



British Embassy
Astana



LEGAL OPINION
on compliance of legislation of
the Republic of Kazakhstan with the basic socioeconomic
principles on business and human rights

Almaty, 2013

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I. GENERAL

1. Background

The Republic of Kazakhstan (**hereinafter – RK**) is striving to receive a permanent observer status in four committees (the Investment Committee, the Education Policy Committee, the Committee for Agriculture, and the Committee on Industry, Innovation and Entrepreneurship) of the Organisation for Economic Co-operation and Development (**hereinafter – OECD**) to gain an opportunity for developing and implementing a more efficient national economic policy.

One of the OECD priorities consists in increasing responsible conduct of business enterprises (especially in the extractive sector). OECD recommends adhering to the principle of proportion, transparency and non-discrimination. According to OECD, Kazakhstan should make its legal system more independent, the public procurement system more transparent, and pay more attention to protection of human rights in the business sphere.

Any economic policy, including the policy of recovery from crisis, entails enormous implications involving distribution of finance within a country and is therefore fraught with violation of socioeconomic rights of citizens. It is common knowledge that previous crises had a particularly grave effect on the least protected strata of the population leading to violations of their inherent rights.

The on-going financial crisis and economic decline remain one of the main concerns both for the public authorities and for businessmen who are trying to improve economic governance, fill in regulatory gaps and identify measures for overcoming the existing situation.

Restoration of a healthy global economy requires the return to the state of relevant functions of financial markets' regulator. In addition, negative impact of external factors related to the global financial crisis may be mitigated by returning to the government its inherent role of collective actions' organiser both on the national and global levels.²

The nation address of RK President Nursultan Nazarbaev, *Socioeconomic Modernisation – the Chief Vector in Kazakhstan's Development* (27 January 2012), set the national development target for the nearest decade. The balance between economic development and provision of social wellbeing in the contemporary world is a crucial issue of socioeconomic modernisation, which is directly linked with the legal policy of ensuring the protection of human rights.

Today, positivised human rights are the crucial answer to the question whether and how freedom and equality, pluralism and solidarity as well as state and law can be harmonised. Human rights

¹ This Legal Opinion was prepared by the Research Institute of Financial and Tax Law for the Legal Policy Research Centre with technical support of the British Embassy in Kazakhstan. The views and opinions presented in the Legal Opinion do not reflect the position of the British Embassy in Kazakhstan.

² See The Stiglitz Report Reforming the International Monetary and Financial Systems in the Wake of the Global Crisis. Report of a UN Commission of Financial Experts (Moscow, 2010), p.60.

form a universal complex of political, economic, social and cultural rights. Their violation does not give any greater weight to the argument disputing their universal importance.³

Social injustice originates, first and foremost, when governments in the process of determining the limits of social and economic rights neglect the connection between these sort of rights and indirectly protected core rights; when other factors interfere with this process of setting the limits, apart from the demand to protect the relevant fundamental rights, above all ignorance as well as personal, group, class, and other interests; or when the laws regulating the establishment and functioning of social and economic relations, e.g. tax laws, the civil code or laws with a narrower coverage, are being applied without account taken for inner connections between those rights and indirectly protected core rights, i.e. disregarding the possible consequences for those rights under the circumstances of a specific country.⁴

Business offers multiple opportunities owing to the transformation of production factors into goods or services, stimulating economic development. However, institutions stimulating business far too often lead to decisions that inflict damage on the exercise of human rights.

In this connection, **the Human Rights Council**, in its resolution 17/4, **has unanimously approved the Guiding Principles on Business and Human Rights**. Today the Guiding Principles have become a universally accepted norm aimed at the prevention and liquidation of a negative impact of business activities on human rights.

In 2005, the Secretary General, on request of the Human Rights Commission, appointed Professor **John Ruggie as Special Representative on the issue of human rights and transnational corporations and other business enterprises** with the mandate to identify and clarify standards of corporate responsibility and accountability with regard to human rights and deliberate the issue of the role of the state in this regard.

2. Laws and Regulations of the Republic of Kazakhstan Reviewed

- 1) The Constitution of the Republic of Kazakhstan of 30 August 1995, as amended (**the RK Constitution**);
- 2) Constitutional Law of the Republic of Kazakhstan of 25 December 2000 No. 132 on the Legal System and Status of Judges in the Republic of Kazakhstan (**Constitutional Law on the Legal System**);
- 3) The Civil Code of the Republic of Kazakhstan of (the General and Special Parts) of 27 December 1994 and 1 July 1999, as amended (**Civil Code; RK CC**);
- 4) The Labour Code of the Republic of Kazakhstan of 15 May 2007 No. 251-III, as amended (**RK LC**);
- 5) The Tax Code of the Republic of Kazakhstan of 10 December 2008 No. 99-V, as amended (**Tax Code, of RK TC**);
- 6) The Civil Procedure Code of the Republic of Kazakhstan of 13 July 1999 No. 411-I, as amended (**CPC**);
- 7) The Code of Criminal Procedure of the Republic of Kazakhstan of 13 December 1997 No. 207, as amended (**CCP**);

³ For detail, please, see, Hans Jörg Sandkühler, *Democracy, Universality of Rights and Real Pluralism*, *Voprosy Filosofii* (1999, 2), p.49.

⁴ See I. Kuchuradi, *Social and Global Justice*, *Voprosy Filosofii* (2003, 2), p.23.

- 8) The Code of the Republic of Kazakhstan on Public Health and the Public Health System of 18 September 2009 No. 193-IV, as amended (**the Public Health Code**);
- 9) The Environmental Code of the Republic of Kazakhstan of 9 January 2007 No. 212-III 3PK (**RK EC; Environmental Code**);
- 10) The Code of the Republic of Kazakhstan on Administrative Offences of 30 January 2001 No. 155-II (**CAO**);
- 11) The Criminal Code of the Republic of Kazakhstan of 16 July 1997 No. 167-I (**RK CC**);
- 12) Law of the Republic of Kazakhstan of 24 March 1998 No. 213-I on Laws and Regulations, as amended (**the Law on Laws and Regulations**);
- 13) Law of the Republic of Kazakhstan of 23 July 1999 No. 453-I on Public Service (**the Law on Public Service**);
- 14) Law of the Republic of Kazakhstan of 12 January 2007 No. 221-III 3PK on Procedures for Consideration of Appeals by Individuals and Legal Entities, as amended (**the Law on Appeals Consideration Procedures**);
- 15) Law of the Republic of Kazakhstan of 28 January 2011 No. 101-IV on Mediation (**the Law on Mediation**);
- 16) Law of the Republic of Kazakhstan of 15 March 1999 No. 349-I on State Secret (**the Law on State Secret**);
- 17) Law of the Republic of Kazakhstan on Informatisation of 11 January 2007 No. 217-III 3PK (**the Law on Informatisation**);
- 18) Law of the Republic of Kazakhstan on Industrial Safety at Hazardous Industrial Facilities 3 April 2002 No. 314-II (**the Law on Industrial Safety**);
- 19) Law of the Republic of Kazakhstan on Radiation Safety of the Population of 23 April 1998 No. 219-I (**the Law on Radiation Safety**);
- 20) Law of the Republic of Kazakhstan of 14 April 1997 No. 93-I on the Use of Nuclear Energy (**the Law on the Use of Nuclear Energy**);
- 21) Law of the Republic of Kazakhstan of 15 November 2010 No. 352-IV on State Regulation of Biological Fuel Production and Turnover (**the Law on Biofuel**);
- 22) Law of the Republic of Kazakhstan of 12 January 2007 No. 221-III 3PK on Protection of Consumer Rights, as amended (**the Law on Protection of Consumer Rights**);
- 23) Law of the Republic of Kazakhstan on Safety of Toys of 21 July 2007 No. 306-III (**the Law on Safety of Toys**);
- 24) Law of the Republic of Kazakhstan of 11 January 2007 No. 214-III 3PK on Licensing, as amended (**the Law on Licensing**);
- 25) Law of the Republic of Kazakhstan of 09 November 2004 No. 603-II 3PK on Technical Regulation as of 10 July 2012 (**the Law on Technical Regulation**);
- 26) Law of the Republic of Kazakhstan of 25 December 2008 No. 112-IV 3PK on Competition

as of 10 July 2012 (**the Law on Competition**);

- 27) Law of the Republic of Kazakhstan of 09 July 1998 No. 272-I on Natural Monopolies and Regulated Markets as of 10 July 2012 (**the Law on Regulated Markets**);
- 28) Law of the Republic of Kazakhstan of 02 July 2003 No. 461-II on the Securities Market as of 05 July 2012 (**the Law on the Securities Market**);
- 29) Law of the Republic of Kazakhstan of 31 January 2006 No. 124-III 3PK on Private Entrepreneurship, as amended (**the Law on Private Entrepreneurship**);
- 30) Law of the Republic of Kazakhstan of 23 January 2001 No. 149-II on Employment, as amended (**the Law on Employment**);
- 31) Law of the Republic of Kazakhstan of 8 February 2003 No. 387-II on the State of Emergency, as amended (**the Law on the State of Emergency**);
- 32) Law of the Republic of Kazakhstan of 22 July 2011 No. 477-IV 3PK on Migration as of 10 July 2012 (**the Law on Migration**);
- 33) Law of the Republic of Kazakhstan of 09 April 1993 No. 2107-XII on Trade Unions (as amended, as of 29 April 2009) (**the Law on Trade Unions**);
- 34) Law of the Republic of Kazakhstan of 22 April 1998 No. 220-I on Limited and Additional Liability Companies (as amended, as of 12 January 2012) (**the Law on LLC**);
- 35) Law of the Republic of Kazakhstan of 13 May 2003 No. 415-II on Joint-Stock Companies (as amended, as of 05 July 2012) (**the Law on JSC**);
- 36) Law of the Republic of Kazakhstan on investment Funds of 07 July 2004 No. 576-II (**the Law on Investment Funds**);
- 37) Law of the Republic of Kazakhstan of 07 February 2005 No. 30-III 3PK on Compulsory Insurance of Employees against Occupational Hazards, as amended (**the Law on Compulsory Insurance of Employees against Occupational Hazards**);
- 38) Law of the Republic of Kazakhstan of 25 April 2003 No. 405-II on Compulsory Social Insurance, as amended (**the Law on Social Insurance**);
- 39) Law of the Republic of Kazakhstan on Grain of 19 January 2001 No. 143-II (**the Law on Grain**);
- 40) Law of the Republic of Kazakhstan of 24 June 2010 No. 291-IV 3PK on Subsoil and Subsoil Use, as amended (**the Law on Subsoil Use**);
- 41) Presidential Decree of the Republic of Kazakhstan of 24 August 2009 No. 858 on the Legal Policy Concept of the Republic of Kazakhstan for the period from 2010 to 2020 (**Legal Policy Concept until 2020**);
- 42) Presidential Decree of the Republic of Kazakhstan of 14 November 2011 No. 174 on Information Safety Concept until 2016 (**Information Policy Concept until 2020**);
- 43) Presidential Decree of the Republic of Kazakhstan of 19 March 2003 No. 1042 on the Human Rights Commission at the President of the Republic of Kazakhstan (**Decree on the Human Rights Commission**);

- 44) Presidential Decree of the Republic of Kazakhstan of 19 September 2002 No. 947 on Institution of the Position of Human Rights Commissioner (**Statute of the Human Rights Commissioner**);
- 45) Presidential Decree of the Republic of Kazakhstan of 29 November 2004 No. 1474 on Further Improvement of the Constitutional Human and Citizens' Rights and Freedoms Protection System (**Decree on Improvement of the Human Rights Protection System**);
- 46) Resolution of the Constitutional Council of the Republic of Kazakhstan of 10 March 1999 No. 2/2 on Official Interpretation of Article 14 (paras 1 and 2), Article 24 (para 2), Article 77 (subpara (5) of para 3) of the Constitution of the Republic of Kazakhstan (**Resolution of the RK Constitutional Council of 10 March 1999 No. 2/2**);
- 47) Resolution of the Constitutional Council of the Republic of Kazakhstan of 12 March 1999 No. 3/2 on Official Interpretation of Article 61 (para 7) and Article 28 (para 1) of the Constitution of the Republic of Kazakhstan (**Resolution of the RK Constitutional Council of 12 March 1999 No. 3/2**);
- 48) Resolution of the Constitutional Council of the Republic of Kazakhstan of 01 December 2003 No. 12 on Official Interpretation of Articles 10 and 12 of the Constitution of the Republic of Kazakhstan (**Resolution of the RK Constitutional Council of 01 December 2003 No. 12**);
- 49) Resolution of the Constitutional Council of the Republic of Kazakhstan of 07 June 2000 No. 4/2 on Official Interpretation of Article 5 (para 4) of the Constitution of the Republic of Kazakhstan (**Resolution of the RK Constitutional Council of 7 June 2000 No. 4/2**);
- 50) Resolution of the Constitutional Council of the Republic of Kazakhstan of 5 August 2002 No. 5 on Compliance of the Law of the Republic of Kazakhstan on Introduction of Amendments and Additions to Some Legal Acts of the Republic of Kazakhstan on Public Prosecutor's Supervision with the Constitution of the Republic of Kazakhstan (as amended as of 27 April 2011) (**Resolution of the RK Constitutional Council of 5 August 2002 No. 5**);
- 51) Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of 21 June 2001 No. 3 on Legal Application of the Legislation on Compensation for Moral Damage (**Regulatory Resolution of the RK Supreme Court of 21 June 2001 No. 3**);
- 52) Government Resolution of the Republic of Kazakhstan of 15 February 2008 No. 141 Matters of the Republic of Kazakhstan Agency for the Protection of Competition (Antimonopoly Agency) (**Resolution of 15 February 2008 No. 141**);
- 53) Government Resolution of the Republic of Kazakhstan of 9 December 2003 No. 1251 on Establishment of the Intergovernmental Commission for International Humanitarian Law and International Treaties on Human Rights (**Resolution of 9 December 2003 No. 1251**);
- 54) Government Resolution of the Republic of Kazakhstan of 5 December 2011 No. 1457 on Approval of the Rules for Mandatory Periodical Working Conditions Attestation of Production Facilities (as amended as of 01 June 2012) (**Resolution of 5 December 2011 No. 1457**);
- 55) Government Resolution of the Republic of Kazakhstan of 28 October 2011 No. 1225 on Approval of the Rules and Timelines for Training, Instructing, and Knowledge Certification on Employees' Safety and Labour Protection Matters (as amended as of 01 June 2012) (**Resolution of 28 October 2011 No. 1225**);

- 56) Government Resolution of the Republic of Kazakhstan of 21 August 2007 No. 721 on Approval of the Rules for Adopting Labour Protection and Safety Regulations by Relevant Authorised Bodies (**Resolution of 21 August 2007 No. 721**);
- 57) Government Resolution of the Republic of Kazakhstan of 21 August 2007 No. 720 on Approval of the Rules for Information Submission and Keeping Public Statistics on Labour Protection and Safety (as amended as of 17 June 2010) (**Resolution of 21 August 2007 No. 720**);
- 58) Government Resolution of the Republic of Kazakhstan of 22 November 2011 No. 1368 on Approval of the Rules for Tobacco Manufacturers' Reporting (**Resolution of 22 November 2011 No. 1368**).

II. COMPLIANCE OF THE RK LEGAL PROVISIONS WITH SOCIOECONOMIC PRINCIPLES OBLIGING THE STATE TO PROTECT HUMAN RIGHTS

Part II of this Legal Opinion contains a legal analysis of provisions of the RK legislation for compliance with socioeconomic principles obliging the State to protect human rights.

1. General

The Republic of Kazakhstan, having ratified the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), has committed to exercise the rights recognised by the Covenant by any adequate means, including the adoption of legislative measures (RK Law of 21 November 2005 No. 87-III, entered into force in the RK on 24 April 2006).

In connection with the global economic crisis, the State has assumed the responsibility for taking the national economy out of the difficult situation. The RK has introduced additional mechanisms for regulating the financial sector, systemic and operational response of the State to financial instability hazards, budget expenditure saving measures, tightened control over the activity of business enterprises, conducted measures to increase the level of governance, etc.

It should be mentioned that in the period of stagnation, any State generally extends the sphere of its interference. Moreover, upon the completion of such a period it usually narrows its sphere of responsibility, but does not go back to the pre-crisis level. Economic crises generate not only temporary, but also constant increase in the scope of state interference. Thus the State gains additional opportunities for control of observance and protection of socioeconomic human rights which are being frequently ignored or infringed by business enterprises in their attempts to maintain competitiveness. However, there is a risk of violation of the rights of private business entities by the State.

In this connection, the problem of observance and protection of human rights and regulating compliance of effective legal provisions with socioeconomic principles ensuring protection of human rights gains particular importance in relationships of the State with business enterprises.

The State has the duty to protect against human rights abuses by third parties, including business enterprises. Business enterprises, in turn, are responsible for respecting human rights. The key issue is providing more effective access to judicial and extra-judicial remedies.

The Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (hereinafter – **the Report**) highlights two **core principles** obliging States to protect human rights:

(i) First, States are required, within their territory and/or jurisdiction, to protect against human rights abuses by third parties, including business. For this purpose, States need to take appropriate steps to prevent and investigate such abuses, punish and redress through appropriate policies, regulation, and adjudication (hereinafter – **the State duty to protect against human rights abuses by third parties, including business**).

(ii) The second core principle obliges States to take appropriate steps to ensure that business enterprises domiciled in their territory and/or under their jurisdiction respect human rights within the process of their activity (hereinafter – **the principle of legal policy coherence in ensuring respect of human rights**).

Along with the core principles, the Report formulates the **operational principles**. The operational principles are a logical continuation and specification of the core principles.

The operational principles are grouped into four clusters:

(1) General Functions of the State in the Legal and Policy Sphere

The general functions of the State in the legal and policy sphere include provisions directly stemming from the principle of State protection of human rights against abuses by third parties, including business.

In line with this duty, the States are recommended *to ensure the implementation of the laws obliging business entities to observe human rights, assess the adequacy of these laws, and at the same time address legislative gaps.*

In addition, the State should survey over *corporate law provisions which are to promote the observance of human rights by business entities.* Moreover, the State should instruct (provide guidance) business enterprises on human rights observance methods, encourage and require the submission of information on the human rights situation inside organisations.

(2) State Interaction with Companies

The second part of the operational principles builds on requirements envisaged by the State's general functions in the policy and legal sphere. In particular, those *requirements spread on business enterprises owned or controlled by the State and enjoying considerable state support.* In the event of concluding contracts with those business entities or adoption of legal acts in their interests, the State must take into account its international obligations.

(3) Ensuring Observance of Human Rights by Business Entities in Conflict-Affected Areas

The states are recommended to promote the respect of human rights by business organisations operating in conflict-affected areas.

During the conclusion of contracts between the State and the aforementioned business entities, the State should point out the need for them to respect human rights and render them further support in this direction, in part, by enhancing the efficiency of legal provisions. In the event of gross violations of human rights by these organisations, the states are recommended to refuse the granting of state support to those organisations.

Therefore, this operational principle builds on the principle of legal policy coherence in ensuring protection of human rights. States are recommended to set requirements of human rights observance for business enterprises domiciled in their territory and/or under their jurisdiction and operating in conflict-affected areas.

(4) Ensuring Policy Coherence

Striving to protect human rights, the State should coordinate the activities of all of its bodies directly involved with the operation of business entities and also preserve the necessary freedom of action for the protection of human rights with other states and business entities within the framework of international investment agreements.

In the State joins international institutions related to entrepreneurship and their negative impact on the observance of human rights, it is recommended to restrict the impact of such institutions.

Therefore, the policy coherence requirements constitute an inseparable part of the principle of legal policy coherence in ensuring human rights protection.

In connection with the above, the Expert considers it appropriate to determine the nature of effective legal provisions, establish their interconnections, logical consistency, and to identify gaps in the RK legal system within the context of protection of socioeconomic human rights based on the principles presented in the Report.

2. Compliance of the RK Legal Provisions with the Ruggie Principles Obliging States to Observe and Protect Human Rights

This section of the Legal Opinion is divided according to different spheres of legal regulation (constitutional, civil, labour, environmental law, etc.).

2.1. Provisions of the RK Constitution Fixing State Duty to Protect against Human Rights Abuses by Third Parties, including Business

According to Article 1 of the Constitution, the Republic of Kazakhstan proclaims itself a democratic, secular, legal and social state whose highest values are an individual, his life, rights and freedoms.

The recognition of the highest value of human rights means that the **State has no more important concern than care of the individual and his material wellbeing**. The State must do everything within its power to create conditions for decent human existence (Resolution of the RK Constitutional Council of 1 July 2005 No. 4). At the same time, **the striving to perform the role of a social state is limited by actual powers of the state**. Kazakhstan recognises and guarantees the rights and freedoms of individual and citizen in its Constitution (Resolutions of the RK Constitutional Council of 21 December 2001 No. 18/2).

As the exercising of socioeconomic rights, unlike civil and political rights, requires relevant material resources, they can be exercised only gradually, as the wellbeing of the entire state develops.

It should be mentioned that the Constitution and other laws and regulations of the Republic of Kazakhstan do not contain strict criteria distinguishing the rights of an individual from the rights of citizen. This is characteristic not only of Kazakhstan's legal system, but for the legislations of other countries as well.

This circumstance creates considerable complications in legal regulation of relations, e.g. in situations involving refugees of stateless persons, including the protection of their socioeconomic rights.⁵

⁵ Many renown researchers have expressed their opinions regarding the distinction between the rights of an individual and the rights of a citizen. For example, according to Giorgio Agamben, the so-called sacred and inalienable human rights within the system of the national state lose any sort of protection and stop being real at the very moment when it becomes impossible to present them as the rights of citizens of some

The provisions of the Kazakhstan legislation suggest the conclusion that the concept of human rights is practically equalised with the rights of citizen, making it the duty of the State to observe and promote them, protect citizens' rights against abuses by third parties, including business.

According to Article 40 (2) of the RK Constitution, the President of the Republic is the guarantor of inviolability of the Constitution, rights and freedoms of an individual and citizen.

In this connection, RK Presidential Decree of 19 March 2003 No. 1042 has set up a **Human Rights Commission at the RK President**, which is an *advisory body facilitating the fulfilment of the Head of State's constitutional duties of guarantor of the rights and freedoms of an individual and citizen, recognised and guaranteed by the RK Constitution*.⁶

In addition, other specialised human rights institutions were created for the purposes of implementation of international legal obligations assumed within the framework of international humanitarian law and international human rights treaties to which the Republic of Kazakhstan is a signatory.

RK Presidential Decree of 19 September 2002 No. 947 instituted the position of **Human Rights Commissioner**, whose functions include observance of compliance of human and citizen's rights and freedoms and take remedial measures for restoring the abused human and citizen's rights and freedoms (para 1 of the Statute of the Human Rights Commissioner).

RK Governmental Resolution of 9 December 2003 No. 1251 set up **the Interdepartmental Commission for International Humanitarian Law and International Human Rights Treaties**. The main task of the Commission is to work out proposals on matters of: ensuring the implementation of the RK international legal obligations in the sphere of international humanitarian law and international human rights treaties; implementation of *norms and principles of international humanitarian law and international human rights treaties* assumed by the RK; harmonising the national legislation with provisions of the international humanitarian law and international human rights treaties to which the RK is a signatory.

It should be noted that the institutions designated for ensuring the protection of human and citizens' rights are not always supported with efficient mechanisms of influencing third parties (the state authorities, business entities) in the event of violation of human and citizens' rights.

E.g., response acts of the Human Rights Commissioner are restricted to recommendations (para 24 of the Human Rights Commissioner).

particular state. – Please, see, Giorgio Agamben, *Homo Sacer Sovereign Power and Bare Life*. (1998). Similar views were expressed in the works by Hannah Arendt, Jacques Rancière, and Slavoy Zizek.

⁶ According to para 4 (2) of the Statute of the Human Rights Commission at the RK President, its competence includes preparing of annual and special reports on observance of the rights of an individual and citizen in the Republic of Kazakhstan for submission to the Head of State. These reports may be published in the media. The 19 September 2012 Report of the Human Rights Commission at the RK President on the Human Rights Situation in the Republic of Kazakhstan in 2011 touched upon matters of compliance of the national legislation with socioeconomic principles of human rights. According to the Report, the existence of a legislative framework in Kazakhstan regulating issues of setting and payment of labour remuneration and control over its requirements made it possible for Kazakhstan to ratify the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value. In 2011, employers have committed 4131 violations of the deadlines for timely payment of labour remuneration, and 309 unlawful cancellations of employment contracts with employees. As a result of the measures taken by the RK Ministry of Labour and Social Security jointly with other state authorities, the level of back wages in the Republic has more than halved: the total amount of back wages registered in Kazakhstan on 1 January 2011 equalling 3.2 billion tenge dropped by 30 December 2011 to 1.4 billion tenge.

The Decree on Improvement of the Human Rights Protection System excluded some effective powers of the Human Rights Commissioner from the Statute of the Human Rights Commissioner, such as the eligibility to participate in legal review of a case for purposes of protection of the violated human and citizen's rights and freedom; the possibility of appealing to court or the prosecution bodies for expert review of a decision, court sentence, determination or resolution that has entered into legal force; the possibility of taking measures for compensation for material or moral damage in cases of initiation of disciplinary or administrative proceedings or a criminal case against an official guilty of violation of human and citizen's rights and freedom.

Article 6 (2) of the RK Constitution prescribes that property shall impose obligations, and its use must simultaneously benefit the society – subjects and objects of ownership, the scope and limits of the rights of proprietors, and guarantees of their protection shall be determined by law.

Article 12 of the RK Constitution stipulates that human rights and freedoms in the Republic of Kazakhstan shall be recognised and guaranteed in accordance with this Constitution. Human rights and freedoms shall belong to everyone by virtue of birth, be recognised as absolute and inalienable, and define the contents and implementation of laws and other regulatory legal acts. Exercise of a citizen's human rights and freedoms must not violate rights and freedoms of other persons, infringe on the constitutional system and public morals.

The provision that human rights and freedom determine the contents of laws and other regulatory legal acts, according to Resolution of the RK Constitutional Court of 28 October 1996 No. 6/2, shall mean that human rights and freedoms declared by the Constitution are fundamental for the development and adoption of laws and other regulatory legal acts establishing the terms and conditions for exercising those rights and freedoms.

Article 14 of the RK Constitution guarantees the equality of everyone before the law and court. No one shall be subject to any discrimination for reasons of origin, social, property status, occupation, sex, race, nationality, language, attitude towards religion, convictions, place of residence or any other circumstances.

Provisions of the RK Constitution do not provide a detail definition of the concept of “*other circumstances*.”

Analysis of the RK laws and regulations lead to the conclusion that the term “other circumstances” may be interpreted as a ban on discrimination on other grounds, such as nationality (Resolution of the RK Constitutional Council of 1 December 2003 No. 12), age (Article 7 of the RK Labour Code) or health (Article 55 of the RK Labour Code). Some grounds on which citizens could be subjected to discrimination are overlooked by the legislation.⁷

E.g., the issue of discrimination on grounds of sexual orientation is not regulated.

Article 24 of the RK Constitution stipulates that everyone shall have the right to freedom of labour, and the free choice of occupation and profession, the right to safe and hygienic working conditions, to just remuneration for labour without discrimination, as well as to social protection against unemployment. Everyone shall have the right to rest. Working labour agreements stipulating the length of working time, days-off and holidays, and paid annual leave shall be guaranteed by law.

⁷ UN Independent Expert on Minority Issues Gay McDougall noted that Kazakhstan has about 130 different ethnic groups and the national authorities are taking active measures for ensuring the rights of minorities, in part, for preserving languages, culture and traditions. At the same time, the Expert believes, that although the Constitution and other RK laws and regulations contain non-discrimination provisions, a special law should be adopted not only defining the concept of discrimination, but also setting measures of state response to facts of discrimination, and also explicitly prescribing the conditions and penalties for such offences.

Article 28 (1) of the RK Constitution guarantees to citizens of the Republic of Kazakhstan a minimum wage and pension, social security in old age, in case of disease, disability or loss of a breadwinner and other legal grounds.

The provision of Para 1 of Article 28 of the RK Constitution regarding citizens' rights to social security in case of disease, as per Resolution of the RK Constitutional Council of 12 March 1999 No. 3/2, shall mean that the exercising of this constitutional right is guaranteed by the State by creation various systems and implementing other necessary and accessible measures, including by legally binding the employers, irrespective of their form of ownership, to do so.

According to Article 39 (1), the rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary for protection of the constitutional system, defence of the public order, human rights and freedoms, health and morality of the population.

Therefore, provisions of the RK Constitution **recognise the individual, his life, rights and freedoms** as the highest values of the state, **they comply with the universally accepted socioeconomic principles of human rights** and international standards for their protection. They **comply with the principles of ensuring the protection of human rights by the State** against abuses by third parties and legal policy coherence in the sphere of human rights protection.

The provisions of the RK Constitution, which enjoy the highest legal force, are to be specified by subordinate RK laws and regulations (Article 4 of the Law on Laws and Regulations).

However, legal practice shows that many constitutional provisions are not being further developed in subordinate laws and regulations of the Republic of Kazakhstan.

In this connection, the RK Legal Policy Concept for the period from 2010 to 2020, approved by RK Presidential Decree of 24 August 2009 No. 858, points out **the need for further implementation of legal ideas and principles** of the RK Constitution in legislative, institutional and other measures of the State. The implementation of the principles and norms of the RK Constitution is top priority, especially in the activity of the public authorities and their officials, while ensuring both direct effect of the RK Constitution and the realisation of its potential through current legislation and enforcement.

2.2. Provisions of the RK Civil Law Prescribing the Duty of the State to Protect Human Rights against Abuses by Third Parties, including Business

According to Article 2 (1) of the RK Civil Code, civil legislation is based on the recognition of the equality of the participants of the relations regulated thereby, inviolability of property, freedom of agreement, prohibition of arbitrary interference in somebody's private affairs, indispensability of the free exercise of civil rights, and provision for the restitution of violated rights and their defence in court.

The state undertakes to ensure inviolability of property, restitution of the violated rights, including the rights violated as a result of illicit actions of business enterprises, and judicial protection, and guarantees non-interference of its bodies in private affairs.

The losses which are inflicted upon a citizen or a legal entity as a result of issuing by a governmental body of an act which does not comply with legislation, or by any other state body, and also by acts (failure to act) of the officials of those bodies, shall be subject to compensation by the Republic of Kazakhstan or by the relevant administrative and territorial unit.

The protection of civil rights as a form of human rights shall be exercised by the state through the court and non-judicial authorities. The appeal for protection of a violated right to a body of power or

administration shall not prevent an appeal to the court with an action to protect a right (Article 9 of the RK Civil Code).

In the event of appeal for protection of a violated right to a body of power or administration, in keeping with Article 4 of the Law on Procedures for Consideration of Appeals, the state authorities must adhere to the principles of legality; common requirements to appeals; guarantee the observance of rights, freedoms and lawful interests of individuals and legal entities; inadmissibility of manifestations of bureaucracy and red tape during the consideration of appeals; equality of individuals and legal entities; transparency of activity of entities and officials during the consideration of appeals.

The Republic of Kazakhstan shall ensure the protection and support of entrepreneurial activities (Article 10 (2) of the RK Civil Code). This means not only the protection of rights of entrepreneurs, i.e. individuals and legal entities whose activities are aimed at the generation of net profit by satisfying demand for products, but also the rights of *consumers which constitute an inseparable element of socioeconomic human rights*.

Today, there are **eight globally recognised consumer rights** which constitute the basis of the Law Protection of Consumer Rights.

International practice has developed a complex of fundamental consumer rights (rights to quality and safe goods (jobs, services), to education, information, full compensation for the inflicted damage, to judicial protection, to association into public organisations, etc.), which are fixed in a special resolution of the UN General Assembly of 1985. With the adoption of those principles consumer rights received international recognition. They envisage procedures for Governments to abide by during the elaboration of legislation on protection of consumer interests.

Each consumer shall have the right to freely enter agreements to purchase goods and to use work and services; to proper quality and safety of goods (work, services); to full and reliable information on goods (work, services); and the right to join public associations of consumers (Article 10 (6) of the RK Civil Code). Protection of consumer rights and lawful interests shall be exercised within the competences of relevant state authorities and the court, arbitration or mediation tribunal (Article 22 of the Law on Protection of Consumer Rights).

Consumer rights and their protection are regulated in detail by chapter 3 of the Law on Protection of Consumer Rights.

Civil relations in the Republic of Kazakhstan related to consumer rights are characterised with economic inequality of the parties (entrepreneurs and consumers), and also involve monopolistic (dominant) position of entrepreneurial entities and dependent position of consumers. In order to observe a balance of interests of entrepreneurs and consumers, the RK Agency for the Protection of Competition has developed a Draft Law on Introduction of Amendments and Additions to Some Legal Acts of the Republic of Kazakhstan on Protection of Consumer Rights (the Draft Law is included in the Plan of Legislative Work of the RK Government for 2013).⁸

The Draft Law envisages: state support of public organisations for the protection of consumer rights; extending the rights of public associations and attestation of workers of public associations; strengthening the position of the authorised consumer rights protection agency; free consumer access to the territory of a trade market; regulation of procedures for exercising consumer rights in cases of property damage due to electricity overstress; a ban on inclusion of banking expenses in the tariffs of natural monopolies; introduction of amendments to the RK Civil Code regarding the

⁸ For details, please, see: <http://www.azk.gov.kz>.

price of a standard form contract; separate billing of heat and electricity.⁹ The Draft Law envisages increasing fines for violations of consumer rights.

The State, represented by the RK Agency for the Protection of Competition, ensures the implementation of state policy of consumer rights protection, takes measures for the improvement of the RK legislation on consumer rights protection, interacts with public consumer associations, consumer rights protection alliances (unions) (Resolution of 15 February 2008 No. 141).¹⁰

According to Article 4 (4) of the RK Civil Code, certain types of entrepreneurial activities, because of considerations of national security; ensuring law and order; protection of the environment; property and lives and health of citizens must be carried out in accordance with the State licences (see also Articles 12–37-1 of the Law on Licensing).

Licensing is introduced in cases where the produce quality requirement prescribed by the RK laws, mandatory compliance confirmation requirements to individual types of produce (Article 27 of the Law on Technical Regulation) and processes are insufficient for attaining the objectives of the State, including the protection of consumer rights.

In addition to licensing, the State is adopting other safeguards for the purposes of protection of the environment, property, life and health of its citizens.

In keeping with Article 29 of the Law on Private Entrepreneurship, state regulation is exercised in the form of setting requirements to private business entities, produce and processes; certification of compliance confirmation bodies, verificatory, calibration and testing laboratories (centres); mandatory compliance confirmation of individual types of produce and processes with legal requirements; state control and supervision over private entrepreneurship; licensing, certification, accreditation, and issuance of other types of permits; compulsory civil liability insurance of private business entities; prescribing the liability of private business entities, state authorities and their officials.¹¹

⁹ The RK has 172 registered public associations for the protection of consumer rights, but only 70 public associations are actually functioning. This situation is largely a result of a lack of funding of their activity. Due to the voluntary nature of contributions, the sources of funding of those associations are often insufficient to cover all expenses involved in representing consumer interests in court (sending claims, telephone negotiations, obtaining reference information, payment for the services of a lawyer, etc.). In order to stimulate the activity of public consumer rights protection associations, the Draft Law envisages the implementation of a state social order for services aimed at enhancing the level of consumer rights protection, awareness-raising in the sphere of consumer rights and protection means. To develop the independent community, it is proposed to extend the rights of public consumer rights protection associations (participation in the elaboration of new laws and regulations setting requirements to goods (jobs, services); free access to standards and technical specifications of goods (jobs, services); development of external cooperation by joining international consumer rights protection associations; conducting independent expert evaluations).

To avoid violations of Article 5 (2) of the RK Constitution, the Law suggests holding attestations at mediation centres, introducing a ban on the financing of public associations by entrepreneurs to prevent the imposition of their interests. Therefore, the State, on the one hand, intends to finance the activity of public consumer rights protection associations by implementing state social order, and on the other – to prohibit the financing of such organisations by businesses.

¹⁰ According to the Concept of the Draft Law on Introduction of Amendments and additions to some Legal Acts of the Republic of Kazakhstan on Protection of Consumer Rights developed by the RK Agency for the Protection of Competition, the present weak position of this authority is connected with the insufficient amount of its statutory functions. Hence, the Draft Law envisages provisions empowering the authorised agency to: request and receive information necessary for discharging its functions; carry out inter-sector coordination on issues of consumer rights protection; interact with the state authorities of foreign states and international organisations in the sphere of consumer rights protection, etc.

¹¹ In practice, the Law on Private Enterprises is often being violated. For instance, in mid-March 2005, PetroKazakhstan accused the RK Ministry of Energy and Mineral Resources of violations of this Law and refused to sign an agreement with the RK Government on the allocation of fuel at special prices for

Article 11 of the RK Civil Code prohibits the abuse of freedom of entrepreneurship. Specifically, monopolistic activities and any other activities aimed at restricting or eliminating legal competition or the extraction of unreasonable advantages by the restriction of *rights and legitimate interests of consumers*, shall not be allowed.

The violation of human rights by natural monopolies is a significant aspect in consumer rights protection.

Article 3 (17) of the Law on Regulated Markets qualifies as natural monopolies individual entrepreneurs or legal entities engaged in the production of goods, fulfilment of jobs and/or provision of services to consumers in conditions of a natural monopoly.

The definition envisaged by the law cannot be recognised as quite adequate as it connects the concept of natural monopolies with the concept of conditions of a natural monopoly.

A natural monopoly should be recognised as the state of the market of services (goods, jobs) where the creation of a competitive environment for satisfying demand for a certain type of services (goods, jobs) is impossible or economically unfeasible due to technological specifics of production or provision of this type of services (goods, jobs) (Article 3 (15) of the Law on Regulated Markets).

One of the key mechanisms of protection of citizens' socioeconomic rights consists in restriction of activities of natural monopolies, as per Article 5 of the Law on Regulated Markets.

At a time of financial and economic crisis, the ban on charging payment for regulated services (goods, jobs) over the limit established by the authorised body has become an important government-imposed restriction.

E.g., since the beginning of 2012, the RK Agency for the Regulation of Natural Monopolies (hereinafter – **AREM**) has considered 121 applications for approval of 310 tariffs. Due to violations of the legislation on regulated markets, 51 applications were waived from the start; 11 tariffs were left at their former level; 10 were approved with a reduction; and 238 tariffs were increased.¹²

conducting sowing activities. The company explained its position with the fact that the fuel distribution system is far from being perfect and offers scores of opportunities for abuse.

¹² AREM chief Murat Oslanov said that AREM priorities in 2012 included: modernisation of the housing complex infrastructure, reducing electricity losses, creating mechanisms for encouragement of energy saving, electricity and water saving.

AREM chairman also said that unlawful actions of monopolists damage small and medium business entities, in whose interests the law on state control and supervision was adopted. Differences with monopolists often become a serious obstacle to business activities. This is why the Agency has proposed to amend the legislation (for more detail, see the interview of AREM chairman Murat Oslanov with the newspaper *Kazakhstanskaya Pravda*, 2012, 27 June).

AREM vice-chairman Anatoly Shkarupa said in his interview with *Kazakhstanskaya Pravda*, 2012, 08 September, that AREM has managed to slow down the paces of tariff increases for socially vulnerable groups of the population with moderate power consumption. The introduction of differentiated tariffs on heat will also take into account cases where the installation of common building heat supply meters is impossible. Shabby buildings, the emergency stock, light construction buildings, registered in every akimat, will be excluded from the differentiation system and their dwellers will pay for the consumed heat according to the average retail tariff. In addition, AREM vice-chairman said, social support mechanisms are in place: a heat consumer who cannot afford to pay for utilities and for the purchase and installation of metering devices shall be eligible to housing benefit support.

The public nature of hearings is a positive aspect of the tariff approval. A natural monopoly has a chance to defend its tariff estimations directly vis-à-vis the population.¹³

RK Government Resolution of 30 October 2012 No. 1368 introduced amendments and additions to Procedures for Holding Public Hearings during the consideration of applications for the approval of tariffs (prices, fee levels) or their top margins to regulated services (products, goods) of natural monopolies (approved by RK Government Resolution of 21 April 2003 No. 376) (hereinafter – **Procedures for Holding Public Hearings**).

According to amendments to the Procedures for Holding Public Hearings, the authorised body is to place on its website and publish in the periodical media information on the date and venue of public hearings: (1) in case of approval of tariffs, or their top margins, on regulated services of a natural monopoly – not later than fifteen calendar days prior to the event; (2) in case of approval of tariffs on regulated services of a natural monopoly under Article 18 (5) of the Law on Regulated Markets – not later than seven calendar days prior to the event (Article 17 (2) of the Law on Regulated Markets).

The State regulates the prices in economic sectors identified by Article 7-1 of the Law on Regulated Markets. The pricing procedures on regulated markets are established by the RK Government.¹⁴

In general, the Law on Regulated Markets is aimed at ensuring protection of interests of consumers, natural monopolies, and regulated market players. The purpose of regulating the activity of natural monopolies is to achieve a balance of interests of consumers and natural monopolies on a regulated market (Article 1 (2) of the Law on Regulated Markets).¹⁵

To address socioeconomic tasks determined by the needs of society and the State, the State regulates competition in cases of absence of other options for ensuring national security, defence capacity or protecting social interests; using strategic facilities constituting public property; and when there is a special need to produce goods in spheres of social production where competition is non-existent or underdeveloped (Article 31 (1) of the Law on Competition).

The Law on Competition provides a legal framework for *protecting the rights of market entities and consumers* against monopolistic activities.

The State duty to protect against human rights abuses by third parties, including business, concerns, *inter alia*, the protection of personal non-pecuniary rights. Personal rights are

¹³ Despite the amendments introduced to the procedure of public hearings, in practice violations are quite common. For example, Director of LLC Esepaudit Audit Company Natalia Galenchik who took part in the work of public commissions pointed out that the efficiency of the public hearings is low. Review of a company's financial status is a far from simple matter. And even if representatives of the public who are involved in the process have special education and certain experience in the past, it can hardly be applied nowadays. Nevertheless, Ms. Galenchik admitted, public hearings are the only way for public experts to receive the most complete information. The current legislation does not allow involving public representatives in audit inspections. – For more detail, see E. Shibarshin. Why are Public Hearings on Tariffs Ineffective? // <http://www.ng.kz/modules/news/article.php?storyid=7849>.

¹⁴ For details, see, The Pricing Procedures on Regulated Markets (approved by RK Government Resolution of 3 March 2009 No. 238).

¹⁵ It should be noted that the Sherman Antitrust Law (1890) in the United States was also adopted for making illegal the business agreements leading to cost pass-through to consumers, but, according to Dominick Armentano, antimonopoly legal acts found support of the existing business interests and were used by representatives of the business community in their attempts to restrict competition. Being incapable of competing efficiently with more successful companies, certain representatives of the business community tried to erect political and legal barriers in order to protect and strengthen their market positions. – For more detail, see, Armentano D., Antitrust and Monopoly.

inseparably linked with such concepts as equality, liberty, personal immunity, and determine a person's position in society, as well as the level of development of the society itself.

Personal non-pecuniary rights and benefits the violation, deprivation or diminishing of which may entail the infliction of moral damage on the victim shall be interpreted as *the benefits and rights inherent on a citizen by virtue of birth or law, which are inseparably connected with his personality*. *The benefits* inherent on a citizen by virtue of birth include life, health, honour, liberty, personal immunity, and *the rights of a citizen* are the right to inviolability of residence or property; the right to personal and family secret, secret of telephone, telegraph and postal communications; the right to use a name; the right to graphic image; the right to authorship, and other personal non-pecuniary rights envisaged by the law on copyrights and related rights; the right to freedom of movement and choice of residence; the right to reliable information, as well as other rights granted under the republican legislation (Regulatory Resolution of the RK Supreme Court of 21 June 2001 No. 3).

Provisions of the Constitution form the basis for legal regulation of personal non-pecuniary rights, fixing a system of personal rights of citizens and setting legal guarantees of their practical implementation. Protection of personal rights is regulated by the RK Civil Code and is carried out by the court in the manner prescribed by the RK Code of Civil Procedure.

The principle of ensuring State protection against human rights abuses by third parties, including business, is implemented, *inter alia*, by enforcement measures envisaged by § 2 of chapter 47 of the RK Civil Code *for compensating the damage inflicted on the life and health of citizens in the process of fulfilling contractual obligations, labour (official) functions*. This is a manifestation of the protective power of law, which means legal impact aimed at protection by the State of the core social relations, specifically, protection of human rights, compensation for the damage inflicted on his life and health.

Considerable measures for protection of socioeconomic human rights, namely with respect to former employees of enterprises with difficult, harmful and hazardous labour conditions, who sustained professional diseases or job-related injuries, were introduced by the RK Law on the Introduction of Amendments and Additions to the RK Civil Code (Special Part) of 30 March 2011 No. 424-IV.

On the basis of this regulation, former employees were granted a right to benefits and compensation for damage by the employer recognised responsible for the inflicted harm, depending on the amount of the average salary of a worker of a similar occupation and qualification determined as per cent of the increased average monthly salary (income) corresponding to the level of loss by the victim of his professional capacity, and in case of its absence – overall labour capacity.

Proceeding from the above, the employers are obliged to bring the calculations of monthly compensation for lost earnings (income) due to a job-related injury or professional disease in line with Article 938 (6) of the RK Civil Code.

For purposes of implementing Article 945 (3) of the RK Civil Code, in cases when capitalisation of payments cannot be performed due to a lack or insufficiency of property or a liquidated legal entity, the awarded benefits shall be paid to the victim by the State.

RK Government Resolution of 25 May 2011 No. 571 approved the Rules of monthly payments to RK citizens after the completion of the period of capitalisation of payments for compensation of the damage inflicted on the life and health of workers by legal entities liquidated as a result of bankruptcy, granting the aforementioned persons who have lost their working capacity but do not receive any allowances the right to compensation for damage.

Proceeding from the civil law provisions, the essence of state protection of socioeconomic human rights under civil law provisions consists in:

(a) guaranteeing *citizens' freedom of choosing their manner of conduct in individual life at their own discretion*, ruling out third party interference in their life, except cases explicitly prescribed by laws and regulations;

(b) guaranteeing *protection of the rights of other participants in civil transactions* by creating all sorts of preventive mechanisms (e.g., introduction of standards, requirements, licenses, etc.), and ensuring their procedural clarity;

(c) *restoring the violated human and citizens' rights* abused by parties to civil transactions, including business, and *imposing civil liability on the offenders*.

Therefore, setting aside the issues of law enforcement practices, a conclusion can be made that **on the whole, the RK civil laws and regulations comply with the principles of ensuring state protection against human rights abuses by third parties and legal policy coherence in respect of human rights protection, as well as their operational principles.**

The only exception is the sphere of Subsoil management which is regulated not only by the laws and regulations of the Republic of Kazakhstan, but also by subsoil management contracts.

The Republic of Kazakhstan has 15 effective contracts on subsoil management concluded in the form of production sharing agreements (hereinafter – **PSA**) between subsoil developers (contractors) and the RK Ministry of Energy (presently – the RK Ministry of Oil and Gas) in the period from 1992 to 2009.

The effective RK Tax Code stipulates that the taxation regime established by a PSA concluded between the RK Government or a competent authority with a subsoil developer before 1 January 2009, which has undergone tax due diligence, and by a subsoil management contract approved by the RK President shall be preserved with respect to taxes and other dues to the budget for which the provisions of such an agreement (contract) directly guarantee stability of the taxation regime, shall be granted exclusively to parties of such an agreement (contract) and to operators during the entire prescribed term of its validity and shall not spread on persons which are not parties to such an agreement (contract) or operators, and may be amended by mutual agreement of the parties (Article 308-1 (1) of the RK Tax Code).

Therefore, the RK Tax Code envisages **guarantees of stability of the tax regime established by PSAs** (in other words, the invariability of the procedures for determining and discharging the duties with respect to payment of taxes and other dues to the national budget existing in the RK tax legislation on the date of conclusion of a relevant subsoil management contract).

Such tax regime stability guarantees in respect of PSAs are modified tax regime stability guarantees in respect of subsoil management contracts unilaterally introduced by the State to the RK tax law as of 1 January 1997 by virtue of its sovereign right to the adoption of laws.

It should be specially mentioned that from the very beginning of introduction of tax regime stability guarantees in respect of subsoil management contracts simultaneously with tax regime stability provisions, the RK tax law contained provisions that in the event of amendment of the legislation after the contract signing date making further abidance by the initial contractual terms impossible or leading to considerable modification of its overall economic conditions, the subsoil developer and representatives of the authorised and tax bodies may introduce amendments to the contract necessary for restoring the economic interests of the parties to their status at the moment of signing the contract.

Many PSAs explicitly stipulate that in the event of amendment of the RK tax law after the PSA conclusion considerably deteriorating the position of the parties, the parties shall agree on

amendment of the PSA terms to preserve the initial balance of economic interests the parties were entitled to during the PSA conclusion.

Due to the global changes in the world economy, a considerable growth in oil prices, transformation of Kazakhstan's society in general, and other factors, PSA provisions currently negatively impact Kazakhstan's development.

*PSA stability guarantees restrict the ability of the State to influence contracting companies, inter alia, ensure respect of socioeconomic human rights by contracting companies and their effective legal protection.*¹⁶

2.3. Provisions of the RK Labour Legislation Obliging the State to Protect Employees' Rights

According to Article 3 (1) of the RK Labour Code, the objective of the labour legislation of the Republic of Kazakhstan consists in legal regulation of labour relations and other relations directly connected with labour and geared to **protecting the rights and interests of the parties** to the labour relations and establishing **minimal guarantees of the rights and freedoms** in the sphere of labour.

Articles 4–8 of the RK Labour Code prescribe **the principles** of labour legislation **obliging the State to ensure respect and protection of employees' rights and freedoms, and protect against human rights abuses by third parties.**

Specifically, the State is responsible for **the prevention of human and citizen's rights restriction** in the sphere of labour; taking **measures to prohibit discrimination**, forced labour and the worst forms of child labour; ensuring labour conditions at public enterprises that meet safety and hygiene standards; guaranteeing the right to fair remuneration for labour not less than the minimum salary; guaranteeing employees' and employers' right to **association for the protection of their rights** and interests; regulating matters of **labour protection and safety.**

In order to implement the principles of labour legislation and at the same time protect human rights, Article 11 of the RK Labour Code prescribes **the requirements to acts of the employer.**

The employer issues acts within the bounds of its terms of reference and in accordance with the RK regulatory and legal acts, the employment contract, agreements, and the collective bargaining agreement. In cases envisaged by this Code and the collective bargaining agreement, the employer issues acts on agreement or in consideration of the opinion of employees' representatives.

Acts of the employer that are detrimental to the employees' status compared with the labour legislation of the Republic of Kazakhstan, the collective bargaining agreement and agreements or that are issued in violation of relevant procedures are null and void.

At the same time, the State guarantees the implementation of policy conducive to ensuring productive and freely chosen employment of citizens (Article 4 (1) of the Law on Employment).

¹⁶ In 2011, workers of oil companies in Mangistau region in West Kazakhstan demanded salary increases. The companies Karazhanbasmunai and Ozenmunaigaz fired several thousand workers for participating in illegal strike. At the end of September 2011, the press service of the national welfare foundation, Samruk-Kazyna, holding a government package of oil companies' stocks reported that the oilmen's strike was "localised," the conflict was "settled within the framework of the labour legislation." At the same time, the problem of employment of two thousand workers fired for violating their employment contracts remained outstanding.

According to Article 4 (2) of the Law on Employment, state policy in the sphere of employment is aimed at ensuring **equal opportunities for RK citizens, foreign nationals and stateless persons permanently residing in the Republic of Kazakhstan**, to free choice of occupation and profession, fair and favourable work conditions, social security against unemployment; ensuring productive employment, reducing unemployment, creating jobs, stimulating employers to maintain the existing jobs and create new ones, including for target groups, etc.

To protect human rights in the sphere of labour relations, the state authorities are vested with the rights and responsibilities prescribed by chapters 2 and 38 of the RK Labour Code.

The terms of reference of the state authorities in the labour sphere can be classified as follows:

(a) **law-making** (according to Article 15 of the RK Labour Code, the RK Government develops the key spheres and provides for implementation of state policy in the sphere of labour, labour protection and labour safety; determines the size of social allowances, the procedure for awarding them and their payment; Article 16 (22, 23) of the RK Labour Code authorises the Ministry of Labour and Social Security to establish the procedure for mandatory periodical certification of production facilities with respect to working conditions, organise monitoring and assessment of risks in the sphere of labour protection and labour safety, etc.).

(b) **regulatory powers** (conducts co-ordination and interaction in the sphere of labour protection and labour safety with other state authorities, as well as with representatives of employees and employers (Article 16 (5) of the RK Labour Code); local executive bodies of the Ministry of Labour and Social Security set the quota for job placement of population categories determined by the laws of the Republic of Kazakhstan (Article 18 (7) of the RK Labour Code);

(c) **supervisory powers** (Article 16 (12) of the RK Labour Code authorises the Ministry of Labour and Social Security to exercise control over timely and objective investigation of industrial accidents; organise monitoring and assessment of risks in the sphere of labour protection and labour safety (Article 16 (22) of the RK Labour Code); according to Article 17 (4) of the RK Labour Code, territorial subdivisions of the Ministry of Labour and Social Security investigate industrial accidents; state labour inspectors exercise state control over compliance with the RK labour legislation by organisations (Article 328 (1) of the RK Labour Code);

(d) **jurisdictional powers** (territorial subdivisions of the Ministry of Labour and Social Security consider applications by employees, employers and their representatives on aspects of labour protection and labour safety (Article 17 (8) of the RK Labour Code).

Therefore, the State is vested with the spectrum of powers providing it **with a real opportunity to actually protect against human rights abuses by third parties.**

The general political line of ensuring protection of socioeconomic human rights was set in the RK President Nursultan Nazarbaev's Nation Address entitled "Socioeconomic Modernisation – the Chief Vector in Kazakhstan's Development" (27 January 2012).

On instruction of the Head of State, the RK Government approved the **Employment Programme** setting three priority goals: creating an efficient system of training and employment support; promotion of rural employment; increasing the mobility of human resources, priority employment at Kazakhstan's economic activity centres.

The **Employment Programme–2020** identifies three lines of activity of the State.

The first programme line of activity is aimed at ensuring sustainable and productive employment by promoting employment near places of residence, and it will include self-employed, unemployed and low-income persons.

The objective of **the second line of activity** is to step up the population's economic activity by organising their own businesses.

The third line of activity is conceived for programme participants who have covered two former options but were unable to find a paid job or to start their own business.

The Legal Policy Concept until 2020 points out the need to improve the labour legislation building upon a systematic analysis of its enforcement practice and the international experience in this sphere. Matters of further differentiation of the labour and social legislation depending on the nature of labour activity and workers' labour conditions must be thoroughly revised, as well as the issues of extending the sphere of employment and instruments of social partnership.

One of the perspective vectors of development of the social legislation includes: using the existing and creating new safe financial instruments for the placement of pension assets; improvement of the system of social security of individual categories of the population, including persons for whom welfare payments are the only source of subsistence.

Therefore, the lines of activity of the State envisaged by the said programme documents and concerning socioeconomic human rights provide an **idea of the requirements set by the State to the business community**.

Along with the positive aspects in the regulation of labour relations, some provisions require amendments and additions.

The labour legislation lacks effective mechanisms of social security of persons of pre-retirement and retirement age.

Despite the fact that no-one may be subjected to any discrimination in exercising their labour rights depending on age (Article 7 of the RK Labour Code) and the absence in the RK Labour Code of such grounds for terminating an employment contract as the attainment of the age of retirement by the employee (subpara 1-1 of Article 27 (1) of the Law on Public Service), the age of retirement constitutes grounds for dismissal of administrative public services with the right to conclude a fixed-term employment contract with them for the period of one year on mutual consent of the parties. It should be mentioned that public service is not such a specific form of labour activity that would require distinctions, exceptions, preferences and restrictions prescribed by Article 7 (3) of the RK Labour Code.

The situation is similar with respect to labour migrants, i.e. temporarily displaced individuals from other countries to Kazakhstan and from Kazakhstan and within the country, for purposes of discharging their labour functions (Article 1 (4) of the Law on Migration).¹⁷

The recruitment of foreign labour force in the RK is exercised on the basis of an annual quota for professional and qualification categories (Article 37 (1) of the Law on Migration). The procedures for establishing quotas for the recruitment of foreign labour force in the RK, the rules and procedures for the issuance of employment permits to foreign workers and permits to recruit

¹⁷ On 01 October 2012, UN Special Rapporteur on contemporary forms of slavery Gulnara Shahinian suggested that Kazakhstan should simplify its process of employment of labour migrants and officially register their status. Presently the employer and a labour migrant must fill out an enormous amount of documents for registration purposes. Labour migrants are not protected by law and work illegally, being in the powers of their employers. - <http://www.zakon.kz/kazakhstan/4516215-oon-predlagaet-kazakhstanu-uprostit.html>.

foreign labour force to employers are established by the RK Government (Article 37 (4) of the Law on Migration).¹⁸

To regulate issues of foreign labour force migration, provisions on affirmative actions have been introduced to the Law on Migration envisaging the provision of preferential employment rights to foreign workers of Kazakh ethnic origin and former Kazakhstan nationals.

The local executive authority issues employment permits to foreign workers and permits to employers to recruit foreign labour force from among ethnic Kazakhs and former Kazakhstan nationals *according to simplified procedures* established by the RK Government (Article 38 of the Law on Migration).

Therefore, setting aside the issues of law enforcement practices, a conclusion can be made that on the whole, **the RK labour legislation complies with the principles of ensuring state protection of employees' rights against abuses by employers. The State has set the standards of the expected conduct of businesses with respect to employees.**

2.4. Provisions of the RK Environmental Legislation Prescribing State Duty to Protect Socioeconomic Human Rights against Abuses by Third Parties, including Business

On 07 December 2007, Nursultan Nazarbaev, addressing the 18th Plenary Meeting of the Foreign Investors Council on sustainable development of the state and environmental issues, spoke of the need for joint work of the government and investors on development of alternative renewable energy sources and on creation of conditions stimulating entrepreneurs toward "green" business practices.

The Head of State introduced compulsory requirements to the Government on the **mainstreaming of the principles** of sustainable development, **sustainable and efficient mineral resources management** and a balanced demographic policy **in all sector-specific and regional programmes**. All draft laws elaborated by the state authorities must undergo state environmental due diligence. In addition, in view of the aggravation of the problem of atmospheric air pollution by motor vehicles exhaust in big cities of Kazakhstan, the Head of State authorised the Government to take **measures to increase the environmental standards for transport** and ensure wider use of environmentally clean fuel.

The Law of 26 March 2009 No. 144-IV was ratified by the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The implementation of obligations under the Kyoto Protocol is aimed at creating a national system of regulating greenhouse gas emissions, pursuing national policy of reducing the level of man-made atmospheric emissions.

On 05 July 2009, the Head of State signed law on support of renewable energy sources which lifted a whole range of organisational and financial barriers on the way to implementation of renewable energy sources in Kazakhstan.

The Legal Policy Concept until 2020 specifies that **the environmental situation in many regions of Kazakhstan is quite grave**.¹⁹ In this connection, it is important to develop and further improve

¹⁸ Please, see, The Rules and Procedures for the issuance of employment permits to foreign workers and permits to recruit foreign labour force to employers (approved by RK Government Resolution of 13 January 2012 No. 45).

¹⁹ According to the National Scientific Portal of the Republic of Kazakhstan, the anthropogenic overload practically across the entire territory of Kazakhstan violated the natural ability of the natural environment to provide for future economic and social development of the country. Excessive pollution of the air, water and soil, animal and vegetal life degradation and depletion of natural resources have led to the destruction of ecosystems, desertification and considerable losses of biological and landscape diversity, growth in the

the environmental legislation, *inter alia*, in terms of its harmonisation with international obligations and standards. To increase the efficiency of environmental activities, it is necessary to draw a strict line between the mechanisms of legal regulation of environmental management and the protection of natural resources. The environmental legislation should promote sustainable environmental management and compliance with the environmental standards, development of green productions and environmentally safe conduct of the population.

International legal practice shows²⁰ that the rights to an adequate environment can be subdivided into more specific environmental rights and be considered within the context of such rights as **the prohibition of inhuman or degrading treatment** and **the right to respect for private life**.

The RK Environmental Code regulates relations in the sphere of protection, restoration and preservation of the environment, use and reproduction of natural resources in the process of business and other activities involving the use of natural resources and impact on the environment within the territory of the Republic of Kazakhstan (Article 3 of the RK Environmental Code).

The environmental conditions for Kazakhstan's sustainable development related to principles of human rights protection include the achievement of the state objective of creating a favourable environment for human life and health; observance of the right of every person to access to environmental information and comprehensive public participation in addressing environmental protection and sustainable development challenges; ensuring transparency of the measures implemented in the environmental sphere.

The aforementioned conditions for sustainable development and implementation of the principles of the environmental legislation are ensured by mechanisms of state regulation of environmental protection and environmental management.

The fundamental provisions on government regulation of environmental protection and government administration of natural resource use codified by Article 6 of the RK Environmental Code are also aimed at the protection of socioeconomic human rights.

The government regulation of **environmental protection** includes: licensing of activities in the area of environmental protection; implementing the environmental regulation; implementing the technical regulation of environmental protection; carrying out the state environmental review; issuing environmental permits; exercising the government environmental control; maintaining a system of economic regulation of environmental protection; encouraging the implementation of best environmentally sound technologies; and maintaining a system of funding environmental protection efforts; exercising government environmental monitoring; carrying out government registration of nature users, sources and areas of environmental pollution; and promoting environmental education and awareness-building.

The government administration **of natural resource use** includes: carrying on the government planning of natural resource use; exercising the government control over the protection, use and reproduction of natural resources; issuing licenses/permits and executing agreements/contracts for natural resource use; securing restoration and reproduction of natural resources and implementation of resource-saving technologies; exercising natural resource monitoring and maintaining natural resource inventory; setting limits and allocating quotas for natural resource

population's morbidity and mortality. The consequence of such changes is the decrease of the quality of living and unsustainable development of the Republic (for detail, please, see: http://www.nauka.kz/biol_med/razd4/probl_ekologii_v_KZ.php).

²⁰ The European Human Rights Court reviewed the Case of Lopez Ostra v. Spain and passed a decision on 9 December 1994 (Publications of the European Court of Human Rights, Series A, No. 303DC) determining that the disturbance and inconvenience caused by environmental pollution by the enterprise constitute the violation of Article 8 of the European Convention of Human Rights (Right to respect for private and family life, home and correspondence). The Commission found this statement admissible also on the basis of Article 3 (Prohibition of torture and inhuman or degrading treatment and punishment).

use; managing state-owned legal entities involved in the use, restoration or reproduction of natural resources; and organising the protection of natural resources.

It should be noted that although the participants of relations regulated by the RK Environmental Code are individuals, the state and government authorities regulating the above mentioned spheres, it is legal entities that constitute the main target audience of environmental provisions. Practice shows that it is precisely the activity of these entities that poses the greatest danger to the environment and, hence, human rights violation hazard.²¹

The environmental rights ensuring the satisfaction of various needs of an individual in the process of his interaction with nature are formulated by Article 13 of the RK Environmental Code.

According to this provision, **individuals shall have the right:** (1) to environment which is favourable for their life and health; (2) to take measures as to the protection and improvement of the environment; (3) to create environmental protection public associations and funds; (4) to participate in decision-making by government agencies on environment-related matters in accordance with legislation of the Republic of Kazakhstan; (5) to participate in gatherings, meetings, picketing, processions, demonstrations and referenda in relation to environmental protection in accordance with legislation of the Republic of Kazakhstan; (6) to apply to government agencies with letters, complaints, requests and proposals as to environmental protection matters and to demand that the same be considered; (7) to request and obtain actual, complete and reliable environment-related information from government agencies and organisations; (8) to participate in discussions of draft laws on environmental protection at their drafting stage and make comments to the drafters; (9) to participate in the preparation of environment-related plans and programmes; (10) to request, and to participate in, a public environmental review; (11) to demand that decisions to place, construct, renovate and put into operation enterprises, structures, and other environmentally-hazardous facilities be reversed by administrative or judicial authorities, and that business or other activities of individuals or legal entities, if such activities adversely impact on the environment and human health, be restricted and suspended; and (12) to bring actions for damage caused to their health or property due to violations of the environmental legislation of the Republic of Kazakhstan.

The biggest problem in the environmental sphere in recent years is posed by the growth of the stockpiles of accumulated waste. The activity of the Republic of Kazakhstan is aimed at strengthening government regulation of greenhouse gas emissions and uptake in keeping with

²¹ The most serious facts of damage infliction to the environment and violation of environmental human rights are registered in the activities of subsoil users. In September 2009, inspection of Joint-stock company SNPS-Aktobemunaigaz revealed that the 19 oil wells operated at the Kenkiyak oil field are insufficiently equipped with service tracks and the stratal water settling facility is operated with deviations from the initial project "Post-salt deposit development at the Kenkiyak oil field." Moreover, the deadlines for the implementation of these project solutions have expired way back in 2005. Joint-stock company SNPS-Aktobemunaigaz was penalised for non-fulfilment of the project solutions.

The environmental inspection of LLC Tengizshevroil for compliance with the environmental legislation revealed the fact of disposal of 155 thousand tonnes of sulphur in the period from 21 December 2009 to 01 January 2010 without a permit to emission to the environment. In this connection, the environmental inspection authority imposed a fine in accordance with Article 243 of the RK Administrative Procedure Code in the amount of 1 billion tenge and charged compensation for the damage inflicted on the environment in the amount of 1 billion tenge.

In 2010, an unannounced inspection of Joint-stock company Arselor Mittal Temirtau uncovered the fact of exceeding the maximum permissible discharge (hereinafter – MPD) of ammonium nitrogen (2.37 MPD) and nitrites (7.88 MPD) to the river Nura. In this connection, the legal entity was fined to 7 million tenge and had to pay compensation in the amount of 6.8 million tenge.

According to the Ministry of Environmental Protection, the overall amount of damage inflicted as a result of activities of the subsoil users in 2010 amounted to 5 billion tenge. – For more detail, please, see, <http://www.kursiv.kz/1195205757-prirodooxranoe-zakonodatelstvo-rk-soblyudaetsya-ne-vsemi-nedropolzovatelnyami.html>

Kazakhstan's obligations in relation to addressing the global environmental challenge of climate change.

By the end of 2010, *emissions of majors enterprises in the oil and gas, energy, mining, and chemical industrial sectors, agriculture and transport in the RK reached approximately 214 million tonnes, or 90% of the total volume, the amount of waste exceeded 2 billion tonnes, including some 7 billion tonnes of hazardous waste.*

The pace of waste accumulation in the period from 2008 to 2010 demonstrated that *20% of the total waste is being annually utilised on average, whereas some 500 million tonnes every year are left stockpiled.* With such tendency persisting, by 2020 the accumulated waste is expected to reach 28 billion tonnes. Owing to legislative imperfections, it was cheaper for enterprises to pay for waste disposal than to take measures for its utilisation and recycling. Enterprises did not bear pecuniary responsibility, did not compensate for the inflicted damage, and did not take any measures for reducing the amount of waste and lowering its impact.

The Coordinating Council of Law Enforcement Agencies has repeatedly pointed to the fact that *criminal law provisions do not conform to environmental hazards. Out of the 18 articles criminalising environmental offences only three or four provisions (poaching) are being applied in practice.*

In this connection, on 15 and 22 July, 09 November, and 03 December 2011, amendments and additions were introduced to the Environmental Code and other laws and regulations of the Republic of Kazakhstan containing provisions on environmental protection. Specifically, considering the importance of protecting the interests and rights of the individual, society, and the state against the dangers posed by man-made and natural environmental impacts, much attention was given to the improvement of the RK Criminal Code and Administrative Offences Code.

New environmental standards were introduced to the Environmental Code with a view to implement international environmental conventions ratified by Kazakhstan; and economic mechanisms for stimulating waste utilisation and recycling or reducing its accumulation were envisaged. Starting 2011, subsoil users whose annual greenhouse gas emissions exceeded 20 thousand tonnes, were obliged to obtain quotas.

However, at present effective mechanisms of compensating for damage to the population's health and property inflicted by environmental offences are still missing. There are no effective legal procedures obliging the public authorities and their officials to support NGOs and the population in exercising their environmental rights.

Therefore, regulatory provisions **do not guarantee the exercise and protection of environmental rights and lawful interests of citizens in full measure in the event of their abuse by business enterprises.**

2.5. Provisions of the RK Legislation Obliging the State to Protect Socioeconomic Human Rights during Public Emergency

According to Article 1 (5) of the Law on the State of Emergency, *the state of emergency* is a temporary measure applied exclusively in the interests of ensuring security of the population and protecting the RK constitutional order and representing a special legal regime of operation of the state authorities and organisations allowing the imposition of individual restrictions on the rights and freedoms of citizens, foreign nationals and stateless persons, as well as the rights of legal entities, and charging them with additional responsibilities.

According to Article 44 (16) of the RK Constitution, in the event of a serious and immediate threat to the democratic institutions of the Republic, its independence and territorial integrity, political

stability of the Republic, security of its citizens and the disruption of normal functioning of the Constitutional bodies of the state, the President shall have official consultation with Prime Minister and Chairpersons of the Parliamentary Chambers of the Republic and take measures, caused by a state of emergency on the entire territory or in particular areas of Kazakhstan, and immediately inform the Parliament of the use of the Armed Forces of the Republic.

The state of emergency is imposed by a Presidential Decree which is to meet the criteria prescribed by Article 6 of the Law on the State of Emergency.

According to Article 24 (1) of the RK Constitution, **involuntary labour shall be permitted in the conditions of a state of emergency.**

However, the measures applied in the conditions of a state of emergency and restrictions imposed on the rights and freedoms of individuals and the rights of legal entities and charging them with additional responsibilities shall be within the limits required under the circumstances which called for the introduction of the state of emergency. The measures and restrictions applied in the conditions of a state of emergency shall not contradict the international human rights treaties ratified by the Republic of Kazakhstan (Article 17 of the Law on the State of Emergency).

Despite the imposition of a state of emergency, the State guarantees certain rights to individuals and legal entities for the time it remains in force. E.g. Article 18 of the Law on the State of Emergency guarantees to individuals who became victims of the circumstances which called for the imposition of the state of emergency the provision of housing and compensation for material damage, as well as material assistance in the manner and in amounts prescribed by the RK Government. In addition, individuals and legal entities whose property and resources were used for the needs of liquidation of the circumstances which called for the imposition of the state of emergency, shall be granted equivalent compensation for material damage in the manner prescribed by the RK Government.

The RK laws and regulations adopted for the purposes related to the state of emergency and involving temporary restriction of the rights and freedoms of individuals and legal entities shall be applied only during the period for which the state of emergency remains imposed and shall lose force simultaneously with the lifting of the state of emergency without special notification thereof.

The termination of the state of emergency shall entail the termination of administrative proceedings in cases of violation of the public emergency regime (Article 21 of the Law on the State of Emergency).

An important provision arising from Article 75 (4) of the RK Constitution and guaranteeing the protection of human and citizens' rights and freedoms is **the non-admission of establishment of special and extraordinary tribunals under any name.** This means that justice in the area where a state of emergency was imposed shall be administered by courts in keeping with the RK laws and regulations (Article 23 of the Law on the State of Emergency).

Therefore, human rights in some cases **may be restricted in compliance with the RK Constitution** by means of issuance of laws only to the extent to which it is necessary **for purposes of protection of the constitutional order, public law and order, human rights and freedom, health and morality of the population.** Provisions of the RK Constitution and the Law on the State of Emergency shall promote respect and protection of human rights restricted under the regime of public emergency.

3. Conclusions

Analysis of the RK constitutional and civil law shows that on the whole, their provisions guarantee respect and protection of human rights. Yet some segments of the civil law (e.g. dealing with

regulation of competition, public procurement, protection of consumer rights, relationships with subsoil users, etc.) do not meet the fundamental standards initially imbedded in these sectors of the legislation.

The labour legislation contains key principles proclaiming State duty to protect employees' rights against abuse by the employer, but the standards of the expected businesses' conduct with respect to their employees established by the State are not supported by effective enforcement mechanisms prescribed by the labour legislation. In other words, the basic provisions of the labour legislation guaranteeing human rights protection are not specified by provisions that should provide for their enforcement.

The RK environmental legislation has prescribed a number of principles obliging to observe human rights. However, following the Decree of RK President Nursultan Nazarbaev of 29 August 1991 No. 409 on shutting down of the Semipalatinsk nuclear test base (2nd State Central Test Base), the RK environmental legislation has largely stopped guaranteeing the enforcement and protection of citizens' rights to a favourable environment in the event of their abuse. The problem of universal and regular violation of the environmental legislation consists in the lack of adequate protective provisions and effective control mechanisms of the national environmental situation.

The Law on the State of Emergency envisages some restrictions of citizens' rights only to the extent to which it is necessary for purposes of protection of the constitutional order, public law and order, human rights and freedom, health and morality of the population, but at the same time this RK Law shall promote the observance and protection of human rights restricted under a regime of public emergency.

III. COMPLIANCE OF RK LEGAL PROVISIONS WITH SOCIOECONOMIC PRINCIPLES OBLIGING ORGANISATIONS TO OBSERVE HUMAN RIGHTS

Part III of this Legal Opinion contains a legal analysis of provisions of the RK legislation for compliance with the socioeconomic Ruggie Principles obliging organisations to respect human rights.

1. General

Social responsibility of business is recognised as one of the crucial components of Kazakhstan's long-term development strategy. In this connection, much attention is paid to promoting ideas of **corporate social responsibility**, creating favourable conditions for socially responsible conduct of business enterprises, respect and protection by them of human and citizens' rights.

Addressing the First Forum on Social Responsibility of Business (Jezkazgan, 2008) Nursultan Nazarbaev spoke of the need to involve the business community in addressing ambitious tasks of social development and, in this connection, instructed the RK Government to continue work on creating of a favourable environment encouraging business entities toward raising their corporate social responsibility.

During the Forum, the RK Ministry of Labour and Social Security and big companies²² signed an Agreement on Promoting the Principles of the UN Global Compact in the sphere of social security

²² There is a commonly shared opinion that a big corporation (precisely because it is big) must take into consideration the indirect implications of its decisions and assume responsibility that no one intends to place on a small business. However, according to the just opinion of Nobel Prize Winner Friedrich Hayek, at the very moment the management of a big corporation becomes regarded not only as vested with the right, but also obliged to take into consideration the so-called public interest, support the so-called noble cause and

and employment. Entrepreneurs undertook to abide by socioeconomic principles embedded in the RK legislation, as well as the fundamental principles of the twelve ratified Conventions of the International Labour Organisation (ILO) aimed at guaranteeing freedom of association and recognition of the right to bargain collectively, elimination of all forms of forced labour, including child labour, liquidation of discrimination in the sphere of labour and employment.

The problem of respect and protection of human rights, establishing compliance of provisions of effective law with the socioeconomic principles guaranteeing protection of human rights is acquiring special importance not only in state interaction with business enterprises, but is becoming a crucial factor in relationships between entrepreneurs (employers) and employees.

According to the Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (10 April 2012, A/HRC/20/29), "Governance gaps lie at the core of the human rights and business challenge. This remains the case for all States and regions and for companies of all sizes, sectors and operational contexts."

The Report outlines five **basic principles** obliging business enterprises to respect human rights:

(i) According to the first provision, human rights observance by business enterprises means that organisations should avoid human rights abuses and eliminate the consequences of their human rights abuses (hereinafter – "**the principle of corporate responsibility to respect human rights**").

(ii) The second basic provision specifies the principle of corporate responsibility to respect human rights, stipulating that the responsibility of business enterprises spreads on *internationally recognised human rights* (prescribed by the International Bill of Human Rights, ILO Conventions, etc.).

(iii) The third provision formulates, firstly, *a ban on business enterprises' involvement in human rights abuses* and in the event of detection of such abuses – the duty to eliminate them and, secondly, *urges to mitigate the consequences of human rights abuses*.

(iv) The next provision stipulates that *the duty to respect human rights is vested on all legal entities* irrespective of the form of ownership, type of incorporation, activities, etc. However, such factors as the scopes and forms of activity of business enterprises should be taken into consideration, as the severity of implications of human rights abuses may depend on them.

(v) Taking into account the former provision, business enterprises are recommended to put into place the *policies and procedures for human rights respect and protection* (a policy statement expressing their commitment to respect human rights; appropriate operational policies and procedures that enable them to identify, prevent, mitigate and account for their human rights performance; procedures that enable them to remediate any adverse human rights impacts).

As the latter basic principle insists on the need to put into place human rights protection policy and relevant procedures by business organisations, part III of the Report identifies nine operational principles clarifying the requirement for setting out the human rights policies and procedures.

In this connection, the Expert considers it necessary to establish the nature of particular RK legal provisions and analyse their compliance with socioeconomic principles obliging business enterprises to respect human rights.

serve the "common benefit," it actually gains uncontrollable power. – Hayek F.A., Law, Legislation and Liberty: the Political Order of a Free People.

Taking into consideration the essence and meaning of the principles, the deductive logical sequence of their presentation, part III of this Legal Opinion is structured without strict connection to each principle.

2. Compliance of RK Legal Provisions with the Ruggie Principles Obliging Organisations to Respect Human Rights

This section of the Legal Opinion is divided into parts matching different spheres of legal regulation (constitutional, civil, labour, environmental, etc.).

2.1. Provisions of the RK Constitution Obliging Organisations to Respect Human Rights

The Constitution shall have the highest juridical force and direct effect on the entire territory of the Republic (Article 4 (2)). Consequently, Constitutional **provisions protecting human rights shall be implemented throughout the entire national territory, regardless of the circumstances of the organisations.**

The Constitution does not contain any clauses or exceptions allowing organisations or other entities not to fulfil their obligations to respect human rights. This means that human rights are protected by the State under any circumstances.

Article 5 (4) of the RK Constitution prescribes that activities of political parties and trade unions of other states, religious parties as well as *financing political parties and trade unions by foreign legal entities and citizens, foreign states and international organisations shall not be permitted* in the Republic.

In other words, the article *does not allow foreign organisations to participate in the financing of trade unions*, which, in the opinion of international human rights organisations, impedes international cooperation. E.g. in its Report *Striking Oil, Striking Workers: Violations of Labour Rights in Kazakhstan's Oil Sector*, the Human Rights Watch recommends that the Republic of Kazakhstan should improve its legislation in this sphere and lift this ban.²³

In the Expert's opinion, the position of the RK Constitutional Council in this issue seems to be more reasonable, assuming that of all public associations political parties and trade unions are the highest forms of citizens' self-organisation and constitute sufficiently structured entities pursuing *political and socioeconomic objectives*. They have inherent consolidation, *ability to influence people's political views and policy of the state in various aspects of social life* (RK Constitutional Council Resolution of 7 June 2000 No. 4/2). Consequently, the financing of political parties and trade unions of the Republic of Kazakhstan by foreign nationals, legal entities, states and international organisations is regarded as undesirable.

According to Article 14 (2) of the RK Constitution, no one shall be subject to any discrimination for reasons of origin, social, property status, occupation, sex, race, nationality, language, attitude towards religion, convictions, place of residence or any other circumstances. This establishes the universal non-discrimination principle.

In practice, this principle is often being violated by various legal entities.²⁴

²³ Please, see, the Human Rights Watch Report: *Striking Oil, Striking Workers: Violations of Labour Rights in Kazakhstan's Oil Sector*, p.42.

²⁴ Business activities, e.g. mineral production and infrastructure development, have a serious and incommensurable impact on the interests of the local population. Often these people encounter discrimination during employment, labour remuneration, the "package" of social benefits provided by the employer, etc. For example, the Control and Social Security Department of the Atyrau region filed a claim

Article 24 (1) of the RK Constitution stipulates that everyone shall have the right to freedom of labour, and the free choice of occupation and profession. *Involuntary labour shall be permitted only on a sentence of court or in the conditions of a state of emergency or martial law.*

The RK Constitution also stipulates that everyone *shall have the right* to safe and hygienic working conditions, to *just remuneration for labour without discrimination*, as well as to *social protection against unemployment*. The *right to individual and collective labour disputes* with the use of methods for resolving them, stipulated by law including the *right to strike*, shall be recognised. Everyone shall have the *right to rest*. Working labour agreements stipulating the *length of working time, days-off and holidays, and paid annual leave shall be guaranteed by law* (Article 24 (2 – 4) of the RK Constitution).

A citizen of the Republic of Kazakhstan shall be guaranteed a minimum wage and pension, and guaranteed social security in old age. In case of disease, disability or loss of a breadwinner and other legal grounds. Voluntary social insurance, creation of additional forms of social security, and charity shall be encouraged (Article 28 of the RK Constitution).

The Constitutional Council determined that *social security in the events of illness shall be granted the status of a constitutional right and its implementation shall be guaranteed*. Bringing this category of rights and freedoms to the constitutional level and their constitutional guarantees means that *the State assumes the duty to ensure the realisation of these rights and freedoms through specially created systems and entities*. The State assigns *the duty of social security of employees on employers*, irrespective of their form of ownership (RK Constitutional Council Resolution of 12 March 1999 No. 3/2).

As the socioeconomic human and citizens' rights prescribed by the RK Constitution are of a general nature, they are specified in other laws and regulations of the Republic, in particular, by the labour legislation and provisions regulating social security of the population.²⁵

The Report recommends as the first step for prescribing companies' duty to respect human rights the commitment to abide by this duty in a policy statement.

The policy statement shall: (a) be approved at the companies' top management level; (b) build upon relevant conclusions made by internal and/or external experts; (c) determine the attitude toward human rights expected by the company from its staff, business partners and other parties directly related to its business, produce or services; (d) be disclosed and disseminated inside and outside the company, among the entire staff, business partners and other direct stakeholders; (e) be reflected by operating policies and procedures required for its implementation throughout the entire operating activity of the company.

According to Article 31 (1) of the RK Constitution, the state shall set an objective to protect the environment favourable for the life and health of the person.

“Favourable environment” means the environment, the condition of which ensures the environmental safety and human health protection, preservation of biodiversity, prevention of pollution, and enables stable functioning of ecosystems, reproduction and sustainable use of natural resources (Article 1 (23) of the RK Environmental Code).

against LLC Kazakhstan Caspian Offshore Industries for recognition of the fact of labour discrimination by the employer. In particular, the point at issue is the disproportionate difference in labour remuneration of Kazakh and foreign employees for performing the same labour functions at LLC Kazakhstan Caspian Offshore Industries. - <http://caspionews.kz/?p=12286> (10 August 2012).

²⁵ For detail, see, RK Constitutional Council Resolution of 10 March 1999 No. 2/2 on Official Interpretation of paras 1 and 2 of Article 14, para 2 of Article 24, para 3 (5) of Article 77 of the Constitution of the Republic of Kazakhstan.

As the State is a sort of guarantor of environmental protection, it is eligible to oblige organisations to respect the human right to a favourable environment.

Therefore, the RK Constitutional provisions set **the general criteria of organisations' proper conduct in relation to respect of socioeconomic human and citizens' rights**. Responsibility for respect of human rights is a universal norm and standards of activity for all organisations.

The legal provisions obliging to respect human and citizens' rights in the Republic of Kazakhstan in good faith are prescribed by the civil legislation.

2.2. Provisions of the RK Civil Legislation Obliging Organisations to Respect Human Rights

According to Article 8 (3–5) of the RK Civil Code, the exercise of civil rights must not violate the rights and the interests of any other subjects under legislation, and it must not do any harm to the environment. Citizens and legal entities must act in good faith, reasonably and fairly when exercising their rights, and comply with the requirements which are contained in legislation, with the moral principles of the society, while entrepreneurs must also comply with business ethics rules. This obligation may not be excluded or restricted by any agreement. *The good faith, reasonableness and fairness of the acts of participants in civil rights relations shall be presumed.* Acts of citizens and legal entities which aim to cause harm to any other person, at the abuse of rights in any other form and also at an exercise of a right in contradiction to its intention shall be inadmissible.

Although the good faith, reasonableness and fairness of the acts of participants in civil rights relations shall be presumed and on the whole they do not have to prove a lack of good faith or unfairness of their acts, the civil law, unlike criminal law has a *presumption of the violator's guilt*. According to the general rule prescribed by Article 9 (6) of the RK Civil Code, when emergence of the legal consequences of a violation is related to the guilt of the violator his guilt shall be presumed, except for the cases where legislative acts stipulate otherwise. The violator shall be considered guilty until he proves otherwise. According to Article 359 (1) of the RK Civil Code, a debtor shall be recognised as innocent, if he proves that he *adopted all the remedies under his control for a proper execution of the obligation*. This is connected with the fact that the civil law is dealing with the usual civil relationships rather than unusual phenomena.

Therefore, *in the event of organisations' adverse impact on human rights or rights abuses citizens are guaranteed the right of protection of their rights and lawful interests, and organisations, in turn, must prove that they have taken all the remedies under their control for proper execution of their obligations to respect human rights or to eliminate the negative consequences of their impact.*

The most important principle of civilised development and functioning of market relations is the **protection of the rights of consumers**, i.e. *buyers, customers, passengers, and other persons using the outputs of business activity on a paid basis*. The provision of high-quality products (jobs, services) to consumers is one of the key duties of organisations.

The protection of consumer rights is ensured not only by the means envisaged by the RK Civil Code but also by provisions of other legal acts.

Each **consumer shall have the right**: (a) to freely enter agreements to purchase goods and to use work and services; (b) to proper quality and safety of goods (work, services); (c) to full and reliable information on goods (work, services); (d) the right to join public associations of consumers (Article 10 (6) of the RK Civil Code).

At the same time, the desire of business to receive maximum proceeds from the consumers seems reasonable. In conditions of a capitalist market economy, such proceeds are sometimes achieved by means of a consumer's economic coercion to use the services of one business entity.²⁶

Therefore, the elimination of monopolistic activity of market entities and maximal development of competition becomes the principal mechanism of protecting consumer interests. The consumers should not be bothering about a search for a manufacturer (seller, service provider, etc.); on the contrary, the manufacturer should be striving to satisfy the needs of consumers by offering optimal conditions.

Freedom of enterprise may result in the satisfaction of unjustifiable interests of entrepreneurs by abusing the interests of consumers and the entire society. Such actions are particularly dangerous in a monopolistic market of some or other entrepreneur without guaranteed freedom of competition. Free competition equally protects both the interests of consumers, allowing them to choose the most convenient and profitable terms of purchasing goods, and the interests of the country as a whole, providing opportunities for choosing the most beneficial options for developing production forces.²⁷

Monopolistic activities and any other activities aimed at restricting or eliminating legal competition or the extraction of unreasonable advantages by the restriction of rights and legitimate interests of consumers, shall not be allowed (Article 11 (1) of the RK Civil Code).

Except for the cases provided for by legislative acts, **the use by entrepreneurs of civil rights for the purpose of restricting competition, shall not be allowed, in particular:** (a) *the abuse by entrepreneurs of their dominant position* in the market to restrict or terminate the production or reserve from circulation of any goods in order to create shortages or increase the prices;²⁸ (b) *entering into and implementing by persons who carry out similar entrepreneurial activities of agreements concerning prices, subdivision of markets, elimination of any other entrepreneurs* or any other conditions which materially restrict competition; (c) *commission of unfair acts which are aimed at restriction of the legitimate interests of a person who performs similar entrepreneurial activities and of consumers (unfair competition)*, in particular, the misleading of consumers with regard to the manufacturer, designation, method and place of manufacture, quality or any other properties of goods of other entrepreneurs, by way of unfair comparison of goods in advertising and in any other information, copying external design of somebody else's goods and by any other methods. The remedies to control unfair competition shall be established by legislative acts (Article 11 (2) of the RK Civil Code).

According to the RK civil legislation, respect of human rights is a norm of expected conduct and, hence, the violation of these rights entails legal responsibility.

It has already been noted that provisions codifying the protection of human rights are prescribed, apart from the RK Civil Code, by other laws and regulations of the Republic of Kazakhstan.

²⁶ E.g., see, Hayek F. A. *Law, Legislation and Liberty: the Political Order of a Free People* (1979).

²⁷ Please, see, the Civil Code of the Republic of Kazakhstan (General Part). Commentary (paragraph-to-paragraph). Book 1. – 3rd edition / Chief Editor M.K. Suleymenov (Almaty, 2007), pp.127–128.

²⁸ Friedrich Hayek wrote on this subject that in the contemporary world, it is not major concentration of resources in control of one enterprise that gives power over people but the firm's ability to deprive the public of the benefits it cannot do without. – For detail, see, Hayek F. A. *Law, Legislation and Liberty: the Political Order of a Free People* (1979).

Practice shows that one of the main acts currently regulating business activities in the Republic of Kazakhstan and specifying the provisions of the RK Civil Code is the Law on Private Entrepreneurship.²⁹

According to Article 8 (2) of the Law on Private Entrepreneurship, private enterprises entities shall be obliged to observe the legislation of the Republic of Kazakhstan, the rights and legally protected interests of physical persons and legal entities; ensure consistency of produced products (work, services) to the requirements of the legislation of the Republic of Kazakhstan; obtain licenses to exercise the forms of private business subject to licensing in accordance with the law of the Republic of Kazakhstan on licensing; carry obligatory civil liability insurance in accordance with the laws of the Republic of Kazakhstan.

The licensing procedures stipulated by Article 8 (2) of the Law on Private Entrepreneurship are introduced for considerations of national security, law and order, *protection of the environment, property, life and health of the population* (Article 4 (2) of the Law on Licensing).

The obligation of organisations engaged in activities subject to obligatory licensing to obtain licenses and meet certain qualification requirements is aimed at the protection of human rights.

Kazakhstan has over a thousand authorisation documents regulating entrepreneurial activity. Sophisticated and non-transparent procedures that have to be covered by entrepreneurs to set up and maintain a business constitute a barrier to economic growth and may significantly restrict competition due to entrepreneur's unwillingness to have to deal with complicated bureaucratic licensing mechanisms.

It is not accidental therefore that in his nation address, *Socioeconomic Modernisation – the Chief Vector in Kazakhstan's Development* of 27 January 2012 set the task of completing the development of e-government and have all license forms presented in electronic format by the end of 2012. The State is gradually reducing the number of licenses and permits, in keeping with the President's nation address their quantity will be decreased by another third.³⁰

Organisations must bear the **responsibility to respect** not only consumer **rights**, but also the **rights of their shareholders and investors**. These requirements are prescribed by a number of RK laws and regulations.

To observe a balance in the sphere of entrepreneurial activity, protect the rights of investors and holders of the shares of enterprises which are agents of the securities market, the Law on the Securities Market imposes certain restrictions.

Article 53 of the Law on the Securities Market envisages restrictions and bans on operations on the securities market. According to the general rule, the license holder (a legal entity operating on the

²⁹ Please, see, Korolenko V.N., Brief Scientific Analysis of the RK Law on Private Entrepreneurship and Areas of Concern in Small and Medium Business (*Kazakh-American Free University Herald*, 2006, 3), // <http://www.vestnik-kafu.info/journal/7/254/>.

³⁰ Speaking at the opening of the exposition-conference "Connect Kazakhstan-2012" (21 May 2012) in Astana, Kazakhstan Minister of Transport and Communications Askar Jumagaliev pointed out that by the end of 2012 it will take 15 minutes to obtain a state registration certificate through the system of electronic government, and it will take only one minute to have real estate documentation issued using the same system. This year, it is planned to transfer a total of 80 services to e-government, including 18 authorisation documents for socially important services, which is approximately 60% of all services of this sort. In the future, all social significant services will be transferred to the electronic format and the same work will be performed for authorisation documents. 80% of the necessary services will be carried out in the absence of any sort of documents in paper form.

securities market on the basis of a license) *shall not be eligible to discharge entrepreneurial activities unrelated to the financial market.*³¹

An exception is made only for such cases as: (a) administering proprietary assets, including lease out of property acquired for proprietary needs; (b) advisory services provision on issues related to activity on the securities market; (c) sale of special literature on issues related to activity on the securities market recorded on any media; (d) organisation of training for upgrading the skills of specialists on activity on the securities market; (e) other cases prescribed by the RK legal acts.

Therefore, for purposes of protecting the rights and interests of participants of the securities market the activity of the license holder is strictly limited to the activities directly prescribed in the issued license.

The license holder is prohibited from advertising its activity if such advertising does not conform to reality (Article 53-1 of the Law on the Securities Market). Such advertising is misleading stakeholders and can significantly abuse their rights and entail unfavourable consequences. Moreover, the ban is not limited to unfair advertising, as market entities are also prohibited to exert any influence whatsoever (distribution of unreliable information, concluding transactions for purposes of manipulation, etc.) on other players on the securities market for purposes of changing their market conduct (Article 56 of the Law on the Securities Market).

The negative implications envisaged by legal provisions cannot contribute to normal functioning of the securities market and infringe the rights of market entities, and therefore it is necessary to closely monitor the possible violations and terminate them. Practice shows that it is not an easy task to detect and prove facts of manipulation and influence on market players.

In order to protect stakeholders' rights, the issuers of securities intended for placement among an unlimited range of investors are *legally bound to disclose information* contained in the securities prospectus; in the in-house document establishing the joint-stock company's auction and subscription terms and conditions; in reports submitted to the authorised body; other information subject to disclosure in accordance with the rules and procedures of the auction organiser or the securities issuer (Article 101 of the Law on the Securities Market).

Analysis of Articles 101–104 of the Law on the Securities Market shows that the right to information is one of the core rights the observance of which is obligatory for all entities operating on the securities market. Information is a decisive factor in all spheres of business activity, especially such a dynamic market as securities.

However, human rights impacts of companies operating on the market of securities are still unclear. *Despite the existing corporate rules and provisions regulating the circulation of securities in the Republic of Kazakhstan, there is no clarity as to what exactly the companies and their staff are permitted to do in the human rights sphere. The RK has yet to formulate sufficient guidelines allowing companies to observe human rights.*

The laws on competition and protection of consumer rights are fundamental acts of the RK civil legislation obliging organisations to respect human rights.

Violation of the Law on Competition usually covers simultaneously several articles of this legal act.

³¹ For example, the Board of the RK National Bank issued its decision to recall the license from Joint-stock company Premier Capital (11 September 2012) on the basis of violations of legal provisions detected in the process of remote supervision and a regular audit of this organisation's activities, one of which consists in conducting entrepreneurial activity unrelated to the securities market.

Article 10 of the Law on Competition *prohibits and recognises invalid* in full or in part any agreements between market entities that result or may result in restriction of competition.³² Article 11 (1) prohibits anticompetitive concerted actions of market entities.

Therefore, the Law on Competition uses the concept of “*anticompetitive concerted actions of market entities*” in addition to “*anticompetitive agreements*.”

The legal concept extrapolated from the European law, on the one hand, facilitates the process of proving business entities’ collusions, but on the other, the concepts used in the legislation create law enforcement problems. E.g. questions arise in connection with the definition of the concept of “concerted actions” in the system of civil law and during the assessment of evidence.

The concepts of agreement and concerted actions by their legal nature convey an identical meaning and are equivalent with respect to this particular case. Both these concepts are connected with the concept of “agreement.”

Article 378 of the RK Civil Code stipulates that an arrangement of two or several persons concerning the establishment, amendment or cessation of civil rights and obligations shall be recognised as agreement. This means that an agreement requires *the expression of a general consent* of two parties (bilateral agreement) or three or more parties (multilateral agreement) (Article 148 (3) of the RK Civil Code). The parties’ general consent means the parties’ agreement to take certain actions. However, *not all similar and parallel actions shall be considered as concerted actions, but only those which result from the parties’ mutual consent*.

The Law on Competition is part of the system of civil law within the framework of which the concept of “concerted actions” should be identified with the concept of “agreement.” However, the concept of “concerted actions” used in the Law on Competition includes all similar actions, including incidental ones.

International experience of applying the antimonopoly legislation shows that parallel actions of participants in civil relations should be strictly distinguished from parties’ concerted actions. Otherwise there is a danger of imposing responsibility on entrepreneurs for non-existent price collusions. Pricing on the basis of competitors’ prices does not prove the coordination of activities of market players or concerted actions in that respect. On the whole, this pricing method is quite common and natural for a new market entrant and one of the tools of companies’ marketing policy.

The meaning of the concepts of agreement and concerted actions aimed at collusion is practically identical, but there are certain distinctions in their form of expression (written or verbal form, including implicative actions).

Therefore, the separation of verbal agreements and concerted actions, which are also verbal agreements, seems redundant. Hence, verbal agreements should be excluded from the Law on Competition.

³² In December 2009, violations of Article 10 (1) of the RK Law on Competition were detected, manifested in the setting and/or maintaining prices or other product purchase or sale terms. In the period from January to September 2009, LLC KazakhOil was selling fuel and lubricants to LLC Etalon-Avto Resource at higher prices than to other market entities. At the same time, LLC Etalon-Avto Resource, having an opportunity to purchase fuel from other market entities at lower prices, was purchasing gasoline exclusively from LLC KazakhOil. This ultimately resulted in an unjustified increase in the price of gasoline for end consumers. Both market entities, having set a mutually profitable price and been maintaining it, were receiving high profits, which would have been impossible without concerted actions infringing consumer interests. Having examined the case presented by all stakeholders, the Petropavlovsk administrative court issued a resolution recognising the aforementioned market entities guilty of anticompetitive actions and imposed fines to the total amount exceeding 120 million tenge with confiscation of monopolistic profit in the amount of 95.5 million tenge. – For detail, please see: www.azk.gov.kz (30 March 2010).

In addition, it has already been mentioned that questions regarding evidence assessment arise during the application of the Law on Competition. Qualifying the actions of economic entities as concerted and aimed at elimination of competition on the basis of a complex of indirect evidence and recognising them sufficient contradicts the principle of relevance of legal acts. In the absence of a written agreement proving the parties' consent it seems inappropriate to make a priori judgement as to which particular indirect evidence constitutes sufficient proof. This approach allows rather arbitrary (in violation of the principle of objective truth) qualification of actions of economic entities as lawful or unlawful. E.g. the elements of an offence of anticompetitive agreement include the condition that the agreement would result or could result in restriction of competition, whereas the elements of the offence of anticompetitive concerted actions do not provide for such a condition, and it is recognised sufficient that the actions of market players are aimed at the restriction of competition.

Despite the fact that insufficient relevance of legal acts is most often caused by incomplete examination of the circumstances of a case, a lack of arguments in favour of the evidence accepted or waived by the court, inadequate review and assessment of the parties' arguments in contentious damage,³³ in this case it is precisely incoherence and insufficient clarity of formulations of substantive provisions of the Law on Competition that entail procedural costs. Concerted actions must be clearly distinguished from any incidental parallel actions of economic entities, even if the latter indirectly contribute to the elimination of competition. One way or another, the essence of a capitalist economy consists precisely in competitive struggle between the market participants.

The Law on Competition contains other provisions aimed at the protection of human rights. E.g. Article 13 of the Law on Competition prohibits "actions or inaction of the market entities having dominant or monopolistic position that restrict or may restrict the access to the relevant commodity market, or prevent, limit or eliminate competition and(or) *infringe upon the legal rights of the consumers.*" According to Article 16 (1), any actions in competition aimed at attainment or provision of illegal advantages in competition as well as actions that violate the rights and legal rights of the consumers shall be deemed to be *unfair competition. No unfair competition shall be allowed.*³⁴

In the opinion of Professor M. Suleimenov, the Law on Competition contains a number of provisions which, in comparison with the previous laws in this sphere, *are aimed at the liberalisation of approaches to regulating entrepreneurial activity.* Nevertheless, it still has some negative aspects restricting entrepreneurial activity. In the Expert's opinion, the Law on Competition still has room for improvement to harmonise it with provisions of Article (4) of the RK Constitution.³⁵

To draw a line in analysis of provisions of the Law on Competition, it is important to dwell on one more aspect.

³³ Fursov D.A., Contemporary Concepts of the Principles of Civil and Arbitration Proceedings (Moscow, 2009), p.47.

³⁴ In practice, there are many cases where noncompliance with the provisions of this law and the rules of competition result in human rights abuses by enterprises. The RK legal provisions are presently insufficiently efficient as entrepreneurs often carry out anticompetitive actions and enter into price collusions. Such actions are quite common on the market of fuel and lubricants. After the public technical inspections centres were transferred into the private sector violations started manifesting themselves on that market as well. The penalties imposed on the offenders in the form of fines are disproportionate to the violations. Large companies prefer to violate the law, gain super-profits and pay fines afterwards. – For details, please see: <http://www.zakon.kz/4468376-antimonopolnoe-agentstvo-rk-vyjavilo.html>; <http://meta.kz/life/652435-gelios-za-cenovoy-sgovor-oshtrafovali-na-2-milliona-tenge.html#>; <http://www.zakon.kz/4487233-po-faktam-cenovogo-sgovora.html>.

³⁵ Please, see M. Suleimenov, Constitutional Bases of the Ownership Rights in Kazakhstan // <http://www.zakon.kz/206876-konstitucionnye-osnovy-prava.html>.

It has already been mentioned that the Constitutional provisions protecting human rights are applicable across the entire national territory, irrespective of the organisations' circumstances. The Constitution does not contain any clauses or exceptions allowing organisations not to fulfil their obligations to respect human rights.

According to Article 3 of the Law on Competition, "*this Law shall be in force on the territory of the Republic of Kazakhstan and apply to all relations that affect or may affect competition on commodity markets of the Republic of Kazakhstan.*" It is also important that provisions of the Law on Competition are applicable to "actions of the market entity performed outside the Republic of Kazakhstan, provided one of the following conditions is met as a result of such actions: (1) fixed assets and (or) intangible assets, shares (ownership interest in the authorised capital) of the market entities on the territory of the Republic of Kazakhstan, property or non-property rights related to legal entities of the Republic of Kazakhstan are directly or indirectly affected; (2) competition in the Republic of Kazakhstan is restricted."

Therefore, provisions of the Law on Competition are applicable not only in the Republic of Kazakhstan but also outside its territory in cases stipulated by paras (1) and (2) of para 2 of Article 3. The Article envisages no exceptions for any forms of activity or references to certain conditions under which organisations are allowed not to abide by this law and thus impact human rights and freedoms.

The Law on Protection of Consumer Rights obliges organisations to respect human rights.

Consumers are granted the following rights: free conclusion of contracts on the purchase of goods (fulfilment of jobs and provision of services); access to information in the sphere of protection of consumer rights; information on a product (job, service) and on the manufacturer (executor, provider); purchase of safe products (jobs, services); free choice of a product (job, service); adequate quality of a product (job, service); exchange or return of a product of both adequate and inadequate quality; receipt of a seller's (manufacturer's, executor's) document confirming the fact of purchase of a product (fulfilment of a job, provision of a service) (Article 7 of the Law on Protection of Consumer Rights).

One of the key problems encountered by consumers in the exercise of their rights is obtaining reliable information on a product.

According to Article 448 of the RK Civil Code, the seller *must provide the buyer with the necessary and reliable information on the product* offered for sale. This information shall meet the standards prescribed by legal acts and requirements usually set in retail trade to the contents and methods of providing such information.

The buyer *has the right to examine the product before concluding a contract*, request a check of the working ability or demonstration of the product's use in his presence, unless it is impossible due to the nature of the product or contradicts the rules accepted in retail trade.

*A seller who failed to provide the buyer with the opportunity to receive relevant information on the product shall be responsible for the quality defects of the products occurring after their transfer to the buyer if the buyer proves that they resulted from his lack of information.*³⁶

The consumer right to access to information in the sphere of consumer rights protection is being ensured by including aspects of the fundamentals of consumer knowledge in educational curricula,

³⁶ Practical implementation of the said provisions often depends on the seller's status. Along with duly registered business enterprises fulfilling their tax obligations and functioning in good faith on the market of Kazakhstan, there are scores of illegally operating trade agents. The latter are not interested in abiding by the existing requirements, they are reluctant to provide reliable product information and do not guarantee its quality. Unfortunately, there are no legal mechanisms for imposing liability on such dishonest sellers.

and by organising a system of informing consumers of their rights and the necessary actions to protect those rights (Article 9 of the Law on Protection of Consumer Rights).

The process of informing stakeholders is not intended as a direct obligation to fulfil the existing requirements, but, if properly implemented, is aimed at developing and raising legal culture and awareness, and legal education of society in terms of knowing and protecting its rights.

According to Article 10 (1) of the Law on Protection of Consumer Rights, consumers have the right to *complete, reliable and timely* information on a product (job, service), and on the seller (manufacturer, executor).

If the provision of incomplete, unreliable and untimely information on a product (job, service), and on the seller (manufacturer, executor) entailed: (a) the purchase of a product (job, service) not possessing the properties needed by the consumer, he shall be entitled to cancel the contract and demand compensation for his losses; (b) the impossibility of using the purchased product (job, service) for its intended purpose, the consumer shall be entitled to the provision of proper information within three calendar days from the date of purchase of the product (fulfilment of a job, provision of a service). If the information is not provided within the prescribed time period, the consumer shall be entitled to cancel the contract and demand compensation for his losses; (c) damage to the consumer's life, health and/or property, he shall be entitled to present claims to the seller (manufacturer, executor) for full compensation for losses (harm).

These provisions establish the measures and means of consumer protection in the event of infliction of damage, violation of their rights, freedoms and interests.

Article 24 of the Law on Protection of Consumer Rights stipulates that the seller (manufacturer, executor) must provide information on a product (job, service), and on the seller (manufacturer, executor) in two languages – Kazakh and Russian.

One of the key requirements to sellers and manufacturers is that the product (job, service), if the rules of its utilisation, storage, transportation and utilisation are complied with, should be safe for the life, health and/or property of the consumers and the environment. Requirements aimed at ensuring product (job, service) safety are obligatory and are prescribed by the RK legislation on technical regulation (Article 11 of the Law on Protection of Consumer Rights).

Article 24 of the Law on Protection of Consumer Rights stipulates that the seller (manufacturer, executor) must ensure safety of a product (job, service) and its adequate quality.

Requirements of product (job, service) safety are also prescribed by other laws and regulations of the Republic of Kazakhstan.

Article 14 of the Law on Biological Fuel stipulates that for the purposes of preventing actions misleading the consumers concerning the safety and quality of biological fuel, the manufacturers of biological fuel shall provide buyers and consumers with full and reliable information on the safety and quality characteristics of the biological fuel, as prescribed by the RK legislation.

Biological fuel and its life cycle processes shall be safe for the life and health of humans and the environment in keeping with the technical regulations (Article 15 of the Law on Biological Fuel).

Article 7 of the Law on the Safety of Toys stipulates that toys shall meet the requirements ensuring safety of life and health of humans and the environment. Toys may be admitted to the RK market only if, given their use according to their intended purpose, *they do not endanger human life and health, as well as the environment; preserve moral and emotional wellbeing of a child; do not mislead consumers regarding the intended purpose of the toy.*

The specifics of the activity of entities distributing products impacting a vulnerable and specially protected category of the population is regulated by the application of relevant measures aimed at excluding negative impact. The existing requirements do not fully prevent the possibility of negative impact on product consumers.

Practice shows that the right to exchange or return a product of adequate quality within 14 days from the date of its purchase is one of the most important rights of consumers in Kazakhstan. The previous Law on Protection of Consumer Rights envisages a similar right, but did not specify the timelines for the product exchange or return or the list of products excluded from this right.

Consumer rights have relevant corresponding obligations of the seller (manufacturer, executor) (Article 24 of the Law on Protection of Consumer Rights).

According to Article 19 of the Law on Protection of Consumer Rights, consumers shall have the right to present claims to the initiator (organiser) of games concerning the quality of a product (job, service) transferred (fulfilled, provided) in the form of a prize.

The initiator (organiser) of games *shall satisfy the consumer's claims* within twenty calendar days *by applying to the seller (manufacturer, executor)* for the remedy of defects in the product (job, service), unless it proves that the defects in the product (job, service) originated after their transfer (fulfilment, provision) to the consumer as a result of violation by the consumer of the rules of the product use or storage or by third party actions or insuperable force.

In other words, *manufacturing enterprises are responsible for their produce* supplied to a third party by an initiator (organiser) of games and shall eliminate unfavourable impact.

According to Article 16 (2) of the Law on Protection of Consumer Rights, all consumers shall have the right to demand compensation for losses (harm) inflicted as a result of a defect of a product (job, service), *irrespective of the guilt of the seller (manufacturer, executor) and the fact whether it had contractual relations with the latter or not.*

Under the present circumstances, enterprises shall also bear full responsibility for the unfavourable impact on human rights directly related to their operations, their produce and their business relations, even if they were not directly involved in exerting such impact.

Therefore, a conclusion can be drawn that the Law on Protection of Consumer Rights provides sufficiently detailed and balanced legal support of the main consumer rights and effective protection against their abuses by enterprises.³⁷

In order to meet their responsibility to respect human rights, the Ruggie Report says, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) *a policy statement* expressing their commitment to respect human rights; (b) *appropriate operational policies and procedures* that enable them to identify, prevent, mitigate and account for their human rights performance; (c) *procedures* that enable them to remediate any adverse human rights impacts they cause or contribute to through their activities and relationships.

The most common forms of incorporation of business enterprises in the Republic of Kazakhstan are *limited liability partnerships* and *joint-stock companies*.

According to Article 14 of the Law on Limited Liability Partnerships, other provisions concerning the creation and operation of the partnership not contradicting this Law and other legal acts may be

³⁷ Please, see, P.V. Afanasiev, Bringing Human Rights Protection to a New Level, http://www.rusnauka.com/25_WP_2010/Pravo/71100.doc.htm.

included in the memorandum of incorporation on the founders' decision. The memorandum of incorporation of a limited liability partnership may also specify its goals and subjects.

Articles of association of a limited liability partnership may also include other provisions not contradicting the RK legislation. Articles of association of a limited liability partnership may also specify the goals and subjects of its activity (Article 17 of the Law on Limited Liability Partnerships).

Article 7 of the Law on Joint-Stock Companies stipulates that a memorandum of incorporation (decision of the sole founder) shall contain, *inter alia*, other provisions subject for inclusion in the memorandum of incorporation (decision of the sole founder) on decision of the founders and in accordance with the RK legislation.

Articles of association shall also contain other provisions as prescribed by the RK legislation. All stakeholders have the right to familiarise themselves with a company's articles of association. The company shall, on request of a stakeholder, provide him an opportunity to familiarise himself with its articles of association, including further amendments and additions. The joint-stock company shall grant the request of a shareholder to provide him with a copy of articles of association within three working days. The company may charge a fee from the shareholder for provision of a copy of articles of association, which shall not exceed the expenses on production of the copy, and if it needs to be delivered – expenses on its delivery (Article 9 of the Law on Joint-Stock Companies).

Therefore, the laws under consideration indicate obligatory documents (memorandum of incorporation, articles of association) which may contain, in addition to their basic provisions, also *provisions regulating the company's human rights policy and various human rights protection procedures*.

RK laws and regulations set specific requirements to some enterprises the activity of which may entail serious human rights abuses, which shall be included in the enterprises' policy documents. E.g. subsoil users must prescribe human rights protection procedures in their policy documents (environmental human rights, labour safety, etc.). However, RK laws and regulations lack provisions obliging enterprises to regulate procedures that enable them to remediate any adverse human rights impacts in their policy documents. For most enterprises, formulating their human rights protection policies is a right rather than an obligation. On the contrary, the inclusion of provisions on compensation for damage and parties' responsibility is presumed by contract law and constitutes an inseparable part of any contract.

In this connection, the State needs to improve its corporate law and develop the methods stimulating enterprises to formulate their human rights policies and procedures. Measures for the observance of human rights undertaken by the State in respect of enterprises must be efficient, but at the same time they should in no way abuse or restrict the rights of entrepreneurs.

One of the main principles declared in the Ruggie Report is to identify, prevent and mitigate the implications of adverse human rights impacts.

According to Article 143 of the RK Civil Code, through the court a citizen or a legal entity shall have the right to refutation of information which damages his honour, dignity or business reputation. Where the information that damages the honour, dignity or business reputation of a citizen or a legal entity is spread through the mass media, that information must be free of any charge refuted by the same mass media. In the case where said information is contained in a document *issued by an organisation*, such a document shall be subject to replacement or annulment with the obligatory communication to the addressees of the inconsistency of the information contained in that document. The procedure for refutation in other cases shall be established by the court.

A citizen or a legal entity with regard to which the mass media published information which restricts his rights or legitimate interests, shall have the right to publish their response in the same mass media free of any charge.

The claim by a citizen or a legal entity to publish a refutation or response in the mass media shall be considered by the court in a case where the mass media refused such publication, or did not carry out the publication within one month, and also in the case of its liquidation. Where a court decision is not executed, the court shall have the right to impose a fine upon the violator, which shall be taken for the revenue of the budget. The fine shall be imposed in accordance with the procedure and in the amounts which are established by the civil procedural legislation. The payment of the fine shall not exempt the violator from the obligation to execute the action stipulated in the court decision.

A citizen or a legal entity with regard to whom information was spread that damages his honour, dignity or business reputation, shall have the right, apart from the refutation of such information, to demand compensation for the damage and the moral harm inflicted by their promulgation. The provisions of this Article on protection of a citizen's business reputation are applicable also to protection of business reputation of a legal entity, except the claims of moral damage compensation. Provisions on compensation for losses prescribed by the RK Civil Code are applied to protection of a legal entity's business reputation.

Where it is impossible to identify the person that spreads the information which damages the honour, dignity or business reputation of a citizen or a legal entity, the person with regard to whom such information is spread, shall have the right to appeal to the court with an application to recognise that the promulgated information as not true.

The distributed information, including certain required data, performance reports or information promulgated for other purposes, must be checked for reliability and filtered, and the measures taken should rule out the possibility of integrating outside information which damages the honour, dignity or business reputation of a citizen or a legal entity. In the event of a precedent, the legislators shall provide measures for restoring the abused rights (self-defence) of entities and sanctioning the source of such information.

For purposes of protecting consumer rights, the Law on Natural Monopolies introduced restrictions on the natural monopolies' activities.

According to Article 5 (1) of the Law, **a natural monopoly shall be prohibited from:** charging payment for regulated services (products, jobs) exceeding the amount established by the authorised body; charge additional fee not envisaged by the Law on Natural Monopolies or otherwise impose additional obligations the content of which is irrelevant to the subject of the provided regulated services (transfer of cash or other property, pecuniary rights, etc.); impose terms of access to regulated services (products, jobs) of natural monopolies or perform other actions leading to consumer discrimination; refuse to provide regulated services (products, jobs) to bona fide consumers in connection with the failure of dishonest consumers to pay for the consumed amount of regulated services (products, jobs); include in the tariffs (prices, fee levels) of regulated services (products, jobs), or their top margins, the costs unrelated to their provision; demand payment for the provided regulated services (products, jobs) not meeting the quality standards of the regulated services (products, jobs) established by government authorities within the frames of their competence; recognise as commercial secret the information of the tariff estimate: the cost of purchase and installation of regulated public utility services metering devices and the billing mechanism purchase; on available regulated public utility services (products, jobs).

The above restrictions enable to protect consumer rights against abuses by monopolistic enterprises.

Article 7 of the Law on Natural Monopolies prescribes the **obligations of a natural monopoly**. It shall: (1) provide regulated services (products, jobs) at tariffs (prices, fee levels) approved by an authorised body; (2) grant equal terms for consumers of regulated services (products, jobs), except

cases of regulated services (products, jobs) provision with account for advantages and benefits granted by the RK legislation, including equal access to regulated services (products, jobs); (3) on request of the authorised body, present financial reports and other necessary information on paper and/or electronic media within the timelines established by the authorised body, which cannot be less than five working days from the date of receipt of a relevant request by the natural monopoly; (4) conduct annual statutory audit by an audit organisation, except natural monopolies indicated in Article 15 (3) of the Law on Natural Monopolies, conducting statutory audit once every three years;³⁸ (5) report annually on regulated services (products, jobs) provision activities to consumers and other stakeholders; (6) submit annual reports on fulfilment of the tariff estimate not later than 1 May of the year following the reporting period; (7) not allow violations of consumer rights during the conclusion of contracts on provision of regulated services (products, jobs); (8) notify the authorised body and consumers of the lowering of tariffs (prices, fee levels) not later than ten days prior to their entry into force; (9) reduce tariffs (prices, fee levels) in the manner prescribed by the authorised body for all consumers in the event of relevant amendment of the tax law, as a result of which the expenses of the natural monopolies are reduced, as of the date of entry of the said amendments into force.

To protect human rights to access to information, Article 7-3 of the Law on Natural Monopolies prescribes the following **obligations of regulated market entities**: (1) to present to the authorised body *information on wholesale ex-factory prices with attached rationalising materials supporting the price level; monthly information on output (sales) volumes, profitability level and ex-factory prices of the products (jobs, services) manufactured (sold); information required for expert price evaluation; quarterly information on fulfilment or non-fulfilment of the investment programme (project), with its subsequent publication in the media;* (2) notify the authorised body of an upcoming *increase of the prices* of products (jobs, services) over the marginal price and the reasons for their increase; (3) observe the *pricing procedures* on regulated markets; (4) fulfil *investment programmes* (projects) included in the marginal prices in compliance with the pricing procedures on regulated markets; (5) *return the profit gained but unused for purposes of implementation of investment programmes* (projects); (6) *return the profit gained as a result of unjustified exceeding of the marginal price.*

Although provisions of the Law on Natural Monopolies on the whole comply with the Ruggie Principles, in order to protect the rights of citizens and organisations, additional obligations and restrictions are imposed on natural monopolies. However, practice shows that there are still a lot of violations in this sphere. The main reasons for such violations include **poor access of public institutions to inspection of natural monopolies** and to influencing the **decisions issued by supervisory authorities in respect to such entities**. Public institutions and stakeholders have no legally prescribed effective measures of influencing natural monopolies. It is also necessary to mention the **low level of protective provisions inconsistent with the present realities**. It is necessary to tighten sanctions for antimonopoly violations.

Therefore, on the whole, the RK civil legislation obliges organisations to respect human rights. The problems occurring in the sphere of civil law mainly concern enforcement aspects and imposing liability on persons guilty of inflicting damage.

2.3. Provisions of the RK Labour Legislation Obliging Organisations to Respect Human Rights

Everyone shall have the right to safe and hygienic working conditions, to just remuneration for labour without discrimination, as well as to social protection against unemployment (Article 24 (2) of the RK Constitution).

³⁸ The audit report and annual financial statement shall be published in periodical media disseminated on a relevant territory of an administrative territorial entity where the natural monopoly is operating not later than thirty calendar days after approval of the audit report.

According to Article 22 of the RK Labour Code, **an employee** shall have the following core socioeconomic **human rights**: labour protection and labour safety; timely and full payment of wages in accordance with the conditions of the employment contract and the collective bargaining agreement; rest, including annual paid vacation; association, including the right to create a trades union or other association, and be a member thereof for the purpose of representation and protection of his labour rights; mandatory social insurance in cases envisaged by the laws; guarantees and compensation payments; equal payment for equal labour without any discrimination.

Article 5 of the RK Labour Code prescribes that no-one's rights may be restricted in the sphere of labour, apart from cases and in a manner envisaged by this Code and other laws of the Republic of Kazakhstan.

The inadmissibility of restriction of rights and freedoms in the sphere of labour is one of the basic principles of the RK labour legislation. This principle is based on the 1988 ILO Declaration on Fundamental Principles and Rights at Work and complies with Article 12 of the RK Constitution.³⁹

According to Article 6 of the RK Labour Code, everyone shall have the right freely to choose labour or agree to work without any discrimination or compulsion to do so, the right to apply labour abilities, choose a profession and type of activity.

This provision is of a universal nature and fixes the right of everyone to freedom of labour, and the free choice of occupation and profession without any discrimination or coercion. Everyone shall have the right to freedom of labour, and the free choice of occupation and profession (Article 24 (1) of the RK Constitution).

The social orientation of the principle of freedom of labour means release of human beings from labour exploitation. The meaning of this principle consists in the following: (a) freely disposing of one's labour capacities, choosing an occupation and profession; (b) realising one's labour capacities independently or on the basis of agreement; (c) freely choose the place of work, including abroad; (d) be guided exclusively by one's own interests in the process of realising one's labour capacities.

The principle of freedom of labour is reflected in the labour law in the form of the **principle of freedom of employment contract**. The parties are free in the process of cooperation to search for efficient means of raising labour productivity, improving the quality of produce, rational use of raw materials, energy, etc.

In turn, this principle is closely linked with **a ban on discrimination in the sphere of labour**, which means: (a) everyone shall have equal opportunities to exercise their rights and freedoms in the sphere of labour; (b) no-one may be subjected to any discrimination in exercising their labour rights depending on sex, age, physical disabilities, race, nationality, language, material, social or official position, place of residence, attitude to religion, political convictions, tribe or social stratum or membership of public associations (Article 7 of the RK Labour Code).

Article 25 of the RK Labour Code **prohibits the violation of equality of rights and opportunities in concluding an employment contract**. Pregnancy, the existence of children up to the age of three years, being under age, and disability may not restrict the right to conclude an employment contract, with the exception of cases envisaged by the RK Labour Code.

The principle of non-discrimination complies with ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation and Article 14 (2) of the RK Constitution.

³⁹ Please see The Labour Code of the Republic of Kazakhstan. Itemised Practical Commentary / under the edition of B.M. Saparbaev, (Almaty, 2007), p.52.

These provisions, despite their status of core principles, are not being observed in practice. *Enterprises prefer hiring people with work experience and often ignore young specialists or offer discriminate labour conditions to the latter (lower salary, fulfilment of additional functions unrelated to their position, etc.). Many enterprises do not abide by the schedule of working hours and people in fact spend more than eight hours at work. Such violations are often encountered in the public service sector. In practice, there are cases of employment depending on ethnic origin, sex, etc.*⁴⁰

Consequently, more effective measures need to be taken to encourage companies, including state enterprises and organisations, to abide by the principles and strengthen penalty measures for their violation.

For example, Nursultan Nazarbaev, in his article *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour*, pointed out **the need to modernise the law on state youth policy**. Legal provisions are needed on employment guarantees and social benefits for young specialists, and procedures for organising practical work with young people.⁴¹ The principle of non-discrimination in the sphere of labour should be supplemented with **the principle of priority state protection of labour rights of women, young people and people with disabilities**, as they constitute the most vulnerable category of employees in whose employment entrepreneurs are interested least of all.

The principles of non-discrimination and freedom of labour are connected with the fundamental idea of prohibiting forced labour.

⁴⁰ The press service of the Astana prosecution office reported that facts of discrimination against Kazakhstan nationals were uncovered in a number of companies operating in Astana, as their salary levels were lower compared to those of foreign specialists. The comparison of employment contracts of foreign employees and employees who are Kazakhstan citizens revealed that the management of LLC HEILEYBURU ASTANA was paying a much higher salary to foreign employees than to citizens of Kazakhstan for performing the same job. Similar violations were detected at LLC IFL Kazakhstan Engineering and Project Management, LLC Solaks Hotel Business Management Company, and LLC FA-BO. – Please, see, <http://newskaz.ru/society/20120817/3742087.html>.

In his address to the RK Prime Minister, Human Rights Commissioner Bolat Baykadamov noted that people were complaining against illegal dismissals practiced by foreign enterprises. This policy has the highest negative impact on positions of women: Ms. O. (Incoming No. 1119/03 dd. 04 July 2005), formerly employed as OJSC Petro Kazakhstan Kukmol Resources, was dismissed after childbirth; individual employment contracts were not prolonged with employees of CJSC Air Astana (Incoming No. 129/03 dd. 25 January 2005) despite their pregnancy. Labour conditions at foreign mining companies deserve special mention. Mr. N. (Incoming No. 377/03 dd. 11 May 2004) wrote in his complaint that employees were working 10-12 hours a day at the mines of JSC Kazakhmys, without observing safety regulations; miners were being set excessive work assignments. The violations of the labour legislation at the Kazakhmys corporation are also covered in media reports. According to the newspaper *Caravan* of 10 March 2006, dozens of workers were killed at the mines of the Kazakhmys corporation as a result of violation of safety regulations and using obsolete equipment. The salary of mine workers did not meet the standards established for the sector and the profit gained by the company. Other violations of the labour legislation include delays in salary payments. An employee of a Turkish construction company, Mr. S. (Incoming No. 583/03 dd. 13 April 2005) complained that the company has not been paying salaries for three months. Numerous violations of the labour legislation by foreign companies were revealed during an inspection conducted by the prosecution bodies and the RK Ministry of Employment and Social Security in 2005. - Please, see, http://ombudsman.kz/publish/docs/doklad_zhyl/detail_2.php?ID=1445.

According to recruiting agency statistics, many employers prefer not to hire older people. People find it difficult finding a job after 40 years old. - See, <http://www.caravan.kz/article/42614>.

In addition, some employers practice gender-based discrimination preferring to hire males, although considerable progress has been registered in this respect in recent time. - Please, see, http://www.un.org/ru/documents/decl_conv/declarations/ilo_principles.shtml.

⁴¹ Please, see, Nursultan Nazarbaev, *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour // Kazakhstanskaya Pravda*, 2012, 10 July.

Forced labour shall mean any work or services required from any person *under threat of any punishment, for fulfilment of which this person has not offered its services voluntarily*, with the exception of work: required from someone by virtue of a court sentence that has come into legal effect, on the condition that the work will be performed under the supervision and control of state authorities and that the person performing it is not yielded or handed over to any individuals and (or) legal entities; required under the conditions of an emergency or martial law (Article 8 of the RK Labour Code).

Citizens' labour activity, choice of profession, type and nature of occupation is based on the principle of voluntariness. No forms of administrative or other coercion to labour shall be admitted, except cases envisaged by law. This principle complies with the International Covenant on Civil and Political Rights (1976) and ILO Conventions.

The 1998 ILO Declaration on Fundamental Principles and Rights at Work envisages the introduction of mechanisms for implementing this declaration and elimination of all forms of forced or involuntary labour. It has already been mentioned that forced labour is admitted in Kazakhstan under certain conditions envisaged by law. According to the RK Constitution, involuntary labour shall be permitted only on a sentence of court or in the conditions of a state of emergency or martial law.

Nursultan Nazarbaev, in his article *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour*, drew attention to one more key aspect of labour rights protection. He noted that **some laws were morally obsolete or declarative and for these reasons failed to efficiently regulate individual spheres of social relations**. The Law on Trade Unions was adopted way back in 1993. It does not even mention the concept of social partnership, the mechanism of conclusion and implementation of collective bargaining agreements, etc. It is not surprising, therefore, that **trade union organisations in Kazakhstan are not always capable of playing the role of an efficient tool of labour disputes prevention and settlement**. The trade union movement should be of the highest standards to enable working people to work with dignity. Trade unions are among the main partners of the State in matters of improving labour relations. However, **the current format of activity of the largest trade union centre – Federation of Trade Unions of Kazakhstan – does not conform to the needs of the modern times**, as it is based on the "soviet-style" sector-specific principle.⁴²

The current situation is actively discussed by the public. Member of the RK Presidential Human Rights Commission Professor Enlik Nurgalieva insists on the need to revive the role of labour collectives and trade unions and **the need of an adequate law on trade unions**, explicitly prescribing all trade union relations and procedures for workers; participation in meetings in strikes. In the Professor's opinion, **the current law on trade unions lacks transparency**.⁴³

According to Article 266 (2) of the RK Labour Code, the employer, in accordance with the terms and conditions of the collective bargaining agreement, shall create conditions for the activities of a trades union operating within the organisation. It should be admitted, however, that this provision is often being violated in practice. **Employers prevent the creation of a trade union at their enterprise**⁴⁴ or ignore its requirements.

⁴² Ibid.

⁴³ For detail, please see, K. Ayanov, Not a word has been said at the Commission about Janaozen // *Respublika*, 24 September 2012.

⁴⁴ E.g., the management of a cement plant in the village of Sas-Tobe in South Kazakhstan region was not only abusing employees' labour rights, but also refused to recognise the trade union created for the purposes of protection of their rights. Initiators of the trade union creation and its leaders were threatened with dismissal. – M. Aimbetova, Mogul's Shine and Poverty // *Vremya*, 4 October 2012.

The problem of observance of labour safety and labour protection regulations is no less acute. Labour safety and protection issues are regulated by the RK Labour Code and many bylaws.⁴⁵

According to Article 308 (2) of the RK Labour Code, requirements of labour protection and labour safety shall be binding on both employers and employees in performance of their activities on the territory of the Republic of Kazakhstan.

The employee's right to labour safety and labour protection is manifested in his right to: a work place equipped in accordance with the labour protection and labour safety requirements; provision with sanitary and amenity premises, means of personal and collective protection, and special clothing in accordance with the labour protection and labour safety requirements, as well as with the employment contract and collective bargaining agreement; appeal to the state labour authority and its territorial subdivisions to inspect the working conditions and labour safety at his place of work; participation personally or through his representative in investigation and consideration of matters relating to improving working conditions, labour protection and labour safety; refuse to perform work in a situation jeopardising his health or life, notifying his immediate superior or the employer in writing to this effect; the education and occupational training required for safe performance of his job duties, in the manner established by the legislation of the Republic of Kazakhstan; receipt of reliable information from the employer on the work place and the territory of the organisation, on the working conditions, labour protection and labour safety, on any threat to life and health, as well as on measures for his protection against the impact of harmful (particularly harmful) and (or) hazardous production factors; retention of his average wage during halts to the functioning of the organisation owing to failure to comply with the labour protection and labour safety requirements; appeal against unlawful actions on the part of the employer in the sphere of labour protection and labour safety (Article 314 of the RK Labour Code).

The employees' rights are matched with corresponding relevant obligations of the employer in respect of labour safety and labour protection.

According to Article 317 of the RK Labour Code, **the employer shall** create the necessary sanitary and hygiene conditions for employees, provide the supply and repairs of special clothing and footwear of employees, supply them with means of protective treatment, washing and disinfectant, a first aid kit, milk, therapeutic and healthy meals in accordance with the standards established by the RK Government; provide safe working conditions; carry out, at its own expense, periodical (during employees' working lives) medical examination and pre-shift medical certification of employees in cases envisaged by the legislation of the Republic of Kazakhstan, as well as in the event of transfer to different work involving changed working conditions or of the appearance of signs of occupational disease.

The employment contract shall provide an accurate description of the working conditions, including harmful and (or) hazardous production factors, and shall indicate the guarantees, benefits and compensation payments for work under such conditions envisaged by the legislation of the Republic of Kazakhstan and the collective bargaining agreement (Article 310 (1) of the RK Labour Code). In other words, an employee is entitled to receive and the employer shall provide reliable information on the nature of the work place, the organisation's territory, status of labour protection and labour safety, possible threat to the life and health, and measures for protection against hazardous and/or harmful production factors.

In addition to these provisions of the RK Labour Code, other provisions are in place to guarantee employees' rights to labour protection and labour safety in the process of their labour activity (Article 311 of the RK Labour Code), and provisions obliging enterprises to finance labour protection and labour safety measures (Article 318 of the RK Labour Code).

⁴⁵ See, for example, RK Government Resolution of 5 December 2011 No. 1457; RK Government Resolution of 28 October 2011 No. 1225; RK Government Resolution of 21 August 2007 No. 721; RK Government Resolution of 21 August 2007 No. 720, etc.

Article 311 (1) of the RK Labour Code prescribes that labour protection conditions at the work place shall comply with the requirements of state standards and the labour protection and labour safety rules.

The employer must fulfil its obligations and provide the employees with safe labour conditions, and the employees, in turn, shall protect these rights against abuse using the existing protection mechanisms at different levels.

The financing of labour safety and labour protection measures shall be conducted at the expense of the employer and other sources not prohibited by the RK legislation. Employees shall bear no expenses for these purposes.

To fulfil the requirements established by this article, employer enterprises must provide funding for these purposes. The amount of funds shall be determined by the collective bargaining agreement or the employer's financial planning document (business plan, etc.). The employer shall also provide funding of the programmes and plans of improving labour conditions and labour protection of its personnel within the volumes required for those conditions to be safe.

Therefore, the laws and regulations of the Republic of Kazakhstan **include a statutory list of obligations of employers in the sphere of labour protection and labour safety**. Provisions on this score comply with Kazakhstan's international human rights commitments. The duty of the employees to abide by labour safety and labour protection regulations should also be mentioned in this connection.

Practice shows that **employers and employees are regularly violating the established labour safety and labour protection regulations**.⁴⁶ The most common violations of the labour protection legislation are a lack of employee's instruction in safety rules and procedures, operation of defective machines and equipment, failure to provide safe working conditions and individual protection means.⁴⁷

The Head of State mentioned in this respect that it is important to intensify control over compliance with labour safety measures at enterprises and increase **legal responsibility for provoking social-labour conflicts**. The labour collective often becomes a party to a conflict provoked by intentional deterioration of working conditions, disruption of the production process, salary delays, etc. Moreover, Nursultan Nazarbaev pointed out that neither the Labour nor the Administrative nor the Criminal Codes contain **Articles envisaging responsibility of employers, officials and other persons for provoking labour conflicts**.⁴⁸

⁴⁶ For example, the prosecution office of the city of Astana suspended the construction of the Classical Opera and Ballet Theatre in the city of Astana because of the revealed violations of the labour legislation and imposed administrative liability on the subcontractor company. Specifically, the following violations were detected: performance of works at heights without using individual protection means (protective belts), absence of protective barriers along the perimeter of construction panels, absence of fencing of openings in construction panels, admission of persons without appropriate training and certification to cargo slinging. – For details, see: <http://newskaz.ru/incidents/20120613/3315796-print.html>.

⁴⁷ Inspections show that the most common violations of the labour legislation as compared to the corresponding period of 6 months of 2012 include: (1) employing workers without concluding individual employment contracts – 10 cases; (2) noncompliance of the work performed by an employee with his individual employment contract – 157 cases; (3) improper termination of an employment contract – 10 cases; (4) exceeding the limits of working time – 18 cases; (5) violating the timelines for provision of vacations – 43 cases; (6) salary delays – 61 cases; (7) improper imposition of responsibility – 7 cases; violation of the terms of collective bargaining agreements – 6 cases; others – 389 cases. – For detail, see, Explanatory note to Report of the State Labour Inspection of Kyzylorda Region for six months of 2012 // <http://www.enbek.gov.kz/node/257472>.

⁴⁸ Please, see, Nursultan Nazarbaev, *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour* // *Kazakhstanskaya Pravda*, 2012, 10 July.

According to Article 298 of the RK Labour Code, employees may decide to call a strike if mediation procedures have failed to resolve the collective labour dispute, as well as in cases when the employer refuses to participate in the mediation procedures or does not fulfil the agreement achieved in the course of resolution of the collective labour dispute. Participation in a strike shall be voluntary. No-one may be compelled to participate or refuse to participate in a strike.

Article 302 of the RK Labour Code stipulates that *organisation of or participation in strikes shall not be deemed to constitute violation of labour discipline by the employee and shall not entail application of the disciplinary measures envisaged by this Code. During a strike, the employee shall retain his job (position), the right to payment of social insurance contributions, and his service record, and shall be guaranteed the other rights deriving from labour relations.*

The ILO Committee specifies that the right to strike is a right the employees and their organisations are entitled to and any restrictions of this right should not be excessive, and lawful exercise of this right should not entail prejudiced sanctions. Restrictions of strikes in Kazakhstan are excessive and the very participation in strikes most frequently entails various sanctions. Moreover, the legally prescribed long and ambiguous list of sectors where strikes are prohibited constitutes an overt violation of workers' right to strike.⁴⁹

In the opinion of the Human Rights Watch report, **the treatment of strikers in Kazakhstan constitutes not only a violation of its international commitments, but the Republic's domestic legislation as well.**⁵⁰ The fact that the State not only fails to meet its obligations to control the activity of enterprises operating on its territory and their respect of human rights but abuses these rights itself can in no way have a positive impact on development of business in the country and reduces the country's rating in the eyes of the world community.

Facts of violation by employers of their basic obligations are quite common in Kazakhstan. According to Article 23 of the RK Labour Code, the basic obligations of an employer include the obligation to pay the employee wages and other payments envisaged by the regulatory and legal acts of the Republic of Kazakhstan, the employment contract, collective bargaining agreement, and acts of the employer in a timely manner and in full; undertake mandatory social insurance of employees; provide the employee with annual paid vacation, etc.

Some employers continue disregarding their obligations in respect of payment of wages, compelling the employees to file complaints with the state authorities, including the country's President.⁵¹ Even major companies with long-standing operational records neglect their duty to pay regular salaries to their employees but bear no liability whatsoever.⁵² Many companies prefer not to grant vacations to their employees and do not even pay compensation as required by law, explaining it with high work overload and financial crisis.

The employer shall create the conditions for employees undergoing occupational training, retraining or to combine work with study as envisaged by the RK Labour Code, agreements, collective bargaining agreements and employment contracts (Article 140 (3) of the RK Labour Code).

⁴⁹ Please, see, the Human Rights Watch Report: *Striking Oil, Striking Workers: Violations of Labour Rights in Kazakhstan's Oil Sector.*

⁵⁰ See http://www.vb.kg/world/2012/09/11/199098_doklad_human_rayts_votch_osparivaet_oficialnyu_versiu_janaozenskih_sobytyi.html.

⁵¹ For detail, please, see, Salaries delayed by six months to 150 employees of a premium class hotel in Kapchagai // <http://aktausite.ru/index.php?nma=blog&fla=news&cat=1&ids=14&idd=23406>.

⁵² For detail, please, see, Atyraubalik fish processing workers in Atyrau demand their salary // <http://www.zakon.kz/kazakhstan/4517777-v-atyrau-rybopererabotchiki-atyraubalyk.html>.

A survey conducted by Head Hunter in the period from 15 to 18 October 2012 showed that most companies in Kazakhstan, namely 54%, provide training to their personnel.⁵³

In addition to the above mentioned proposals, the Head of State also put forward a proposal to adopt a **law on social standards and social rights guarantees**, specifying minimum key indicators.⁵⁴

Article 159 (1) of the RK Labour Code stipulates that the employer shall pay employees temporary disability allowances, maternity allowances and allowances for women (men) adopting new-borns out of its own funds.

To protect the rights of employees, Article 323 of the RK Labour Code imposes obligations on the employer in the event of an industrial accident.

The employer shall arrange provision of first aid to the victim and, if necessary, his transportation to a healthcare institution; take urgent measures to prevent development of an accident and impact on other persons of the factors responsible for the accident; until the investigation is launched, maintain the status at the site of the accident (the state of the equipment, mechanisms, and tools) as it was at the time it occurred, on the condition that this does not jeopardise the life and health of other persons and interruption of the production process does not lead to an accident, and shall photograph the site of the accident; immediately inform the close relatives of the victim about the industrial accident and send a notification to the state authorities and organisations stipulated in this Code and other regulatory and legal acts; provide for investigation of industrial accidents and record them in accordance with this chapter; provide members of the special investigation commission with access to the site of the industrial accident for the purpose of investigating it; register, record and analyse industrial accidents and occupational diseases.

In other words, **in the event of occurrence of situations capable of impacting human rights employer enterprises must carry out all the necessary actions for mitigating the implications of the impact already made and its proper elimination.**

The Law on Compulsory Insurance of Employees against Occupational Hazards has a special significance among the laws and regulations of the Republic of Kazakhstan acting, so to speak, as guarantors of an employee's social rights.

According to Article 8 (2) of the Law on Compulsory Insurance of Employees against Occupational Hazards, an insurant must conclude a contract of compulsory insurance of employees against occupational hazards with an insurer.

An insurant must conclude an annuity contract in favour of an employee or a person eligible to damage compensation in connection with the death of the employee in cases stipulated by law, within the limits of the insured amount stipulated by the contract of compulsory insurance of employees against occupational hazards (subpara 2 of Article 8 (2) of the Law on Compulsory Insurance of Employees against Occupational Hazards).

Therefore, the employers are obliged to conclude contracts with insurance companies under which the employees in whose favour such contracts are being concluded and who are benefactors under those contracts acquire only the right to receive the amount of coverage. This obligation of the employer constitutes a guarantee of the employees' rights to compensation for damage in the event of occupational accident.

⁵³ For detail, please, see, Most companies in Kazakhstan train their personnel // <http://www.zakon.kz/kazakhstan/4520114-bolshinstvo-kazakhstanskikh-kompanijj.html>.

⁵⁴ Please, see, Nursultan Nazarbaev, *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour* // *Kazakhstanskaya Pravda*, 2012, 10 July.

Provisions of the Law on Social Insurance perform a similar function, prescribing the employers' obligation to observe human rights to social security. Organisations shall timely remit the full amount of social security contributions, and the State shall guarantee citizens' right to receive social security compensations in the event of onset of insured incidents under mandatory social insurance policies.

Therefore, it should be mentioned that **human rights abuses in the labour sphere are widespread and regular**. The reason behind this state of affairs is not only improper legal enforcement, but also scores of gaps in the legal legislation, especially in terms of liability enforcement.

Nursultan Nazarbaev pointed out in his article *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour* that **the mechanisms of regulation, prevention and settlement of labour disputed are insufficiently developed** in Kazakhstan today. It is necessary to minimise risks in this area. The Head of State named among the main causes of the labour conflicts **employee's isolation from company management matters**, as well as **the weakness of the mechanisms of peaceful settlements of disputes and conflicts**. The RK President suggested borrowing the experience of a number of developed countries which have production councils and **stepping up work on creation and use of mediation entities and procedures**, inter alia, in the sphere of labour relations.⁵⁵

It should be noted in conclusion that, proceeding from provisions of Article 9 of the RK Labour Code, *all organisations, including foreign organisations located and operating on the RK territory shall fulfil their obligations to respect human rights*, in keeping with the legislation of Kazakhstan. Employees of foreign organisations located on the RK territory shall enjoy the same rights as Kazakh employees. The RK Labour Code shall be valid in the entire territory of the Republic. Analysis of provisions of the RK Labour Code shows that *enterprises must respect human rights under any circumstances*.

2.4. Provisions of the RK Environmental Legislation Obliging Business Enterprises to Respect Human Rights

In accordance with Article 31 of the RK Constitution, the state shall set an objective to protect the environment favourable for the life and health of the person.

According to subpara 1 of Article 13 (1) of the RK Environmental Code, individuals shall have the **right to environment which is favourable for their life and health**. Enterprises, in turn, shall provide them with this right and exercise environmental protection measures.⁵⁶ Emission standards shall be the basis for the issuance of environmental permits and adoption of decisions concerning the need to implement technological measures for lowering negative impact of business and other activity on the environment and the population's health (Article 25 (3) of the RK Environmental Code). In other words, enterprises seeking to obtain permits shall, first and foremost, monitor the abidance by the existing environmental standards and, secondly, observe them.

⁵⁵ Please, see, Nursultan Nazarbaev, *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour // Kazakhstanskaya Pravda*, 2012, 10 July.

⁵⁶ The Republic of Kazakhstan is experiencing mass-scale violations of the rights to a natural environment favourable to human life and health. The population is compelled to live in sanitary protection zones of polluting enterprises. In some cities (Rider, Ust-Kamenogorsk, Almaty, etc.), atmospheric air pollution is way above permissible concentration levels. The state authorities are taking practically no measures to remedy the situation. The principles of the environmental legislation are being violated, e.g. the presumption of environmental hazard of the planned business and other activity (Article 5 (15) of the RK Environmental Code). – For detail, please, see S.F. Katorcha, S.G. Kuratov, N.I. Medvedeva, A.A. Shytov, Violation of the human right to a favourable environment in the Republic of Kazakhstan // <http://www.greensalvation.org/index.php?page=prava-tezisy2009>.

Nature users which generate emissions must obtain an emission permit from the environment protection authority, except pollution emissions generated by moving sources (Article 69 (1) of the RK Environmental Code). Nature users must comply with the conditions set out in the emission permit and shall be liable for the failure to so do in accordance with laws of the Republic of Kazakhstan (Article 69 (3) of the RK Environmental Code).⁵⁷

Environmental permits are different depending on the nature of enterprises' activity (Chapter 8 of the RK Environmental Code).

Not all provisions of the Kazakhstan environmental legislation comply with international principles. Provisions and their implementation for guarantee to the population the preservation and sustainable use of nature and its resources.

Fair distribution of benefits would significantly improve the population's wellbeing and increase the status of the State. Constant violations of the international environmental conventions and the national legislation are becoming common practice. As a result of activities of the state authorities and private entrepreneurs citizens are increasingly being subjected to various forms of environmental discrimination.

Public participation in addressing environmental problems boils down to formal hearings, otherwise the public is fully barred from the decision-making process. This is largely explained by the fact that participation in environmental decision-making is envisaged only if the planned activity of enterprises may have a direct considerable impact on the environment and the population's health. This state of affairs contradicts international principles.

Environmental rights of the population of Kazakhstan to health, safe food, clean air and water, and others, are being gross violated. The country is pursuing an economic policy aimed at unregulated exploitation of natural resources, which is, in fact, one of the reasons behind all violations. Instead of abiding by human rights, taking measures for liquidating negative environmental impact, transnational corporations continue making their negative impact on the environmental situation in the country.

The crucial reason for such state of affairs is the predominant development of the extractive economic sector, which is the main source of state budget proceeds.

One of the core human rights to be respected by enterprises is the access of any stakeholder to environmental information.

Article 31 (2) of the RK Constitution prescribes that officials shall be held accountable for the concealment of facts and circumstances endangering the life and health of the people in accordance with law.

According to Article 163 of the RK Environmental Code, environmental information shall be accessible to the public, except as otherwise may be prescribed by laws of the Republic of Kazakhstan. Access to some information and data constituting publicly-accessible environmental information shall be provided upon request of individuals and legal entities, by placing it in mass media, special publications and on the Internet as well as using other accessible information and communication resources.

Access to governmental information resources (information databases) of environmental information shall be provided by compiling and maintaining registers and inventories of

⁵⁷ This requirement is often being neglected. Enterprises evade due control by the state authorities, obtain project implementation permits with gross violations of the existing environmental standards. – See, e.g., Ten T. Dust in the eyes – mercury and hard cash // Caravan, 21 August 2009.

environmental information (Article 163 (3) of the RK Environmental Code). Access to documents and information resources containing limited access information and data shall be provided in the manner prescribed by the legislation of the Republic of Kazakhstan (Article 163 (4) of the RK Environmental Code).

Therefore, the RK Environmental Code prescribes the requirement of public accessibility of environmental information, except individual cases. In addition to providing access to information, making this information available to stakeholders is also envisaged.

It should be mentioned that the communication resources stipulated by the RK Environmental Code do not guarantee automatic receipt of information by citizens. Provisions should be introduced to the RK Environmental Code regarding the grounds, forms, timelines and procedures for providing information and the system of reporting. The lack of a strict algorithm of actions of entities and ambiguity of norms make it impossible for all stakeholders to exercise their rights.

Individuals and legal entities shall have the right for free access to publicly-accessible governmental environmental information resources (Article 164 (1) of the RK Environmental Code).

According to Article 163 (2, 3) of the RK Environmental Code, government agencies and officials performing governmental functions or individuals and *legal entities rendering environment-related services to the population on the basis of a public agreement shall provide open access to environmental information*, including access upon requests of individuals and legal entities. Other individuals and legal entities *operating in the Republic of Kazakhstan shall provide, upon request, environmental information* related to impact on the citizens' life and health.

These provisions prescribe the duty to provide information to external entities. However, the law does not envisage the obligation to inform the internal staff of enterprises' workers. It is necessary to prevent the violation of the rights of enterprises' workers and ensure their awareness of abidance by environmental standards in the process of discharging of their functions and the risks involved with failure to comply with such standards. To implement this provision, it is necessary to legally prescribe these obligations of enterprises.

The terms and procedures for providing environmental information by government agencies shall be determined by the legislation of the Republic of Kazakhstan on administrative procedures and procedures for review of citizens' applications (Article 165 (1) of the RK Environmental Code).

Access to environmental information related to the environmental impact assessment procedure and decision-making procedure regarding the planned business and other activity shall be provided in the manner prescribed by the authorised environmental protection body.⁵⁸ The terms and procedures of information provision are determined, as already mentioned, *only for cases of initiative conduct of citizens*, manifested in the filling of a request for access to the necessary information. Dissemination of such information, making it available to stakeholders in the prescribed manner does not constitute an obligation of the state authorities.

A fee may be collected for the provision of environmental information and the amount of such a fee shall not exceed the amount of actual expenses incurred for making copies, search and preparation of information (Article 166 (1) of the RK Environmental Code). In other words, citizen's right to environmental information granted by the legislation is exercised on a paid basis, i.e. reasonable compensation is envisaged for an entity's expenses made in connection with the provision of such information.

⁵⁸ For detail, please see, Order of the RK Minister of the Environment of 25 July 2007 No. 238-n on Approval of the Rules of Access to Environmental Information related to the environmental impact assessment procedure and decision-making procedure regarding the planned business and other activity.

Article 167 of the RK Environmental Code envisages grounds for refusal to provide environmental information to individuals and legal entities (the request is not specific and does not allow determining information and data requested by an applicant; requested information is not available; the request refers to limited access information and data in accordance with laws of the Republic of Kazakhstan). Refusal to provide, non-provision, provision of incomplete or inaccurate environmental information, as well as unlawful attribution of publicly-accessible information to limited access information may be appealed with a superior government agency and/or official or court.

In addition to the RK Environmental Code, certain environmental human rights are guaranteed by the Law on Subsoil.

According to Article 14 (1) of the Law on Subsoil, the use of certain areas of subsoil may be restricted or prohibited by decision of the RK Government for purposes of *environmental protection*. The use of subsoil on territories of populated settlements, suburban areas, industrial transport and communication facilities may be fully or partially restricted or prohibited by decision of the RK Government if such use can pose a *hazard to human life and health and inflict damage on economic facilities or the environment*.

Therefore, this provision protects citizens' the rights to life, property and a safe environment, and imposes a general ban on infliction of damage on the environment and human life and health.

Article 76 of the Law on Subsoil envisages the following obligations of a subsoil user: to ensure *the safety of human life and health and the environment* (para 2); to abide by provisions of project specifications and engineering plans approved in the manner prescribed by the RK legislation for conducting subsoil exploitation operations ensuring *safety of life and health of the population and personnel*, sustainable and comprehensive use of the subsoil and *environmental protection* (para 7); *not to prevent other persons' free movement within the territory specified by contract*, use of common facilities and communications, unless this involves special safety conditions and such activity impedes subsoil exploitation operations (para 8).

The above obligations of subsoil users are directly connected with the protection of socioeconomic human rights (the right to safe labour, citizens' environmental rights, the right to free movement, the right to use communications and common amenities).

The right to safe labour is also guaranteed by safety regulations for conducting petroleum operations and oil transportation (Article 91 of the Law on Subsoil).⁵⁹ The safety of petroleum operations and oil transportation is ensured by *compliance with the existing regulations*, fulfilling a complex of organisational and technological measures aimed at the *protection of human life and health and the environment*, creating conditions for safe construction and exploitation of surface level and underground structures and equipment, and prevention of possible accidents.

⁵⁹ Accidents at oil transportation systems result in depletion of the biosphere. Oil is transported by sea in special tankers or by pipelines. Over nine years, 168 tankers were involved in accidents causing oil spills that inflicted serious damage on the environment. It is necessary to build on the international experience and adopt laws capable of ensuring safe transportation. E.g. after the accident of the Exxon Valdez tanker near the Alaska shores, the United States passed a federal act stipulating that large tankers entering the country's territorial waters must have a double hull. A decision to put all single-hull tankers out of operation was passed by the International Maritime Organisation after the accident of the tanker "Erica" near the French shores causing a spill of fuel oil. In order to avoid the possible implications subsoil users should take into account all factors that could lead to accidents, disruptions of the environmental balance, violation of the human right to a favourable environment. The environmental legislation of many countries takes into consideration all nuances of the ecosystem regulating in detail the possible disruptions of its natural development, for example, the migration routes of animals that might pass across pipelines. – For detail, please, see, *Damage to the Nature during Oil and Gas Production and Transportation* // <http://www.godmol.ru/ekologija/170-uron-prirode.html>; *Ecology of Oil Transportation* // <http://www.mirnefti.ru/index.php?id=108>.

Equipment and other property used by subsoil users in the process of conducting petroleum operations and oil transportation *shall meet the safety standards* prescribed by technical regulations.

The oil handling regime, construction and operation conditions of oil storage and transportation means *shall meet fire safety regulations* prescribed by technical regulations in respect of petroleum and its life cycle processes.

Article 115 of the Law on Subsoil also guarantees *the right to safe labour*. Subsoil users shall ensure the abidance by legally prescribed rules and standards *of safe operations* and carrying out *measures for prevention and liquidation of accidents, hazards, and occupational diseases*. Subsoil operations shall be prohibited *if they pose a danger to human life and health*.

Subsoil users conducting petroleum operations at sea must be guided by the best practices of protecting the marine environment (2 Article 93 (2) of the Law on Subsoil).⁶⁰

Article 99 (1) of the Law on Subsoil prohibits waste discharges into the sea and waste burial at the sea bottom during petroleum operations at sea. The Republic of Kazakhstan envisages administrative responsibility for such actions.⁶¹

Since oil is a primary product that has to be handled with particular care, the safety regulations are aimed at ensuring the protection of the core human rights. The key factor determining the admissibility of conducting subsoil usage operations is their level of hazard for human life and health.

Therefore, the State as the owner of the subsoil has on the whole regulated the issues of subsoil use along the lines: *the State – subsoil user*, but overlooked the problem of relationships between the *subsoil user and the employee*. Hence, the acuteness of the Kazakhstan-specific aspect of the problem. The Republic **has yet to adequately regulate its environmental problems**; in an attempt to improve the investment climate the State **has not introduced strict responsibility measures for subsoil users violating the environmental standards**. Further development of the legislation is needed for raising the efficiency of subsoil use, *inter alia*, providing an effective mechanism of subsoil use regulation.⁶²

According to the Report, responsibility of business enterprises for observing human rights covers internationally recognised human rights, which include at least the rights prescribed by *the International Bill of Human Rights* and the *Principles* concerning the core rights presented in the *ILO Declaration on Fundamental Principles and Rights at Work*.

⁶⁰ In expert opinion, there is a great danger to the ecology of the Caspian Sea. The only instrument regulating the general environmental protection obligations of the Caspian states today is the Teheran Convention (2003) signed by Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan. According to ecologists, this framework convention is practically inoperable, and the Caspian Sea is getting increasingly polluted. E.g. Mels Eleusizov, Chairman of the Environmental Union of Associations and Enterprises of Kazakhstan, “Tabigat,” who took part in the environmental due diligence of the Kashagan project, is convinced that there will be no protection of the Caspian in the event of an accident and one accident would be enough to destroy all life in the Caspian Sea. - For detail, please, see, Kazakhstan cannot provide protection of the Caspian in the event of accident at Kashagan // http://www.zakon.kz/top_news/4521751-kazakhstan-ne-smozhet-obespechit.html.

⁶¹ Some oil companies commit such violations. E.g. in 2007 a discharge of waste into the Caspian has been prevented in Azerbaijan. – For detail, please, see, Waste discharge into the sea prevented // <http://www.1news.az/society/20070706111015236.html>.

⁶² Please, see, Subsoil and subsoil use: pros and cons. State regulation of subsoil use in Kazakhstan in new circumstances // <http://www.zakon.kz/4468837-gosudarstvennoe-regulirovanie.html>.

The Republic of Kazakhstan has ratified the basic conventions on human rights and prescribed their principles in its national legislation. Business enterprises shall observe human rights guaranteed by the legislation and the ratified conventions, otherwise they would have to bear responsibility envisaged by law.

The duty to respect human rights requires from business enterprises:

(a) to avoid causing or contributing to an unfavourable impact on human rights within the framework of their activities and to remediate any adverse human rights impacts they may have caused or contributed to through their activities;

(b) try to prevent or mitigate the adverse human rights impact directly connected with their activities, produce or services or resulting from their business relationships, even they did not directly contribute to causing such impact.

Organisations shall also prevent or mitigate their adverse impact on the environment directly connected with their activities, produce or services or resulting from their business relationships.

Provisions of the RK Environmental Code **oblige all entities** engaged in business and other activities involving the use of natural resources and impacting the environment **to abide by its provisions regardless of any circumstances**.

Foreign individuals and legal entities and stateless persons shall enjoy the same rights and bear the same responsibilities with respect to subsoil use as individuals and legal entities of the Republic of Kazakhstan, unless stipulated otherwise by laws (Article 3 (3) of the Law on Subsoil).

Therefore, responsibility for violating environmental standards in the Republic of Kazakhstan spreads on all persons operating on the territory of Kazakhstan irrespective of their nationality.

2.5. Matters of Observance and Protection of Citizens' Rights to Information

The human right to information and the corresponding **duty of the state authorities and organisations to provide information** to stakeholders is regulated by many legal acts of the Republic of Kazakhstan. This issue, as already mentioned, is regulated by many spheres (civil, labour, environmental law, etc.) of the legislation.

According to Article 18 (3) of the RK Constitution, state bodies, public associations, officials, and mass media *must provide every citizen with the possibility to obtain access to documents, decisions and other sources of information concerning his rights and interests*.

Everyone shall have *the right to freely receive and disseminate information* by any means not prohibited by law. The list of Items constituting state secrets of the Republic of Kazakhstan shall be determined by the Law of State Secret. (Article 20 (2) of the RK Constitution).

The rights of everyone stipulated by Article 18 (3) of the RK Constitution *to familiarise themselves with documents, decisions and sources of information affecting their rights and freedoms* and the duty of the state authorities and officials to grant this right is implemented in systematic connection to other constitutional norms, specifically, provisions of Articles 20 (2) and 39 (1) of the RK Constitution. The rights envisaged by Articles 18 and 20 of the RK Constitution are not included in the list of rights and freedom which are not subject to restriction in any form (Resolution of the RK Constitutional Council of 5 August 2002 No. 5).

In other words, the RK Constitution guarantees *citizens' right to free access to information* affecting their rights and interests, but to exercise this right, *the duty to provide access to information is*

established only for such entities as state bodies, public associations, officials, and the mass media.

At the same time, interpretation of this provision of the RK Constitution presumes the fact of citizens' request for disclosure of the relevant information rather than ensuring that this information is made available to stakeholders. Distribution of information is a right but is not prescribed as an obligation.

The Law on Informatisation is one of the key legal acts regulating information matters in general.

The Law on Informatisation regulates the spectrum of social relations emerging in the process of creation, use and protection of electronic information resources and information systems. Provisions of this law *promote citizens' and organisations' access to the required information.*

According to Article 34 of this law, owners or *holders of information systems* containing public electronic information resources *must provide information at the requests of individuals and/or legal entities* in the manner and on terms prescribed by the RK legislation. *Unjustified refusal to provide information contained in public electronic information resources may be appealed in court.*

Moreover, unlawful refusal to present documents and materials collected in the prescribed manner, directly affecting human rights and freedoms, and restriction of access to public information entails liability.

According to Article 84 of the Code of Administrative Offences, unlawful refusal to present documents and materials collected in the prescribed manner, *directly affecting human rights and freedoms* of an individual or deliberate provision to an individual of incomplete or false information, as well as illegitimate referral *of public information to information with restricted access*, in the absence of elements of a criminally punishable offence, shall entail the imposition of a fine on officials in the amount from five to ten monthly calculation indices.

Unlawful restriction of the right of access to *information resources* shall entail the imposition of a fine on individuals in the amount from five to ten, on officials, individual entrepreneurs, legal entities representing small or medium business – in the amount from ten to fifty, on legal entities representing major business – in the amount from twenty to one hundred monthly calculation indices (Article 84 (2) of the Code of Administrative Offences).

The concept of “non-provision” of information used in the Code of Administrative Offences implies reaction to initiative actions of stakeholders aimed at the receipt of information. Responsibility for non-fulfilment or inadequate fulfilment can be introduced only after the introduction of legal *obligation to make relevant information available to stakeholders.*

Along with positive examples of legal prescription of the duty of state authorities and companies to provide information (on environmental matters; concerning the quality of products and the product manufacturers, etc.) some regulations are in effect that do not fully comply with the Ruggie Principles.

E.g. Article 22 of the Law on Grain stipulates that grain reception points should publish the annual balance sheet and profit and loss statement in mass media using the form established by the RK legislation within one calendar month after the date of their submission to the tax authorities.

A performance report does not meet the requirements of the principle in question, and does not facilitate full attainment of the set targets. A public profit and loss statement of grain reception points can hardly ensure food security or prevent predatory pricing.

The provision prescribed by Article 5 of the Law on Industrial Safety is quite another matter, as it envisages *the right* of RK state authorities, individuals and legal entities *to receive complete and*

reliable information from the administration of an organisation working with hazardous production objects concerning the state of industrial safety at hazardous production objects. The provision establishes the right of stakeholders to information access, but not obligations of entities working with hazardous production objects to make all information concerning the state of industrial safety to stakeholders. It should also be mentioned that the Law on Industrial Safety does not envisage the duty of enterprises to regulate the system of methods and mechanisms of information transfer to stakeholders.

Article 20 of the Law on Radiation Safety stipulates that citizens, public associations and organisations shall have the right *to receive information on radiation safety* from the authorised state bodies for the use of nuclear energy and mass media in accordance with the Law on the Use of Nuclear Energy.

The Law on the Use of Nuclear Energy prescribes the right to information, but the legislators have failed to set out explicit procedures for its provision. As the issue of radiation safety is directly linked to protection of the environment favourable to human life and health, additions should be introduced to the law to ensure the receipt of information by stakeholders irrespective of their initiative.

The principle of information access is also manifested in the fact that the following information directly affecting human rights shall not be secret: (1) on *public emergencies and catastrophes* threatening *human life and health* and their consequences, as well as natural disasters, their official forecasts and aftermaths; (2) on the state of *the environment, public health, sanitation, demography, education, culture, agriculture, and the crime situation*; (3) on *privileges, compensations and benefits* granted by the state to citizens, officials and organisations; (4) on *facts of human and citizens' rights abuses*; (5) on *facts of violation of the law* by state bodies and organisations and their officials; (6) *on mass repressions for political, social and other motives*, including information stored in archives, except the data envisaged by Article 14 of the Law on State Secret (Article 17 (1) of the Law on State Secret).

Officials taking a decision on the secrecy of the above mentioned information or on its inclusion for these purposes in sources of data constituting state secret shall bear responsibility in accordance with the RK laws. Citizens shall be entitled to appeal against such decisions in court (Article 17 (2) of the Law on State Secret).

The legislators included information on top priority, fundamental area of vital activities in the list of information which shall not be made secret. The RK legislation regulating the receipt of information and based on the "*praemonitus praemunitus*" principle ("*forewarned is forearmed*") does not take into account the fact that open access to information is in itself not a sufficient and reliable mechanism of ensuring awareness of the persons whose rights and freedoms may be adversely impacted.

It has already been mentioned that the legislation introduces the requirement of information access with respect to joint-stock companies and limited liability partnerships. Similar requirements are also set to investment funds.

According to Article 45 of the Law on Investment Funds, information about an investment fund shall meet the standards set by the RK legislation, articles of association, the investment declaration, a joint investment fund stock issue prospectus, and unit trust regulations.

The information on an investment fund shall specify: (1) the name of the investment fund, the name, date and license number of its management company, number and date of the unit trust regulations registration; (2) information on the place (indicating addresses and telephone numbers) where detailed information is available about the investment fund; (3) indication that the value of stocks or shares may be increased or reduced, the past investment results do not guarantee future profitability, the state does not guarantee profitability of investment in the investment fund, and the

warning about the need to familiarise oneself with the articles of association of the investment fund, its issue prospectus and investment declaration and unit trust regulations before purchasing stocks or shares of the investment fund (Article 45 (2) of the Law on Investment Funds).

Information on the investment fund and its management company shall not contain unreliable or misleading data, and other information stipulated by Article 45 (3) of the Law on Investment Funds.

In keeping with the RK legislation, a joint-stock investment fund and its management company *shall bear responsibility for the contents of information* on its activity, indicators characterising the composition and value of net assets of the investment fund, inter alia, for distributing or publishing inaccurate, incomplete or misleading information, as well as its untimely distribution of publication (Article 45 (4) of the Law on Investment Funds).

According to general rules, information on hedge funds shall not be published in mass media, except the management company internet resource, and be distributed in the form of outdoor (visual) advertising (Article 45 (4) of the Law on Investment Funds).

A joint-stock investment fund, its management company and their representatives at the points of acceptance of applications for the purchase and/or repurchase of stocks or shares shall provide potential investors, shareholders and stockholders with the information stipulated by Article 46 (1) of the Law on Investment Funds.

According to Article 46 (3) of the Law on Investment Funds, in the event of adoption of a decision on suspension or resumption of the process of placement and/or repurchase of stocks or shares, the joint-stock investment fund or its management company shall publish (distribute) the notification thereof within five calendar days from the date of adoption of this decision.

Therefore, the investment law provisions meet the principles of policy commitments and respect of human rights. The information provision duty is established, its quality characteristics specified, as well as compliance with the standards and responsibility for adverse human rights impact caused by violation of these standards.

Similar provisions are applied to other entities as well.

E.g., manufacturers and importers of tobacco products shall annually, before 01 February of the year following the reporting year, submit reports to the authorised public health body on results of laboratory tests of the maximum permissible content of nicotine and tar in all brands of tobacco and tobacco products and ingredients of tobacco products manufactured or planned to be manufactured, marketed or otherwise distributed by them during the preceding twelve months on the territory of the Republic of Kazakhstan (Resolution of 22 November 2011 No. 1368).

However, *the Reporting Regulations for tobacco and tobacco products manufacturers and importers* envisage only one form of reporting, which does not ensure full control of human rights protection. Introduction of obligations and the duty to report of their fulfilment shall be comprehensive and the methods of obligation fulfilment and control of their fulfilment shall meet systematic requirements.

The Ruggie Principles concerning observance of human rights to information access and due respect of human rights *are not directly reflected by the RK national legislation. Legal protection covers only the spheres of activity that are significant to the State.*

Nevertheless, there is a legislative framework that will allow to create conditions for implementing the aforementioned obligations by gradually developing and improving the target areas.

The Republic of Kazakhstan has developed a Concept of Information Safety until 2016 aimed at *ensuring the interests of society and the State in the information sphere and protection of citizens' constitutional rights*.

In the process of development of the Strategy for the following periods, it is necessary to take into consideration the Ruggie Principles. The human rights activities of the State must be accountable to non-state social institutions. The said principles can be implemented through enterprises' internal policies, which, albeit largely depending on the discretion of the companies themselves, are invariably based on the legal framework ensuring protection of human rights. Any projects and methodologies introduced to companies' activities must be structured in accordance with a comprehensive approach.

2.6. Issues of Compensation for Damage Inflicted by Enterprises

If enterprises establish that they have made an adverse impact on human rights or contributed to such impact they shall compensate for the inflicted damage or cooperate for the purpose of its compensation within the framework envisaged by law.

This principle complies with a number of RK legal provisions.

According to Article 9 (4) of the RK Civil Code, *the person whose right is violated may require the entire restitution of the losses inflicted on him, unless legislative acts or the agreement do not stipulate otherwise. The expenditure shall be understood to mean losses, which are incurred or must be incurred by the person whose right is violated, the loss or the damage to his property (real damage) and also lost profit which this person would have received under the normal conditions of the turnover, should his right have not been violated (lost profits)*.

According to Article 350 (1) of the RK Civil Code a *debtor* who violated an obligation *shall be obliged to compensate the creditor for any losses caused by the violation*. Compensation of losses for obligations which are secured with a forfeit shall be determined by the rules which are stipulated in Article 351 of the RK Civil Code.

The most common way of protection of the rights is compensation for *losses inflicted by the violation*. The material damage inflicted by the violator shall be compensated in monetary form. The application of this measure is directly stipulated by law. Therefore losses may be charged in all cases of infliction of property damage by the violator. Claims for damages shall not be applied only in cases explicitly envisaged by law, where the protection of rights is ensured by other methods.

Compensation for moral damage, i.e. monetary compensation for physical and moral sufferings inflicted on the victim, is also a common method. *Compensation for moral damage shall not prevent compensation for property damage, even if moral and pecuniary damage were inflicted by the same action of the violator*.

It should also be noted that in some cases the possibility of protecting human rights depends on the violator's guilt. The concept of guilt in the RK civil legislation is different from the similar concept applied in criminal law. In civil law, *guilt* means *failure by the violator to take all the measures within its power to eliminate the violation or limit its scope*. Consequently, to prevent guilty actions an enterprise should avoid violations of protected human rights or eliminate them in a timely manner.

Damage compensation is envisaged by the antimonopoly legislation.

E.g., Article 76 of the Law on Competition stipulates that the antimonopoly body shall apply to court, in the manner provided by the legal acts of the Republic of Kazakhstan, for releasing a market entity from the requirement to give up the monopoly income received as a result of

anticompetitive agreements or concerted actions provided that the market entity *voluntarily compensates the damage to the consumers* which was caused by anticompetitive agreements or concerted actions.

In the present case, *voluntarily compensation for damage* in the event of violation by an enterprise of its obligations *constitutes one of the ways to avoid surrendering the monopolistic profit*.

According to Article 7 (1) of the Law on Protection of Consumer Rights, *consumers have the right to compensation* for the full amount of *losses (harm)* inflicted on their life, health and/or property as a result of defects of a product (job, service), and to *compensation for moral damage*.

The seller (manufacturer, executor) must compensate for the full amount of *losses (harm)* inflicted on consumers' life, health and/or property as a result of defects of a product (job, service) (Article 24 of the Law on Protection of Consumer Rights).

Therefore, the obligations of sellers (manufacturers) include compensation for the damage inflicted by the products for which they are responsible and in this way enterprises eliminate and mitigate their negative impact on human rights.

Damage compensation is envisaged by the RK labour legislation.

Article 162 (1) of the RK Labour Code stipulates that the employer shall recompense the employee for wages and other payments due thereto and not received thereby in the event of unlawful transfer to another job, shut-out of the employee from the work place, unilateral amendment of the terms and conditions of the employment contract, suspension from work, or unjustified cancellation of the employment contract.

Employment contracts, collective bargaining agreements and acts of the employer agreed with employees' representatives *may establish additional cases of reimbursement by the employer for damage* caused by unlawful deprivation of the employee of the opportunity to work (Article 162 (2) of the RK Labour Code).

According to Article 163 of the RK Labour Code, An employer causing damage to the property of an employee shall reimburse the latter in full in accordance with the terms and conditions of the employment contracts and the collective bargaining agreement.

In the event of harm being inflicted on the life and (or) health of the employee in connection with fulfilment thereby of his job duties, *the employer shall compensate for the harm* in the volume envisaged by the civil legislation of the Republic of Kazakhstan. Harm shall be reimbursed in full provided the employee receives no insurance indemnity. If insurance indemnity is paid out, the employer shall reimburse the employee the difference between the insurance sum and the actual scale of the harm caused (Article 164 of the RK Labour Code).

Therefore, the employer has to compensate for the damage caused to the employees' rights (owners right, right to labour, right to life, etc.) by the employer's actions.

Practice shows that employers seldom admit their guilt at their own initiative and seldom compensate for damage voluntarily. In most cases the employee has to apply to court to receive compensation.

Provisions of the Law on Compulsory Insurance of Employees against Occupational Hazards have a special significance among in this connection.

Article 10 of the Law on Compulsory Insurance of Employees against Occupational Hazards envisages the right of the beneficiary to receive insurance indemnity in the manner and on terms

prescribed by law and the employee's compulsory insurance contract against occupational hazards.

The receipt of insurance indemnity by the beneficiary constitutes compensation for the damage sustained as a result of an accident.

The damage inflicted on an employee's life and health *includes a tangible expression of the harm* caused by his death or loss of occupational capacity, except the harm connected with the employee's temporary incapacity to work. The amount of damage inflicted on an employee's life and health is measured on the bases of relevant instruments (Article 18 (2) of the Law on Compulsory Insurance of Employees against Occupational Hazards).

The amount of damage in connection with the loss of earning (income) caused by an employee's death or loss of occupational capacity is determined in accordance with provisions of the RK Civil Code (Article 19 (1) of the Law on Compulsory Insurance of Employees against Occupational Hazards).

Therefore, the Law on Compulsory Insurance of Employees against Occupational Hazards ensures compensation for employees' losses inflicted by possible accidents by payment of insurance indemnity. Such guarantees are provided to the employees by imposing liabilities on enterprises to carry compulsory insurance of their employees.

In connection with the recent global environmental catastrophes (explosion of the "Deep-water Horizon" oil platform in the Gulf of Mexico, accident at the Fukushima 1 nuclear power plant in Okuma, etc.), the problem of compensation for damage caused by man-made environmental catastrophes acquires priority importance.

According to Article 322 of the RK Environmental Code, a party who has caused damage to the environment *shall have the right to repair such damage voluntarily or otherwise compensate it*. The person's responsibility with respect to the repair or compensation of damage shall be set out in a letter of guarantee. The compensation may be paid in a monetary form at the violator's own cost, or it may be covered by insurance.

The *monetary forms* of compensation for damage include *cash for restoring the environment to its condition* prior to the moment of damage infliction, implementation of measures for reproduction of natural resources, compensating the claimant for other losses, including lost profit.

Upon consent of the parties and on a court decision, *damage may be compensated in kind* by obliging the respondent *to rehabilitate the environment*. Forms of damage compensation in kind include environmental rehabilitation measures to restore the conditions that existed prior to the moment of damage infliction, provision of *an equivalent natural resource* in place of the destroyed or damaged one. Damage compensation in kind shall be implemented by conclusion or an agreement and/or contract regulating the procedures, terms, timelines and amounts of compensation for the inflicted damage. The recovered amounts of compensated damage shall be remitted to the state budget, and in cases stipulated by the RK legislation – to the victim.

Compensation for damage shall not exempt the person guilty of inflicting damage on the environment of administrative and criminal responsibility.

Pollution of soil, atmospheric air, water, and vegetation causes damage to citizens and their associations. This has an adverse effect on their economic activity. Small private owners experience the strongest impact in this respect. This violates the principle of equality of owners' rights.⁶³ The principle "the polluter pays," in its turn, is actually inoperable. As a result, major extractive and manufacturing enterprises inflict damage on the population's wellbeing and shift

⁶³ G. Vologodskaya, As wise as it gets // *Caravan*, 23 November 2009.

their own environmental outlays to the shoulders of consumers.⁶⁴ The local population, which is not involved in decision-making or negotiations, is forced to move to other regions as a consequence of environmental pollution. Moreover, citizens are not provided with any compensation for losses, monetary compensation, housing or land plots. The principle of compulsory compensation for damage caused by environmental offences is not being applied in practice.

3. Conclusions

The norms of the RK Constitution outline the general criteria of enterprises good practices of compliance with socioeconomic human and citizens' rights.

The RK civil law obliges business enterprises to observe human rights. However, certain provisions of the civil legislation do not facilitate the exercise of human rights. In particular, consumer rights issues protection are not regulated in full measure, a lot of gaps exist in antimonopoly legislation, there are no guarantees of fair competition of private business entities. The problems arising in the sphere of civil law are also connected with enforcement violations, e.g. in cases of imposing responsibility on persons guilty of inflicting damage.

The sphere of labour relations is the most problematic area from the point of view of respect and protection of human rights. Human rights violations in the labour sphere are widespread and regular. This state of affairs is not only a result of improper application of provisions of the labour legislation but also numerous gaps in the labour law.

The mechanisms of prevention of labour disputes and conflicts are insufficiently developed in Kazakhstan. Effective procedures for out-of-court settlement of disputes and conflicts do not exist. Employees and their associations are deprived of opportunities to participate in the management of their enterprises.

Environmental protection relations are poorly regulated in Kazakhstan. The striving towards a better investment climate often results in the lowering of the environmental standards. Strict measures of liability of subsoil users for environmental offences are not envisaged.

The Ruggie Principles concerning the observance of human rights to information and respect of human rights are not explicitly prescribed by the national legislation of Kazakhstan. Nevertheless, a legal framework is in place which, in the event of introduction of relevant amendments and additions, will allow to create conditions for implementing the standards set by the Ruggie Principles. These amendments can build upon the RK Concept of Information Security until 2016, aimed at ensuring the interests of society and the state in the information sphere, as well as protection of constitutional rights of citizens.

IV. COMPLIANCE OF LEGAL PROVISIONS OF THE REPUBLIC OF KAZAKHSTAN WITH THE RUGGIE PRINCIPLES OBLIGING TO PROVIDE ACCESS TO LEGAL PROTECTION

This part of the Legal Opinion contains a general overview of the RK legal provisions for compliance with the socioeconomic principles obliging to provide access to legal protection.

1. General

The need to protect human rights constitutes the main purpose of law. Respect of human rights by the State and organisations is directly connected with citizens' opportunities for protecting their

⁶⁴ It seems appropriate in this connection that Article 127 (1) of the Law on Subsoil envisages the obligation of the guilty party to compensate for the damage (unless it proves that the damage was a result of insuperable force or the victim's ill intent) caused by a violation of the RK Law on Subsoil.

rights with the help of dispute settlement institutions. Issues of citizens' access to legal protection were partially covered by the previous parts of this Legal Opinion.

The specifics of the judicial view of the essence of law are rooted precisely in the fact of legal protection. *Legal (organised) protection is the main distinctive characteristic of law, conditioning and generating its other characteristic properties by its very existence.*⁶⁵

The Report specifies that as part of their duty to protect, States are required to take appropriate steps to investigate, punish and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction – in short, to provide access to remedy. Without such steps, the duty could be rendered weak or even meaningless. Remedy may be provided through judicial, administrative, legislative or other appropriate means (hereinafter – “**access to legal protection**”).

This basic principle specifies *the principle of ensuring state duty to protect against human rights abuses by third parties, including business*, described in part II of this Legal Opinion.

Analysis of the RK legislation has revealed three types of legal protection institutions ensuring the protection of rights of individuals and legal entities.

First, it is the state judicial mechanisms the status and activities of which are regulated by the RK Constitution, the Constitutional Law on the Legal System, The Civil Procedure Code, the Code of Criminal Procedure, the Code of Administrative Offences, the Criminal Code of the Republic of Kazakhstan, the Law on Procedures for Consideration of Appeals, etc. However, even effective legal systems supported by resources cannot shoulder the entire burden of consideration of all supposed violations.

Consequently, along with the state judicial mechanisms, it is necessary to take note of **state non-judicial mechanisms of considering complaints**. In addition to administrative consideration of complaints, the Republic of Kazakhstan has such a pre-court dispute consideration procedure as mediation.

The Law on Mediation has introduced a new form of alternative dispute settlement procedure. According to its provisions, *mediation is a procedure for settling disputes (conflicts) between the parties with support of a mediator (mediators) for purposes of attaining a mutually acceptable solution implemented on voluntary consent of the parties, and a mediator is an independent individual involved by the parties for mediation purposes on professional or nonprofessional basis.*

A mediator shall perform mediation neutrally, impartially, inform the parties of all existing or potential conflicts of interest in the case in question he is aware of, and carry out the mediation procedure only if he has the necessary expertise. If a mediator performing mediation comes to the conclusion that his personal competence is insufficient for carrying on the mediation procedure, he shall discuss this matter with the parties as soon as possible and take the necessary measures to terminate the mediation. The mediator shall work on ensuring adequate quality of the process requiring diligence and abidance by all rules of procedure.

The provisions of the Law on Mediation are aimed at reducing the level of conflict and tension of the disputes at the same time protecting citizens' legal rights and interests in the social sphere. This is also a social factor allowing to mitigate the socio-psychological climate in the country, as social insecurity and lack of people's confidence in the justice system is one of the recognised common determinants of deviation in society, for legal wrangle can lead people to desperation. The introduction of mediation will give people hope for a peaceful settlement of the conflict.

⁶⁵ S.A. Muromtsev, Determination and main division of rights (St. Petersburg, 2004; original publication. 1879), p.118.

The institution of mediation can significantly alleviate the legal system, since the mediation procedure was conceived as a pre-court instance. Unlike a legal decision that satisfies only one party, *the mediation procedure is intended to satisfy all stakeholders who, having reconciled, generally do not go to court for further consideration of the dispute.*

Mediation in Kazakhstan shall be applied only for the settlement of disputes arising in the *civil legal relations*, inter alia, in connection with business and other activities, conflicts related to *labour and family relations*, other private relationships involving individuals and legal entities, and in the sphere of *criminal law in cases of minor and medium offences*.

Third, it is the non-state dispute consideration mechanisms. Non-state dispute consideration mechanisms include: (a) the mechanisms set up by business organisations on their own initiative; (b) international and regional human rights mechanisms.

The third variety of dispute consideration mechanisms practically does not function in Kazakhstan, the management is not eager to create dispute settlement institutions inside their enterprises.⁶⁶ The most effective international mechanisms for the settlement of disputes in the Republic of Kazakhstan include only international investment centres for the settlement of disputes envisaged by subsoil usage contracts.

V. SUMMARY

The provisions of the RK laws and regulations governing relations in the sphere of human rights observance and protection on the whole cope with their intended functions.

The constitutional norms and principles of different sectors of the law guarantee citizens' rights and freedoms. On the whole, substantive and regulatory provisions meet international commitments of the Republic of Kazakhstan in the sphere of human rights. They reflect the core Ruggie Principles.

Such branches of the legislation as constitutional, civil, labour, and environmental law set the general standards of observance and protection of human rights by the State, and envisage criteria of anticipated conduct of business enterprises.

⁶⁶ At the end of May 2012, deputies of the Majilis of the RK Parliament suggested setting up a commission for the settlement of labour disputes. Deputy Sagiyatulla Sarsenov pointed out that "the existing labour disputes have demonstrated the need to examine this problem more profoundly. In addition, the conflict at some enterprises is taking a concealed, latent form. The reason behind this situation is the absence in our country of systematic research of the settlement of social labour conflicts. Therefore, it is necessary, first and foremost, to conduct comprehensive surveys of civil labour relations covering the following priority areas: recruitment and employment system, motivational package, training system, career opportunities, labour dispute settlement system, collective bargaining. There is a need for centres that will consider employees' appeals and complaints, take those matters under control in a timely manner, review and analyse the merits of the case. Despite the fact that Kazakhstan's labour legislation provides for a possibility of concluding collective bargaining agreements, none of the employers actually concludes collective agreements with workers. This is why it is necessary to set up a central coordinating body guiding and controlling relationships of both rank-and-file employees, trade unions and small and big enterprises. The labour legislation requires reform. It is necessary to set up an institution for settlement of labour conflicts and disputes; it is high time to pay close attention to this matter." For detail, please see <http://bnews.kz/ru/news/post/80985/>. RK Secretary of State Muhtar Kup-Muhammed considers the work of representatives of the Ministry of Labour and Social Security in regions aimed at preventing social conflicts and settling labour disputes to be inefficient. In June 2012, more than 23 labour conflicts and disputes were registered in the Republic. The number of labour-related conflicts and disputes is growing. There is no feedback between employers and employees. - For detail, please see <http://www.newskaz.ru/society/20120723/3558779.html>.

However, the regulatory provisions of procedural and protective nature do not comply with the aforementioned norms and do not allow implementing its full regulatory potential. The human rights observance and protection purposes, goals and principles prescribed by the RK laws and regulations are not embedded in the entire legislative system, often have a purely declarative nature and are not translated into practice.

This problem is particularly acute in labour relations, in exercising citizens' rights to a favourable environment, and in citizens' access to information resources.

The mechanisms of regulation, prevention and non-admission of labour disputes and conflicts are insufficiently developed in Kazakhstan. There are no effective mechanisms for out-of-court settlement of disputes and conflicts. Workers and their associations lack opportunities to participate in the management of business organisations; the trade union movement is poorly developed.

The environmental norms in the Republic of Kazakhstan do not guarantee the exercise and protection of environmental rights and lawful interests of citizens against abuse. The problem of universal and regular violation of environmental standards consists in the absence of adequate protective norms and effective mechanisms of control.

The Ruggie Principles concerning observance of human rights, information access and adequate protection of human rights are not directly prescribed by the RK national legislation.

VI. GENERAL RECOMMENDATIONS FOR THE INTRODUCTION OF AMENDMENTS AND ADDITIONS TO THE LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN

1. Many provisions of the RK Constitution *obliging* the State and third parties, including business enterprises, to respect and protect human rights are not prescribed (not specified) by relevant provisions of lower regulations and laws. Concrete legal mechanisms of enforcement of the binding norms and/or responsibility for violations do not exist.

In other words, strict legal consistency is not always in place: from general Constitutional provisions to their specification by lower legal acts and to effective measures of protecting human rights against abuse.

2. The situation is identical at the lower level of the legislation. The formulated principles do not always have a logical follow-up and implementation in the following legal provisions within the system of laws and regulations.

3. Respect of human rights by business enterprises is possible only with relevant guarantees of human rights protection by the State. Therefore, it is necessary to introduce a number of amendments and additions to legal acts regulating the activity of state authorities aimed at the observance and protection of human rights.

Specifically, Law of the Republic of Kazakhstan of 27 November 2000 No. 107-II on Administrative Provision needs to be revised.

This law does not meet present-day realities. For example, the data provided by the RK Prosecutor General's Office Department for Supervision of Enforcement of the Laws on Consideration of Appeals and Paperwork show that 41% of citizen's appeal deal with issues of lawfulness of criminal prosecution authorities' acts and actions, 29% – acts and actions of state bodies and institutions, 22% of appeals are connected with the lawfulness of legal acts and their enforcement. Moreover, during five years the number of appeals filed with the prosecution bodies has increased

by nearly 25%.⁶⁷ The need to elaborate and adopt a Code of Administrative Procedure is ripe in Kazakhstan.

4. For the earliest possible levelling of unequal competition conditions and edges in various market sectors, the State should amend some legal acts.

For example, as the oil and gas complex in Kazakhstan is the driving force of its entire national economy and promotes the development of other economic sectors, it would be fair to all subsoil users to introduce a uniform taxation mechanism. In particular, all subsoil users stipulated by Article 308-1 of the RK Tax Code operating on the basis of a contract should without exception be transferred to a common taxation regime.

5. To restore the balance of rights and obligations of employees and employers, many amendments and additions must be introduced to the labour legislation.

According to the prominent American researcher Noam Chomsky, a comprehensive system including the entertainment industry, corporate media, the education system, political institutions, and everything else, is a whole industry of social relations that has for a long time, starting from World War II, been consciously and with fantastic intensity doing everything possible to fulfil a number of tasks. One of them was to demonise trade unions⁶⁸ Moreover, about 80% of the population believe that workers do not have sufficient influence on what is going on, and trade unions do not always adequately represent the interests of workers. So there is a grain of truth in it. However, this is not their true purpose. The matter is that the workers obtain the floor through democratic trade unions. But this is precisely what has been removed from people's minds.⁶⁹

The situation in Kazakhstan is similar. On the one hand, numerous social and political institutions have offset the influence of trade unions in society, on the other – it has actually been put out of people's minds that workers obtain the floor through their democratic trade unions.

Therefore it seems not accidental that the Head of State noted that democratic trade union institutions in Kazakhstan are not always capable of performing the role of an efficient tool for prevention and settlement of labour disputes. The trade union movement should be of the highest standards to enable working people to work with dignity. Trade unions are among the main partners of the State in matters of improving labour relations. However, the current format of activity of the largest trade union centre – Federation of Trade Unions of Kazakhstan – does not conform to the needs of the modern times, as it is based on the "soviet-style" sector-specific principle.⁷⁰

One of the priorities in this connection is the adoption of a new law on trade unions. The current Law of the Republic of Kazakhstan of 9 April 1993 No. 2107-XII on Trade Unions has long ago become obsolete.

6. In reality, citizens often encounter discrimination in the labour sphere (during employment, promotion, gender-based discrimination, etc.).

According to statistics, the share of unemployed women is 1.5 times higher than the share of unemployed men.⁷¹

⁶⁷ The Prosecutor General's Office told what Kazakhstan citizens were complaining about // <http://news.mail.ru/inworld/kazakhstan/society/11113467/?frommail=1>.

⁶⁸ Noam Chomsky N. *Class Warfare: Interviews with David Barsamian / M.: Praxis, 2003. p. 223.*

⁶⁹ *Ibid.* p. 261.

⁷⁰ Please, see, Nursultan Nazarbaev, *Social Modernisation of Labour: Twenty Steps towards a Society of Free Labour // Kazakhstanskaya Pravda, 2012, 10 July.*

⁷¹ <http://www.zakon.kz/4483126-uroven-bezraborticy-v-kazakhstane.html>.

The Law of the Republic of Kazakhstan of 8 December 2009 No. 223-IV on State Guarantees of Equal Rights and Equal Opportunities of Men and Women is a mere declaration. The mechanism of implementation of this law was not developed during its adoption.

One of the possible solutions of this matter could be the introduction of the institution of Women's Rights Commissioner.

7. The situation is similar in the sphere of labour migration.

RK Deputy Foreign Minister Kairat Tynybekov said that during two years, over 2 million foreigners who arrived in the country were registered, almost one million of whom are citizens of the Kyrgyz Republic, Uzbekistan, and Tajikistan. Less than 1% of them have indicated labour activity as the purpose of their arrival, whereas 96% indicated private purposes of arrival.⁷²

In this connection, the rights of labour migrants are being often violated in Kazakhstan, which is largely caused by various administrative difficulties (during the issue of work permits, employment, etc.).

Laws of the Republic of Kazakhstan of 28 June 2011 No. 445-IV and of 19 December 2007 No. 12-IV have ratified the Agreement on Cooperation in Countering Illegal Labour Migration from Third Countries and the Protocol on the introduction of amendments and additions to the Agreement on Cooperation in the Sphere of Labour Migration and Social Protection of Working Migrants of April 1994.

The Republic of Kazakhstan should adopt as soon as possible the Law on introduction of amendments and additions to some legal acts of the Republic of Kazakhstan on problems of labour migration.

8. According to the monitoring conducted by Kazakhstan' Children's Fund, cases of involving children in hard physical labour are quite common in Kazakhstan. One of the main reasons for involving children in labour is the difficult material situation of their parents who are in Kazakhstan illegally.⁷³

Article 16-1 of the Law of the Republic of Kazakhstan of 8 August 2002 No. 345-II on the Rights of a Child in the Republic of Kazakhstan envisages *the right of a child to protection against economic exploitation*. However, Kazakhstan has practically no mechanisms of protection of children's rights.

The Committee for Protection of Children's Rights set up by Governmental Resolution of the Republic of Kazakhstan No. 36 of 13 January 2006 under the Ministry of Education and Science of the Republic of Kazakhstan and its structural entities are incapable of ensuring genuine protection of children's rights.

In this connection, it seems expedient to institute the position of Children's Ombudsman in Kazakhstan.

9. The general situation requires a systematic revision of the RK labour legislation. The State should, first and foremost, ensure the protection of the rights of employees. The practice of relationships between the employers and employees, especially in the sphere of subsoil usage, has shown that the increasing discrimination against employees who are Kazakhstan's nationals must be terminated. In addition to introducing amendments and additions to effective labour legislation, it is necessary to institute the position of Ombudsman for Labour Issues.

⁷² <http://www.rus.24.kz/novosti/politika/item/v-mazhilise-rk>.

⁷³ <http://www.trend.az/regions/casia/kazakhstan/1795505.html>.

In connection with discrimination on the labour market, employers should be obliged to provide official information on wages.

10. The practice of bank officials is quite common, despite provisions of Article 67 of the RK Labour Code, of attempting to receive from employers the personal details of their employees in connection with the latter's bank debt cancellation.

To ensure protection of human and citizens' rights during the processing of their personal details, taking into account the OECD recommendations concerning the inviolability of private life and international personal data exchanges (23 September 1980), the Law on Personal Information should be adopted.

11. Presidential Decree of the Republic of Kazakhstan of 29 November 2004 No. 1474 on Further Improvement of the Constitutional Human and Citizens' Rights and Freedoms Protection System has excluded a number of effective provisions from the Statute of the Human Rights Commissioner. It seems expedient to return the legal faculties to the Human Rights Commissioner.

12. The principle of adequate protection of the human right to a favourable environment should be introduced to the RK legislation. This principle shall be supported with efficient implementation mechanisms.

Within the context of this principle, subsoil users shall be obliged to elaborate a programme of protection of citizens' rights to a favourable environment. Control of the programme implementation could be assigned to the RK Government. The Head of State should stimulate companies, especially subsoil users, to apply green technologies.

E.g., Europe has been successfully cashing on clean technologies in recent years. The sector of green technologies and services in the EC provided jobs to 3 million people. The sector is steadily growing, building up competitiveness. For example, the London authorities are planning to transfer all taxis to clean fuel with zero discharge as early as in 2020.

To improve the environmental situation, amendments should be introduced to chapter 11 of the RK Criminal Code and chapter 19 of the Code of Administrative Offences. Sanctions must be tightened for environmental violations.

The Concept of Environmental Safety of the Republic of Kazakhstan for 2004–2015 lost legal force in accordance with RK Presidential Decree of 13 April 2011 No. 47 on Invalidation of Some RK Presidential Decrees.

A new policy document should be elaborated aimed at an environmentally sustainable development of society and ensuring the reduction of environmental impact.

The aforementioned proposals will promote the protection of human rights against abuses by business enterprises.

February, 2013