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# **Development of Company Law in Kazakhstan**

Main Issues and Trends

## **1. Introduction**

This article is focused on a brief analysis of development of the legislation of the Republic of Kazakhstan in relation to corporate forms for business entities during the period after collapse of the Soviet Union. Comparing it with the notion of company law in European jurisdictions, the author notes the absence of a clear concept of company law and of a legal term ‘corporation’ in the law of Kazakhstan and also claims that a company (or corporate) law of Kazakhstan has not been adequately institutionalised yet within the national legal system.

Nevertheless, it is shown that special legislation to regulate corporate forms for entrepreneurial activity (apart from forms for non-commercial activities) has been developed in Kazakhstan since the 1990s. The most important stages of such development are highlighted with special emphasis on an influence of Russian legal developments. The article also includes description of the current structure, content, and specifics of Kazakhstan’s legislation on corporate forms for economic activity as well as identifying main trends in development of company / corporate law in Kazakhstan and concerns related to it.

## **2. Meaning of company law in European jurisdictions**

Our studies show that within the European legal environment the notions of ‘company law’ and ‘corporate law’ are used mostly as synonyms in identifying the legal background for: (i) creation of legal entities formed on the basis of an association of persons with the purpose of earning profit and (ii) conduct of economic activity by such legal entities observing adequate balance in protecting rights of a company, its members (shareholders) and creditors, and public interest. The company law is called on to become a ‘special private law’ combining laws on capital companies, general partnerships, and limited partnerships.<sup>\*1</sup>

Depending on the terms of such association, all respective commercial legal entities are classified into two groups – partnerships (also sometimes called associations of persons) and companies (entities formed on the basis of joint capital contributions of their members / shareholders). This classification of business entities was also known in Soviet-time civil law.<sup>\*2</sup> Formation of a partnership allows its members (partners

<sup>1</sup> P. Hommelhoff. *Corporate and business law in the European Union: Status and perspectives 1997*. – Towards a European Civil Code. 2nd revised and expanded ed. Nijmegen: Ars Aequae Libri 1998 (652 p.), pp. 602–603.

<sup>2</sup> Гражданское и торговое право капиталистических государств [‘Civil and Commercial Law of Capitalist States’]. Р.Л. Нарышкина [R. Naryshkina] (ed.). Москва: Издательство ‘Международные отношения’, 1983 [Moscow: International Relations, 1983] (Volume I, 286 p.), p. 148 (in Russian).

or participants) to conduct their entrepreneurial activity on the basis of joint property, common management, and unlimited liability of members of the partnership, who often are required to have or acknowledged as having a status of entrepreneurs. In turn, a company is set up, and performs its activities, on the basis of a separation of participation in the company's capital from the company's management and on limited liability of its members (shareholders), who, in general, can be considered investors in the company, not entrepreneurs. As a formal criterion for such distinction between companies and partnerships Varul mentions existence of a corporate structure: the corporate structure shall be established in any company, but it does not exist in a partnership.<sup>\*3</sup>

There is a conclusion drawn in scientific publications that in some states partnerships are not recognised as having a separate legal personality but capital companies always have the status of legal entities.<sup>\*4</sup> However, there are jurisdictions where, like in France, partnerships have been recognised as legal entities together with joint-stock companies and companies with limited liability. Varul also indicates that in Germany only certain types of partnerships are not considered to be legal entities and in the UK and Estonia they are.<sup>\*5</sup>

In some European jurisdictions, the term 'company law' applies to regulate both partnerships and companies; in the others, it is related to regulation of companies only. For example, in English law, companies are treated as distinct from partnerships and also a distinction exists between partnership law and company law. Although it is said that 'the distinction between partnership and companies is often merely the one of machinery and not of function', nevertheless it entails separate regulation of legally significant specifics of these two types of corporations and relevant legal provisions have been largely codified in different acts – in the Partnership Act 1890 and the Companies Act 1985, respectively.<sup>\*6</sup>

In most jurisdictions in continental Europe (in the civil-code countries particularly), company law includes regulation of both types of business entities: partnerships and companies. All the business entities formed on the basis of association of persons for common objectives are combined under the term 'company', and all the entities are classified as being either partnerships or companies. For instance, that is true in German law.<sup>\*7</sup> A similar approach can be found in the French Code du Commerce 2000: all forms of business entities with separate legal personality have been united under a single term for a commercial company (*societe*) regulated in Book II of the Code, including general and limited partnerships; companies with limited liability; and various types of joint-stock companies (*societe par actions*), such as ordinary JSC (SA), simplified JSC (SAS), and limited partnership issuing shares (SCA).<sup>\*8</sup> The same is obviously true for the Estonian Commercial Code 1995: §2 of Chapter 1 applies the general term 'company' with respect to general partnerships, limited partnerships, private limited companies, public limited companies, or commercial associations, as well as to other companies if prescribed by law.<sup>\*9</sup>

Nevertheless, there is one detail that can be noted when the terms 'company law' and 'corporate law' are compared. When a company law is referred to, it mostly applies to the law surrounding organisational forms and activity of business entities.<sup>\*10</sup> However, the notion 'corporate law' embraces both commercial

<sup>3</sup> П. Варул. Место корпоративного права в правовой системе [P. Varul. "The Place of Corporate Law within a Legal System"]. – Гражданское право и корпоративные отношения: Материалы междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященной 90-летию видного казахстанского ученого-цивилиста Юрия Григорьевича Басина [Civil Law and Corporate Relations: Materials of the International Scientific and Practical Conference...] (Almaty, 13–14 May 2013). М.К. Сулейменов [M. Suleimenov] (ed.). Алматы [Almaty], 2013 (736 p.), p. 108 (in Russian).

<sup>4</sup> Civil and commercial law of capitalist states (Note 2), pp. 148–150; Е.А.Суханов. Очерк сравнительного корпоративного права [Ye. Sukhanov. 'Essay on comparative Corporate Law']. – Е.А.Суханов. Проблемы реформирования Гражданского кодекса России: Избранные труды 2008 – 2013 гг. Москва: Статут, 2013 [Ye. Sukhanov. 'Problems of Reforming the Civil Code of Russia: Selected works 2008–2013'. Moscow: Statut, 2013] (494 p.), pp. 155–163 (in Russian).

<sup>5</sup> P. Varul (Note 3).

<sup>6</sup> P. Davies. Gower's Principles of Modern Company Law. 6th ed. London: Sweet & Maxwell, 1997 (867 p.), pp. 3 – 5.

<sup>7</sup> Х.-Й.Шмидт-Тренц. Ю.Плате, М.Пашке и др. Основы германского и международного экономического права / Grundlagen des Deutschen und internationalen wirtschasrecht. Учебное пособие. [Basics of German and International Economic Law]. Санкт-Петербург: Издательский дом С.-Петерб. гос. ун-та, Издательство юридического факультета СПбГУ, 2007 [Sankt-Peterburg: Publishing house of the St. Petersburg's state university, and publishing office of its law faculty, 2007] (736 p.), pp. 296–297 (in Russian).

<sup>8</sup> Коммерческий кодекс Франции [French Code du Commerce] 2000 / предисловие, перевод с французского, дополнение, словарь-справочник и комментарии В.Н. Захватаева. [Commercial Code of France 2000 / introduction, translation, amendments, dictionary and commentaries by V. Zakhvatayev]. Москва: Волтерс Клувер, 2008 [Moscow: Wolters Kluver, 2008] (1272 p.), pp. 144–346 (in Russian).

<sup>9</sup> Estonian Commercial Code. – RT I 1995, 26, 355. Available in English at <https://www.riigiteataja.ee/en/eli/504042014002/consolide> (3.2.2016).

<sup>10</sup> P. Hommelhoff (Note 1), pp. 602–601.

and non-commercial corporations (i.e., all organisations formed on the basis of association of persons).<sup>\*11</sup> This view has become reflected in the Russian Civil Code, which now includes legal classification of commercial and non-commercial corporations, as well as general provisions applicable to all commercial corporations and to non-commercial corporate organisations.<sup>\*12</sup>

### 3. Development of corporate law in Russia

During the era before 1917, the concept of corporation was fully recognised in Russian law. In Article 13 of Chapter II of the draft of the Russian Civil Code (*Grazhdanskoye Ulozheniye*) it was proposed that private partnerships be acknowledged as private-law legal entities. In explanations to Articles 13 and 14 the following statements were included: (i) both partnerships (*tovarischestvo*) and societies (*obschestvo*) were defined as types of private-law corporations; (ii) joint conduct of an enterprise with the purpose of gaining profit was established as the subject-matter of partnerships' activities, while societies could be created only for non-commercial purposes of social development; and (iii) decisions of a general meeting of its members were acknowledged to be the form for expression of the will of each corporation.<sup>\*13</sup>

The *Grazhdanskoye Ulozheniye* has never been adopted as a law. However, the legislation of that time regulated the following forms of private corporations for a trade business: a type of co-operative (*artel'noye tovarischestvo*), general partnership (*polnoye tovarischestvo*), limited partnership (*tovarischestvo na vere*), and joint-stock partnership (*aktsionernoye tovarischestvo*). The core difference between those forms was based on whether the personal participation by efforts of members of a corporation represented an essential element of its existence or the members only participated in formation of its capital – e.g., in a co-operative, participation with personal efforts was mandatory, and in general and limited partnerships it was implied on the side of their general partners, whereas investors in limited partnerships and shareholders in joint-stock partnerships were required to pay their shares in the capital of the respective partnership.<sup>\*14</sup>

The Soviet-time law practically rejected acknowledgement of entrepreneurship and corporate relations; no corporate law was developed in the USSR. However, today the law of the Russian Federation fully operates with the legal terms 'corporation' and 'corporate legislation'. In particular, creation of corporate law as a 'full-weighted branch of civil legislation' has been declared as one of two main goals in the process now being implemented of modernisation of the acting Civil Code of the Russian Federation. And as a starting point there was a proposal made to classify all legal entities as either corporations (i.e., those 'created on the basis of the principle of membership') or non-corporate legal entities.<sup>\*15</sup> The recently amended Russian Civil Code now declares that civil legislation regulates, among other elements, 'relations pertaining to participation in corporate organisations or their managing', which relations have been clearly defined as corporate ones (§1 of Article 2). Corporate organisations – as such 'legal entities where their members implement corporate rights with respect to an organisation' – have been acknowledged as a separate type of legal entities (§2 of Article 48). Their classification, including both commercial and non-commercial corporate organisations, has been established in Article 65.1. And, finally, corporate rights (as rights of members of a corporation) have been recognised and defined in Article 65.2. In addition, Articles 66 through 123.16-2

<sup>11</sup> P. Varul (Note 3).

<sup>12</sup> Е.А. Суханов. Проблемы кодификации законодательства о юридических лицах [Ye. Sukhanov. Problems of codification of legislation concerning legal entities]. – Кодификация российского частного права 2015 [Codification of Russian private law 2015]. П.В. Крашенинников [P. Krashennnikov] (Ed.). Москва: Статут, 2015 [Moscow: Statut, 2015] (447 p.), p. 56 (in Russian).

<sup>13</sup> Гражданское уложение. Кн. 1. Положения общие: проект Высочайше учрежденной Редакционной комиссии по составлению Гражданского уложения (с объяснениями, извлеченными из трудов Редакционной комиссии) / под ред. И.М. Тютрюмова; сост. А.Л. Саатчиан. [*Grazhdanskoye Ulozhenie*, Civil Code. Book I. General provisions: the draft of the appointed editorial commission for preparation of the Civil Code (with explanations extracted from works of the editorial commission. I. Tyutryumov (Ed.), A. Saatchian (compiler)]. Москва: Волтерс Клувер, 2007 [Moscow: Wolters Kluwer, 2007] (288 p.), pp. 70–74 (in Russian).

<sup>14</sup> Г.Ф. Шершеневич. Учебник торгового права / по изданию 1914 г. / Вступительная статья Е.А. Суханова. [G. Shershenevich. Textbook on commercial law / according to edition of 1914 /. Introductory article by Ye. Sukhanov]. Москва: Фирма 'СПАРК', 1994 [Moscow: SPARK, 1994] (335 p.), pp. 104–166 (in Russian).

<sup>15</sup> Концепция развития гражданского законодательства Российской Федерации. Вступ. ст. А.Л. Маковского. [The concept paper concerning development of civil legislation of the Russian Federation. Introductory article by A. Makovskii]. Москва: Статут, 2009 [Moscow: Statut, 2009] (159 p.), pp. 7, 48–49 (in Russian).

now contain general provisions and specific norms applicable for each and every type of commercial corporations (including economic partnerships and companies) and non-commercial corporations regulated by acting Russian law.<sup>\*16</sup>

## 4. Inadequate institutionalisation of company / corporate law in Kazakhstan

Since for a long time Kazakhstan was a part of the Russian Empire and the Soviet Union, Kazakhstan's law has to a great extent inherited a legal culture and traditions, as well as legal concepts and instruments, from Russian and Soviet-era law. And currently close economic and social co-operation exists between our countries. Therefore, the process and results of the legal development in the Russian Federation matter for the development of modern law in Kazakhstan.

Nevertheless, such terms as 'company law' and 'corporate law' do not have their legal definitions in the law of Kazakhstan. The phrase 'company law' is not used at all in the legislation or in either official or unofficial communications.

However, the concept of corporate law has been widely referred to in scientific and informal discussions and has also been included in certain programming or conceptual documents addressing legal development and improvement of the regulatory framework for entrepreneurial activity and practice of corporate governance. Nonetheless, in the concept paper on development of the corporate legislation of Kazakhstan adopted in 2011 (the '*Corporate Law Development Paper*')<sup>\*17</sup> clear statements were made that no legal definition of the notion of 'corporation' exists in Kazakhstani legislation, nor are the terms 'corporate law' and 'corporate legislation' fixed and widely accepted in the law and practice. Also, no place for corporate law has been determined in the legal system of Kazakhstan.

These conclusions remain true today. But one should note that there was an attempt made to define corporate law in the aforementioned Corporate Law Development Paper. In particular, in the preamble to the Corporate Law Development Paper it was stated that 'corporate law is represented by a set of general and special provisions of private law and corporate norms intermediating corporate relations, and corporate legislation means an aggregate of normative legal acts that include rules of different branches of law (both private and public) that regulate relationships within a corporation and outside'. However, this attempt appeared to be unsuccessful, because there: (i) no legal definition of a corporation has been proposed and (ii) no nature of corporate relations as an object of legal regulation has been clearly identified, either in the Corporate Law Development Paper or in the law of Kazakhstan.

In the modern civil-law doctrine of Kazakhstan, however, only one position with respect to the essence of corporate law has been clearly expressed as of this moment. Namely, according to Suleimenov, corporate law shall be considered a part of civil law and as such it shall develop as a separate institution of civil law focused on regulation of relations pertaining to participation in corporate organisations and managing their activity. He specifically mentions that it is the most common view that corporate law should be treated as part of law concerning legal entities. However, he argues that the institution of legal entities has been developed to regulate legal entities in civil relations with third parties ('existing outside a legal entity'), whereas corporate relations exist as so-called internal organisational relations within a corporate organisation.<sup>\*18</sup>

<sup>16</sup> The Civil Code of the Russian Federation. Available at <http://www.consultant.ru/popular/gkrf1/> (15.10.2015) (in Russian).

<sup>17</sup> Концепция развития корпоративного законодательства Республики Казахстан, утвержденная Министерством юстиции Республики Казахстан 28 марта 2011 г. [The concept paper concerning development of corporate legislation of the Republic of Kazakhstan dated 28 March 2011]. Available at [http://online.zakon.kz/?doc\\_id=30956110](http://online.zakon.kz/?doc_id=30956110) (9.3.2016) (in Russian).

<sup>18</sup> М.К. Сулейменов. Гражданское право и корпоративные отношения: проблемы теории и практики [M. Suleimenov. Civil law and corporate relations: Problems of theory and practice]. – Гражданское право и корпоративные отношения: Материалы междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященной 90-летию видного казахстанского ученого-цивилиста Юрия Григорьевича Басина (Алматы, 13–14 мая 2013) [Civil Law and Corporate Relations: Materials of the International Scientific and Practical Conference (Almaty, 13–14 May, 2013)]. М.К. Сулейменов [M. Suleimenov] (Ed.). Алматы [Almaty], 2013 (736 p.), pp. 43–44 (in Russian).

## 5. Regardless of no legal term ‘corporation’ existing, recognition of the existence of corporate relations in the law of Kazakhstan

Unlike the law of the Russian Federation, Kazakhstani legislation fails to define what the term ‘corporation’ means and what type of social relations can be identified as corporate relations, and, in addition, it does not refer to the term ‘corporation’ at all. No specific legal provisions addressing the notions of corporate organisations and corporate relations can be found in the Civil Code or other legislative acts of the Republic of Kazakhstan. This situation has existed since the very start of development of the law of independent Kazakhstan: Basin mentioned in 2000 that Kazakhstani law does not operate with the term ‘corporation’ for indication and characterisation of a certain type of legal entities.<sup>\*19</sup>

Nevertheless, this does not mean that there is no a legislative framework for foundation of corporations and their activities existing in Kazakhstan.

First of all, as described below, there are specific corporate forms regulated in the law and thousands of corporations are active in Kazakhstan. This fact allows claiming existence of corporate (or company) law in Kazakhstan.

In addition, certain legal terms that include the word ‘corporate’ have been established in the law. For example, all legal entities (whether they are corporations or instead non-corporate organisations) pay ‘corporate income tax’ under the Tax Code 2008.<sup>\*20</sup> In accordance with the Law on Joint-Stock Companies 2003 (the ‘JSC Law’),<sup>\*21</sup> each joint-stock company is required to adopt its ‘corporate governance code’, maintain its ‘corporate web site’, disclose certain ‘corporate events’, and appoint its ‘corporate secretary’ to perform prescribed functions. The Civil Procedure Code (the previous one, of 1999,<sup>\*22</sup> as well as the new code, of 2015<sup>\*23</sup>) (the ‘CPC’) invests courts with the competence to solve ‘corporate disputes’, while the JSC Law and the Law on Partnerships with Limited and Additional Liability of 1998 (the ‘LLP Law’)<sup>\*24</sup> require JSCs and LLPs to disclose information about a company’s involvement in a corporate dispute, as well as about other facts specified as so-called corporate events.

Moreover, not provisions of the Civil Code (General Part of 1994<sup>\*25</sup> and Special Part of 1999<sup>\*26</sup>) but norms of other laws allow respective qualification of corporate relations and understanding of what forms

<sup>19</sup> Ю.Г. Басин. Коммерческие корпоративные отношения и юридическая ответственность [Yu. Basin. ‘Commercial Corporate Relations and Legal Liability’]. – Ю.Г. Басин. Избранные труды по гражданскому праву. Предисловие М.К. Сулейменов, Е.У. Ихсанов. Сост. М.К. Сулейменов. Алматы: АЮ – ВШП ‘Адилет’, НИИ частного права КазГЮУ, 2003 [Yu. Basin. ‘Selected Works on Civil Law. Introduction by M. Suleimenov and Ye. Ikhsanov. Compiled by M. Suleimenov. Almaty: Law School ‘Adilet’, 2003] (734 p.), p. 135 (in Russian).

<sup>20</sup> Кодекс Республики Казахстан «О налогах и других обязательных платежах в бюджет (Налоговый кодекс)» [‘Tax Code’], 10 December 2008, №99-IV (as amended). Available at [http://online.zakon.kz/Document/?doc\\_id=30366217](http://online.zakon.kz/Document/?doc_id=30366217) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at <http://adilet.zan.kz/eng/docs/K080000099> (most recently accessed on 29.2.2016).

<sup>21</sup> Закон Республики Казахстан «Об акционерных обществах» [‘Law on Joint-Stock Companies’], 13 May 2003, №415-II (as amended). Available at [http://online.zakon.kz/Document/?doc\\_id=1039594](http://online.zakon.kz/Document/?doc_id=1039594) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at [http://adilet.zan.kz/eng/docs/Z0300000415\\_](http://adilet.zan.kz/eng/docs/Z0300000415_) (most recently accessed on 29.2.2016).

<sup>22</sup> Гражданский процессуальный кодекс Республики Казахстан [‘Civil Procedure Code’], 13 July 1999, №401-I (now no longer in effect as of 1 January 2016). Available at [http://online.zakon.kz/Document/?doc\\_id=34329053&doc\\_id2=1013921](http://online.zakon.kz/Document/?doc_id=34329053&doc_id2=1013921) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at [http://adilet.zan.kz/eng/docs/K990000411\\_](http://adilet.zan.kz/eng/docs/K990000411_) (most recently accessed on 29.2.2016).

<sup>23</sup> Кодекс Республики Казахстан «Гражданский процессуальный кодекс Республики Казахстан» [‘Civil Procedure Code’], 31 October 2015, №377-V (in force as of 1 January 2016). Available at [http://online.zakon.kz/Document/?doc\\_id=34329053](http://online.zakon.kz/Document/?doc_id=34329053) (most recently accessed on 29.2.2016) (in Russian).

<sup>24</sup> Закон Республики Казахстан «О товариществах с ограниченной и дополнительной ответственностью» [‘Law on Partnerships with Limited and Additional Liability’], 22 April 1998, №220-I (as amended). Available at [http://online.zakon.kz/Document/?doc\\_id=1009179](http://online.zakon.kz/Document/?doc_id=1009179) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at <http://invest.gov.kz/uploads/files/2015/12/03/law-of-the-republic-of-kazakhstan-on-limited-liability-companies-and-additional-liability-companies.pdf> (most recently accessed on 29.2.2016).

<sup>25</sup> Гражданский кодекс Республики Казахстан (Общая часть) [‘Civil Code (General Part)’], 27 December 1994 (as amended). Available at [http://online.zakon.kz/Document/?doc\\_id=1006061](http://online.zakon.kz/Document/?doc_id=1006061) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at <http://adilet.zan.kz/eng/docs/K940001000> (most recently accessed on 29.2.2016).

<sup>26</sup> Гражданский кодекс Республики Казахстан (Особенная часть) [‘Civil Code (Special Part)’], 1 July 1999 (as amended). Available at [http://online.zakon.kz/Document/?doc\\_id=1013880](http://online.zakon.kz/Document/?doc_id=1013880) (most recently accessed on 29.2.2016) (in Russian). Also

the sphere of corporate relations. Particularly, during the last 15 years there have been certain categories of legal acts (mainly regulations of the National Bank and enactments of the Government but also some laws) adopted on implementation of measures to introduce a system of 'corporate governance' in commercial organisations and improve it. Practically all of them have been focused on regulation of corporate governance in joint-stock companies. Thus, Kazakhstan's legislation certainly considers JSCs to be corporations, and existence of corporate-law norms in its legal system (even if they are not sufficiently developed) can be confirmed.

However, not only a JSC is a corporation under Kazakhstan's law. According to Basin, the term 'corporation' has been well-known in the legal theory and legal practice. In the law of many foreign states, this has a clear meaning as a 'self-organised legal entity where its founders, being at the same its members, act jointly and on equal legal ground'.<sup>\*27</sup> The common understanding has always existed between Kazakhstan's researchers in the field of civil law that a corporation means an economic or business entity with its separate legal personality founded by its members who either (i) joined their property and efforts for participation in the business environment or (ii) combined their investments to set up the business entity in exchange for receiving respective membership rights. In addition to JSCs, the Civil Code also regulates other forms of commercial (and non-commercial) organisations based on membership, though without qualifying them expressly as corporations.

At the same time, in 2008 the old CPC was amended with the notion of corporate disputes and clear specification of corporate disputes as a type of disputes under civil law. The amendment included a definition of 'corporate dispute' according to which initially the dispute could be between commercial legal entities or a dispute related to specified matters wherein a legal entity and/or its shareholders (participants or members) participated. Since 2011, not only commercial organisations but also individual entrepreneurs and non-commercial organisations of any allowed organisational forms as well as current or former members of an organisation have been able to be parties to corporate disputes. Additionally, the list of grounds for the acknowledgement of a corporate dispute has been significantly extended. Similar provisions have been reproduced in the new version of the CPC (2015), which has been in effect since 1 January 2016.

## 6. Development of corporate legislation in Kazakhstan, beginning in 1990

The following most important periods of development of Kazakhstani legislation concerning business corporations can be identified (although this description is very simplified, it seems to be sufficiently illustrative):

- 1) The time before adoption of the Civil Code (General Part) in 1994, including the following stages:
  - Until the beginning of the 1990s: There was no corporate legislation or corporate law recognised as existing (we disregard the Civil Code of the *RSFSR* of 1922,<sup>\*28</sup> as well as legislative provisions of the Civil Code of the *Kazakh SSR* of 1963<sup>\*29</sup> concerning *kolkhozes*, various types of consumer co-operatives, and other non-profit social membership organisations).
  - Starting on 31 May 1991: The new Basics of Civil Legislation of the USSR and the Union Republics (*Osnovy grazhdanskogo zakonodatel'stva Soyuzu SSR i soyuznykh respublik*) defined the notion of a commercial organisation, distinguished economic partnerships from economic societies / companies, and made provision for regulation of the legal status of separate types of economic partnerships and companies by special legislative acts;<sup>\*30</sup> also, certain enactments

available in English (unofficial translation), at <http://cis-legislation.com/document.fwx?rgn=1167> (most recently accessed on 29.2.2016).

<sup>27</sup> Yu. Basin (Note 19).

<sup>28</sup> Гражданский кодекс РСФСР: официальный текст с изменениями на 1 января 1952 г. ['Civil Code of the RSFSR: Official Text with Amendments as of 1 January 1952']. Москва: Государственное издательство юридической литературы, 1952 [Moscow: publishing house of law texts, 1952] (159 p.) (in Russian).

<sup>29</sup> Гражданский кодекс Казахской ССР (Официальный текст с изменениями и дополнениями по состоянию законодательства на 1 января 1988 г. ['Civil Code of the Kazakh SSR (Official Text with Changes and Amendments as of 1 January 1988)]. Алма-Ата: Казахстан, 1989 [Alma-Ata: Kazakhstan, 1989] (256 p.) (in Russian).

<sup>30</sup> Основы гражданского законодательства Союза ССР и союзных республик, утверждены Постановлением Верховного Совета СССР от 31 мая 1991 г. ['Basic of Civil Legislation of the USSR and Union Republics Approved by the Supreme

and regulations by the USSR's Council of Ministers concerning joint-stock companies, economic partnerships, and some other specific forms of associations for commercial purposes were in effect.<sup>\*31</sup>

- After 21 June 1991: The Law of the *Kazakh SSR* on Economic Partnerships and Joint-Stock Companies<sup>\*32</sup> was adopted, and very important concepts were introduced as a start for formation of corporate legislation in Kazakhstan; a joint-stock company was recognised as one of the allowed forms of economic partnerships; payment for shares was established as the only obligation of a shareholder; mandatory real-value asset contributions to the capital of a company were required; a guarantee function of the authorised capital was fixed for the first time as a precondition to later regulation of capital maintenance obligations; and regulation of directors' and managers' liability, along with a requirement for adoption of a code of conduct for directors and managers of a JSC, and other important provisions were established.
- 2) The time after adoption of the new Civil Code as the basis for development of modern corporate legislation in Kazakhstan:
- 27 December 1994: The Civil Code (General Part) was adopted to regulate (among many other aspects of private law) the notion of economic partnership as the legal organisational form for commercial entities.
  - 2 May 1995: The Law on Economic Partnerships was enacted to regulate general partnerships, limited partnerships, partnerships with limited liability (LLP), and partnerships with additional liability (ALP) and the JSC as special forms of economic partnerships.<sup>\*33</sup>
  - 5 October 1995: The Law on Production Co-operatives was adopted.<sup>\*34</sup>
- 3) The time after separate regulation of the status of JSC and LLP / ALP was introduced in the law of Kazakhstan:
- 28 April 1998: The LLP Law was adopted, and special provisions regarding LLPs and ALPs were excluded from the Law on Economic Partnerships of 2 May 1995, although the latter remains restrictedly in effect with respect to LLPs and ALPs since it regulates general principles applicable to all forms of economic partnerships, including LLPs and ALPs.
  - 10 July 1998: The Law on Joint-Stock Companies (no longer in effect) and the law on amendments to a number of legislative acts on matters related to the legal status of JSCs were adopted, and the JSC was recognised as a separate organisational form and it no longer remains a type of economic partnerships.<sup>\*35</sup> That was a start for development of an independent (joint-stock) company law.

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Council of the USSR on 31 May 1991], №2211.–Ведомости Съезда народных депутатов СССР и Верховного Совета СССР, 1991, №26, ст.733 [the Bulletin of the Congress of Peoples Representatives of the USSR and the Supreme Council of the USSR, 1991, #26, Art. 733] (in Russian).

<sup>31</sup> For example, Положение об акционерных обществах и обществах с ограниченной ответственностью, утвержденное Постановлением Совета Министров СССР от 19 июня 1990 г. [Regulations Concerning Joint-stock Companies and Companies with Limited Liability, Approved by the Resolution of the Council of Ministers of the USSR dated 19 June 1990]. – Собрание постановлений правительства СССР, 1990, №15, ст.821 [‘Collection of Resolutions of the Government of the USSR, 1990’, #15, Article 821] (in Russian).

<sup>32</sup> Закон Казахской ССР «О хозяйственных товариществах и акционерных обществах» [‘Law on Economic Partnerships and Joint-stock Companies’], 21 June 1991 (now no longer in effect). – Ведомости Верховного Совета Казахской ССР, 1991, №26, ст. 343 [Bulletin of the Supreme Council of the Kazakh SSR, 1991, #26, Article 343]. Available at [http://online.zakon.kz/Document/?doc\\_id=1000574](http://online.zakon.kz/Document/?doc_id=1000574) (most recently accessed on 9.3.2016) (in Russian).

<sup>33</sup> Закон Республики Казахстан «О хозяйственных товариществах» [‘Law on Economic Partnerships’], 2 May 1995, №2255 (as amended). Available at [http://online.zakon.kz/Document/?doc\\_id=1003646](http://online.zakon.kz/Document/?doc_id=1003646) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at <http://adilet.zan.kz/eng/docs/U950002255> (most recently accessed on 29.2.2016).

<sup>34</sup> Закон Республики Казахстан «О производственном кооперативе» [‘Law on Production Cooperatives’], 5 October 1995, №2486 (as amended). Available at [http://online.zakon.kz/Document/?doc\\_id=1003955](http://online.zakon.kz/Document/?doc_id=1003955) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at <http://adilet.zan.kz/eng/docs/Z950002486> (most recently accessed on 29.2.2016).

<sup>35</sup> Закон Республики Казахстан «Об акционерных обществах» [‘Law on Joint-Stock Companies’], 10 July 1998, №282 (now no longer in effect). Available at [http://nationalbank.kz/cont/publish234665\\_240.pdf](http://nationalbank.kz/cont/publish234665_240.pdf) (most recently accessed on 29.2.2016) (in Russian). Also available in English (unofficial translation), at [http://online.zakon.kz/Document/?doc\\_id=1017168](http://online.zakon.kz/Document/?doc_id=1017168) (most recently accessed on 29.2.2016); Закон Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам акционерных обществ» [‘Amending Law Concerning Joint-stock Companies’], 10 July 1998, №282. Available at [http://online.zakon.kz/Document/?doc\\_id=1009824](http://online.zakon.kz/Document/?doc_id=1009824) (most recently accessed on 29.2.2016) (in Russian).

- 4) The time since May 2003, in which significant changes in the status of joint-stock companies have been introduced:
- 13 May 2003: The JSC Law was adopted, and the previous law, of 10 July 1998, concerning joint-stock companies was terminated, which fact caused numerous and significant amendments being introduced to the legislation – *e.g.*, classification of JSCs into closed-type and open-type JSCs was cancelled, rules on the structure of capital of a JSC and its maintenance were changed, the figure of corporate secretary and a requirement for independent directors were introduced, protection of shareholders' rights has been improved and directors' and managers' liability has been increased, the requirement of a corporate governance code and for disclosure of major corporate events/disputes were established, etc.
  - Later: Significant amendments have been introduced in the 2003 JSC Law, from its adoption until the present day.

## 7. Current structure of Kazakhstan's legislation on corporate forms for business

The structure of Kazakhstan's legislation concerning corporations rests on the following important approaches.

First of all, the Civil Code (in its General Part) defines the basic concept of a legal entity and establishes various classifications of legal entities, depending on such different criteria as: (i) whether the entity is a commercial or non-commercial organisation and (ii) who are the founders of the legal entity and what the legal nature of the relations between the entity and its founder(s) is.

A legal entity shall be recognised as a commercial organisation if it is founded for the purpose of earning profits and its profit is distributable to its founders / members. A non-commercial organisation cannot pursue profit-earning as its main goal, and its profit cannot be distributed among its founders / members under any circumstances.

Legal entities of corporate type can be set up by one or more persons by way of cash or other property contributions to the capital or assets of a company in exchange for membership rights with respect to the company and its profit. There are also other types of legal entities (both commercial and non-commercial), which can be founded by a single founder who transfers property to the legal entity but remains the owner of the property transferred, and such entities cannot be considered corporations.

There is no classification of legal entities in Kazakhstani law analogous to that in Germany or Estonia wherein an organisation can be either a private-law company or a public-law company.

Secondly, each legal entity can be founded and perform its activities in one of the organisational forms allowed by the law, in a manner depending on the commercial or non-commercial nature of the entity and on specifics of its foundation. The *numerus clausus* principle applies to regulate legal forms of commercial organisations.

The founders of a legal entity decide whether it is to be a commercial or non-commercial organisation, and whether they want to be its members or choose to remain the owner of its property. This decision is a precondition for the founders' decision on the organisational form of the legal entity. For each type of legal entities (commercial and non-commercial), the Civil Code proposes allowed organisational forms. For entrepreneurial activity, if the founder is the State (either the Republic of Kazakhstan or a local state authority) and if the law allows this, it may choose to found a state enterprise and remain the owner of the property transferred to the entity while the enterprise would exercise the so-called right of economic management (*pravo khozyaistvennogo vedeniya*) with respect to the property.<sup>36</sup> This legal construction has been inherited from the system of Soviet times, and this is the reason there is such a specific legislative system for regulation of legal forms for business activities in Kazakhstan.

Nevertheless, the vast majority of commercial legal entities in Kazakhstan perform in organisational forms based on principles of association and membership. The Civil Code allows the following organisational forms for such commercial entities: economic partnership (*khoyzaistvennoye tovarischestvo*), production

<sup>36</sup> Субъекты гражданского права [‘Persons in Civil Law’]. М.К. Сулейменов [M. Suleimenov] (ED.). Алматы: НИИ частного права КазГЮУ, 2004 [Almaty: Institute of private law, 2004] (538 p.), pp. 172–178 (in Russian).

co-operative (*proizvodstvennyi kooperativ*), and joint-stock company (*akcionernoye obschestvo*). In turn, economic partnerships can be set up in any of the following four organisational forms, depending on the intention and personality of their founders and expected members: general partnership (*polnoye tovarischestvo*), limited partnership (*kommanditnoye tovarischestvo*), partnership with limited liability (*tovarischestvo s ogranichennoy otvetstvennos'yu*), and partnership with additional liability (*tovarischestvo s dopolnitel'noy otvetstvennost'yu*).

Private persons (legal entities and individuals) as well as the State or a local state authority may be shareholders / members in a JSC or LLP, while only individuals can be general partners in general and limited partnerships.

More detailed description and explanation of all of the aforementioned organisational forms of commercial legal entities (including economic partnerships, joint-stock companies, state enterprises, and production co-operatives) can be found in our previous publications.<sup>\*37</sup> With the exception of the form of state enterprise (*gosudarstvennoye predpriyatiye*), all of them can be identified as corporations.

## 8. Main trends in the development of company / corporate law in Kazakhstan

Although the corporate legislation (or company law) of most European countries is acknowledged as developed, our study reveals that there are a lot of aspects wherein our European colleagues see the potential for its further development. A range of key issues under consideration for such development has usually been identified in relevant publications (though mostly in the context of harmonisation and/or unification).<sup>\*38</sup>

Similar issues related to development of corporate law are urgent in Kazakhstan. But, besides these, there are many other problems awaiting an adequate legislative solution. In particular, we need corporate relations to be clearly recognised and the term 'corporation' to find its legal definition in the law. Reclassification of corporations is also required, to differentiate between regulation of partnerships and of capital companies. Reconsideration of the legal framework for general and limited partnerships, as well as for LLPs, is necessary. Also, significant modernisation of the legislation concerning joint-stock companies is on the agenda. And there is also the important topic of harmonisation or even unification of corporate legislation, which remains relevant in the context of Kazakhstan's participation in the Customs Union (*Tamozhennii Soyuz*) alongside the Russian Federation and the Republic of Belarus, as well as in the Eurasian Economic Union.

As a separate challenge there is a task to eliminate such types of property rights as the right of economic management (*pravo khozyaistvennogo vedeniya*) from the law of Kazakhstan and cease to use the form of a state enterprise (*gosudarstvennoye predpriyatiye*) for legal entities performing business activities.<sup>\*39</sup> The following understanding is becoming more common among legal scholars: that corporate forms of legal entities represent the most appropriate choice for business purposes, and that developed corporate legislation serves the purpose of economic progress.

The following can be considered to be important tasks on the route of development of corporate law in Kazakhstan:

<sup>37</sup> Ф.С. Карагузов. Правовое положение коммерческих организаций по законодательству Республики Казахстан [F. Karagussov. 'Legal Status of Commercial Organisations under the Laws of the Republic of Kazakhstan']. Алматы [Almaty], 2012 (333 p.) (in Russian); Ф.С. Карагузов. Основы корпоративного права и корпоративное законодательство Республики Казахстан [F. Karagussov. 'Basics of Corporate Law and Corporate Legislation of the Republic of Kazakhstan']. 2nd ed. amended. Алматы: Издательство «Бастау», 2011 [Almaty: Bastau, 2011] (368 p.) (in Russian); F. Karagussov and S. Tynybekov. Development of corporate law in the Republic of Kazakhstan. – KazNU Bulletin (Law series), 2015, №1(73) (537 p.), pp. 158 – 163.

<sup>38</sup> G. Roth, P. Kindler. The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe. Germany: C.H. Beck, Hart, Nomos, 2013 (190 p.), pp. 1–26; P. Davies (Note 6), pp. 61–71; P. Hommelhoff (Note 1), pp. 585–603.

<sup>39</sup> М.К. Сулейменов. Гражданское право как наука: проблемы теории и практики [M. Suleimenov. 'Civil Law as the Science: Problems of the Theory and Practice']. – Гражданское право как наука: проблемы истории, теории и практики: Материалы междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященной 70-летию М.К. Сулейменова (Алматы, 29-30 сентября 2011 г.) ['Civil Law as the Science: Problems of the History, Theory and Practice: Materials of the International Scientific and Practical Conference' (Almaty, 29–30 September 2011)]. М.К.Сулейменов [M. Suleimenov] (Ed.). Алматы [Almaty], 2012 (800 p.), p. 34 (in Russian).

- Development of the legal framework for use of a joint-stock company as an organisational form to conduct large-scale business and qualified types of business activities (mostly in the fields of finance, banking, and capital markets) could be carried out. The legal framework for formation and activities of JSCs shall be based on imperative legal regulations and companies' professional management allowing a guarantee of transparent corporate governance and efficient control of the financial performance of the company, better protection of shareholders' rights and creditors' interests, effective achievements of business goals of the company, and correlation of its activities with public interests.

Since 2001, the National Bank of Kazakhstan has concentrated on creation of a proper corporate governance and financial reporting system and their improvements in joint-stock companies acting in the jurisdiction of Kazakhstan. Enactment of the current JSC Law, in 2003, has been implemented as a major step in this regard. And in this context the JSC Law has been amended to a significant extent numerous times. For example, in 2007 an amending law was passed to improve protection of rights of minority shareholders and new concepts were introduced into the legal environment – 'minority shareholders', 'corporate web site', 'corporate secretary', and some others – together with introduction of the disclosure and information access mechanisms ensuring heeding of interests of shareholders in JSCs and members of LLPs. In 2008, a new set of amendments to the JSC Law were made, to ensure sustainability of the financial system in Kazakhstan by way of increasing the role of the board of directors alongside the management board in managing a company, as well as restricting possibilities for major shareholders to interfere in the functioning of the corporate governance bodies of a JSC. Later, in 2011–2014, other amendments were made to the JSC Law and other legislative acts of Kazakhstan, to regulate JSCs and LLPs with the State's direct or indirect participation in their capital, to provide better protection of investors' rights by strengthening provisions related to responsibilities and liability of JSC directors and managers, to promote development of the securities market, etc.

However, the idea of a better legal framework for corporate governance practice and organisational structure in JSCs still remains important. The work focused on creation of a legislative basis harmonised with modern patterns of legal regulation for corporate relations in the EU and worldwide is ongoing.

- Improvement of legislation related to economic partnerships is necessary. This is needed to exclude inconsistency in current legislation addressing the status and activity of different types of economic partnership, as well as to increase investment-attractiveness of Kazakhstani business. The need for such reform is obvious in Kazakhstan, and it has great significance in terms of both legal development in the field of private law and economic growth in Kazakhstan.

- Harmonisation or unification of corporate legislation in the space of the Eurasian Economic Union has been inevitable, and an attempt at harmonisation of private law within the EurazEC has taken place already. This work remains unfinished for various reasons, of different nature. One of them was the failure to agree on the role and significance of the proposed EurazEC civil code: (i) whether it should serve as a binding legal instrument or as a set of recommendations to improve national legislation and (ii) whether such improvement should be made with a view to unification or harmonisation, or as something else.

Nevertheless, this co-operation had a very positive impact on creation of common approaches to regulate corporate relations and improve national laws on private-law corporations. Particularly, this gave rise to discussions of whether only commercial organisations having members can be considered to be corporations or, instead, such entities as non-commercial organisations can also be subject to corporate law.

The approach adopted to amend the Russian Civil Code by direct indication that corporate relations shall be regulated by civil legislation and that most of the legal entities performing business activities in a market economy are corporations<sup>40</sup> has been shared in Kazakhstan.

However, even with the recent modernisation of the Russian Civil Code, a certain inconsistency remains in separating commercial entities and non-commercial organisations. The newly introduced classification into corporations and non-corporate organisations has been carried out in addition to the existing separation between commercial and non-commercial organisation.<sup>41</sup> And this seems to cause unnecessary

<sup>40</sup> The concept paper concerning development of civil legislation of the Russian Federation (Note 15), p. 25; Ye. Sukhanov (Note 4), p.147 – 187; Г.Е. Авилов, Е.А. Суханов. Юридические лица в современном российском гражданском праве [G. Avilov, Ye. Sukhanov. 'Legal Entities in Modern Russian Civil Law']. Москва: Вестник гражданского права, том 6, 2006, №1, [Moscow: Herald of Civil Law, Volume 6, 2006, #1], pp. 17–18 (in Russian).

<sup>41</sup> Е.А. Суханов. О концепции развития законодательства о юридических лицах [Ye. Sukhanov. 'About the Concept of Development of Legislation Concerning Legal Entities']. – Е.А. Суханов. Проблемы реформирования Гражданского

complication in the legislative structure for the following reasons: (i) non-commercial organisations have a different organisational structure, and no membership rights exist in non-commercial membership organisations similar to those existing in business corporations, and (ii) as Basin indicated, there are some commercial organisations (like state enterprises) as well as non-commercial organisations (like public unions and funds, along with religious organisations) that are not corporate organisations, and totally different rules apply to these types of legal entities.<sup>\*42</sup> Finally, there are more common legal characteristics for all types of non-commercial organisations than for non-commercial and commercial corporations, which makes it more reasonable to avoid extension of any general regulation to both commercial and non-commercial corporations (other than that common for all types of legal entities).

Therefore, it appears to be more practicable if corporate law (or company law) were institutionalised in Kazakhstan primarily (or only) as the law regulating relations pertaining to implementation of the material interest and property rights of private persons in connection with their participation in business entities of any corporate form. In turn, any membership in non-commercial organisations and their activities would be regulated by a separate set of rules because the primary goal for such regulation is to provide adherence to public and/or non-property interests, and not to protect property rights of a private person (whether it be a private-law corporation, a member of one, or a creditor). It has been the traditional approach in Kazakhstani law to regulate commercial and non-commercial organisations separately,<sup>\*43</sup> and this has been reflected in the legislation: (i) the law on non-commercial organisations has been separated from the legislation dealing with organisational forms for commercial organisations (though regulation of both types of legal entities is based on the Civil Code's concept of a legal entity and its general provisions applicable to all legal entities) and (ii) the notion of corporation has been applied with respect to commercial organisations based on membership (though often limited to joint-stock companies) only and not to non-commercial organisations. Such an approach differs from the one reflected in Russian law wherein the distinction between commercial and non-commercial organisations has not been made so clear.<sup>\*44</sup>

## 9. Conclusions

The Civil Code of Kazakhstan establishes the most important provisions for regulation of organisational corporate forms for economic activities. These provisions include the legal definition of the concept of a legal entity, classifications of legal entities and their organisational forms, and general regulation applicable to each separate form of legal entities. All the detailed regulation of each of the allowed organisational forms of commercial legal entities is done on the level of separate legislative acts supported (in certain situations) by lower-level regulations.

In relation to business entities, all the types (forms) of corporate organisations under the laws of Kazakhstan in their basic features can be compared with types of companies provided for in the European jurisdictions (e.g., by the Estonian Commercial Code), though certain jurisdiction-specific elements can certainly be found.

There are sufficient grounds to conclude that the Kazakhstani legislator acknowledges that: (i) a corporation shall be considered to be a legal entity established by its members participating in formation of the entity's assets and being entitled to participate in the process of managing the entity; (ii) the core object of corporate relations includes rights and obligations in connection with foundation of a corporate organisation, formation of its assets, managing its affairs and its representation in the process of its economic activities, and protection of rights of its members and creditors; and (iii) such corporate relations are predominantly regulated by civil law.

кодекса России: избранные труды 2008–2012 гг. [Ye. Sukhanov. 'Problems of Reforming the Civil Code of Russia: Selected Works 2008–2012]. Москва: Статут, 2013 [Moscow: Statut, 2013] (494 p.), pp. 82 – 83 (in Russian).

<sup>42</sup> Ю.Г. Басин. Юридические лица по гражданскому праву. Понятие и общая характеристика. [Yu. Basin. 'Legal Entities in Civil Law. The Concept and General features']. – Ю.Г. Басин. Избранные труды по гражданскому праву. Предисловие М.К. Сулейменов, Е.У. Ихсанов. Сост. Сулейменов М.К. Алматы: АЮ – ВШП 'Адилет', НИИ частного права КазГЮУ. 2003 [Yu. Basin. 'Selected Works on Civil Law'. Introduction by M. Suleimenov and Ye. Ikhsanov. Compiled by M. Suleimenov. Almaty: Law School 'Adilet', 2003] (734 c.), p. 95 (in Russian).

<sup>43</sup> Yu. Basin (Note 42), pp. 101–104.

<sup>44</sup> Persons in Civil Law (Note 36), pp. 177–178.

Nevertheless, since the company / corporate law in Kazakhstan does not have its institutionalisation in accordance with the best patterns of developed jurisdictions, the need for its further development and improvement seems to be obvious. Certain directions for such development are of a similar nature to those existing in countries with a developed market economy, though others can be identified as Kazakhstan-specific issues. The following position seems to have more perspective for implementation: (i) the concepts of a corporation and corporate relations shall be those of 'business law', not of legislation of non-commercial organisations, and (ii) legislation pertaining to business activities should be separated from laws regulating non-commercial activities. Such a functional approach appears to have proved its practicability and efficiency in European jurisdictions.<sup>\*45</sup> And we believe it can be effective within the legal system of Kazakhstan.

Finally, legislative solutions for all of the aforementioned tasks, as well as other, related matters, require joint efforts of the legislator, the government, businesses, and legal scholars. None of the tasks can be properly resolved in the law if there is a lack of adequate legal research (including doctrinal analysis of a national law, as well as legal historical and comparative study) proposing reasonable and well-grounded legal constructions and mechanisms.

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<sup>45</sup> P. Hommelhoff (Note 1), pp. 585–592.