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ON THE HIERARCHY OF NORMATIVE LEGAL ACTS

Abstract

The article is devoted to one of the key problems of the modern theory of law - the hierarchy of normative legal acts. The points of view that exist in the legal literature on the concept of hierarchy in positive law are studied. The author comes to the conclusion that it represents the ratio of normative legal acts, which are arranged in a certain vertical sequence, as their legal force decreases, and implies the correspondence of acts of each lower level to acts of higher levels. A critical analysis of the Constitution of the Republic of Kazakhstan and the Law "On legal acts" was carried out. It has been established that this Law, fixing the hierarchy of normative legal acts, in its separate provisions contains norms that are controversial and contrary to the Constitution. On the basis of the analysis carried out, proposals were developed to improve the Law "On Legal Acts".

Key words: law, hierarchy, Constitution, normative legal act, resolution, decree, legal force.

Introduction

Hierarchical issues of regulatory legal acts are one of the traditional topics in legal theory. Its essence lies in clarifying the relationship of legal force among acts containing legal norms, primarily laws and bylaws. Determining the hierarchy of regulatory legal acts is necessary to avoid contradictions between them and the resulting incorrect interpretation and application of legislation.

The aim of this article is to examine the system of regulatory legal acts of the Republic of Kazakhstan and determine their correct relationship from the perspective of legal force, based on the general principles of constructing the legal system.

The scientific value and theoretical significance of the conducted research consist of identifying existing inaccuracies and contradictions in the foundation of the hierarchy of regulatory legal acts in the Republic of Kazakhstan and developing recommendations for overcoming them. The article will be useful for researchers dealing not only with the problems of legal theory and constitutional law but also with other legal sciences.

The practical significance of the article lies in the possibility of using its conclusions and suggestions in improving national legislation.

Materials and methods

The main materials for preparing this article were the provisions of the Constitution of the Republic of Kazakhstan (hereinafter - RK) of August 30, 1995, the Law of the RK of April 6, 2016, "On Legal Acts," and other laws, as well as studies by Russian and Kazakhstani legal scholars on the relevant issues.

In the process of working on this article, the author used general philosophical and specific methods of scientific cognition: dialectical, analysis and synthesis, structural-functional, formal-legal, comparative-legal, and others.

Literature review

This issue has received sufficient coverage in contemporary legal literature, primarily in Russian. Works by Russian scholars such as Kuznetsova M.A., Vlasenko N.A., Shevchenko S.N., Kozhokar I.P., Karnaukhova E.V., and others are dedicated to the hierarchy of regulatory legal acts, factors influencing it, legislation systematization, the relationship between acts of different legal force, and collisions of legal norms [1, pp. 190–195; 2–5].

A monograph by Petrov A.A. and Shafirov V.M. “Subject Hierarchy of Regulatory Legal Acts” has been published on this issue [6].

Kazakhstani scholars have addressed this problem in the works of Yelubaev Zh.S. [7], Taukibaeva Zh.Sh. [8], as well as in the works of civil law scholars such as Suleimenov M.K., Moroz S.P., and others. The study of the legal nature of normative resolutions of the Supreme Court and their role in the legislative system was discussed at the international scientific-practical conference “Legal Nature of Normative Resolutions of the Supreme Court of the Republic of Kazakhstan and Their Role in the Efficiency of Justice Delivery,” held at the Almaty City Court of the RK on May 12, 2009 [9].

This scientific work is based on the author’s article published in Russian in the journal “Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan” in 2022 [10]. However, due to the relevance of the research topic and the constitutional reform conducted in 2022, we consider it appropriate to revisit this issue and present an English version of the article taking into account the changes and additions made to the legislation.

Main provisions

The concept of “hierarchy” in relation to law is defined as “the most important organizational principle of systemic objects, the arrangement of their elements (parts) in ascending order from highest to lowest, subordination” [2, p. 154], “determined by specific factors in the construction of norms contained in legal acts of different legal force, whereby they are in subordination and consistency” [3, p. 15], “the order of relations between different-level elements of law, based on the inequality of lower and higher levels in the context of the generality (abstractness) of law description, layers of decision-making in law, or organization of law as a system” [6, p. 39].

It should be noted that we are discussing hierarchy in positive law, i.e., law as a system of legal norms. In this understanding, legal hierarchy represents the relationship of regulatory legal acts arranged in a specific vertical sequence depending on their legal force, implying that acts of each lower level correspond to all acts of higher levels.

The hierarchy of regulatory legal acts is also conditioned by the system of state bodies, many of which are hierarchically (vertically) subordinate to each other. On this basis, the system of executive power is constructed: Government - central executive bodies (ministries, agencies) – their internal divisions (departments) – local executive bodies (akimats, akims). At the top of this pyramid is the President, who, although not leading the executive branch, nevertheless shapes it, to which it is organizationally subordinate and accountable. Accordingly, acts issued by all these subjects are also arranged vertically – from acts of higher legal force to subordinate acts.

The fundamental principles of legal hierarchy are enshrined in Article 4 of the Constitution of the Republic of Kazakhstan. They establish the conformity of the norms of the Constitution to laws, other regulatory legal acts, international treaty obligations of the Republic, as well as normative resolutions of the Constitutional Court and Supreme Court of the RK, giving the Constitution higher legal force, and priority of norms of international law (ratified international treaties) over national laws [11].

Results and discussion

However, other provisions regarding the legal force of regulatory legal acts of various state bodies and their place in the legal hierarchy are also contained in the main regulatory document of the country. They concern the decrees of the President of the RK (Clause 1 of Article 45), laws and resolutions of the Parliament of the RK and its chambers (Clause 7 of Article 62), resolutions of the Government of the RK (Clause 3 of Article 69), legal consequences of decisions of the Constitutional Court of the RK

(Article 74), activities of courts in connection with the application of unconstitutional acts (Article 78), acts of local representative and executive bodies (Article 88), amendments to the Constitution of the Republic of Kazakhstan (Clauses 2,3 of Article 91).

The Law of the RK dated April 6, 2016, “On Legal Acts” does not provide definitions for the terms “legal hierarchy” or “hierarchy of regulatory legal acts,” but it does define the related concepts “level of regulatory legal act” (Subclause 28 of Article 1) and “legal force of regulatory legal act” (Subclause 29 of Article 1) [12].

The law establishes the legislative system of the Republic, ensuring its integrity (Article 4), the legal force and place of normative resolutions of the Constitutional Court and Supreme Court of the RK in the legislative system (Article 5), as well as the priority of international treaties of the RK over its laws (Article 6).

Article 10 establishes the hierarchy of regulatory legal acts. This hierarchy is generally based on the provisions of the Constitution outlined above. This article of the Law prohibits contradictions between acts of lower levels and acts of higher levels, and also determines the place of a derivative regulatory legal act depending on the level of the main type of act.

At the same time, some questions arise regarding this hierarchy.

For example, codes occupy a higher position compared to consolidated and ordinary laws, as they are fundamental regulatory legal acts in the relevant branch or sub-branch of law and are adopted through a more complex procedure. The procedure for adopting codes and amendments thereto is essentially identical to that for ordinary laws (by sequential consideration in separate sessions of the Chambers by a simple majority vote). However, they must undergo no fewer than two readings. Although it should be noted that the majority of laws are adopted in two readings as well. Nevertheless, changes and amendments to codes can also be made and adopted under special procedures established by the respective codes (Subclauses 1 and 1-1 of Clause 2 of Article 34) [12].

For example, amendments to the Tax Code are made by a law that does not provide for amendments to other legislative acts of the RK, except for the Law on the Entry into Force of this Code (Clause 4 of Article 3) [13].

However, in most codified acts, changes are made by ordinary laws, when amendments to codes are allowed simultaneously with amendments to other laws. For example, changes and amendments to the Budget, Administrative Procedural, and Procedural Codes, and the Law “On the Supreme Judicial Council of the Republic of Kazakhstan” were introduced by the Law of the RK dated December 20, 2021 [14].

And the issue is not that the order of mandatory readings might not be followed here. Precisely in this regard, the procedure is usually adhered to. The concern is about laws of different legal force. It turns out that amendments are made to ordinary laws, both to acts of equal force and to acts of higher legal force. A contradiction arises, relating to the so-called “vertical collisions,” associated with the different levels of the legislative structure [4, p. 18].

In our view, this is unacceptable. Amendments made to a normative legal act should be made by an act equivalent in its legal force. Thus, changes to constitutional laws, which are hierarchically higher than codes in the hierarchy of normative legal acts, can only be made in the form of constitutional laws.

The next provision of Article 10 of the Law “On Legal Acts,” where the normative resolutions of the Parliament and its Chambers are above the normative legal decrees of the President, is also very questionable.

According to Article 45, Clause 1 of the Constitution of the Republic of Kazakhstan, “The President of the Republic of Kazakhstan, on the basis and in accordance with the Constitution and laws, issues decrees and orders that have binding force throughout the territory of the Republic.” Clause 7 of Article 62 does not allow contradictions between the resolutions of the Parliament and its Chambers and the laws [11].

Despite the different presentation of these norms, they indicate the place of normative resolutions of the Parliament and its Chambers and normative legal decrees of the President in the hierarchy of normative legal acts. In both cases, the Constitution and laws are superior to them. So why are they at different levels in the hierarchy?

This was caused by the introduction into the Constitution of the Republic of Kazakhstan (Clause 1 of Article 62) and the Law “On Legal Acts” (Clause 7 of Article 1) of the term “legislative act,” which covers different types of laws, resolutions of the Parliament, resolutions of the Senate and the Majilis. At the same time, the Constitution contains a general formulation “law,” and the Law “On Legal Acts” elaborates on it in terms of types of laws. However, it is not specified that it specifically refers to normative legal resolutions of the legislative body and its chambers. After all, such acts may not contain legal norms. For example, a resolution may concern the establishment of a joint commission of the Chambers of Parliament with the determination of its composition.

It is understandable that the developer of this norm sought to combine all types of acts adopted by the legislative authority under one term. And since the institution of the President is more associated with the executive power, although according to our Constitution it does not belong to any of the branches of power and is equidistant from them, in the system of separation of powers, the legislative power is somewhat higher than the executive power, despite their organizational independence and non-interference in each other’s affairs. At least, their acts are at different hierarchical levels.

In this case, we are talking specifically about laws and subordinate acts. Moreover, the Parliament itself also adopts subordinate acts, in particular, resolutions. It has already been mentioned that their contradiction to the Constitution and laws is unacceptable.

However, the consolidation of acts of different legal force under one term has led to a legal “trap” into which both the legislature and law enforcement agencies fall. What does this entail? The fact that when regulating, for example, the powers of a particular state body or any other issues, the corresponding article often makes a blanket reference to “other legislative acts” or “legislation” as a whole, although by the meaning of the norm, other laws are meant, but by no means resolutions of the Parliament or its Chambers, let alone subordinate normative legal acts.

Much of this was due to the transition from the Soviet legal system, where laws and resolutions of the highest representative body (Supreme Soviet) were often enacted in one bundle: laws were often brought into force by resolutions. At present, the rules on the entry into force of a law in general or its individual provisions are usually contained in the final articles of the law itself, or a separate law is adopted on this matter. If no specific term is indicated, the procedure for putting the law into effect is determined by Article 42 of the Law “On Legal Acts.”

In this regard, if the term “legislative act” claims to be further preserved, it can only encompass various types of laws, but not include subordinate acts, namely resolutions of the Parliament and its Chambers.

As for the lower position of normative legal decrees of the President compared to the normative resolutions of the Parliament and its Chambers, they undoubtedly should be on the same level in the hierarchy of normative legal acts, since they legally formalize the independent powers of each of these subjects, requiring legal regulation. The Parliament and the President are not organizationally subordinate to each other and are not accountable to each other.

For comparison, one can refer to the provisions of the Law of the Republic of Belarus (hereinafter - RB) “On Normative Legal Acts,” in which the resolutions of the House of Representatives and the Council of the Republic of the National Assembly of the RB are positioned below not only decrees and orders of the President but also resolutions of the Council of Ministers (Clause 2 of Article 3) [15]. This is hardly acceptable, as this norm is based on the supremacy of the presidential and executive power over the legislative power, which contradicts the principle of separation of powers.

Criticism arises regarding the exclusion from the hierarchy of acts of the Chairman of the Security Council of the Republic of Kazakhstan (Clause 5 of Article 10 of the Law “On Legal Acts”). Firstly, the Law “On the Security Council” itself was initially adopted and oriented towards the status of the First President, who was a lifelong chairman of this body. Although in 2022 it was headed by the acting President and corresponding changes were made to the Law, the form of acts of the Chairman of the Security Council remained undefined by the Law. However, since the Chairman of the Security Council is the head of state, what other acts besides decrees and orders can they issue? Only these. But normative legal decrees of the President are included in the hierarchy of normative legal acts and have a subordinate nature. The form of acts of the head of state is prescribed by the Constitution and the Constitutional Law of the Republic of Kazakhstan of December 26, 1995, “On the President of the Republic of Kazakhstan.”

Thus, there is an obvious contradiction in Clause 5 of Article 10 of the Law “On Legal Acts” to acts of higher legal force, which needs resolution through exclusion.

The commented norm also places normative resolutions of the Constitutional Council and the Supreme Court of the Republic of Kazakhstan outside the hierarchy.

Again, comparing with the aforementioned Law of the Republic of Belarus, it should be noted that in it, normative legal acts of the Supreme Court of the Republic of Belarus are placed in the hierarchy and are positioned on the same line as normative legal acts of both Chambers of the National Assembly, the Prosecutor General’s Office, and normative legislative bodies subordinate (accountable) to the President of the Republic of Belarus.

This approach of the legislator raises doubts for the reasons mentioned above.

For several years now, it has been argued that it is erroneous to consider normative resolutions of the Constitutional Council (Court) and the Supreme Court of the Republic of Kazakhstan as part of normative legal acts, considering their special legal nature. They are acts of normative interpretation and, as such, serve as legal sources of current law. Therefore, they cannot be part of the hierarchy of normative legal acts. In fact, this norm becomes meaningless.

The conducted study allows us to formulate the following conclusions and suggestions.

In the hierarchy of normative legal acts, as established by Article 10 of the Law of the Republic of Kazakhstan “On Legal Acts,” normative legal acts are arranged in a vertical sequence in descending order of legal force. However, certain provisions of the Law, including those concerning the hierarchy, contradict constitutional norms and therefore need to be reviewed.

In order to maintain the principle of equal legal force of a code and the normative legal act that amends it, it is necessary to supplement Subclause 3) of Clause 2 of Article 10 of the Law of the Republic of Kazakhstan “On Legal Acts” after the word “code” with the words “laws amending and supplementing codes.”

To clarify the concept of “legislative act,” it is necessary to leave in its content only various types of laws, excluding resolutions of the Parliament and its Chambers. This is necessary to prevent the incorrect use of this term in the presence of blanket norms in one or another law.

In order to bring the Law “On Legal Acts” in line with the norms of the Constitution, it is advisable to make amendments to Article 10 by combining Subclause 5) and Subclause 6) of Clause 2, providing for different legal force of normative legal decrees of the President and normative resolutions of the Parliament of the Republic of Kazakhstan and its Chambers.

Considering that the Security Council is currently chaired by the President, who issues subordinate normative legal acts (decrees), and also considering the legal nature of normative resolutions of the Constitutional Council and the Supreme Court as acts of normative interpretation, we believe it is appropriate to exclude Subclause 2-1 and Subclause 5 from Clause 2 of Article 7 and Clause 5 from Article 10 of the Law of the Republic of Kazakhstan “On Legal Acts.”

Conclusion

Thus, the hierarchy of normative legal acts should be structured in accordance with the principles and norms of the Constitution of the Republic of Kazakhstan, be logically consistent, non-contradictory, and complete.

The Law of the Republic of Kazakhstan “On Legal Acts” is to a large extent a framework law that establishes the basic requirements for normative legal acts, the procedures for their development and adoption. The hierarchy of normative legal acts established in it needs rethinking and revision.

According to Z.S. Yelyubaev, “it is time to ... start revising the entire legal framework to identify contradictions in normative legal acts of different levels” [7].

The improvement of legislation should be carried out in accordance with the principles of reasonable, transparent, evidence-based, and effective regulation, protecting the fundamental rights, freedoms, and legitimate interests of individuals and organizations, as required by the Concept of Legal Policy of the Republic of Kazakhstan until 2030 [16].

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НОРМАТИВТІК ҚҰҚЫҚТЫҚ АКТІЛЕРДІҢ ИЕРАРХИЯСЫ ТУРАЛЫ

Андатпа

Мақала нормативтік құқықтық актілердің иерархиясының қазіргі теориясының негізгі мәселелерінің біріне арналған. Позитивтік құқықтағы иерархия ұғымы туралы заң әдебиеттерінде бар көзқарастар зерттеледі. Автор заңды күшінің төмендеуіне қарай белгілі бір тік реттілікпен орналасатын нормативтік актілердің арақатынасы деген қорытындыға келеді. Бұл әрбір төменгі деңгейдегі актілердің жоғары деңгейдегі актілерге сәйкес келуін болжайды. Қазақстан Республикасының Конституциясы мен «Құқықтық актілер туралы» Заңына сыни талдау жасалды. Нормативтік актілердің иерархиясын белгілей отырып, осы Заңның жеке ережелерінде даулы және Конституцияға қайшы келетін нормалар бар екені белгілі. Талдау негізінде «Құқықтық актілер туралы» Заңды жетілдіру бойынша ұсыныстар әзірленді.

Тірек сөздер: заң, иерархия, Конституция, нормативтік құқықтық акт, қаулы, жарлық, заңды күш.

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ОБ ИЕРАРХИИ НОРМАТИВНЫХ ПРАВОВЫХ АКТОВ

Аннотация

Статья посвящена одной из ключевых проблем современной теории права – иерархии нормативных правовых актов. Изучены точки зрения, существующие в юридической литературе, о понятии иерархии в позитивном праве. Автор приходит к выводу, что она представляет собой соотношение нормативных правовых актов, которые располагаются в определенной вертикальной последовательности по мере убывания их юридической силы и предполагают соответствие актов каждого нижестоящего уровня актам вышестоящих уровней. Проведен критический анализ Конституции Республики Казахстан и Закона «О правовых актах». Установлено, что данный Закон, закрепляя иерархию нормативных правовых актов, в отдельных своих положениях содержит спорные и противоречащие Конституции нормы. На основе проведенного анализа разработаны предложения по совершенствованию Закона «О правовых актах».

Ключевые слова: закон, иерархия, Конституция, нормативный правовой акт, постановление, указ, юридическая сила.