

## THE ESSENCE OF CORPORATION IN THE MODERN LAW OF KAZAKHSTAN

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The concept of corporation in the legislation of Kazakhstan, legal literature is considered in work. The history of formation of this category of corporation since the Roman period is analyzed. The signs characterizing corporation in the legislation of the certain countries, during the different periods of formation of this concept are considered. The main signs are revealed to which member nature of participation in association of persons and capitals; absence of corporate responsibility on debts of participants, absence of responsibility of participants on corporation debts is referred. The purpose of activity directed on receiving net income is carried to number of signs. On the basis of these signs corporation definition is formulated.

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Frequent use recently of the term «corporation» and derivative terms from it – «corporate law», «corporate relations», «corporate acts» – induced jurists to address again to research of concept and essence of corporation as subject of the civil relations. This interest is caused also by that, despite wide spread occurrence, the term «corporation» not usual to Kazakhstan legislation unlike the legislation of foreign countries where it is actively applied or at definition of the legal entity, or at the characteristic of his various organizational and legal forms.

Research objective is revelation of features of corporation as legal entity and definition of its signs, allowing formulating definition of this concept.

Material and research methods. The essence of corporation concept relating to the Kazakhstan legislation is investigated in work. Application of historical method and method of the comparative and legal analysis of using of corporation term in the legislation of the various countries, since the Roman period, allowed formulating more precisely characteristics of corporation and its definition.

The concept «corporation» was known in Ancient Rome. So, I.B. Novitsky and I.S. Peretersky write that in Rome «in the most ancient times there were ... private corporations: the unions with the religious purposes (sodalitates, collegia sodalicia), trade unions of handicraftsmen (faborum, pistorum) ... all these associations possessed property means» [1, 115]. Authors point out that corporations possessed the general property which was considered by the ancient law «on the beginnings of partnership, societas i.e. as the property belonging to each of its participants in a certain share ...» [1, 116].

In legal literature by the Roman law corporations as a rule are considered in aspect of the arising doctrine about the legal entity and characteristics with which corporations in the further development are allocated get classical

characteristics of the legal entity. Nevertheless, the Roman lawyers of later period recognized existence of the following features of corporations:

- corporation can be considered in the sphere of private law as the individual (D. 50.16.16);

- legal existence of corporation doesn't stop and isn't broken by an exit of certain members from structure of association (D.3.4.7.2);

- property of corporation is segregated from property of its members, besides it not in common to all members of corporation belonging property, but corporation property, as whole, as special subject of the rights: that the corporation has to – its members shouldn't; that somebody owe corporations – don't owe its members (D.3.4.7.1);

- corporation as the legal entity enters into regulations with other persons by means of the individuals authorized on that in accordance with the established procedure [1, 116].

Apparently, the Roman lawyers recognized independence of corporation. The corporation wasn't simple contractual association as each of its participants could leave its structure and the corporation thus didn't stop though in source it is called as association. Respectively, this was association which got the status independent of its participants. Interest in the analysis of the Roman Corporation causes the instruction that its participants don't incur responsibility for debts of corporation, and the corporation doesn't incur responsibility for debts of the participants too. Now such feature is characteristic for such legal entities as Limited Responsibility Partnership (item 1 of Art. 77 of Civil Code), Joint Stock Company (item 1 of Art. 85 of Civil Code), public associations (p.3 item 1 of Art. 106 of Civil Code), religious associations (item 10 of Art. 109 of Civil Code), alliances in the form of association (union) (item 4, item 5 of Art. 110 of Civil Code).

One more important point is that in sources in relation to the Roman corporations is pointed to presence of members, i.e. the corporation is member association and on rudiments of bodies as the corporation enters into legal relations with other persons by means of the individuals authorized on that in accordance with the established procedure.

Thus, apparently, the corporation of that time can be defined as the association based on membership possessing organizational and property independence which participants are not liable for debts on association, as well as, association is not liable for debts of the participants.

To look at corporation from more accurate positions it is, already, possible to tell how on the established subject of civil relations, further development of the doctrine about legal entities the German scientists allowed. So, at the end of the XIX century O. Girke, proving regulations about concept and essence of the legal entity, offered the conception about «allied persons (personalities)», distinguishing from them the state, corporations and institutes.

The allied personality, according to the concept of O. Girke, is the ability of the human union recognized by legal order as whole, other than the sum of the connected individuals, to be the subject of the rights and duties [2, 11]. To its features along with capacity and capability, he referred compound character of the person which unity is carried out in a public organism which though is called since ancient times because of its organic structure as «body», with «head», «members», «organs» but as social formation differs in the internal being from natural formation.

«Its compound parts are an essence of the person and therefore the internal vital relations which simply don't enter into legal area, in the allied person are capable to legal norming and are erected in degree of the legal relations» [2, 12]. The allied person, emphasizes Girke, has the device, and «conditions of acquisition and the termination of qualities of the member and body, the assumptions under which the volition and function of bodies is a volition and function of the allied person, the mutual rights and duties of members and whole, as well as members among themselves» [2, 12] are defined by legal norms.

As corporation (as variety of the allied person) O. Girke understood the real collective person who is the communication, which carriers are an essence the individuals connected among themselves [3, 97-98] is.

Thus, O. Girke, as well as earlier Roman lawyers, specified that the corporation is the union, i.e. the association based on membership. On the basis of existence of the right

of membership in the modern legislation it is possible to allocate such legal entities, as economic partnerships, joint-stock company, production and consumer cooperatives, public associations, alliances and unions.

At the end of the XIX century other German jurist Bernattsik developed this doctrine and marked out feature which, on his opinion, was inherent only to corporations. This feature was the common purpose which was put before themselves by participants of corporation: it admitted by the law as obligatory that meant renunciation of certain individuals from this purpose. The purpose which has found will by means of which it in the long view will be constantly carried out, began own life. The purpose of creation and activity of corporation was carried out not only for the purposes of certain participants, but even contrary to them [2, 13]. Thus, existence of own will was considered as a sign of corporation. And the will of corporation is the will of all her members connected at its creation which realization was assigned to bodies of corporation which, working in its interests, expressed the will of corporation sometimes opposed to will of its certain participants. Proceeding from it, those legal entities which will was expressed in the constitutive act – the unitary enterprises didn't treat corporations.

During the pre-revolutionary period the main classification of legal entities was their division into connection of persons (corporations) and into establishments. In G.F. Shershenevich's works such definition meets: «The legal entity represents connection of persons, corporation as British speak when it consists of some number of people who are uniting for achievement of common purpose and independently managing common affairs. Individuals form in connection a special subject of law, other than them: they are only members of connection... The connections of persons having private character can ... be subdivided into societies and partnership companies» [4, 120]. He refers to societies «connections of several persons which, without having a problem of receiving for it profit on maintaining any enterprise, chose a subject of the cumulative activity definite purpose» [4, 120]. In this case the non-profit organization functioning under the terms of membership as it is a question of cumulative activity of several persons means. In the modern law there are public associations, consumer cooperatives and associations (unions). Partnership Company, in turn is connection of several persons who put a problem of the joint activity extraction for itself profits. Further G.F. Shershenevich specifically specifies – Partnership companies full, partnership in commendam, joint-stock, stock and labor

artels [4, 121]. In the modern law there are economic partnership, joint-stock company and production cooperative.

Establishment, in turn, represented the legal entity when property of the united individuals intended for achievement of the known purpose. The subject of this property with the special purpose which didn't depend on personal interests of the subjects which have allocated part of the property was created. Such establishments could be public and private, considering purpose of property. Establishment serves to interests of many persons, but these persons are not his members and not subjects of the rights making property of establishment [4, 121].

Thus, we see that pre-revolutionary scientists-jurists as well as the German civilists, recognized association of the persons connected by a common purpose, based on membership as corporation. The association answering to above signs, created for the purpose of receiving profit and without that, i.e. commercial and noncommercial associations was considered as corporation. The term «corporation» was used as generic term.

The concept of corporation in the common law has the own nature, other than that which developed within continental system.

So, in the USA concept «corporation» covers the widest range of legal entities. Depending on the pursued purposes corporations can be public, quasi-public, entrepreneurial (private, business of profit-making) and not entrepreneurial (non-profit):

1) public corporations are the governmental and municipal bodies;

2) quasi-public corporations are the corporations, serving to the general needs of the population (corporations in the field of population supply by gas, water, electricity, railway corporations);

3) entrepreneurial corporations are the corporations operating for the purpose of receiving profit [5, 909–925; 6, 36–40].

In fact and to the contents entrepreneurial corporations represent the commercial organizations in the form of joint-stock companies. It should be noted that in the USA jurisprudence legalized the opened and closed corporations.

O.N.Syroyedova notes that lines of any American entrepreneurial corporation are, first, limited liability of participants of corporation on its debts; secondly, free carve-out of shares by participants of corporation (the closed corporations are an exception); thirdly, existence of the centralized management when administrative functions carry out the corporations isolated from participants bodies; fourthly, «eternal existence» of corporation that means its independence of structure of participants of

corporation [7, 21]. Features of the status of the closed corporation are that the number of equity holders in them is limited, the public capital stock subscription is forbidden and freedom of a transfer of stock is limited.

In turn, not entrepreneurial corporations in the USA are understood as corporations which don't pursue the aim of receiving profit (the religious organizations, schools, charity foundations).

Thus, in the USA the concept «corporation» covers practically all types of legal entities to which the following signs are peculiar:

– limited liability of participants on corporation debts;

– existence of the management isolated from participants;

– independence of structure of participants;

– created in entrepreneurial and not entrepreneurial purposes.

In England the corporation has the own legal personality independent of members of corporation. O.A. Makarova allocates its following distinctive features:

– limited liability of participants according to company obligations;

– the centralized management exercised by persons, other than members of the company;

– permanence of activity of the company irrespective of leaving of its members [8].

As a whole it should be noted that, judging by signs, to concept of corporation both of the USA, and of England approach equally, except for the creation purpose, but neither in England, nor in the USA, according to the legislation, associations don't treat number of corporations as an organizational and legal form of implementation of entrepreneurial activity [9].

In the law of many foreign countries concept «corporation» has the accurate legal contents it is the self-organized legal entity which founders at the same time are its participants acting together and on an equal legislative basis. Establishment – the legal entity formed by the external founder, keeping the apartness and individually operating legal entity as the unitary institution, not having any independent participants [10, 330] is opposed to it. In Kazakhstan as still Yu.G. Basin quite recently specified, such accurate differentiation is lost [10, 330].

Really, Kazakhstan law doesn't provide such view or an organizational and legal form of the legal entity as corporation. The term «corporation» and many other concepts, derivatives from it now are a subject of scientific discussions. It is possible to allocate conditionally three points of view in a look that during the modern period it is necessary to understand as corporation.

According to one of them, only joint-stock companies are corporations [11, 27].

So, F.S. Karagusov writes that «it is necessary to share concept of «corporation» and a subject of corporate law. In particular, for identification of subject of regulation by norms of corporate law by the most expedient is to understand corporation as joint-stock company ... the corporate legislation has to regulate ... questions of creation and activity of joint-stock companies, demanding use of this corporate form only when conducting large entrepreneurship and leaving beyond the limits regulation of various forms of economic associations, including associations (societies) with limited liability» [11, 26–28].

F.S. Karagusov allocates the following signs of corporation:

- it is created for the purpose of receiving profit;
- is a form of large entrepreneurship;
- in legal status governing bodies and members are allocated;
- the circle of participants isn't limited [11, 16–18].

Analyzing these signs it is possible to come to such conclusions. For the purpose of receiving profit according to the current legislation only the commercial organizations, among which joint-stock companies, economic partnerships, production cooperatives and the state enterprises are created. Subjects of large business, according to item 8 of Art. 6 of Law of the RK about private enterprise the legal entities carrying out private enterprise and answering to one or two of the following criteria are capable to be: the average annual number of workers more than two hundred fifty people or a total cost of assets in a year over the three hundred-twenty-five-thousand fold monthly calculation index established by the law about the republican budget. The main legal form of functioning of modern large business, the joint-stock company which attracts the capital at the expense of issuance and placement of shares serves. At the same time, to subjects of large business are capable to expand and separate associations, for example, the limited liability branch associations of the national companies being payers of excess profits duty, unlike full and special partnerships which are created and functioning in the conditions of small and medium business.

Both joint – stock companies and limited responsibility partnerships are the member organizations. It also gives the grounds for existence of other point of view according to which along with joint-stock companies to corporations carry also the limited responsibility partnerships. So, S.I. Klimkin considers that the legal status of the limited responsibility partnerships as most popular form of conducting business activity in the Republic of Kazakhstan

as much as possible came nearer to legal status of joint-stock companies [12], especially in connection with amendments in the legislation from May 16, 2003 and July 8, 2005 owing to which restrictions of the maximum number of participants of LRP were eliminated.

Thus, under the signs of corporation formulated by S.F. Karagusov, falls not only joint-stock company, but also the limited responsibility partnerships.

According to the third point of view other forms of the commercial and non-profit organizations operating on the basis of association of the capitals [13] belong to corporations along with joint-stock companies. In this definition the fact of pooling of capitals is defining sign of corporation.

It should be noted that in economy of the enterprise businessmen associations share on associations of persons and association of the capitals depending on nature of association and degree of responsibility of participants according to its obligations. Associations of persons are based on personal participation of their members in firm business management. Members of such enterprise unite not only monetary and other means, but also own activity in the apposition of these means [14]. Each participant of such enterprise has the right to business management, proxyship and management. Association of the capitals assumes addition only the capitals, but not activity of investors: the management and operational control of the enterprise is exercised by specially created bodies. Responsibility according to obligations of association of the capitals is born by the enterprise, and participants are thus exempted from the risk resulting economic activity.

Thus, it is necessary to consider as associations of persons the associations which members directly participate in its activity and bear a joint liability according to its obligations as it occurs, for example, in full partnerships. In capital associations members participate in the annex of the capital to reproduction process, the management of such association carries out special body. Besides, unlike associations of persons associations of the capitals independently bear responsibility according to the obligations.

On the strength of it, to associations of persons from among commercial legal entities it is possible to carry full partnership, special partnership, production cooperative, to associations of the capitals – joint-stock companies, limited responsibility partnerships and additional liability partnerships.

In turn non-profit organizations aren't constant, professional participants of civil turn. Their performance as independent legal entities is caused by need of material security

of their primary, main activity which hasn't been connected with participation in the property relations. In this regard the phrase «capital association» use concerning noncommercial legal entities is dissonant, opposite to a being of the non-profit organizations which purpose of activity isn't connected with receiving profit.

Summarizing the above, it is possible to define corporation as follows. This association of persons based on membership and their capitals in the form of the commercial legal entity which doesn't bear responsibility for debts of the participants and which participants don't answer on its debts.

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