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Contact information

Website: https://conference-w.com/

E-mail: ger@conference-w.com

Content

ON SOME ISSUES OF BORROWING THE DISCLOSURE PROCEDURE INTO THE CIVIL PROCESS OF THE REPUBLIC OF KAZAKHSTAN

Aizhan Satayeva
Senior Lecturer of Turan-Astana University

Introduction

The thirty-year period of Kazakhstan's independence has been marked by steady development in the field of lawmaking and the improvement of national legislation, including civil procedural law. Particular attention has been paid to improving civil court proceedings by adopting and adapting foreign legal institutions into Kazakhstan's civil procedural legislation. Remaining committed to the course of political and legal reforms, on September 1 of this year, in his Address to the people of Kazakhstan, the Head of State, K.K. Tokayev, once again emphasized the importance of justice quality. Specifically, he mentioned "access to justice" at the district and regional court levels.

Access to Justice and the Disclosure Procedure

It is widely known that "access to justice" is a complex, multifaceted concept in common law systems, embodying the idea of the accessibility of justice as a fundamental principle of civil procedure in common law countries. "Access to justice" includes, among other things, fair proceedings and the adversarial nature of the process, which are also supported by the disclosure procedure. A partial implementation of disclosure was made through amendments to the Civil Procedure Code of the Republic of Kazakhstan (CPC) on December 20, 2021. Nevertheless, it seems that such piecemeal, out-of-context borrowing does not always yield positive results and can create new obstacles to justice, potentially undermining public trust in the judiciary.

The disclosure of documents is a civil procedural institution in common law countries aimed at ensuring adversariality, equality of parties, and contributing to quick and effective court proceedings. However, the amendments to Kazakhstan's Civil Procedure Code on disclosure of documents cannot fully realize the potential of this procedure.

To begin with, the concept of adopting foreign legal elements is not new. Renowned scholar René David once noted that any effective legal reform that has proven its value could be adapted with certain modifications and implemented in the legal systems of other countries. Examples include cases where England and Belgium introduced elements of their legal institutions into French law.

In academic circles, there is ongoing debate on how best to describe contemporary processes of borrowing from foreign legal systems. Terms such as "assimilation," "transplantation," and "acculturation" are increasingly used in the modern literature to describe these processes. The idea that reception of foreign law, whether voluntary or enforced, serves to improve national law is not entirely supported by the theory that, depending on the outcome, borrowing can also have a negative impact or have no influence on the law at all.

It is crucial to consider that the success of borrowing largely depends on achieving the goals and desired outcomes. Simply introducing a norm from a foreign legal system does not ensure its effective implementation in the practice of law enforcement or the attainment of set objectives in the receiving legal system. The lack of methodological justification in the law-making process may also contribute to unsuccessful borrowing attempts.

Issues with Adapting the Disclosure Procedure in Kazakhstan

The attempt to implement the disclosure procedure into Kazakhstan's civil procedural legislation has exposed issues related to consistent, systematic, and thoughtful borrowing of foreign legal institutions amid the inevitable convergence and mutual penetration of legal systems. In today's world, isolated legal development is impossible, and legal systems are moving towards convergence and self-improvement. Advocating for the pure uniqueness of national law, entirely rejecting foreign legal elements, just as excessively copying foreign legal institutions, are two extremes that should be avoided.

M.K. Suleimenov's observation that "mechanical introduction of English legal institutions, given the limited independence of the judiciary in Kazakhstan, will not yield the desired effect" is entirely valid in the current realities of Kazakhstan's justice system. For example, we have dedicated research to the problematic aspects of introducing the pre-trial protocol into Kazakhstan's civil process, as it does not fully align with its essence and original purpose in English law. Foreign legal institutions cannot be adapted without considering the historical, social, and cultural factors of our state. The borrowing process requires double the efforts of both lawmaking representatives and the academic community.

Perspectives on Japan's Experience

In this regard, Japan's experience as a country with a continental law system that has successfully incorporated the disclosure procedure into its civil procedural legislation is a significant example. For several

years, joint efforts by the academic and professional legal communities and legislative authorities led to the creation of a unique model of the disclosure procedure in the Japanese Civil Procedure Code of 1996. Only a few decades ago, scholars of comparative law categorically stated that "there is practically no disclosure in Japan," "there is no pre-trial discovery in Japan," and "the Japanese Civil Procedure Code has more limited grounds for issuing a court order for disclosure than US law." However, following amendments to Japan's procedural legislation, both pre-trial and trial-stage disclosure procedures appeared in the civil process, though the Japanese CPC does not explicitly use the terms "discovery" or "disclosure."

Today, Japan's disclosure procedure represents a "golden mean" between Germany's highly restrictive documents presentation system and the expanded American disclosure system. It is important to note that Japan's legal system has historically developed under the influence of various legal systems. Four periods can be conditionally distinguished: 1) the influence of French law; 2) the influence of English law; 3) the influence of German law; and 4) the influence of American law. Throughout its development, Japan selectively assimilated elements of the system that had the greatest impact during each period.

J.H. Elliott, in his studies, notes that the Japanese legal system is truly unique, representing a symbiosis of continental and common law systems with elements of national law based on customs and traditional values of Japanese society, which remain relevant today. The Japanese have managed to borrow foreign institutions successfully without sacrificing their inherent values.

Discussion and results

In Kazakhstan's academic environment, there is ongoing debate about the attempt to borrow the disclosure procedure: some scholars consider disclosure to be rudimentary and nothing more than self-testimony. Others, on the contrary, present arguments in support of this information-gathering mechanism. We are inclined toward the latter position, as documentsd by the words of K. Huang, who studied the adoption of disclosure by Taiwan and Japan. He expressed concern about continental law countries rejecting the disclosure procedure, arguing that the consequences of such a rejection are so serious and inevitable that failure to take timely measures could lead to reduced efficiency and timeliness of court proceedings. As an alternative to complete refusal to adopt foreign institutions, he suggests implementing programs or concepts at the legislative level to allow parties to collect documents before the trial begins and ease the burden of proof. K. Huang cites Japan as an example, considering its experience ideal for countries with a continental law system in relation to disclosure procedure adoption. He explains his choice with three factors. First, Japan has one of the world's leading jurisdictions with a highly developed civil litigation system. Second, Japanese civil procedure has been shaped by both German and American civil procedure influences. Third, Japan, being part of the Romano-Germanic legal family, incorporated disclosure into its new Civil Procedure Code in 1996, which was innovative and provides valuable experience for research in this area.

In general, the disclosure procedure is an interesting and multifaceted phenomenon in civil procedural law. It would be a mistake to consider it in isolation from the historically developed "adversarial" type of process, much less to view it as a relic of the "inquisitorial" process. Moreover, it represents an achievement of Anglo-Saxon law that originated centuries ago and continues to evolve within the original English civil process. The institution has not become obsolete but continues to exist and is even gaining popularity in the legislation of countries with a continental law system.

A sociological survey conducted in the summer of 2022 as part of scientific research among legal consultants, attorneys, and lawyers working in companies showed that the perception of the Anglo-Saxon legal system's experience was positively or somewhat positively received by 52.5% of the 102 respondents, while 23.7% had a negative or somewhat negative perception. About 23.8% had a neutral stance. With permissible margins of error, it can be concluded that those who represent clients in court are predominantly positive about adopting the experience of England or the USA.

Conclusion

To summarize, the improvement of justice quality includes the implementation of foreign legal institutions into the civil procedural legislation of the Republic of Kazakhstan. The issue of qualitatively and adaptively borrowing the disclosure procedure into Kazakhstan's civil process can be addressed by combining the efforts of the academic and professional communities and legislative representatives to further improve the legal regulation of documents disclosure. In this regard, Japan serves as a prime example of successfully adopting the disclosure procedure, incorporating best practices from both common and continental law systems while preserving the identity of its national legal system to ensure accessibility and enhance the quality of justice.

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