

Farkhad Karagussov,
senior scientific fellow of the Institute of Private Law
of Caspian University (Almaty, Kazakhstan),
associate member of the International Academy of Comparative Law,
doctor of law, professor

Lado Chanturia - the person who discovered the concept of legal entities of public law for Kazakhstan

This article is dedicated to my dear friend, a wonderful person and a great lawyer of our time, Doctor of Law, Professor, member of the International Academy of Comparative Law Lado Chanturia on the occasion of his 60th birthday!

I. Professor L.L. Chanturia is the person who opened the category of a legal entity of public law (hereinafter - "LEPL") for the Kazakh scientific community.

Within the framework of the International scientific-practical conference dedicated to the 10th anniversary of the independence of the Republic of Kazakhstan on June 18-19, 2001, he made a very interesting presentation on the classification and system of person of law provided for in the Civil Code of Georgia.¹ Lado's report caused a genuine interest of the conference's participants and a very lively discussion on the concept of LEPL. But for a long time, the idea of recognizing LEPL in Kazakhstani law was treated with distrust and skepticism.

At the same time, we understood from the presentation that the structure of a legal entity of public law allows the State to effectively participate in civil-law relations on an equal footing with all other participants of the sphere of economic turnover. As L. Chanturia formulated later in his other publication, the division of legal entities into legal entities of private law and legal entities of public law in the Civil Code of Georgia "was a revolutionary novelty in the whole post-Soviet area ... By introducing the concept of legal persons of public law, the code determined the state's legal framework, within which the State is entitled to establish legal persons. All legal persons of public law, and primarily the State, are equal participants in civil relationships".²

II. More than thirty years have passed since the moment when the formation of the current civil legislation began in sovereign Kazakhstan. And only a few years ago, for the first time in Kazakh law, a fairly comprehensive study was carried out, which remains the only one so far, on the question of what is it - a legal entity / person of public law. Within the framework of the research we

¹ See, Чантурия Л. Юридические лица – правовая конструкция современного права. В: Чантурия Л. Свобода и ответственность: право и правосудие постсоветской эпохи. Тбилиси: Издательство «САНИ», 2004. – 170 с. С. 39 – 60 [*Chanturia L. Legal entities - the legal structure of modern law. In: Chanturia L. Freedom and responsibility: law and justice of the post-Soviet era. Tbilisi: SANI Publishing House, 2004. - 170 p. Pp. 39 – 60*].

² See, Chanturia L. The Development of Civil Law in Georgia. In: Georgia in Transition: Experience and Perspectives, King L. and Khubua G. (eds.). Peter Lang, 2009. Pp. 9 – 10.

analyzed the following aspects: why and how national legislations of economically developed States regulate the legal institution of legal persons of public law, if it is necessary or expedient that such legal institution would exist in the law of Kazakhstan and, if yes, how the functioning of legal entities of public law shall be organized within the framework of the domestic political and socio-economic system, as well as how a perception of this legal concept should be carried out practically.

Today we understand that: (1) a legal entity of public law is a way of participation of the State and / or other public-law persons in civil / property relations, (2) each such legal entity of public law shall be established and operate in order to serve or implement a specific common or public interest on a countrywide or separate territory/local community basis, (3) certain organizational and legal forms provided by law for legal entities of private law can be used for setting up and operations of LEPL, (4) regardless of whether the entity is a legal entity of public law or private law, this entity has a completely equal status with all other participants in the sphere of civil-law relations, and (5) establishment, operation and termination of legal entities of public law (regardless, each of them separately or a certain category of such entities) shall be regulated by special provisions of the law.

It is also clear to us that in each national system where existence of legal entities of public law is recognized, a legal framework for LEPLs differs. And the national system of LEPLs itself may have noticeable features (including those due to tradition, specifics of the state structure and territorial division, the role of the church or other public organizations of nationwide importance, degree of independence of local communities or territories, and other factors). However, the above criteria for LEPLs are inherent in almost all respective jurisdictions.

III. The need for regulating the legal status of legal entities of public law by Kazakhstani legislation, as well as the proper perception of the experience of developed jurisdictions in the formation of a necessary legislative and organizational conditions for the effective functioning of legal entities of public law, is beyond doubt. We strongly believe that an introduction of the concept of LEPLs in our national system will contribute to the progressive development of our State and society. Besides, we are also of the opinion that there no comparable alternative to the legal regulation of legal entities of public law exists for a country striving for the sustainability of its development as an economically and politically independent State with the rule of law and an active civil society responsible for the future of its people. Existence of the relevant framework will contribute to such State's fuller and more comprehensive participation in international political, humanitarian, economic and other public relations, integration into the system of socio-economic relations as its equal participant.

Over the decades since the adoption of the Kazakh Civil Code, we see that the transition from the use of purely Soviet forms of state participation in civil relations (which were created for the purposes of the command planned economy

that existed in the USSR) towards a system and forms normal for a market economy has clearly dragged on. When deciding on the introduction of the concept of LEPL into the national legal system, the argument about the need to take into account the complexity of the transition period, which sounded convincing at a certain stage in the historical development of our states, loses its significance after 30 years.¹ Moreover, the experience of Georgia, Moldova, Azerbaijan and the Baltic countries shows that the rejection of the soviet-time system of the State's participation in civil relations and the use of LEPL structures instead can be successful (although the scale of the economy may matter, but, as it seems, only in relation to the timing of the transition to use of new legal forms).

And most importantly: such a longstanding commitment to the Soviet principles of managing the national economy (even when using corporate forms of economic activity) objectively led to the fact that the existing legal framework for the State's involvement in entrepreneurial activity in Kazakhstan clearly showed its inefficiency and groundlessness.

IV. It is noteworthy that back in 2002, referring to the problem of legal forms for the State's participation in economic turnover, professor Yu.G. Basin analyzed in detail the so-called national companies that had appeared by that time, quite definitely identifying them as an instrumentality of direct control of the most important economic and production processes by the state, as well as satisfying and protecting the state's interests. At the same time, he unequivocally understood the national company as a special organizational and legal form of a legal entity or "an essentially new type of legal entity", the emergence and wide development of which he assessed as "one of the most serious measures of modern public administration of a free market." In addition, Yu.G. Basin emphasized that the activities of national companies are carried out with disregard for the "axiom of civil law" which provides for "a possibility for state bodies representing the state to enter into both public and private legal relations", while "national companies [being commercial organizations - *F.K.*] have both authoritative and interdependent (civil) rights and obligations within the framework of a single legal relationship, on the same subject of rights and obligations".

Separately, Yu.G. Basin emphasized that "no generalizing legislative acts defining the specifics of the legal status of national companies: the procedure for their formation and liquidation, their management - have been adopted". As a solution of the problem, he unambiguously pointed out that "a separate legislative act is needed, since the national company, being a joint-stock company, in addition to its public functions enters into civil law relations, including

¹ See, Маковский А.Л. Новые гражданские кодексы государств-участников СНГ: стабильность и переходный характер регулирования. В: Маковский А.Л. О кодификации гражданского права (1922 – 2006). М.: Статут, 2010. - 736 с. С. 690 – 691. [*Makovsky A.L. New Civil Codes of the CIS Member States: Stability and Transitional Nature of Regulation. In: Makovsky A.L. On the codification of civil law (1922 - 2006). M.: Statute, 2010. - 736 p. Pp. 690 – 691*].

investment contracts” and expressed his firm view that such an act should be “essentially of the civil-law [nature – *F.K.*]”. At the same time, he outlined the specific structures to be established in such a law and also warned that “the creation of a new type of legal entity in essence and its active introduction into the most important sectors of the economy requires careful analysis and cautious critical assessments of the possible consequences for the further development of the market (including investment) turnover in the country while ensuring proper protection of the public and social interests of the Kazakhstani society”.¹

V. Unfortunately, Kazakhstani legislation continued to develop in its own way without serious consideration of international experience in regulating the ways and forms of participation of public-law entities in civil relations. The respective legislative framework has developed as the legal environment for the functioning of such a monster as the “quasi-public sector”. At the same time, along with corporate organizations (JSC and LLP) with direct or indirect participation of the state in their capital, this phenomenon also combines state enterprises (“*gosudarsvennoye predpriyatiye*”) as well as any other legal entities affiliated with them, while not prohibiting them from creation of subsidiaries with also unlimited right of their multi-level subsidiaries to create the own subsidiaries.²

This monster (quasi-public sector) has developed to incredible proportions, and not only did it not contribute to the prosperity of our society and the well-being of our people, but it also caused the emergence of certain significant prerequisites for the bloody events in January 2022 in Kazakhstan. After the acting president of Kazakhstan took the situation under his control, he demanded a radical reform of the mentioned “quasi-public sector”, including to reduce the harmful effect of its existence. Unfortunately, the instructions of the head of the State were taken quite literally, and instead of liquidating the quasi-public sector, some interested people at the state-power level are trying to preserve it, albeit with some (moreover, unreasonable and poorly thought out) changes in legislative regulation.³

Of course, we fully support the idea of abolishing such an organizational and legal form of legal entities as the state enterprise, reflected in the proposed

¹ See, Басин Ю.Г. Национальная компания. В: Басин Ю.Г. Избранные труды по гражданскому праву. Предисловие Сулейменов М.К., Ихсанов Е.У. Сост. Сулейменов М.К. – Алматы: АЮ – ВШП «Әділет», НИИ частного права КазГЮУ, 2003. – 734 с. С. 199 – 211 [*Basin Yu.G. national company. In: Basin Yu.G. Selected works on civil law. Preface Suleimenov M.K., Ikhsanov E.U. Comp. Suleimenov M.K. - Almaty: AJ - HSL "Adilet", Research Institute of Private Law of KazGUU, 2003. - 734 p. Pp. 199 – 211*].

² See, paragraph 31) of Article 3 of the Budget Code of the Republic of Kazakhstan dated December 4, 2008 # 95-IV [*Бюджетного кодекса Республики Казахстан от 4 декабря 2008 года № 95-IV*].

³ See, Концепция проекта Закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам развития квазигосударственного сектора» (январь 2023 года). [*The Concept of the draft Law of the Republic of Kazakhstan "On amendments and additions to certain legislative acts of the Republic of Kazakhstan on the development of the quasi-public sector" (January 2023)*]. Internet resource https://online.zakon.kz/Document/?doc_id=33808420.

documents on the reform of the quasi-public sector. However, it seems that the only justified reform of the quasi-public sector (if aimed at a progressive development of Kazakhstan, ensuring sustainability of the national economy and well-being of citizens) is to be liquidation of the quasi-public sector and formation, initially, of a proper legal framework and, subsequently, a reasonable system of legal entities of public law.

VI. For the first time we addressed this issue in 2017 by conducting a comparative legal study to analyze the meaning of the legal concept of a legal entity of public law and experience of certain foreign states on creation of legal framework for legal entities of public law. Based on the results of that study, we came to the conclusion that Kazakhstani law is ready for acceptance of the concept of LEPL, as well as that proper perception of this concept by Kazakhstani law is expedient and necessary for the development of the rule of law, civil society and free market. Based on the results of that research, we have published two large analytical reports, which include a review of the experience of foreign countries and a conceptual approach to perception of the institution of legal entities of public law by Kazakhstani law.

Like professor Yu.G.Basin, we also believe that the legal basis for LEPL should be predominantly of the civil-law nature, and this institution should be introduced into the national system of law thoughtfully and responsibly.

We developed the mentioned concept paper on perception of the notion of LEPL in 2018, and today it remains fully relevant. At the same time, its implementation should be carried out taking into account the following two aspects.

Firstly, the legal institution LEPL should be implemented in the way commonly acknowledged in the vast majority of member states of the Organization for Economic Cooperation and Development (OECD), albeit taking into account national specifics. And in no case should this lead to a weakening of the statehood of the Republic of Kazakhstan, unreasonable interference of law enforcement agencies in the activities of the LEPL and unfair / illegal redistribution of national wealth.

Secondly, today we are convinced supporters of the position that the institution of LEPL should be introduced into our legal system in such a way that the quasi-public sector irrevocably disappears from Kazakhstani law and the Kazakhstani economic system. There is no need to reform this sector, it must be liquidated.

At the same time, we emphasize that our analysis of foreign legislation allows us to conclude that the LEPL structure is applicable not only to forms of the State's participation in property / civil relations. It is also effective in organizing any activity that promotes or aims at implementation of a recognized public or other common interest. For example, in foreign jurisdictions, local communities and local governments perform as LEPLs, as well as LEPL's legal status is used to organize economic activities of other public organizations and /

or social mission-driven entities (for example, the national church, national forums and associations and similar organizations).

VII. Thus, we have been addressing the question of the expediency (even necessity) of the perception by Kazakhstani law of the legal concept of a legal entity of public law for more than five years.

At the same time, existence in Kazakhstan of a consensus (whichever it can be, social, intrastate, both in relations between the branches of the state and within the governmental apparatus, or at least at the level of theoretical developments in legal science) cannot be seen.

At the level of the state power, importance of introducing the legal institution of legal entities of public law into the national legal system has not been recognized until now. Also, in the theory of civil law of Kazakhstan, interest in this topic has not yet become at least somehow widespread. The Kazakhstan's Legal Policy Concept, approved in November 2021, only emphasizes the need to "continue the work on the issue of implementing international legal experience in introducing the institution of legal entities of public law into the national legal system."¹

At the same time, at the stage of discussion of the draft of this Concept of the Legal Policy of Kazakhstan, we invariably proposed the perception of the institution of LEPL within the framework of modernization of civil legislation, in particular, in such a way that the Civil Code should provide for the classification of legal entities into legal entities of public law and legal entities of private law, as well as we have suggested to develop, approve and implement in the legislation a concept of introducing the institution of legal entities of public law.² The basis for such proposed approach is that, as mentioned earlier, LEPL represent a form of the State's participation in civil relations or a way / instrumentality for the State to carry out economic activities.

If Kazakhstan is moving towards greater integration into the system of international humanitarian and social ties and economic relations with the developed economies of the World, any prominent participation in international trade, then the question of the perception by national law of the institution of LEPL (as it is recognized in almost all of the OECD member states, and also receiving greater development in other countries in the territory of the former USSR) should not even be doubted. Such a perception, taking into account the best practices of legislative regulation in developed jurisdictions, seems necessary.

¹ See, Концепция правовой политики Республики Казахстан до 2030 года, утвержденная указом Президента Республики Казахстан от 15 октября 2021 года № 674. П. 4.3. [*The concept of the legal policy of the Republic of Kazakhstan until 2030, approved by Decree of the President of the Republic of Kazakhstan dated October 15, 2021 No. 674. Clause 4.3*]. Internet site <https://adilet.zan.kz/rus/docs/U2100000674>

² See, Proposals of the Research Institute of Private Law of the Caspian University on the main directions of development of the civil legislation of the Republic of Kazakhstan. Internet site https://online.zakon.kz/Document/?doc_id=37068414

VIII. As for our scientific Conceptual approach to the perception of the legal institution of legal entities of public law by the legislation of the Republic of Kazakhstan (hereinafter referred to as the “*Concept*”), results of the research of the theory of a legal entity and legislative practice of a number of foreign countries (including some OECD member states) on regulating the legal status of legal entities of public law which we undertook at the end of 2017,¹ as well as the study and analysis of Kazakhstani legislation for the purpose of improving the national legislation about participation in private-law relations of public-law entities and introducing the concept of “legal entity of public law” conducted in 2018, served as the basis for the development of the Concept. Results of both stages of the research were reported and discussed at the international conference held on May 17-18, 2018 in Almaty,² and the Concept was published in the Internet.³

The following legal definition of LEPL is proposed as a key element of the Concept:

“A legal entity of public law is an organization established on the basis of a law or, if provided for in a law, a regulatory legal act of an authorized state body for provision of public services, implementation of the function of logistical support for the activities of state bodies, or for the implementation of other activities provided for or permitted by law in the benefit of the whole society or in the national interest, interests of a local community of an administrative-territorial unit. Any organization with direct or indirect participation of the State in it authorized capital, authorized fund or property equal or exceeding twenty-five percent of its amount shall be recognized as a legal entity of public law.”

¹ See, Отчет по результатам изучения опыта законодательного регулирования статуса юридических лиц публичного права в некоторых развитых иностранных государствах и бывших советских республиках [2018]. - 332 с. [Report on the results of studying the experience of legislative regulation of the status of legal entities of public law in some developed foreign states and former Soviet republics [2018]. - 332 p.] Internet site

<https://atameken.kz/uploads/content/files/ОТЧЕТ%20по%20результатам%20изучения%20опыта.pdf>

² See, Сулейменов М.К., Карагусов Ф.С., Кот А.А., Дуйсенова А.Е., Скрябин С.В. О юридических лицах публичного права (по результатам коллективного исследования). – Гражданское право в современном мире: влияние на развитие национального права. Материалы юбилейной междунар. науч.-практ. конф. (в рамках ежегодных цивилистических чтений), посвященной 20-летию цивилистических чтений (Алматы, 17 – 18 мая 2018 г.) / Отв. ред. М.К. Сулейменов. Алматы, 2019. – 528 с. С. 263 – 296 [Suleimenov M.K., Karagussov F.S., Kot A.A., Duisenova A.E., Skryabin S.V. On legal entities of public law (results of a collective study). – Civil law in the modern world: influence on the development of national law. Materials of the anniversary international scientific-practical conference dedicated to the 20th anniversary of the civil law readings (Almaty, May 17-18, 2018) / Ed. ed. M.K. Suleimenov. Almaty, 2019. - 528 p. Pp. 263 – 296].

³ See, Аналитический отчет: Концепция восприятия правового института юридических лиц публичного права законодательством Республики Казахстан [2018]. – 112 с. [Analytical report: The Concept of perception of the legal institution of legal entities of public law by the legislation of the Republic of Kazakhstan [2018]. - 112 p.]. Internet site
<https://atameken.kz/uploads/content/files/АНАЛИТИЧЕСКИЙ%20ОТЧЕТ%20Концепция%20восприятия.pdf>

Since, in accordance with the Kazakh Civil Code, the State (i.e. the Republic of Kazakhstan) and its administrative-territorial units have already been recognized as subjects of civil rights (along with individuals and legal entities), and the rules concerning legal entities apply to them unless otherwise provided by laws, we do not consider it groundless to call them as legal entities of public law (though they are certainly persons of public law).

In order for LEPLs to be able to participate in the sphere of property relations, it will be necessary to include in the Civil Code a provision stating that its rules governing participation of legal entities in relations regulated by civil law shall apply to LEPLs, unless otherwise follows from legislative acts. All other aspects of the legal status of LEPL should be regulated by a special law.

Thus, we consider it expedient to adopt a separate law which shall be focused (and limited) to fixing a legal definition of the concept of LEPL, as well as the general provisions on the legal status of LEPLs and grounds for their establishment. It will also be necessary to introduce relevant and expedient changes and other amendments to existing legislative acts based on legislatively established qualification features common to all LEPLs.

We believe that such approach will allow a consistent and more thoughtful introduction of the concept of LEPL into Kazakhstani law and implementation of appropriate legislative changes.