitoring, more than three thousand recommendations were submitted to public authorities and management, with more than 40% implemented between 2023 and early 2024. [6]. Thus, this institution is of great importance in the field of human rights protection in the Republic of Kazakhstan. At the same time, there is a tendency to expand the mandated institutions. For example, in 2016, the powers expansion in the National Preventive Mechanism was initiated, by including a number of children's institutions in the mandate [7]. Conceptually, this institution powers will be further expanded by including them in mandatory institutions where there may be a potential threat to human rights from the modern society point of view. These may be general education schools, military units, kindergartens, and other facilities where civil control over human rights is, in the opinion of society, insufficiently effective.

5) The mechanism for financing the National Preventive Mechanism activities is provided for by the Rules for Reimbursement of national preventive mechanism participants expenses for Preventive Visits as amended by the Decree of the Government of the Republic of Kazakhstan dated 02/16/2023. These rules regulate the procedure for expenses reimbursement, while, in our opinion, they require improvement [8]. As a result of the observation and bylaws analysis, we propose to amend paragraph 5 of the Rules "Participants of the national preventive mechanism are reimbursed by the budget program administrator." The first paragraph of subparagraph 1) should be worded as follows: "for each day of stay at the place of preventive visit, the participant of the preventive mechanism is paid a daily allowance in the amount of two monthly calculation indices, including the day of departure to the place of stay and the day of arrival at the place of main work." This will allow you to pay a daily allowance not only during your stay at the place of preventive visit, but also on the day of departure and the day in return if this is confirmed by train or bus tickets or other means of transport. It also seems necessary to include payment for transportation costs if participants in the National Preventive Mechanism use personal transport or taxis to remote locations where institutions of concern are located. It seems possible to propose that the Coordinating Council consider the justification for the remoteness of the mandatory facility and, if it decides positively, finance taxi travel with the provision of supporting documents. A possible option may be to conclude a contract for the provision of transport services between the National Center for Human Rights and a specific transport organization.

Discussion

The analysis of publications allows us to conclude that the issue of improving the National Preventive Mechanism has not received sufficient attention at the scientific level. Most available materials consist of

journalistic articles and information found on various websites related to human rights activities. Among the few scientific works, several studies dedicated to the analysis of national human rights institutions stand out: Bashimov M.S., in his doctoral dissertation “The Ombudsman Institution in the Republic of Kazakhstan and Foreign Countries (Comparative Legal Analysis)”, conducts an in-depth institutional analysis of the Ombudsman in Kazakhstan, comparing it with similar institutions in other countries [9]. Pavlov E., Slavkina N. and other in the collective monograph “The Ombudsman in Foreign Countries”, explore the legal status features of constitutional and parliamentary ombudsmen in foreign countries [10]. Kuzminykh N.V., in his work “The Institute of the Commissioner for Human Rights (Ombudsman) in the Countries of the Commonwealth of Independent States (CIS)”, analyzes the specifics of ombudsmen functioning in post-Soviet states, paying attention to historical and cultural peculiarities [11]. Shabanova Z.M., in her dissertation “Specialized Commissioners for Human Rights in Russia and Foreign Countries”, examines the legal aspects of ombudsmen’s work, as well as their interactions with government agencies and the public [12]. The publication “The Eurasian Ombudsman Alliance: Models and Competencies” is noteworthy as it examines the legal status and organizational positions of national human rights institutions in 10 countries of the Eurasian Ombudsman Alliance. Another important publication is “National Human Rights Institutions of Foreign Countries and the Republic of Kazakhstan”, which analyzes information regarding the competence, structure, regulatory framework, financing, and other aspects related to the functioning of national human rights institutions in foreign countries and Kazakhstan [2; 11]. Additionally, the publication “Establishment and Appointment of National Preventive Mechanisms,” prepared by the Association for the Prevention of Torture in 2006, is of interest [13]. These studies address various issues related to the institution of the Commissioner for Human Rights, including the activities of the National Preventive Mechanism and other similar human rights institutions. The article by Saparali A.B., titled “The National Preventive Mechanism for Torture Prevention in Kazakhstan: A Comparative Legal Analysis,” examines the history of the institution’s formation and concludes that this human rights institution is optimal and unique [14]. In the research by Sabayeva S.V. and Gulyaev D.E., titled “The Search for an Optimal National Preventive Mechanism Model for the Russian Federation (Results of a Comparative Legal Study of Foreign Legislation),” the authors conclude that it is possible to develop a concept and subsequently adopt a law “On State and Public Control Over Human Rights in Places of Forced Detention.” This law would regulate the status, composition, and powers of the bodies forming the national preventive mechanism [15; 210–218]. Discussions regarding the development of the National Preventive Mechanism have been carried out on various information platforms. For example, seminars aimed at the practical implementation of the national preventive mechanism for preventing torture and other cruel, inhuman, or degrading treatment or punishment have been held [16]. The results of these discussions and scientific research led to the development of a draft law “On the National Preventive Mechanism in the Republic of Kazakhstan,” which was presented in April 2024 by experts from the Coalition of Non-Governmental Organizations of Kazakhstan Against Torture, including former and current members of the Coordinating Council. The submitted draft law defines the legal status and organization of the mechanism’s activities [17]. Currently, this bill is proactive in nature; it has not yet been submitted to the Mazhilis and is being discussed across various information platforms by civil society institutions. Since this draft has not been published, it is not possible to analyze it.

The issues and consequences of the preventive mechanism operating activities in the “Ombudsman plus” format in the fourth of national human rights approaches development are considered in the publications of V.S. Issabekova [18; 16–22], A.B. Ashirbekova, O. Anayurt [19; 6–13]. V.S. Issabekova, J. Zalesny [20; 25–30]. In these publications, a comparative legal analysis of the foreign institution ombudsman and the national institution of the Commissioner for a small number of people in the Republic of Kazakhstan was conducted and proposals were made for progressive Kazakh legislation in this area.

During these publications research, it can be concluded that further research is needed for the problems inside functioning at the National Preventive Mechanism. At the same time, the issues and problems considered in this study are new and relevant. Assessing the research results as new, it should be noted their practical significance and scientific validity.

The result is the need to develop a scientific concept that reveals, from a theoretical view, the state and public control legal nature. This control type is implemented during visits to participants of the national preventive mechanism, which combines State powers and the formation of public nature of human rights institution. During preventive visits, participants exercise their rights and obligations on the basis of Kazakh legislation, while also being responsible on the basis of legal norms. They are elected by the Coordinating Coun-

cil for a two-year term and exercise their powers in their personal capacity. This control type has a mixed (state-public) character, which can be characterized as quasi-governmental control (monitoring).

The research results are reliable because they are based on the analysis and international standards generalization, the foreign countries experience, Kazakh legislation, scientific publications and other information from official sources. The results reliability is also due to the fact that, unlike other studies, the correctness and results necessity is confirmed by the author's observation during the practical powers implementation of a participant in the national preventive mechanism.

Conclusions

Based on the conducted research, it is possible to systematize all approaches to the consideration of problems in the legal regulation field at the National Preventive Mechanism Institute, dividing them into scientific and practical ones. Scientific and theoretical approaches to the research are carried out in the research context on the entire human rights activities system. They are aimed at studying and reviewing human rights institutions to ensure compliance of national legislation with international standards. Approaches to the institution research, as a rule, are applied in nature and are aimed at developing the most effective techniques and ways to achieve their goals. Accordingly, it seems important to combine both approaches when developing organizational human rights activities forms and regulating the procedure for carrying out these activities.

Thus, in order to improve the institution of the “National Preventive Mechanism,” it is advisable to propose the following.

- It seems necessary to consider the National Preventive Mechanism as an interdisciplinary legal institution. This institution includes legal norms from various industries, united by the subject at legal regulation. The legal regulation subject should encompass human rights activities for the torture prevention, cruel and inhuman treatment and punishment.

- It seems necessary to define the National Preventive Mechanism legal status in regulatory legal acts. Based on legal status, conclude an employment contract or a civil contract with the participants of this mechanism. The legal contract form must be determined by the legal relations that nature arise: labor, civil law, or other legal relations.

- It seems necessary to be guided by the Paris Principles when improving national human rights institutions. To consider these principles as programmatic goals for improving Kazakhstan's legislation in the human and civil rights protection field.

- In order to streamline public relations and ensure rights and obligations knowledge participants in the National Preventive Mechanism, the label “for official use” from the Rules for Visiting Institutions of the Penitentiary System dated April 12, 2017 No. 63., should be removed.

- The National Preventive Mechanism is an important human rights institution that covers a large number of mandated institutions. It seems necessary to note the development and its powers expansion.

- In order to ensure travel expenses payment, it seems necessary to amend paragraph 5 of the Rules for participants Expenses Reimbursement in the national preventive mechanism for preventive Visits. The first paragraph, subparagraph 1) should be worded as follows: “for each day staying at the preventive visit place, the participant is paid a daily allowance in the amount of two monthly calculation indices, including the day departure to the place and the arrival day for work.”

The study has practical value, as the results are aimed at improving the activities in the National Preventive Mechanism participants, ensuring its effectiveness and independence.

The scientific research value are theoretical aspects in the legal status of subjects in legal relations that are not legally defined. From modern legal theory view, all law subjects are divided into individuals, legal entities, administrative-territorial units and the state. Accordingly, the new organizational introduction and legal forms into legislation — that go beyond the modern legal theory framework — requires further study.

The research results can be used in scientific research devoted to the defining problems of legal subjects, their characteristics and the procedure for exercising rights and obligations. The research results can be used in law-making activities in the field of improving derivative legal acts regulating the human rights institutions activities.

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Ұлттық алдын алу тетігі — Қазақстан Республикасындағы адам құқықтарын қорғау жөніндегі құқықтық институт

Мақалада Қазақстан Республикасындағы Ұлттық алдын алу тетігі қызметін құқықтық реттеудің түйткілді мәселелері қарастырылған. Ұлттық алдын алу тетігінің қызметі ұлттық заңнамада іске асырылатын халықаралық стандарттармен айқындалатын азаптаулардың, сондай-ақ қатыгездік пен адамгершілікке жатпайтын қарым-қатынас пен жазаның алдын алу үшін үлкен маңызы бар құқықтық институт ретінде зерделенген. Зерттеудің мақсаты — Ұлттық алдын алу тетігі құқықтық институтына талдау жүргізу, құқықтық реттеу мәселелерін айқындау және оларды шешу жолдарын әзірлеу. Зерттеу теориялық ережелер мен құқықтық нормаларды және оларды жүзеге асыру тәжірибесін талдау мен қорытуды пайдалана отырып, жалпы ғылыми және арнайы құқықтық әдістер арқылы жүзеге асырылады. Салыстырмалы-құқықтық әдіс негізінде қазіргі уақытта Ұлттық алдын алу тетігі институтының дамуының негізгі тенденциялары анықталды. Құқықтық нормалар мен халықаралық стандарттарда бекітілген Қазақстандағы ұлттық алдын алу тетігі қызметінің ерекшеліктеріне талдау жүргізілді. Зерттеудің негізгі нәтижелері азаптаулардың алдын алу саласындағы ұлттық заңнаманы осы саладағы халықаралық стандарттармен үйлестіруге бағытталған құқықтық шараларды жетілдіру қажеттілігі туралы ұстаным. Қорытынды ретінде ұлттық алдын алу тетігіне қатысушыларының профилактикалық сапарларын өткізу тәртібін, сондай-ақ осы құқық қорғау институтының қызметін қаржыландыру және тәуелсіздігін қамтамасыз ету тәртібін егжей-тегжейлі сипаттайтын құқықтық нормаларды әзірлеу ұсынылған.

Клт сөздер: Қазақстан, алдын алу, адам құқығы, азаптау, жазалау, заңнама, құқықтық нормалар, құқықтық мәртебе, халықаралық стандарттар.

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Национальный превентивный механизм — правовой институт защиты прав человека в Республике Казахстан

В статье рассматриваются проблемные вопросы правовой регламентации деятельности Национального превентивного механизма в Республике Казахстан. Деятельность Национального превентивного механизма рассматривается как правовой институт, имеющий большое значение для предупреждения пыток, а также жестокого и бесчеловечного обращения и наказания, обусловленного международными стандартами, имплементированными в национальное законодательство. Цель исследования — осуществить анализ правового института Национального превентивного механизма, выявить проблемы правовой регламентации и выработать пути их преодоления. Исследование осуществлено посредством общенаучных и специально-правовых методов, используется анализ и обобщение теоретических положений и правовых норм и практика их реализации. На основе сравнительно-правового метода выявляются основные тенденции развития института Национального превентивного механизма в настоящее время. Проведен анализ особенностей деятельности Национального превентивного механизма в Казахстане, закрепленных в правовых нормах и международных стандартах. Основным результатом исследования является положение о необходимости совершенствования правовых мер, направленных на гармонизацию национального законодательства в сфере деятельности по предупреждению пыток с международными стандартами в этой сфере. В качестве выводов предлагается разработка правовых норм, детализирующих порядок осуществления превентивных посещений участников Национального превентивного механизма, а также порядка финансирования и обеспечения независимости деятельности этого правозащитного института.

Ключевые слова: Казахстан, превенция, права человека, пытки, наказание, законодательство, правовые нормы, правовой статус, международные стандарты.

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