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# ACTUAL ISSUES OF OWNERSHIP OF ANIMALS

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According to Article 1 of the Law of the Republic of Kazakhstan dated July 9, 2004 No. 593-II "On the Protection, Reproduction and Use of the Animal World" the concept of the animal world is enshrined, which is a collection of animals permanently or temporarily living in the Republic of Kazakhstan, as well as relating to the natural resources of the continental shelf and exclusive economic zone of the Republic of Kazakhstan [1].

So, the main determining characteristic of the objects of the animal world are such elements as:

1. Set of living organisms - all types of wild animals;
2. Wild animals in a state of natural freedom on land, in water, atmosphere and soil.

Art. 4 of the Law of the Republic of Kazakhstan "On the protection, reproduction and use of the animal world" establishes that the animal world within the Republic of Kazakhstan is in state ownership, while the objects of the animal world, withdrawn from the habitat, as well as divorced and kept in captivity and (or) semi-free conditions, are the property of individuals and legal entities that have mined, bred and maintained them.

Meanwhile, Civil Code of the Republic of Kazakhstan established Article 124 about animals – "The general rules on things apply to animals, since the law does not establish otherwise" with the link to Law "On the Protection, Reproduction and Use of the Animal World" [2]. But the law itself does not include the definition "animal", which Civil Code may refer to.

In this case, we find very curious the provisions of Civil Codes of Germany and Czech Republic. Section 90a of German Civil Code (Bürgerliches Gesetzbuch) contains following: "Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided" [3]. More extended than in Kazakhstani legislation, in addition it declares the special status to animals, distinguishes them from things.

In the new Civil Code of Czech Republic, "a living animal has a special significance and value as a living creature endowed with senses. A living animal is not a thing, and the provisions on things apply, by analogy, to a living animal only to the extent in which they are not contrary to its nature" [4]. So, we can unequivocally state that animal is a living creature, according to Civil Code. Basing on this, such definition may resolve some problems and gaps in Kazakhstani legislation.

The next important point is the fact that neither legislation nor legal science provides a full and comprehensive explanation of the concept and content of the ownership right to the animal world. Based on the provisions of Article 4 of the above-mentioned Law, a wild animal, recognized as state property, acts as property and possesses the attributes of a thing.

Also, there is practically no mention of the possibility of applying the category of property in relation to wild animals. Most legal scholars acknowledge that objects of the animal world can be in state ownership without trying to cast doubt on this thesis. Researchers mainly consider issues of using the animal world: conditions for using the animal world, the grounds and procedure for issuing licenses for the use of wildlife, issues of fees for using objects of the animal world on the basis of a license, etc. The issues of protection of the animal world are also the subject of study,

wherein often quite merely lists the powers of the state authorities of the Republic of Kazakhstan in this area, as enshrined in the Law “On the Protection, Reproduction and Use of the Animal World”.

The issue of ownership of animals, therefore, is not sufficiently developed and thus difficult, hence the frequent legal conflicts. Such uncertainties, shortcomings, and contradictions necessitate appropriate explanations, which are especially relevant in our society, where the very concept of ownership is much undeveloped, and the state protects private property very weakly [5]. The most important national interests at the present stage are the rational use and protection of the natural resources of the Republic of Kazakhstan with a view to its social development and ensuring the welfare of citizens. All national natural resources (land, its bowels, waters, forests, wildlife, and atmospheric air) need legal protection from inefficient and inappropriate use (albeit in different forms and degrees).

The study of ownership of natural resources and, in particular, the possibility of state ownership of objects of the animal world is of great practical importance. At the present stage, environmental law is strongly influenced by Soviet legal doctrines. In many ways, this is why natural resources are overwhelmingly state property. This state of things does not seem to be entirely correct from the point of view of economic feasibility, since most scientists recognize that private property provides the most efficient use of property. In the case of objects of the animal world, recognition of their state ownership was established without any significant legal justification, which will be discussed below.

In Art. 24 of the Law "On the Protection, Reproduction and Use of the Animal World" reveals an approximate list of uses of the animal world: hunting; fisheries, including the seizure of aquatic invertebrates and marine mammals; the use for economic purposes of animals that are not related to objects of hunting and fishing; the use of animals for scientific, cultural, educational, educational, aesthetic purposes, as well as to prevent epizootics; the use of beneficial properties and animal waste products; the use of animal species for reproductive purposes. Moreover, only citizens and legal entities can act as subjects of such use. From this norm it follows that the state itself as the owner cannot use the objects of the animal world. The state, excluding itself from the number of users of objects of the animal world, exercised its right to establish a legal regime in relation to such objects. Thus, the use of objects of the animal world differs from classical use, which is directly indicated in paragraph 4 of Article 6 of the Law [1]. Citizens and legal entities, as a rule, use domesticated animals on their own, and can transfer to another entity the right to use such animals by agreement. Whereas the conclusion of an agreement by the state with citizens and legal entities for all types of specified use is not provided for by applicable law.

Undoubtedly, the categories of “possession, use and disposal” do not fully reflect the nature of the content of state ownership of wildlife, since it is difficult to imagine the possession of wild animals by the state owner. In the theory of civil law, ownership is defined as the physical possession of something characterized by the possibility of exercising control over this object.

Quite discussing and controversial is the issue of recognition of the animal world as state property. There are two main directions in the opinions of scientists.

The first is that the objects of the animal world, in principle, cannot be the subject of a property right, it is only a legal fiction, which, in the opinion of V. M. Gorshenev, is defined as “a normative prescription enshrined in legal acts and used in legal practice in the form of a specific a method, expressed in the proclamation of an existing fact or circumstance that does not actually take place” [6].

The second is expressed in the rejection of the concept of civil-law institution of ownership of objects of the animal world and its replacement with such categories as: “public domain”, “national wealth”, etc. S. A. Bogolyubov adheres to this position, who believes that “a wild migratory animal cannot act as an object of civil law and of an institution such as property right” [7].

In addition to these opinions, there is a position from the point of view of which it is impossible to establish a regime of state ownership of wildlife. An example is the view of D. I. Meyer, who attributed, in particular, “birds flying in the sky” to objects that are not at all in the

power of man, and therefore are not in civil circulation and cannot represent any kind of property value [8].

The objects of the right of ownership cannot leave the ownership of the owner against his will. To exercise this competence in relation to a wild animal, it is necessary to remove it from its natural environment or to limit its natural freedom, but then this animal ceases to be an object of the animal world (based on the definition of the animal world, which should only be in a state of natural freedom). No less controversial in the scientific literature is the exercise of the authority to dispose by the state owner of objects of the animal world that are in a state of natural freedom. In particular, T.N. Malaya believes that the issuance of permits, licenses for fishing, shooting and trapping of wild animals is nothing but the disposal of the state by this property, since the disposal of wildlife can also be considered as the activities of authorized bodies aimed at on the implementation of acts of the owner on the use of resources of the animal world and products of its vital activity [9]. Other authors categorically disagree with this statement, noting that the issuance of permits for the possession of animals, the determination of the procedure for use and supervision of compliance with the established rules for the extraction and use of animals, the creation of conditions for the most effective development and preservation of the animal world are regulated by administrative law and has nothing to do with the exercise of competence.

Today, a quick renunciation of state ownership of wildlife objects will bring down all ideas about property rights and other rights that exist today in Kazakhstan's natural resource law. The fact is that in this case it will become inevitable to discuss the renunciation of the right of public and private ownership of other natural resources, for example, land, water, mineral resources, forests and atmospheric air, since all natural resources are equally needed and important, and in relation to them there can be no fundamentally different legal regimes.

At the same time, the situation in fauna law when a public owner disposes of a natural resource that he does not actually own and use is quite common. For example, in land law, along with classical property relations (state, municipal, private), there is also the so-called unrestricted state ownership of land, which, as a general rule, is disposed (but not owned and not used) by local authorities (urban settlements, urban districts and municipal districts), providing the respective land plots to property or rent to citizens and legal entities for a fee or free of charge.

To begin with, we ask ourselves: why did the legislator enshrine the right of state ownership of the animal world in the Law? Can we say that the state began to own and use wild animals because of the consolidation of such a norm in the law? Obviously not. This means that the method of the previously mentioned legal fiction was applied here, when processes or objects that do not exist in reality are given an artificial legal status.

For example, according to Art. 117 of the Civil Code of the Republic of Kazakhstan, ships and aircraft are real estate, although it is obvious to everyone that they have a lot of fundamental differences from buildings and other real estate [2]. But why was this done? Probably, the legislator considered this appropriate, based on the goals and objectives of civilian traffic. In our case, we propose to extend the method of legal fiction further and recognize that the state as the owner of objects of the animal world should have not only good, but also the burden of the owner and compensate for the harm caused by wild animals to life, health and property of citizens.

But, as a general rule the state is not liable for damages caused by wildlife to private individuals and their property. Of course, the legislature can adopt specific legislation granting relief for losses. Let us consider the experience of foreign countries. In USA, this rule is supportable under general concepts of sovereignty as well as by reference to the practical point that, since the state in fact exercises no actual control over wildlife, it cannot be held accountable for actions beyond its control. This rule is operative even when the state seeks to affirmatively protect a wild species under fish and game laws. In the case of Alex Leger v. Louisiana Department of Wildlife and Fisheries , 306 So. 2d 391 (1975), the court held that the state was not liable for the damages caused by deer in eating his commercial crop even thought the agency had told him he that under state law he could not kill the deer. It is ultimately a public policy question of who should bear the risk, individuals or the public at large [10].

As a result, the establishment in the Law of the Republic of Kazakhstan "On the Protection, Reproduction and Use of the Animal World" of the regime of state ownership of objects of the animal world, in fact, has nothing to do with the generally accepted understanding of property rights. The state does not exercise the powers of the owner, it only regulates the right to use the wildlife, protects it and establishes liability for violation of the rules for the protection and use of wildlife. However, no matter what responsibility the state establishes, all of its powers in this area are based on the fact that the state is a law-making force that establishes generally binding rules of conduct, and not on the ability of the owner to determine the procedure for using his property. Having analyzed the normative acts in the field of protection and use of the wildlife, the powers of the state authorities of the Republic of Kazakhstan in this area, it must be recognized that the ownership right simply does not remain in the system of legal regulation of public relations for the protection and use of wildlife. Based on this, we believe that the legislator, declaring the animal world exclusively state property, did not fully understand the specifics of the animal world objects, was influenced by Soviet doctrines, and accordingly approved, in our opinion, the wrong state of things. Consequently, the recognition of objects of the animal world as state property is a fiction that does not have real content. And since each phenomenon must have reasons that determine its appearance in the world, as well as a clear, strictly defined content that should not be replaced by the content of another phenomenon, should not contradict it, in connection with the foregoing, it is necessary to recognize objects of the animal world as ownerless things, in respect of which the state has public rights to protect the national heritage, which would be a more logical construction corresponding to the history of the development of domestic law.

Summing up the above, it seems that the animal world is not state property in reality, it is only a declarative consolidation in the legislation.

The remaining gaps in the legislation and the lack of a uniform approach to resolving issues related to animals, still do not allow achieving a certainty in their understanding and place among other objects of civil rights. The solution of these issues could be a new stage in the development of legislation governing relations regarding animals.

Based on the foregoing and taking into account all the indicated features, we consider it necessary to distinguish animals from other objects of civil law with the creation of a special legal regime for them, within which, given their specifics, a special procedure for treating them would be fixed (including habitat removal procedures), as well as special conditions for concluding transactions where they act as their subject, and the responsibility for the death of the animal resulting from a violation of the above provisions. This goal can be achieved by amending Law "On the protection, reproduction and use of the animal world" and the Civil Code of the Republic of Kazakhstan, bringing them to a special chapter in the section on civil rights.

Today, the definitions provided by law in a number of countries describe animals as living, sentient beings. The main feature of animals is that they have their own soul and have the ability to feel, while other objects in civil law are deprived of these qualities. Therefore, the allocation of animals among other objects, in addition to consideration from the point of view of law, is also a moral issue.

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