

Political and Legal Thoughts of Some Kazakhstani Scientists-Lawyers of the End of the XX and Beginning of the XX Centuries about Development of the Law-Based State in Kazakhstan

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Abstract: In study political and legal thoughts and ideas of some Kazakhstan scientists-lawyers of the end of the XX beginning of the XXI centuries of the law-based state of development of legal statehood in the Republic of Kazakhstan are investigated. As a result of the conducted research, it became clear that domestic scientists treat process of construction and development of legal statehood ambiguously. In general, according to scientists-lawyers such institutes and the legal phenomena as strengthening of the constitutional responsibility, development of potential and realization of standards of the constitution, legal support of economic freedom and enterprise activity, improvement of legal consciousness and legal culture, further democracy promotion, importance of compliance of laws to standards of justice, freedom and equality can act as “locomotive” on the way to the strong law-based state.

Key words: Law-based state, constitution, private law, judicial practice, Kazakhstan

INTRODUCTION

During our era the law-based state acts as a certain standard, a measure to which any civilized society tries to correspond. It is not surprising after all only in the law-based state the best protection of the rights and freedoms, economic wellbeing and prosperity is provided to the individual. Therefore, the majority of the countries in the world, taking into account local traditions and features attach serious significance to development and strengthening of the signs characterizing law-based statehood.

Today, among most of the Kazakhstani scientists, the opinion is indisputable that it is necessary to develop the law-based state and it is important. However, what way of development of legal statehood is the most preferable? Development of what institutes may provide the strongest law-based state in the conditions of independent Kazakhstan?

Due to the previously mentioned, we consider actual to reflect thoughts of some domestic scientists-lawyers of what political and legal phenomena, in their opinion, play the most important role on the way of development of the law-based state in Kazakhstan.

MATERIALS AND METHODS

When determining methodology of research researchers proceeded from multiple layers of an object of

research. In view of that the problems considered in the study are to a certain extent interdisciplinary and raise the questions of political and legal doctrines, theories of the state and the law, a constitutional law, researchers during research used the wide range of methods. The methodological basis was a narrative-analytical approach to an object and a subject of research.

In the process of preparation of the study also methods of interpretation and an assessment, comparative, historic-legal, structural and system methods were used. In the monograph of group of researchers under the leadership of Baymakhanov *et al.* (2001), the interesting idea of a role of the law-based responsibility in formation of the law-based state was introduced. In particular, it was noted that “stable development of the country in many respects depends on research of its central bodies. Violation of laws, abuse of authority from their party can lead to negative consequences, sometimes of nation-wide scale. Therefore, the constitutional responsibility directly influences process of creation of the law-based state”. Further, it was emphasized: “Thus, observance of the principle of the rule of law and institute of the constitutional responsibility are the conditions necessary for formation of the law-based state” (Baymakhanov *et al.*, 2001). Here, it would be desirable to pay attention to the emphasis placed towards observance of the principle of the rule of law as an important condition for development of the law-based state. At the same time, scientists paid attention to institute of the

constitutional responsibility of the central government bodies which should limit a discretion of the power and provides a certain balance of forces in the state. Importance of the constitutional responsibility is also emphasized in the concept of legal policy of the Republic of Kazakhstan for the period from 2010-2020: "In the course of the further development in the country of the principles of the law-based state, it is important to achieve, on the one hand, the greatest possible security of implementation of constitutional rights and freedoms of the person and the citizen and with another, unconditional and exhaustive performance of the constitutional duties by all government bodies, officials, citizens and the organizations".

Basin (1989) attached great value to existence at the law-based state of the following properties: compliance of all laws to provisions of the constitution; unconditional supremacy of laws over all bylaws; supremacy of acts of bodies over acts of subordinates bodies; direct action of acts without their duplication, a statement or other forms of bringing on vertical channels to performers. Kogamov considered that the constitution as the basic law of the law-based state plays a special role in full ensuring the rights and freedoms of the person and citizen. The constitution is the main instrument of realization and "defender" of ideas of law-based statehood. In this regard, for development of our country as law-based state, it is necessary to pay attention to realization and use of provisions of the constitution at the solution of affairs and disputes. In particular, the scientist considers that definition of concept of the Constitution, it is necessary to fix legislatively. It even more will strengthen the constitution position as country's basic law. Shaygaliyev (2005) expressed similar opinion, considering that "carrying out the constitutional norms, we will be able to build the law-based state. And above all, understanding of that the constitution will serve the people only in that case when all citizens of the country are subordinated to the basic law".

Iseev (2005) saw close connection between creation of the law-based state and protection of a private property: "An economic basis of the law-based state are the relations of production which are based on equal and equally legal protected forms of ownership: state, collective, private stock, cooperative and other". In addition, he considers that "civil society and the law-based state logically assume each other-one is impossible without another. At the same time, civil society initially: it is the decisive social and economic prerequisite of the law-based state". Zhakenov (1989) also emphasized that creation of the law-based state very important for economic development. He notes that above the producer from the state must be only one force-the law. Then, the

producer will feel in bigger safety. Thus, economic freedom, enterprise activity and development of economy can also act as attributes of the law-based state.

There was no common opinion concerning the status of the State in the private-law relations among Kazakhstani scientists. For example, expressing the opinions on possibility of the state to unilaterally terminate or change the contract with a subsurface user, Suleymenov wrote the following "A little frightening psychology which isn't acceptable for the law-based State: while I am poor, I am ready to promise you all benefits, privileges and advantages for the entire time of the contract but when I become rich and will be able to manage myself, you can leave because you aren't necessary to me". Further, the researcher concluded that all the actions have to be carried out legally and he mentions that at a contradictory between legality and expediency, a priority has to be given always to the legality.

Unfortunately, not in all cases this priority was followed. There are number of explanations for this: lack of legal regulations, improper conduction of unification process of judicial practice at the level of the Supreme Court and, etc.

As a good example, we could take the case of corporate dispute between participants of "MGK" LLP which was solved by Kazakhstani courts. In this civil case, one of participants of "MGK" LLP, the "Sturgis Investment Limited" Company, filed a claim to court and asked a court to expulse the other participant, the "Acret Limited" Company from the "MGK" LLP.

The "Sturgis Investment Limited" Company claimed their point of view by essential harm that was caused by "Acret Limited" Company to "MGK" LLP. According to the foundation agreement the "Acret Limited" Company had to contribute 50,000,000 US Dollars in this project. However, they invested only 48415098 US Dollars, i.e., lacking 1,584,902 US dollars. Also, the "Acret Limited" Company and "MGK" LLP signed a contract that obliged "Acret Limited" Company to finance "MGK" LLP for additional 12,000,000 US Dollars. These obligations also remained not executed. In addition, between two of these participants of "MGK" LLP took place the corporate conflict and as a result occurred the "deadlock" situation. In such cases how reasonable is to take the course of expulsion of the shareholder?

RESULTS AND DISCUSSION

The first three levels of courts in judicial procedure supported the claimant's request and unsatisfied with this decision "Acret Limited" Company filed a request to the Attorney-General of the Republic of Kazakhstan.

After receiving the request of “Acret Limited” Company the Attorney-General of the Republic of Kazakhstan decided to direct this civil case to the Supreme Court of the Republic of Kazakhstan. The Supreme Court of the Republic of Kazakhstan didn't find any reason to cancel the decision of previous courts, therefore left a protest of the attorney-general unsatisfied.

In our opinion, the protest of attorney general had reasonable arguments deserving more detailed assessment. For example, in item 2 of Article 12 of the Law of the Republic of Kazakhstan “On subsurface and subsurface use” the following right of the Government stated.

In order to preserve and strengthen the resource and energy basis of the country's economy, the newly and previously executed contracts for subsurface use, except for contracts on ground water and widespread mineral deposits, the state shall have the priority right over other party to the contract or participants of the legal entity holding the right to subsurface use and other persons for the acquisition of the right to subsurface use (its part) to be alienated whether with or without charge and (or) objects related to the right to subsurface use.

The “MGK” LLP was the subsurface user and had to follow the above law affirming the priority right of the government on the alienated shares. However, the court drew the opposite conclusions. We believe that these and other legal questions have occurred from the absence of a detailed legal regulation.

Therefore, we completely share opinions of Kazakhstani scientists on an important role of the law-based state as a factor significantly influencing in the creation of an attractive investment climate in the country and in general development of entrepreneurship activity.

As Udartsev (2001) considered: “It is obvious that creation of the law-based state is first of all formation of mature legal culture, legal and moral education of society”. Ibrayeva (2000) holds approximately same opinion: “such state in which was created as a result of democratic development of society rather high legal consciousness and legal culture of most of citizens can be considered as originally law-based democratic state. We will especially note that without the developed legal consciousness all other signs of the law-based state will not work effectively”. In other words for construction and development of the law-based state an important role is played legal consciousness, formation of high legal culture, moral and spiritual qualities of society.

The Kazakhstan scientists note importance of democratization of society on the way of creation of the

law-based state, in particular, Malinovsky (1989) wrote, “Democratization, universal introduction of the principles, structures and forms of self-government represent in our country just that base on which only and it is possible to create the law-based state”. The thought of Beysenova about a role of democracy in the law-based state was also very interesting: “Creation of the law-based state needs to be begun with restoration of an initial essence of the law, its role in society with return to it democratic traditions. The right understanding essence in the law-based state means that the law and the power proceed from the people, the true founder of the law is democratic society and the state carries out necessary actions such publication of legal acts and their realization”. The adherent of primacy of democratization was also Saparbekova (2008): “the democracy is a basis of the law-based state, the essence of a democratic principle consists in creation of conditions for full participation of citizens in administration of the state and instilling in citizens of skills of political work and a sense of responsibility for the actions”. Agreeing with above-mentioned scientists, Ayupova and Sabikenov considered that “the law-based state is the state which recognizes, provides and protects (guarantees) the right and freedoms of the person, the citizen; the state founded on the principle of division of powers which are democratically formed, functioning in the mode of strict and steady respecting the rule of law in the conditions of the developed, harmonious legal system and high legal consciousness of citizens at supremacy of the Constitution and other laws” (Ibrayeva, 2000). Thus, the big group of the Kazakhstan scientists considered that for development of the law-based state, it was necessary to pay a close attention to democratic transformations, participation of citizens in political life of the country, in formation and functioning of all three branches of the power. We consider it natural, after all nobody will protect the rights and freedoms of citizens than citizens themselves by means of active participation in political and legal life of the state.

The interesting idea was introduced by the lawyers considering that for creation of the law-based state it is necessary to pay the main attention to development of fair laws. According to Busurmanov (2006): “It (the law-based state-Reseachers) is sensitive to such concepts and the principles as legislative and restrictive measures, limits, borders which have the universal and internalized character and by which all legal entities are guided. In such state, the law is respected and observed by all because the law the carrier of ideas of justice and humanity, it expresses measure of freedom”. Tusupov (2002) wrote, “Domination of fair laws, a keynote of

law-based statehood. They are accepted by the government bodies urged to express cumulative will of the people and therefore possess a priority in comparison with other regulations". Law it is not only laws of the state. The law-first has to be associated at people with justice, equality and freedom. Only then, society will respect (not because of fear of sanctions) not only law but also the state.

Due to the previously mentioned, we consider actual definition which the prominent Kazakhstan scientist Matiukhin (2003) gave to the law-based state: "The present understanding of the law-based state is not absolutely that which was at the beginning of its formation: as protector of certain interests by law. Originally, law-based state acts as a police state. It arises as the state providing first of all protection of a private property which appears sacred and inviolable. Only later, after works of rather large number of thinkers, we can really claim about change of reference points of understanding of the law-based state as main tool, means and form of protection of the rights, freedoms and interests of the personality. The law-based state in modern conditions is considered also as the socially oriented or social state".

After getting independence, Kazakhstan followed a way of creation of the law-based state. However, as we can see, opinions of the Kazakhstan scientists were shared in what institute of the theory of the law-based state plays a priority role for the fastest development of the country in this direction.

Representatives of the first group of scientists consider that in development of the law-based state it is important to develop the principle of the rule of law and institute of the constitutional responsibility. Which purpose consists in restriction of a discretion of the authorities and ensuring balance of forces in the country.

The second group of scientists-lawyers to agree in opinion on primary role of the constitution as guarantor in observance of the principles of the law-based state. The constitution is also the basic law to which must correspond all other legal acts. Therefore, the constitution carries out important mission, acting as a certain legal reference point in the process of the development of the law-based state.

The third group notes that the law-based state has to pay much attention to development of economy. In this regard, economic freedom, enterprise activity, the thought-over tax policy are one of those levers providing effective development of economy and as a result of the law-based state.

The fourth group of scientists assigns the predominating part in construction and development of the law-based state to sense of legal consciousness, legal culture, moral and spiritual development. Undoubtedly, without highly moral qualities of the population effective development of society is impossible. After all, the law-based state is built by people, society. Therefore, quality of formation and development of law-based statehood will depend on moral qualities and level of legal consciousness.

Those scientists-lawyers who consider vital for the law-based state to pay attention to democratic development, active participation of citizens in political and legal life of the country treat the fifth group. Really, any state exists for its population, for people. Therefore, society has to take active part in activity of the state, there has to be a feedback of the state with society. It is also necessary for the state to have "finger on the pulse" to consider wishes, needs and vital values of the population. After all, the law-based state will be only then fair if considers interests of the people.

At last, the sixth group of scientists pays attention to need of development of fair laws. It is thought, it is connected with fact that not always all laws of the state may be within the law, i.e., a standard of justice, freedom and equality. Therefore, in creation of the law-based state existence of unlawful laws is inadmissible, differently it will be difficult to call such state as law-based.

CONCLUSION

It would be desirable to note that an important role in development of the law-based state in Kazakhstan depends on restoration of active, economically and politically initiative civil society, on connection of ideas of democracy with traditions of the Kazakhstan statehood. It will become possible if historically formed legal nihilism, a gap between the liberal concept of the law-based state and national, ethical, moral, religious elements of national legal consciousness are overcome.

ACKNOWLEDGEMENTS

Researchers are grateful to JSC "KAZGUU University" for support and creation of necessary conditions for carrying out this research.

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