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Benefits of the Specialization of Courts in Social and Labor Disputes

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Abstract. There are no comparative studies of judicial specialization concerning Kazakhstani practice, and the methodology for assessing its specific advantages and disadvantages has not been developed. After a few remarks on the advantages and disadvantages of judicial specialization, this manuscript takes a detailed look at the state of the problem in Kazakhstan, where the announced reforms indicate a new trend in favor of the creation of new specialized courts. It is concluded that specialization indicates the development and functionality of the judicial system of the state. Specialization is both the basis for building the country's judicial system and an important means of its dynamic progressive development. At the same time, judicial specialization should be approached with extreme caution, always evaluating its implementation from different angles and in the light of all the possible side effects that it may have on the proper administration of justice, as well as on the core purposes and values of the judiciary. The paper highlights the factors that make up the argument for the creation of social and labor courts in Kazakhstan. We also argue that the basis for the creation of specialized social and labor courts in Kazakhstan might be something more than just increasing the competence and efficiency of the court; this signals a step towards making decisions focused on the qualitative resolution of social and labor conflicts that have the potential danger of influencing the stability of statehood.

Keywords: court, judicial system, judicial specialization, legal proceedings, social and labor disputes.

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Преимущества специализации судов по социальным и трудовым спорам

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Аннотация. Отсутствуют сравнительные исследования судебной специализации в практике Казахстана, методология оценки ее преимуществ и недостатков также не была разработана. В статье подробно рассмотрена данная проблема в стране, где объявленные реформы предполагают создание новых специализированных судов. Сделан вывод, что специализация влияет на развитие и функциональность судебной системы государства, будучи ее основой и важным средством динамичного поступательного развития. В то же время введение судебной специализации требует осторожности и оценки с разных точек зрения. В статье приведены аргументы в пользу создания социальных и трудовых судов в Казахстане. Мы также утверждаем, что такое решение может дать больше, чем просто повышение компетентности и эффективности суда. Это шаг на пути к качественному разрешению социальных и трудовых конфликтов, которые могут быть потенциально опасны для государственной стабильности.

Ключевые слова: суд, судебная система, судебная специализация, судебные разбирательства, социальные и трудовые споры.

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Introduction

At the end of 2021, a new Concept of Legal Policy until 2030 was approved in Kazakhstan (Kazakhstan, 2022), which proclaimed that in the next ten years, continued work will be required to modernize the judicial system in terms of further specialization of courts.

From the point of view of Kazakhstani legislation, there are no barriers to both the specialization of legal proceedings¹ and

¹ According to paragraph 2 of Art. 75 of the Constitution of the Republic of Kazakhstan, judicial power is exercised through civil, criminal, and other forms of legal proceedings established by law. In cases provided for by law, crim-

the courts². The specialization of judges in Kazakhstan is a fait accompli that characterizes the national judicial system. At the same time, the specialization of judges is connected not only with the functioning of the system of specialized courts for juvenile, administrative, economic, and investigative cases but also with the internal specialization of judges in civil courts of general jurisdiction. Today, in fact, civil courts have formed a specialization of judges who practice processes in certain categories of cases. In courts of all instances, the emerging specialization of certain judges is taken into account when transferring cases to proceedings. Moreover, considering the specialization of judges is directly enshrined as a criterion for the automated distribution of cases in courts³. Thus, the specialization of Kazakhstani judges is an important feature of judicial practice, which affects the quality of the administration of justice and allows the state in the current conditions to maintain the level of guarantees of judicial protection of rights and freedoms without incurring the increased costs usually associated with the creation of specialized courts.

A universal judge in the modern legal environment, which includes an assessment of the state of legislation and its dynamics, the actual complexity of legal relations, the emergence of new areas of legal regulation, is rather an outdated type of representative of the judiciary. This is a myth coming from the post-Soviet system, and its consequence is the existing powerful deep-rooted image of a uni-

versal judge and the rejection of specialization. The ideal of a generalist judge, developed and put into practice, keeps the Kazakhstani system captive to an archaic idea and hinders its development. From the point of view of legal doctrine, this myth is an obstacle for the Supreme Court in its reform course and does not allow serious consideration of the wider specialization of the courts.

inal proceedings are carried out with the participation of jurors.

² By virtue of paragraphs 1, 3, 3–1 of Art. 3 of the Constitutional Law of the Republic of Kazakhstan dated December 25, 2000, No. 132 "On the judicial system and the status of judges of the Republic of Kazakhstan", the judicial system of the Republic of Kazakhstan consists of the Supreme Court of the Republic of Kazakhstan, local and other courts. Other courts may be created in the Republic of Kazakhstan, including specialized courts (military, financial, economic, administrative, juvenile and others). Specialized courts are formed by the President of the Republic of Kazakhstan with the status of a regional or district court.

³ Rules for the automated distribution of cases in courts, approved by the decision of the plenary session of the Supreme Court of the Republic of Kazakhstan dated December 06, 2019, No. 21, https://sud.gov.kz/sites/default/files/pagefiles/pravila_avtomatizirovannogo_raspredeleniya.pdf

The paradox lies in the fact that expert specialization permeates all areas of our lives, all areas of public administration, most modern professions are highly specialized, especially the highest elite level of professional practice. The profession of a judge is the "crown" of the legal profession, as a rule, is the top step of a legal career. Only an extra-specialist in a particular area of legal relations should and can administer justice that ensures not only law and order, but also the trust of society. The results of scientific research (Coviello et al., 2019; Kleandrov, 2021) confirm that the specialization of judges has a positive effect on the quality of the administration of justice and the timing of cases in courts.

However, earlier studies (Baum, 2009, 2011) have concluded that the most important reason for caution in inferring the desirability of judicial specialization is the limited information available on its impact. Existing academic research provides only a fragmentary view of the extent to which the potential effects of judicial specialization are actually manifested – positive, negative, or mixed.

The lack of information on the impact of specialization deserves consideration in the framework of the following hypothesis put forward in this manuscript. Extensive international experience testifies to the effectiveness of the functioning of special labor and social courts in many countries. The specialization of judges and the introduction of certain special rules for the procedural consideration of these disputes will significantly increase the level of guarantees of social and labor human rights and improve the accessibility of justice. At the same time, the specialization of judges and the rules of procedure can be considered as a primary link, which can have an independent place in the national system of administration of jus-

tice. The specialization of the court includes the specialization of judges and procedures, the formation of a new institutional structure, and is also a secondary link in the differentiation of the judicial system.

The goal of sustainable development of Kazakhstan, as a new state in the post-Soviet space, requires the formation of a legal mechanism for resolving social and labor conflicts that can develop into dangerous clashes that threaten the development of the country, based on social and labor disagreements. Special social and labor courts can become an important and effective element in reducing the overall level of conflict in society, achieving social peace and sustainable development goals.

Overview of data influencing decisions on court specialization

In research, the demand for judicial specialization is determined by the following factors:

- the need for a specialized and joint solution of the corresponding serious problem, which gives rise to various conflicts of a criminal and civil nature around itself (in many cases, the need to provide social assistance);
- the constant growth of relevant disputes or offenses, which requires the creation of specialized bodies, which should be enough (Gutiérrez, 2011);
- proponents of judicial specialization regularly refer to what they see as the benefits of specialization for the operation of courts, which they usually refer to as efficiency, competence, and uniformity (Bruff, 1991; Dreyfuss, 1990; Damle, 2005);
- higher efficiency of specialized courts, which is understood as a single case of cancellation of their decisions by higher courts in comparison with universal courts, is defined in the work of Hansford, 2011. In addition, in the last century, in the study of Petrukhin et al., 1979, the experience of a judge allows a 33 % reduction in the number of canceled court decisions, and the presence of specialization – by 75 %;
- efficiency as the speed of the judicial procedure is inherent only if the courts are either specialized in relation to the procedure, or

completely specialized in relation to the cognizance of a certain category of cases, or both. The partial specialization of this issue does not affect the duration of the case (Castelliano et al., 2021);

- the creation of specialized courts with exclusive jurisdiction in certain areas of the law increases the uniformity of decisions in these areas, thereby contributing to greater predictability and confidence in the courts and, possibly, a decrease in the number of appeals (Gramckow & Walsh, 2013). Specialized courts serve to reduce and even eliminate conflicts in the interpretation and application of the law in their area(s) of jurisdiction. Specialized courts are desirable when there are compelling arguments or requirements for uniformity or consistency in the application of the law. Uniformity in decision-making leads to predictability, and the main benefit of predictability is that it reduces the need for litigation, lessens the likelihood that prospective parties will find legitimate grounds for going to court, and that it builds the trust of both parties (Zimmer, 2009);
- research results (Coviello et al., 2019; Castelliano et al., 2021) show that the specialization of judges to consider the same type of cases leads to faster trials and decisions. At the same time, the quality of the administration of justice is not reduced;
- the increasing complexity of modern society and the emergence of new areas of law in which technical concepts prevail can be considered as an ideal justification for the creation of specialized courts. A new array of elaborate cases, raising intricate issues of facts and rights, deserves consideration by judges with high qualifications in the subjects under consideration. As an advantage of a specialized court, it is possible to single out the possibility of establishing additional criteria for a judge when selecting for a position: the presence of special knowledge in a particular field required for deep “immersion” in a controversial question;
- new specialized courts can contribute to the solution of a problem affecting different legal systems, i.e., a huge burden on ordinary courts (Silvestri, 2014).

On the other hand, there are manuscripts presenting results that refute the positive effects of specialization of courts and judges.

Uzelac, 2014 summarizes the arguments against the specialization of courts and judges. It is concluded that over-enthusiasm must be suppressed and that any attempt to specialize judges, judicial structures, and procedures must be carefully balanced against the possible negative effects that specialization may have, both at a general level and at the level of specific benefits associated with the administration of justice. It is concluded that there is no consistent approach to judicial and jurisdictional specialization in Europe, both in terms of the level and the form of specialization. The point of view of judges and their professional organizations is also skeptical about certain aspects of specialization – specialization is considered potentially harmful to the unity of the judicial profession, its basic professional qualities, and ethical foundations. Most importantly, over-specialization can undermine the fundamental values of modern judicial systems.

Silvestri, 2014 points out the shortcomings of judicial specialization: “The danger of “isolation” of specialized courts, a tendency to self-isolation within the limited scope of issues within their competence”.

A review by Gramckow & Walsh, 2013 highlights the following vulnerabilities: risks to judge independence and impartiality; risk to the unity of the judiciary; potential disparities in access to justice; risk of losing flexibility in the development of the law if judgments are always issued by the same limited number of persons.

Each of the above arguments needs to be studied from the standpoint of modern conditions in Kazakhstan, applicability to the current realities of the quality, accessibility, and effectiveness of the administration of justice

Specialization of courts, judges, or rules of procedure?

There are several structures of specialization in the administration of justice: specialization of judges, specialization of the rules of procedure, specialization of courts and their structures (singling out collegiums for civil,

criminal, administrative cases). In turn, the specialization of courts can be carried out in the following forms: the creation of an independent system of specialized courts, the organization of separate courts in the system of general courts, the formation of a specialized composition of the court.

Specialization on a sectoral basis of substantive law (labor and social security) in the conditions of Kazakhstan, first of all, *de facto* exists not so much as a judicial principle, but as a judicial procedure. Special reduced limitation periods have been introduced for applying to courts for individual labor disputes, and a mechanism for mandatory pre-trial settlement of disputes through conciliation procedures is in place. The procedural law establishes special rules of jurisdiction for certain claims arising from labor and social relations; terms of consideration of cases in the courts of the first instance are reduced; court decisions on certain categories of claims are subject to immediate execution. The listed exceptions to the general rules of civil proceedings or special conditions for procedures for claims arising from labor and social security legal relations are not an innovation in Kazakhstani procedural law but are a continuation of the traditions of the legislation of the Soviet period of our history. The specialization of judges in Kazakhstani courts is an important feature of the national model of administration of justice, the legitimacy of which is confirmed by a direct indication in the legal acts of the Supreme Court of the Republic of Kazakhstan.

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However, the practice of specialization of legal proceedings and judges in national conditions is not successful and has not led to a renaissance of the local judicial system both in the considered narrow area of disputed legal relations and in general the entire structure. The number of social and labor conflicts is not decreasing, and there are permanent collective labor disagreements that potentially carry the risk of developing into political confrontations.

The studies conclude that Russian scientists support the idea of the specialization of judges. The arguments against the specialization of courts are as follows: significant material costs that do not correspond to the small number of cases decided by specialized courts, problems with access to justice, and the need for special training for highly specialized judges (Terekhova, 2014). If the specialization of judges does not have the nature of specific training, does not involve the implementation of additional costs, then the creation of courts determines significant budgetary costs.

A study of American jurisprudence summarizes: "Specialization is a regular part of the jurisprudence pattern; a significant number of judges do specialize in certain subject areas. Specialization of judges is an important feature of jurisprudence that can enhance judicial expertise without incurring many of the costs typically associated with specialized courts" (Cheng, 2008).

Judges' specialization is a given of belonging to both a certain structure of courts of general jurisdiction (criminal, civil) and to special courts. Specialization develops throughout the judicial career and is rather a "non-permanent"

characteristic that can change. Specialization is formed under the influence of objective and subjective factors: from working in a court operating in a certain area of disputed legal relations to having previous career experience in a particular branch of law, which is taken into account when distributing court cases. This area of judicial specialization in Kazakhstan has not actually changed, except for the impact of the factor of complication of public relations, the emergence of new branches of law. In Kazakhstan, in fact, the concept of judicial specialization traditionally prevails in the field of specialization of judges' competencies

The 30-year practice of forming a completely new national system of justice in Kazakhstan shows that specialization has actually become the main form of development of the judicial system. The constitutional mechanisms and foundations of the judiciary, enshrined in the 1995 Constitution, remain unchanged; the content of institutional structures changes; new jurisdictions appear, while the unity of the judiciary is not affected. Initiatives have been taken to establish various types of judicial jurisdictions, but the structural pyramid of courts has not changed.

At the same time, the further development of the judiciary requires new approaches and sound proposals for further expanding the specialization of courts, since the specialization of procedures and judges has actually exhausted itself – it has no potential for qualitative development and growth. Specialized courts have the potential to address the already traditional problems of Kazakhstani justice, the most important of which are the poor quality of the administration of justice and miscarriage of justice.

Specialization of courts in social and labor disputes

The main arguments in favor of creating social and labor courts in Kazakhstan (considering claims arising from individual and collective labor legal relations, as well as legal relations on social security, insurance, protection), in our opinion, is the importance of the political system's response to social and labor conflicts, having a potential threat to this sys-

tem and the sustainable development of the state. The transfer of conflict into the civilized field of litigation will allow “turning on” an effective state mechanism for resolving disagreements, finding solutions to acute social problems through legal means.

Of course, the world practice has worked out quite a few means of preventing topical conflicts. The most important tool is, first of all, the effective activity of trade unions. But in Kazakhstan, the trade union movement is normatively regulated and clearly structured with the creation of a single center and subordinate branches; the rights of trade unions are limited, and officials who have no true relation to the representation of workers are appointed to the posts of their heads. In fact, there is no meaningful dialogue between workers and employers through trade unions. These are destabilizing factors that require neutralization and make it necessary to create and search for other new ways to ensure a civilized social dialogue.

International experience testifies to the effectiveness of the functioning of labor and social courts. Many legal systems have specialized labor courts with jurisdiction over individual labor disputes or collective labor disputes, or both (Davies, 2012). Classical examples of effective courts for labor and social disputes are the special courts of Germany, Belgium, Norway, Indonesia, Poland, Hungary, Sweden, Luxembourg, Turkey, Finland. Courts for consideration of individual labor disputes operate in France, Argentina, Chile, Switzerland, Brazil, Spain. Special rules of litigation for the resolution of labor disputes are inherent in the Italian legal system.

The labor courts play an important role in determining the effective level of labor market regulation in Germany. A significant positive relationship has been found between labor court performance and unemployment (Berger & Neugart, 2011). The courts are an important element of the institutional framework of labor markets, often determining the degree of employment protection. The German labor courts are a prime example in this regard (Berger & Neugart, 2012).

In general, we have identified the following factors that make up the argument for the

creation of social and labor courts in Kazakhstan.

1. The need to apply special (in-depth) knowledge in the field of administration of justice in social and labor disputes. The array of labor and social security legislation is extensive, fragmented, and is in a constant process of reform. There were only 4 basic laws on labor in Kazakhstan over 30 years of development. Hundreds of amendments and changes are made to social legislation every year. The system of normative legal acts in this area largely consists not of laws, but of by-laws, including departmental, acts. Practice shows that it is impossible to be a professional expert in all branches of substantive law falling under the jurisdiction of general civil justice. The volume of legal proceedings in the social and labor sphere is growing and becoming more complicated every year. All these prerequisites require further specialization of courts and judges.

2. The specialization of courts in the social and labor field is due to the need to improve the efficiency of justice. The effectiveness of justice can be revealed through a combination of factors. This is an understandable and fair decision, based “on the analysis and application of the norms of substantive law with a necessarily motivated content, which eliminates the dispute about the law; facts, which have legal significance, resolving the case on the merits, capable of being executed by obligated subjects, are established” (Pakhomova, 2010). The decision must be made within the shortest reasonable time, and the circumstances of unreasonable delay in the trial must be excluded. Parties in social and labor disputes must bear adequate, low legal costs. The points made about the characteristics of litigation are based on the high vital importance for a person of employment, stability of labor relations, as well as access to the social security system.

3. In favor of the argumentation of the specialization of courts in social and labor disputes, the demand for a special approach of judges to these controversial legal relations is evidenced: taking into account the special subject composition of labor relations; ensuring a special approach to the settlement of labor disputes, taking into account the vital need for

citizens to participate in hired labor and receive remuneration; taking into account the risk for citizens of loss of life and health in labor relations if the employer fails to comply with labor protection measures; take into account the impossibility of restoring the original position of the parties (bringing the parties to their original position) upon the termination of the employment contract (Khamzina et al., 2021).

4. The need to adequately take into account the multidimensionality of legal regulation and complex law enforcement practice. Judges' superficial knowledge of these issues is dangerous and provokes the growth of social and labor conflicts. In our opinion, judicial specialization, accompanied by the full introduction of the institution of an expert judge, will allow solving the existing problems of qualitative consideration of individual and collective labor disputes, without bringing the latter to an extreme form – declaring strikes and subsequent participation in rallies, mass demonstrations with socio-economic demands.

5. In the first part of this study, we noted that the Kazakhstani judicial system has already undergone such forms of specialization as the specialization of judges and rules for the administration of justice. That is, simple forms of specialization have been implemented, and they have a significant and long-term practice of implementation, but this did not bring significant, tangible results for the issues of qualitative reduction of disputes and conflicts. On the contrary, official statistics (Kazakhstan, 2022) show that the number of social disputes has been steadily increasing in recent years.

Specialization should be carried out from simpler forms to more complex ones. At the same time, the implementation of a more complex form of judicial specialization is possible only if simpler forms are not able to effectively solve existing problems. The judicial system of Kazakhstan has already gone through simple forms of specialization, but this direction of development has not brought tangible results.

6. We should dwell on the factor of the presence of a fairly large category of cases arising in the considered area of legal regulation.

Over the past three years, cases related to labor disputes, violations of pension legisla-

tion, the procedure for assigning benefits, and compensations amounted to about 2 % of the total number of cases considered in civil proceedings with a decision (Kazakhstan, 2022), which is commensurate with the number of cases considered by specialized juvenile courts according to the rules of civil procedure.

In order to fully load the courts initiated for specialization, we propose to consider the feasibility of their integrated jurisdiction. That is, the jurisdiction of social and labor courts may include criminal cases on crimes that violate the social and labor rights of an individual, as well as civil and administrative cases. The allocation of cases within the jurisdiction of social and labor courts should be based on the object of unlawful encroachment – social and labor rights and freedoms of man and citizen.

7. The jurisdiction of social and labor courts should include the resolution of collective conflicts. This critical issue is essentially outside the judiciary in Kazakhstan. The procedures for resolving collective labor disputes are structured in such a way that the parties to the conflict have the opportunity to go to court for protection, restoration of rights and interests only after lengthy conciliation processes.

To resolve collective labor disputes, Kazakhstani labor legislation provides for the following sequential process: disputes are considered by the employer (association (association, union) of employers), if it is impossible to resolve it – in the conciliation commission, if an agreement is not reached in it – by labor arbitration, on issues not settled by it – in court. The last resort to resolve the conflict is to strike. Employees may decide to strike if conciliation procedures fail to resolve the collective labor dispute, as well as in cases where the employer evades conciliation procedures or fails to comply with the agreement reached in the course of resolving the collective labor dispute.

Complex multi-stage procedures for resolving collective conflicts are aimed at finding a solution to the corresponding social and labor problem. The court, like the announcement of a strike, is the last form of achieving an acceptable result. At the same time, Kazakhstani judicial practice in collective disputes is virtually negligible (Kazakhstan, 2022). The courts

proceed from the fact that the employees themselves cannot appeal against, for example, the illegal provisions of the collective agreement, the act of the employer, since they are not representatives of the entire labor collective. In this regard, special attention should be paid to the relevance and relevance of vesting specialized courts with jurisdiction in relation to collective labor disputes, as giving rise to special complex and large-scale social conflicts, which have happened more than once in the history of independent Kazakhstan.

Conclusion

The prerequisites set forth in this article allow us to speak about the existence of grounds for the creation of specialized courts. At the same time, it is necessary to take into account such an important prerequisite as the presence in the state of organizational and financial opportunities for their creation. As in the rest of the world, courts in Kazakhstan are financed from the state budget. The main argument against specialization is the significant financial costs that will inevitably arise when establishing new courts.

According to the Report of the European Commission on the Efficiency of Justice (CEPEJ), covering the period 2018–2020, published on October 22, 2020 (Kazakhstan, 2020), the average financing of courts per inhabitant in Europe is 40.8 euros, in Kazakhstan – 4.5 euros, Azerbaijan – 5.1, Russia – 20.6, Ukraine – 9.4 euros. If the average indicator for the countries of the former USSR (at the end of 2019) of expenditures on the judicial system in the structure of all public expenditures is 1.1 %, then in Kazakhstan this indicator is only 0.47 %, in Latvia – 2.71 %, Ukraine – 1.76, Lithuania – 1.31 (Kazakhstan, 2020). That is, in Kazakhstan, the costs of financing the judiciary are at least two times lower; according to this indicator, the country lags behind not only in comparison with the countries of the post-Soviet space, but, which is significant, is far from the standards of the states that are members of the OECD.

In this connection, we can talk about the chronic underfunding of the judicial system in Kazakhstan, which is really very expensive for

taxpayers. It can be argued that there is a need to increase the investment of public funds so that society can demand a proper return from the functioning of this branch of government, and specialization of courts can become one of the important directions for ensuring greater legal certainty, deeper justification for judicial decisions, shorter procedures, and greater efficiency.

On the way to substantiate the demand for the specialization of judges, one should initially recognize an obvious fact. The objective reasons that we have outlined above do not allow ensuring the proper level of competence of a judge in all branches of law, and hence high professionalism when considering any category of civil cases. Courts of general jurisdiction are overloaded with different categories of cases: from contractual obligations to special proceedings and land disputes. At the same time, the social and labor sphere is strategically important for Kazakhstan, and specialized courts will be sent to create guarantees for the effective preservation and development of human capital.

In this regard, it should be taken into account that specialization at the level of the judiciary, being a means of increasing the efficiency of justice, requires the state to invest certain resources, but only in the short term. At the same time, it is specialization that is an important prerequisite for saving public funds in the long term, due to the fact that within the framework of an efficient judicial system there are additional opportunities to reduce the costs necessary for the functioning of this system.

In addition, when deciding on the establishment of specialized social and labor courts in Kazakhstan, one must take into account the unstable, weak legal traditions of our country, the high level of corruption, the lack of genuine independence of the judiciary, including from local authorities and business structures. Labor legislation is vague, full of gaps, contradictions, and room for different interpretations. Social security legislation is traditionally super-massive, consisting not of laws, but of acts of government bodies; a non-professional cannot actually comprehend this area, and most citizens are not even aware of their social rights. In our opinion, the legislation in this area was

deliberately built and reformed in such a way as to neutralize the will of the state in building a social society and solve social and labor problems, while maintaining the conditions for economic development.

Each of these factors determines the inability of Kazakhstan to fully ensure and pro-

tect social and labor rights and human interests. Providing a new model for social and labor disputes will allow focusing on developing non-traditional solutions to traditional conflicts that take place in the social sphere, some of which directly threaten the sustainable existence of the state.

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