

The Problem of Balancing the Interests When Using the Subsurface Resources

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Abstract: The questions of the balance achievement of private and public interests at using bowels are examined in the article. The author proceeds from the state sole property on bowels. By this the attention to the interests of people living in the given territory and to the society as a whole is paid.

Key words: Private interest • The public interest • State ownership on bowels

INTRODUCTION

According to theory of the separation of law based on the protection of interests, the right aiming at the protection of public interests is recognized as the public law, whereas the right protecting the interests of the private individual, is recognized as the private law. Although it is impossible to fairly distinguish between these two categories in terms of the legal sense, it is the difference in the protected interests that determines the position of the legislator when designating particular area of social life to a public or private law, each having peculiar methods and techniques of legal regulation. In other words, "the intention objectified in law is nothing but an expression of interests" [1]. Having sovereignty relations as a subject of legal regulation, constitutional law, first of all, expresses public interests in the normative form.

Present-day theory of law does not allow one to consider the society and the state separately, ignoring their continuous relationship and determining influence on each other. From this point of view more felicitous is the definition of a public interest, given by Y.A. Tikhomirov. In his view, the public interests are the common interests, some kind of averaging of personal or group interests. These are the public interests. They must be satisfied in order to implement private interests, on one hand and on the other hand, to ensure the integrity, sustainability and normal development of organizations, states, nations, social classes and finally, the society as a whole. These are officially recognized interests provided

by the support of the state and legal protection. As a result, Y.A. Tikhomirov comes up to a conclusion that the public interest is the interest of the social community recognized by the state and secured by the law. The satisfaction of public interest is the prerequisite and guarantee of existence and development of social community [1].

A.V. Kryazhkov reckons the same opinion when defines the public interests as a legally recognized interests of a society being under the protection of the state [2].

However, it seems that these definitions are not completely felicitous. To a certain extent they are idealistic and do not take into account the fact that the interests of the state and society are always dynamic and often reveal serious contradictions. Therefore public-law norms set by the state express not just the public interest in its purest form, but the interest reflected through the needs of the state. In these circumstances, the public interests depending on the type of state may be a valid expression of the will of the majority of citizens, or the will of a separate group of persons in authority.

The goals of creating and maintaining the constitutional legal order are at the intersection of public and private interests, in the intersection of the "power and freedom" [3]. In the dialectic of their subordinate relationships the category of "public interest", which is, by definition of I.A. Il'in, "improvement of living together, through the establishment and maintenance of a justified rule of law" [4], is precisely the dominant legal point.

Exploring the challenges of ensuring the interests of individuals, society and the state in the sphere of subsurface resources use, it is necessary to consider the positive and negative experiences of the Soviet period. First of all, the approach to the national character of socialist property at a time when there were no objective preconditions, led to the overall economy governmentalization. This resulted in almost complete disposition of workfolk from the means of production and the deformation not only of a system of purely economic interests, but the entire system of public interests. At the same time, in many Western countries, the economic and political mechanisms, as well as the forms and methods of state regulation of the economy were improved; they were brought in line with the actual level of socialization. Since the end of the 60s increasing attention has been paid to an individuals, whose level of culture and education, as it was understood even then, in the era of scientific and technological revolution, has become an important, if not the most important factor in the economic success of any country [5].

This is evidenced by the current economic crisis, which proves that the economic growth of Russia and Kazakhstan in the early 21st century is largely due to favorable conditions in the world energy prices rather than creation of an effective economy.

Increasing economic benefit from oil production is only possible providing the direct participation of the state and the management of this strategically important economy sector by the government. An example of such a direct governmental control of the economic relations is the state regulation of gas flaring during oil production.

It is generally admitted that Kazakhstan is one of the largest holders of proven recoverable oil reserves. Kazakhstan's share is 2.9% of the global share [6], which is equivalent to 5.5 billion tons. The availability of such oil reserves allowed Kazakhstan to enter the top ten countries in the world in terms of this indicator [7].

Extraction of Kazakh oil in the 90-ies of the XX century was largely undertaken by foreign companies which were not interested in increasing investments into the conservation and protection of the environment, as the associated gas utilization was not a contractual requirement.

The problems with the associated gas utilization were arising in almost all oil-producing countries of the world, though they were particularly topical issues in developing countries.

Due to the fact that the associated gas flaring has a number of adverse economic and environmental effects of the global scale, the World Bank has established in August 2002 Global Gas Flaring Reduction Partnership (GGFR).

Kazakhstan's reaction was to make changes in the "Oil Law" of the Republic of Kazakhstan that established a ban on the associated gas flaring with some exceptions to the general prohibition, which came into force on January 1, 2005. It should be noted that most of the oil producing companies in Kazakhstan were not ready for the implementation of this ban, because they lacked the facilities for associated gas recycling that resulted in numerous violations on the part of the oil producers. State authorities responded immediately and imposed various sanctions from the administrative fines to claims on reduction of oil production volumes. It is natural that existing situation became the subject of discontent on the part of oil companies and criticism on the side of experts [8].

Fair criticism has been well received by the state. This has led to the introduction of new amendments to the "Oil Law", in particular, extending the list of exceptions to the general ban on associated gas flaring. However, state policies aimed at reducing the associated gas flaring, tightened by increasing the penalties for environmental pollutions. From this example it is evident that the public interests to protect the economic well-being of the country citizens, the health of the population in oil-producing regions, environment and ecological safety, prevail over private interests of oil producing companies.

To ensure optimal balance of different interests when using subsurface resources, it is important to evolve the study on the implementation proprietary rights by the state. According to the fair remark of F.M. Rayanov, in any state one can talk about the state management of economic relations. However, in the framework of this concept we can talk only about the direct state management of economic relations, developing with the involvement of state owned businesses. Even if the legal regulation of market relations dominates in the state, the economic relations involving only state-owned businesses can be defined by direct governmental enactment. On the practical level, such a direct state administration of economic relations results in exercise of owner powers on the part of the state [9].

That is why the characterization of the state as an entity, acting on economic relations in the society, cannot go beyond its imperious features, but must also proceed from the particular features of its legal status as a major and active participant of property relations.

Amendments to an Act of the Republic of Kazakhstan "On subsurface and subsurface use" adopted on October 24, 2007 and the following like-named Act adopted later on June 24, 2010 contradict above statements. According to these amendments, the state on behalf of the competent authority may in its sole discretion terminate the contracts for subsurface use if "actions of subsurface user, while conducting mining operations pertaining to the site of subsurface resources (deposits) that are of strategic importance, lead to a substantial change in the economic interests of the Republic of Kazakhstan, posing a threat to national security" (article 72 of the Act "On subsurface and subsurface use"). Noted changes in the legal regulation of subsurface use in the Republic of Kazakhstan gave researchers reason to believe that generally new Subsurface Law tightens conditions for contracting and execution of subsurface rights in Kazakhstan, makes worse the investment climate in the country, as well as creates a number of prerequisites for the nationalization of the extractive industries [10].

It should be noted that the adoption of this amendment was followed by a heated discussion of all parties concerned [11]. Kazakh lawmakers joined to these debates. Thus, Mussiraly Utebaev, who was at that time a senator and the chairman of the Senate Committee on Finance and Budget of the Kazakh Parliament, declared in his interview to the newspaper "Kazakhstanskaya Pravda" ("Kazakhstan Today") the following: "The Civil Code allows the state to participate in civil matters. Although the state is regarded as a subject of civil rights under those provisions of the Code, which define the participation of legal entities in civil turnover, we cannot ignore the peculiarities of the statehood and the state terms of reference. This means that civil law, including the Civil Code, as well as other regulations include rules of law devoted exclusively to the state.

Public law is bound up with the political regime and national governance structures. With the development of market relations, public law norms apply to business operations in order to neutralize or prevent the negative phenomena that accompany entrepreneurial activities. And in this connection it is clear that the subsurface management belongs to the public law institution. Moreover, this public law sector also contains elements

of private law. But at the same time, the public and private law systems do not merge, but, being completely independent, interpenetrate to each other only to a certain extent.

Here it makes sense to mention the clear separation between civil law and public norms. The state, with the levers of power control, cannot be an equal party to the contract. In the relations of civil turnover it serves not only as a subject of such a relationship but as regulatory body, as a political sovereign, dictating "rules of game" to other economic agents.

In the subsurface management, where the exclusive state property is presented, by virtue of the relevant provisions of the Constitution, it is inalienable and imprescriptible; its use is carried out for the public benefit and common interests. Such employment can only be achieved by administration of the imperious methods. The powers of the state as a subsurface right holder is closely intertwined with its prerogatives of public authority, sovereign guarantor and protector of subsurface resources, ensuring their inalienable and imprescriptible nature, conservation and sustainable use. Therefore, at any stage of the civil transaction - from making deal to its execution - the state may intervene in this process and make a decision based on the national interests" [12].

This assertion is highly controversial. After all, if we start from the context of civil jurisprudence, then in the subsurface use agreements the state acts exactly as the party of civil-law relations and cannot accept powers of authority. Time will show, in what extent the lawful actions of Kazakh lawmakers, who supported the government in this strategically important issue, were appropriate and lawful. Will the amendments made influence the investment attractiveness of Kazakhstan's subsurface resources? We believe that this will not reduce the amount and a number of investments. Kazakhstan with its rich natural resources and loyal tax legislation still remains a "honey pie" for foreign investors.

Referring natural resources in general and subsurface minerals, in particular, to the property should be based on the general requirements to be applied in relation to all areas of regulation, as well as special demands, peculiar solely to natural resources, as a special object of legal regulation. Only through the understanding the nature of property rights and the relationship between property rights and the concept of natural resources, natural wealth and the public domain, as well as the disclosure of constitutional and legal status of this concept and the economic aspect, it is possible to establish procedures

for socially equitable and economically efficient regulation of relations on natural resources ownership to public ends.

Natural resources are varied in purpose; following paragraph 2, article 9 of the Russian Federation Constitution, some of them may belong to public or any other forms of ownership. Paragraph 1, article 9 of the RF Constitution defines the priority quality of natural resources, attributing them to the public category, as the living and working base of the Russian Federation nations. Pursuant to this provision of the Constitution, article 129 of the Civil Code of the Russian Federation has determined that the land and other natural resources may be alienated or transferred from one person to another otherwise to the extent to which their circulation is permitted under the laws of the land and other subsurface resources. This means that special federal laws in the field of wildlife management can state that certain types of natural resources or portions thereof may be withdrawn from civil circulation or limited by such circulation.

Depending on the social significance of subsurface resources, they can be attributed by the federal laws as some form of property, such as public property, which includes not only the state ownership, but municipal property as well. In turn, the Kazakh legislation recognizes private ownership just of land. Other natural resources, including subsurface, are the exclusive property of the state.

The state, providing implementation of public interests, ensures the implementation of the interests of each individual. The main task of the state, as the representative of the whole society interests in the management of state ownership of natural resources, is to ensure the principle of fair and equal right of everyone to the enjoyment of natural resources as the public domain, the principle of equal access to material and other benefits from the use of natural resources (natural rent).

The Constitution guaranties that natural resources are the living and working base of the Russian Federation nations which are essential for the further development of the commonwealth. Therefore, it is Russian nation that is most interested in the conservation, restoration and sustainable use of natural resources. Due to the fact that the only source of power in the Russian Federation is its multi-ethnic commonwealth, we should recognize that it is the Russian people who may be the only legal owners of country's natural resources.

People exercise their power through the public authorities and local government bodies. Thus, the identification of the concept of state ownership of natural

resources and public domain is possible for the purpose of exercising the property rights of the multiethnic Russian nation on natural resources. When exercising ownership powers of the proprietor of natural resources, the state should take into consideration, first of all, to what extent this meets the interest of the whole society. Republic of Kazakhstan faces the same challenge, which should take into account, when solving the matters of subsurface, the interests of all citizens of Kazakhstan as the exclusive and fully legitimate source of power.

The state, when realizing the ownership powers, may delegate some of them to the federal government agencies, as well as the authorities of the Russian Federation subjects, which in turn establish the state and municipal enterprises to exercise these powers, enjoying all the rights provided to the owner by law. According to article 298 of the Civil Code of the Russian Federation, the state and municipal enterprises are free to dispose the income derived from the entrepreneurship, permitted by the owner, including the use of natural resources. But when exercising the owners right for natural resources, as the public domain objects, the state should come primarily from the public interests and the interests of every citizen, which, unfortunately, do not always coincide with the interests of the executive departments and especially the enterprises, to which the natural resources have been conveyed.

Though at that, undoubtedly, there is a danger of substituting the interests of the individuals, society and state by the narrow-corporate interests. More and more straightforwardly, the interests of the groups in power are becoming the determining motive in public decision-making. Laws and regulations, which in fact often serve the interests of corrupted nomenclature, are usually adopted under the banner of protecting the national interests [13].

Therefore the development of an effective mechanism for subsurface resources management by state companies today is becoming the contemporary issue. Such a mechanism should be based on the rules of constitutional law, as it is this branch of the Russian and Kazakh law that aims at protecting both the public interests of the state and society and the private interest of individual personality. At the same time, one of the main goals of the constitutional law, underlying the entire legal system of Russia and Kazakhstan and pursuing the main aim to maintain the order and stability in the society, is providing the balance between public and private interests through the legal arrangements.

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