DOI:10.51634/2307-5201_2021_3_52
УДК 34.01
ГРНТИ 10.07; 10.07.61

BUILDING THE STATE OF LAW (RECHTSSTAAT) IN THE COUNTRIES OF CENTRAL ASIA: AN UNACHIEVABLE DREAM OR REALISTIC OBJECTIVE?

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It is a well-known fact that states in Central Asia have declared in their respective constitutional law their intention to establish the States of Law in their respective territories (Uzbekistan), or announced that they are such States (Kyrgyzstan, Tajikistan and Turkmenistan), or proclaimed themselves to be a State of Law (Kazakhstan). It is also well-known that achieving this aim, i.e., becoming a full-fledged State of Law, is a very difficult task. This article discusses the concept of *Rechtsstaat* and its main features, analyzes critical conditions needed to build up proper States of Law in Central Asia, looks at various challenges faced by these states in reaching that goal and briefly touches upon its achievability. The discussion is based on relevant constitutional legislation, opinions and positions of leading scholars on theory of law in the post-Soviet region as well as international sources. The article proposes its own working definition of the State of Law concept and offers a minimal list of objective and subjective conditions needed to successfully construct the *Rechtsstaat*. This article's novelty and originality consists in that, for the first time, it denotes the problematic issues that the Central Asian states have to overcome in order to implement or live up to their respective constitutional provisions concerning the *Rechtsstaat*. Moreover, the issue of achievability of eventually building up true States of Law in Central Asia has not been considered before from the regional perspective – which is also tackled by this article. The main conclusion of the article is that a true establishment of the States of Law in Central Asia is a hard and long process but it is still possible.

Keywords: Central Asia; State of Law; Rechtsstaat; rule of law; civil society; Kazakhstan; Kyrgyzstan; Tajikistan; Turkmenistan; Uzbekistan.

Introduction

Law is abundant in complicated concepts, specific terminology and (often presumed) abstract theories. A proper understanding and efficient employment of legal principles require a systematic and concentrated study. Out of those concepts, one stands out as perhaps the most complex, rather subjective but also very influential throughout its development in human history: the category of *Rechtsstaat*, or State of Law. It has also been

frequently characterized as "idealistic". Its interpretation in various academic sources on the subject differs from one to another. What has not been questioned, though, is *Rechtsstaat*'s influence upon different state systems, legal branches, political developments and relations between state and non-state actors. Indeed, the aspiration to reach the ideal of a state that is governed by rule of (just) law[1] has been so appealing for many that states which announced their adherence to democratic principles have either declared themselves "States of Law" in their relevant constitutional legislation or indicated that they would be moving in that direction to become one. The post-Soviet states, Central Asian in particular, have not turned out to be an exception in this regard.

Since becoming independent from the Soviet Union in the beginning of the 1990s, the States in Central Asia have been trying to build up and gradually develop their own statehood, political and legal systems, and establish their own place in the world despite the challenges they have to overcome. The domestic legal systems of all five States in the region – Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan – belong to the continental civil law tradition, or Romano-Germanic legal family: normative legal acts are considered the main source of law, with their respective written Constitutions serving as the Supreme Law of the State and providing the legal basis for all other – constitutional and ordinary – laws, codes and what are known as sublegal acts. Judicial precedent in the region does not have a status of a source of law. While all of these legal systems operate based on continental civil law tradition, for the last thirty years those systems have developed their own distinguishing characteristics, from the point of view of both doctrine and practice and depending on to what extent they have absorbed principles and ideas from foreign systems.

When the post-Soviet states gained their independence in the early 1990s, they declared their intention of building up the civil society and eventually achieving a real State of Law in their respective territories.[2] A good and progressive example here would be Kazakhstan. Article 1, para. 1 of the Constitution of the Republic of Kazakhstan stipulates that "The Republic of Kazakhstan *proclaims* [emphasis added] itself as a democratic, secular, State-of-Law, and social state whose highest values are the individual, his life, rights and freedoms." What this essential provision signifies is that Kazakhstan in its Supreme Law recognizes the State of Law as an eventual aim to which it should aspire but has not yet achieved, unlike some other states in the neighborhood such as, for example, the Russian Federation which stated it already IS a *Rechtsstaat* – in its respective Constitu-

[1]Throughout this article, the term "law" is to be understood in its comprehensive connotation as "ius", or "pravo" in Russian, unless otherwise specified. Correspondingly, the concept of the rule of law is also to be interpreted as the "rule of ius" ("verkhovenstvo prava") and not as "rule of lex" (i.e., "verkhovenstvo zakona"), again, unless otherwise specified.

[2]As it has already been noted by some experts in certain fields of public law, the principle of the State of Law ("pravovoe gosudarstvo") has unequivocally been included in the constitutions of all states in the post-Soviet space. See Пуделька Й. Развитие и перспективы развития административного права на постсоветском пространстве и в государствах Центральной Азии [Development of administrative law in the former Soviet Union and Central Asia] // Право и государство. 2013. № 3 (60). – С. 20-26.

tion.[3] In other words, *it does not state* that Kazakhstan *is already* a State of Law; rather, it proclaims itself. This demonstrates a realistic perspective on the side of the legislators (and the drafters of the 1995 Constitution) and the state.[4] Another positive example would be Uzbekistan. Its Constitution mentions the task of "creating a humane democratic State of Law".[5] Other states in the region followed the example of the Russian Federation.[6] Indeed, achieving the ideal of the *Rechtsstaat* appears to be a very difficult task. The question is: is it achievable at all?

Basic Provisions

This article deals with the description of critical notions of *Rechtsstaat* (State of Law) and its key elements. It provides an explanation of major characteristics and principles of the State of Law – after proposing a working definition of the State of Law. The article then analyzes the critical factors, or conditions, needed to build up a proper State of Law for any state followed by the discussion of challenges faced by the Central Asian states in that building process while also looking at the issue of *Rechtsstaat*'s achievability at all. The concluding part summarizes the main conclusions of the article and offers the author's prospective on the States of Law in Central Asia. The author argues that achieving the States of Law in the region is a difficult but feasible process provided that the major factors described in the article are taken into account and the corresponding challenges are addressed by the main decision-makers as well as the society in Central Asia.

Materials and Methods

When drafting the article, this author used the publication materials written by both foreign and Kazakhstani scholars. Several existing definitions and theories proposed in the available published materials of leading theorists of law in the post-Soviet space have been analysed and compared. The comparative and critical approaches allowed the author to sift through different interpretations of the main concepts – *Rechtsstaat*, rule of law, civil society, and propose a working definition for State of Law based on the most comprehensive formulation of it originally proposed in Russian. The comparative method was also useful in juxtaposing certain relevant constitutional legal provisions of some countries in the wider region: Kazakhstan, Uzbekistan and Russia. In addition to the main legal analytical method used throughout the main text, the article employs a minimal historical approach when it delves into a very brief general description of the origins of the notion of State of Law.

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[3]Constitution of the Russian Federation, adopted 12 December 1993, with amendments approved 1 July 2020, article 1, full text in Russian is available at http://kremlin.ru/acts/constitution/item#chapter_start (last visited 4 September 2021).

[4]For the analysis of certain topical issues in the constitutional legislation of Kazakhstan, see Дуйсенов Э.Э. Некоторые проблемные вопросы конституционного законодательства Республики Казахстан [Some Problematic Issues of the Constitutional Legislation of the Republic of Kazakhstan] // Право и государство. 2020. № 3-4 (88-89). – С. 60-84.

[5]Constitution of the Republic of Uzbekistan, adopted and entered into force 8 December 1992, Preamble, full text in Russian is available at https://lex.uz/ru/docs/35869 (last visited 4 September 2021).

Main Part

1. State of Law: definition, main characteristics and principles

The notion of a modern State of Law, or, as it is more generally known, *Rechtsstaat*,[7] has a long enlightening history, both as a special theoretical concept and corresponding practice. As the word itself suggests, the term '*Rechtsstaat*' (formed from the combination of two German words – *Rechts* meaning 'law', 'right', and *Staat* translated as 'State') originated and became established in the German legal literature during the first half of the 19th century, and it has become widespread ever since.[8] It is not generally used in the English-language legal literature; to a certain extent another term, 'rule of law', has been used as its equivalent.[9] When it comes to the content and ideas informing *Rechtsstaat*, in other words, the substance of the concept of State of Law, those have first appeared already back in antiquity while the theoretically developed conceptions of State of Law are first known from the 16th to 17th centuries.

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[6]Constitution of the Kyrgyz Republic, adopted 11 April 2021, entered into force 5 May 2021, article 1, full text in Russian is available at http://cbd.minjust.gov.kg/act/view/ru-ru/112213?cl=ru-ru (last visited 4 September 2021); Constitution of the Republic of Tajikistan, adopted and entered into force 6 November 1994, article 1, full text in Russian is available at https://online.zakon.kz/Document/?doc_id=30391383 (last visited 4 September 2021); Constitution of Turkmenistan, adopted 18 May 1992, article 1, full text in Russian is available at https://online.zakon.kz/Document/?doc_id=31337929#pos=6;-116 (last visited 4 September 2021).

[7]Several alternative terms have been proposed in order to denominate this concept: 'legal state', 'lawful state', 'state of justice', 'rule-of-law state', 'law-state', 'justice-based state', 'constitutional state', etc. It seems to be more proper to use a qualifying term 'State of Law' which can be interpreted as 'state based on law'; that goes in line with one of its most critical characteristics – domination of ius, see below section 3, and corresponds to the working definition of Rechtsstaat proposed in the same section. 'State of Law' may serve as an appropriate translation into English of the equivalent of Rechtsstaat in the Russian language – 'pravovoe gosudarstvo' [правовое государство].

[8]Unlike what is commonly believed, it was not Immanuel Kant who offered the term "Rechtsstaat" itself although as it is described further in the main text he was the man behind an elaborated philosophical justification of the liberal theory of the State of Law. This term first appeared in the works of Carl Theodor Welcker, a German law professor and politician (starting from 1813), and Robert von Mohl, a German jurist (from 1832).

[9]It appears more logical to use the term rule of law in its more exact, or literal, connotation as a crucial principle of law as well as one of the fundamental conditions for Rechtsstaat rather than substitute the 'umbrella' concept of State of Law with it. See section 3 below for a brief description of the rule of law in that capacity. For a comparative analysis of the concepts of Rechtsstaat and rule of law, see Ударцев С.Ф., Темирбеков Ж.Р. Концепции "rule of law" ("верховенство права") и "Rechtsstaat" ("правовое государство"): сравнительный анализ [The Concepts of "Rule of Law" ("Verkhovenstvo prava") and "Rechtsstaat" ("Pravovoe gosudarstvo"): Comparative Analysis] // Государство и право. 2015. № 5. – С. 5-16. See also: Ударцев С.Ф. Сильное государство: вопросы теории [A Powerful State: Issues of Theory] // Право и государство. 2016. № 2 (71). – С. 6-14; Мелкевик Б. Сильное правовое государство: как противостоять современной разрушительной авторитарности [Strong Rule of Law: To stand-up against Contemporary Destructive Authoritarianism] // Право и государство. 2018. № 1-2 (78-79). – С. 35-42; Темирбеков Ж.Р. Политические права, верховенство права и экономический рост [Political Rights, Rule of Law and Economic Growth] // Право и государство. 2018. № 1-2 (78-79). – С. 43-52.

State of Law is one of the significant achievements of human civilization in terms of its influence upon the decision-making processes in the history of state formation. It is a multidimensional and developing phenomenon. In the course of social progress, it acquires new content and new features that correspond to the concrete conditions of societal existence and the level of societal development. And for any State of Law the enduring common element is its boundness by law.

There exist multiple definitions of the State of Law. Some of those definitions highlight the constitutional element: "A *Rechtsstaat* is a 'constitutional state' in which the exercise of governmental power is constrained by the law."[10] It is related to constitutionalism while often tied to the concept of *rule of law*; however, it also emphasizes what is just. Under such a definition, *Rechtsstaat* means that the power of the state is limited in order to protect citizens from the arbitrary exercise of authority. Close to this description are those where "the state in its realization of its governmental and judicial functions is restrained and limited by law; it stands under law and not outside or above it" and where "*Rechtsstaat* is a state dominated by law".[11]

Another definition underlines the element of relationships between various actors and the state: "A State of Law is a special form of organization and activities of state power which is built on the relationships with individuals as well as with their various associations, and is based on [norms of] law".[12] Here, the relational / collaborational component may be understood as the main purpose of this form of organization (state) where such collaboration should stay within the limits of legal norms.

A more complicated description of the State of Law may be presented as follows. *Rechtsstaat* can be defined as a permanent unified organism of institutions which are being guided, supported and activated by a common will and which have as a task the promotion of the permitted goals of a certain people on a given territory.[13] This task encompasses and is addressed to both separate individuals and the whole society. This is probably a definition where the indication of what the State of Law must eventually be is most directly present.

Some simpler definitions of *Rechtsstaat* appear to stem from the well-known theory of social contract: "A law-state is a state giving [its] individuals law-state protection within its territory."[14] This description prioritizes only one function the State of Law performs which is to provide protection to persons on its territory. It does not include other important elements pertinent to the *Rechtsstaat*, and seems to be rather simplistic or restrictive.

A general critique of the above attempts to define *Rechtsstaat*, as proposed by some authors could be that the notion of state in those definitions is given not within its historical

[10]Schmitt C. The Concept of the Political. Chicago: University of Chicago Press, 2008. P. 162.

[11]For a popular description of Rechtsstaat based on a liberalist constitutionalist view, see фон Хайек Ф.А. Конституция свободы [The Constitution of Liberty]. М.: Новое издательство, 2018. С. 528.

[12]Хропанюк В.Н. Теория государства и права [Theory of State and Law]. М.: Omega-L, 2019. С. 323.

[13]Von Mohl R. Encyclopedie der Staatswissenschaften. Berlin, 1817; Шершеневич Г.Ф. Общая теория права [Common Theory of Law]. Т. I. М., 1995.

[14]Frändberg Å. From Rechtsstaat to Universal Law-State. An Essay in Philosophical Jurisprudence. Springer, 2014. P. 190.

context but in an idealized representation.[15] Instead of determining what a state *is* they try to define what it *should be*. In other words, such descriptions lay out an idealized version of what the state must be. While perhaps properly capturing an ought-to-be characteristic of *Rechtsstaat*, this critique is lacking in the realization that no single state in the world has truly become a State of Law. There are state actors that have come very close to being labeled as *Rechtsstaat*, but on the European continent it would be unrealistic to suggest that there exists a state that may claim a one-hundred percent denomination as State of Law. Hence, it appears the definition of *Rechtsstaat* will probably stay as an idealized form of political organization for the foreseeable future.

Out of the multitude of *Rechtsstaat*'s definitions, one appears as perhaps the most comprehensive one in terms of its content, coverage, and elements as well as its teleological perspective.[16] According to this definition, *State of Law represents a form of organization of political power characterized by rule of law, legitimacy of power, and a high prestige and efficiency of the law, that ensure legal protection of the individuals and their unimpeded use of their democratic rights and freedoms in their legitimate (lawful) interests*.[17] This definition provides a list of the most important, democratic as well as relevant features of *Rechtsstaat* while indicating, or at least hinting at some of its main tasks and objectives such as guarantying protection by law and providing for human rights and the lawful interests of citizens. It (the definition) also contains a somewhat indirect reference to an ideal version of what a modern state should be or strive to become but that does not make it less deserving or less informational. For the purposes of this textbook, this definition of the term *Rechtsstaat* is used as a working one.

Based on this definition, the following main objective of the *Rechtsstaat* may be extracted. The purpose of the State of Law is to create conditions for the fullest provision of rights and freedoms of individuals as well as to consistently restrict state power with the help of law in order to prevent abuse of power and its transformation into dictatorship or despotism. The achievement of this noble goal does not seem feasible without a proper application of two principles that are well known to lawyers but not always well understood and that directly relate to the matter of legal regulation.

The first one states: 'Only what is prescribed by law is allowed'. This principle is concerned with a specific circle of legal subjects – state bodies and officials – and is sometimes referred to as the 'permissive binding' principle. It provides the subject of law with the amount of rights that is necessary for the performance of their duties. Here, the rights and obligations of the subject are quite accurately defined, and everything that lies outside of those rights and obligations is withdrawn from the scope of regulation. In this manner, the legal status of the state and state bodies, their subjects of jurisdiction and powers, are regulated.

[15]Марченко М.Н. Правовое государство и гражданское общество [State of Law and Civil Society]. М: Проспект, 2015. С. 648.

[16]For a comparative perspective and more or less inclusive treatment of the concept from contemporary German authors, see passim Silkenat J. et al. The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat). Springer International Publishing AG, 2014. P. 367.

[17]Леонов И.В. Правовое социальное государство: трудности становления [Social State of Law: Difficulties of Formation] // Право и управление: XXI век. 2006. № 1.

The second principle, often labeled as a constitutional principle,[18] stipulates: 'Everything which is not directly forbidden by law is allowed'. It is an opposite of the first one and is applied towards the other subjects of law such as individuals (nationals / citizens and foreigners, i.e., natural persons) and legal persons. In this way, as a rule, the legal status of the individual as well as the implementation of civil and business turnover is regulated. The person bears responsibility before the state only in cases directly foreseen by law; individuals are obliged to fulfill only those requirements that are based on the law.

Having said this, it must be noted here that law will play a primary role in the State of Law only if it serves as a *measure of freedom* of all and everyone and if acting laws *really* serve the interests of the people and society while their realization and implementation represent an embodiment of justice and fairness. One needs to keep in mind that the fact that there exists a comprehensive and developed system of legislation with detailed laws and normative acts in a given state does not yet signal the actual '*Rechtsstaat*-ness'. There have been numerous examples of legal systems where normative legal sources have regularly been enacted, with their enforcement being rigorously and strictly ensured but such a form of legal regulation constituted anything but State of Law. The biggest examples here would be the totalitarian states of the past such as the Nazi German state and the former Soviet Union.

Based on the working definition of the State of Law provided above, several fundamental key features of the *Rechtsstaat* which characterize it as such and which make it stand out from non-State of Law expressions of the state, may be discerned. In order to constitute a true State of Law, it needs to include every one of the following democratic elements, and none may be said to be more important or deserving than the other.

The first one is the principle of *rule of law*. Widely used not only in legal but also in political and academic parlance, this democratic concept is a rather broad and elusive one. There have been a number of differing definitions offered to explain this critical concept, but all of those appear to agree on its one unifying aspect: it is viewed as a constraint on individual and, importantly, institutional (state) behavior. This means that the state and its organs are only allowed to perform particular tasks if they have been given the power to do so by law and to the extent that these tasks are allowed by law.[19] But the notion of rule of law is more holistic than simply a restraint on state action.

The Oxford English Dictionary defines the rule of law as "[t]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes".[20] This rather formalistic definition captures a significant aspect of the principle,

[18]Indeed, it may be found although not in a directly referenced manner in the constitutional legal provisions of most of the post-Soviet states' legal systems such as Kazakhstan, Uzbekistan, Russia and so on.

[19]Frändberg Å. From Rechtsstaat to Universal Law-State. An Essay in Philosophical Jurisprudence. Springer, 2014. P. 190.

[20]Oxford English Dictionary online (accessed 4 September 2021). Black's Law Dictionary provides several definitions; one of those is 'supremacy of regular as opposed to arbitrary power'. Garner B. Black's Law Dictionary, 10th ed. Thomson Reuters, 2014. P. 2016.

namely, its applicability to all; in other words, the rule of law implies that *every person* is subject to the law, including legislators, law enforcement officials, judges and other state representatives. Without such inclusiveness the principle would lose its meaning and appeal.[21]

A substantive description of the rule of law would imply primacy of law (*ius*) not only in terms of its formal aspects such as universality of the law, its generality, equality, publicity, certainty, consistency and prospective application, but also its content. This means the rule of law necessarily entails protection of individual human rights, either some or all of them. In that sense, primacy of *ius* suggests it goes in line with the theory and philosophy of human rights and human dignity as well as international human rights law. That is confirmed by the following substantive and very comprehensive definition of the rule of law: 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are *consistent with international human rights norms and standards* [emphasis added]. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[22] Here, the consistency with international human rights norms and standards is a requirement for the law that rules and that connects it with another important element of *Rechtsstaat* – supremacy and ensuring of human rights and freedoms considered further below.

The second feature of the *Rechtsstaat* is *supremacy of human rights and freedoms*. This democratic aspect involves both the rights and interests of individuals and rights and freedoms of citizens. Here, the concept of freedom plays a critical role. In a true *Rechtsstaat*, freedom of the individual in social and political life constitutes their right. Such a State of Law fully recognizes this individual freedom and does not allow itself to intervene in it. The state power's duty not to intervene corresponds to the individual right to demand the fulfilment of this duty. In case this right is violated, it is to be fully redressed and ensured by proper judicial protection.[23] These conditions enable the above noted second principle of legal regulation, namely, the general permissive principle ('everything which is not directly forbidden by law is allowed') to really work. It is imperative that supremacy of human rights and freedoms is not just expressed in a nominal recognition and establishment in the domestic legislation of the fundamental rights and freedoms of individuals; it must be actually guaranteed in reality, with a concrete possibility to enforce and fulfil those rights, interests and freedoms.[24] As for the specific human rights categories,

[21]For the analysis of one individual interpretation of the rule of law concept, see Темирбеков Ж.Р. Альберт Венн Дайси және құқық үстемдігі [Albert Venn Dicey and the Rule of Law] // Право и государство 2021. № 1 (90). – С. 6-14.

[22]United Nations Security Council. The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, S/2004/616, 23 August 2004, at 4, para. 6. // URL: https://digitallibrary.un.org/record/527647?ln=en

[23]Хропанюк В.Н. Теория государства и права [Theory of State and Law]. М.: Omega-L, 2019. С. 323.

[24]Ибраева А.С. Теория государства и права [Theory of State and Law]. А.: Жеті жарғы, 2017. С. 344.

those include all the major internationally recognized types of rights and freedoms: civil rights, political rights, social, economic and cultural rights, and so on. In this way, it would be possible to speak about the fullest and most efficient legal protection of the individuals that is possible to imagine in such a State.

The third, also democratic, characteristic would be the *principle of mutual responsibility of the state and the person*. It means that the relationship between the state as a carrier of political power on the one hand, and the individual as a full-fledged participant in the formation and fulfilment of that power, must be built upon the basis of equality, justice and fairness. Determining in its laws the measure of individual freedom, the state within the same boundaries limits itself in its own decisions and actions. It takes upon itself the obligation to ensure fairness in its relations with each individual. Obeying the law, state bodies cannot violate its rules and are responsible for violations or non-fulfillment of this obligation. The binding nature of the law for state power is ensured by a system of guarantees that exclude and leave no room for administrative arbitrariness.[25]

The fourth element of *Rechtsstaat* is the *principle of separation of powers* which can be said to serve as the basic underlying democratic principle of organization and action of the State of Law. This implies the separation of the state (public) power into three relatively autonomous and independent branches: legislative, executive and judicial. This tripartite division operates on the so-called 'system of checks and balances' whereby the balance of interaction among all three branches is supported by special legal organizational measures / provisions that ensure not only their proper interaction but also, very importantly, their mutual limitation and restraint. Such a separation of the unified public power into three branches in this manner prevents potential abuses of power and a possible emergence of a totalitarian governance not bound by law.

The fifth component that is ascribed to the *Rechtsstaat* is the *high legal culture and advanced level of legal awareness* (or alternatively, the so-called 'sense of justice') in the society. Legal culture may be understood as an achieved level of development in the legal organization of the life of the people in a given state at a given time. It represents an important part of general culture and includes all positive legal / law-related achievements; everything that has been accumulated by humankind in the field of law. Legal culture encompasses legal views and viewpoints, norms, institutions as well as behavioral relations based on law. Essentially, the high legal culture in the *Rechtsstaat* signifies a culture of recognition, protection and realization of human rights and freedoms as among the highest values of society.[26] If legal awareness is understood as a form of realization of the law as a specific phenomenon of social reality, then the advanced level of legal awareness would include a good / solid / fair knowledge of the law, respect for the law and understanding of its relevance and importance for the life of the people in the society.

The sixth, and arguably the last key element of the State of Law is civil society. It constitutes one of the main democratic components of the State of Law. Without it no true

[25]Хропанюк В.Н. Теория государства и права [Theory of State and Law]. М.: Omega-L, 2019. С. 323.

[26]Нерсесянц В.С. Общая теория права и государства [Common Theory of Law and State]. М.: Норма; ИНФРА-М, 2016. С. 560.

Rechtsstaat could be imagined. A developed civil society is therefore not just an integral part of the State of Law; it may be viewed as the most important prerequisite for building such a State.[27]

Different approaches towards looking at and explicating civil society and its nature have been proposed. Some posit it as a contrast or juxtaposition to anarchy. Others distinguish civil society from church and clergy. A popular view is that civil society represents a set of public relations distinct from or even opposite to the state. Often these positions are accompanied by a proposition that civil society is a concrete phenomenon and product of western civilization.

As noted above, civil society seen as a set of certain public relations reflects a rather popular view. In that sense, it is often defined as an aggregate of public, moral, social, economic, national, religious and family relations and institutions that help satisfy the individual as well as group needs in a given society. The main ideas here would be the primacy of the individual (person, man) in society, the notion of the individual's autonomy and independence, the capacity to develop and carry out activities independently based on ethical principles and respect for the law. At that, the state generally should not, and is not expected to, interfere with the life of civil society, doing so only in cases of violations of law.

If one were to offer an even more expanded definition of civil society, it would make sense to do so in the following manner: *civil society constitutes a free democratic legal society aimed at separate individuals, and is conducive to the environment of respect for legal norms and universal humanistic values and ideals. It promotes freedom of creative activities and business / entrepreneurship, and establishes possibilities for the achievement of well-being of citizens as well as a full-fledged realization of human rights.* It reaches these objectives also by creating mechanisms of control and restraint on state action. As one might see, the notion of civil society is detached from a classical notion of the state and is a 'non-state society' in that sense; however, it does not mean that it operates fully in isolation from the state. Its independence does not exclude interaction and cooperation with the state.

It is a commonly accepted view that civil society represents the highest and most progressive stage in the development of society and the most modern form of human community possible, even if it sounds idealistic. Some might even argue (but not this author) that progress is tied to the withering away of the state, with the latter being gradually taken over by civil society[28] slightly reminding one of the Kantian cosmopolitan society. This is probably too extreme a view. Be that as it may, one thing is clear: the building of a State of Law and civil society will necessarily imply narrowing the scope of state regulation of the life of members of society. This is closely related to the fact that in a true *Rechtsstaat* the individual and the state are considered equal partners; the two actors are not operating in a sovereign-subordinate paradigm.

[27] A free civil society has been determined to be necessary for democracy while the absence of it would be a mark of totalitarianism. See Hage J. et al. Introduction to Law. Springer, 2017. P. 397.

[28] Ибраева А.С. Теория государства и права [Theory of State and Law]. А.: Жеті жарғы, 2017. С. 344.

2. From idea to ideal: Central Asian states

Consideration of issues dealing with formation and functioning or, even more so, the achievability of the *Rechtsstaat* is of a principal interest for any state in the world but it becomes especially relevant for the Central Asian states, first of all, Kazakhstan and Uzbekistan, which announced and put forward the task of building up 'States-of-law' within their respective borders. Most of them have included this element in their Supreme Law. When it comes to creating and maintaining a successful State of Law one needs to ask about certain real, objective and also subjective conditions[29] needed to reach that goal. What are those?

First of all, any state that truly aims at establishing a State of Law has to realize the necessity of achieving a *high level of political and, by extension, legal awareness and culture among its people*. Their active participation in political and public / social life is needed. At that, it becomes clear that the fifth element of the *Rechtsstaat* described briefly above in section 3 is more than just a constituent part of it; it represents an essential factor without which the *Rechtsstaat* does not appear plausible. Indeed, without an actively concerned, well-informed and educated population it would be hard to hope that the principle of mutual responsibility between the state and the members of the society is fully implemented; that – and even more importantly – the key principle of rule of law could be realized: if people do not care for the law (*ius*) and are unwilling to comply with it, they are not informed or do not want to be informed about the law and legal norms, then no matter how hard the state may try to build other elements inherent in the State of Law, it will ultimately fail. Raising an advanced level of culture may be done in different ways (even if it is difficult and requires a lot of patience, resources and time) including systemic educational measures – in the sphere of legal education as well, development of science, support for arts and cultural life, and so on.

Another significant factor contributing to the success of efforts to build the State of Law is the *creation of a just, fair, unified, harmonious and realistic legislative framework*. Again, what is important here is not a high level of complexity of such a legal system. The quantity and level of detail in the regulative scope of laws does not appear here as relevant. Instead, the state significantly raises the chances of its people respecting and complying with its laws if it makes sure those laws correspond to the meaning of *ius*; in other words, they are just and they serve the interests of the individual and collective interests of the society as a priority and not interests of the state itself.[30] Also, laws need to be regularly updated, so that they will respond to the societal needs and address the newly appearing problems in time. It goes without saying that laws have to be formulated in a sufficiently clear manner so that they are understood and made possible to be obeyed. The often unnecessarily difficult and sophisticated language of normative rules in legislative acts and statutes is notoriously well known. That hinders the very possibility of the legal frameworks being followed and complied with, hence making it more difficult to ensure the rule of law.

[29]Марченко М. Теория государства и права. Элементарный курс [Theory of State and Law. An Elementary Course]. М.: Норма, 2019. С. 304.

[30]Which does not suggest in any way that state interests are not to be protected by laws and normative regulations. They are; but the priority must be accorded to the members of the society.

Finally, it appears that some authors would also list the *existence of civil society* as a precondition for forming a successful State of Law. Thus, civil society would not only be considered as one of the constituent elements of the *Rechtsstaat* but in fact it would come as a necessary factor for the latter. The relationship between *Rechtsstaat* and civil society has briefly been described above in the preceding section. As noted before, civil society is frequently viewed as a system of relations, positions and actors contrasted or contraposed to the state. So, curiously enough it appears that the presence of the state-opposed independent set of relations comes as a required condition to have an 'ideal' state. In a way, civil society serves as a safeguard against the state and state structures violating the rules of law they had themselves enacted; it will be taking all the lawful measures to make sure the state bodies return to the path of law. Therefore, civil society is not just an element, it is in fact a condition necessary for the State of Law to exist and develop.

To a certain extent, all the major characteristics of the State of Law considered in this article may be thought of at the same time as its preconditions. Indeed, without even one of them it is not feasible to picture a full-fledged State of Law. Removing one of those elements from the picture will immediately endanger the whole construction: no rule of law – no supremacy of human rights and freedoms, or no separation of powers – no civil society. But perhaps, one last condition may allow us to summarize this conclusion: to ensure a true *Rechtsstaat*, *principles of real democracy* must be consistently followed, implemented and realized in the political, economic, social, scientific, cultural and educational spheres of life of the society.

All of the conditions, factors and bases pertinent to *Rechtsstaat* (political, social, economic, and moral) need to be figured out and comprehensively 'taken care of' – in a positive sense if a state truly aims at achieving the status which comes closest to be labeled as *Rechtsstaat*. The tasks appear very difficult, and they are. This is also due to the fact that only focusing on one or two or three components of the State of Law while ignoring others will not bring any tangible results. The approach here needs to be holistic. There is no guarantee against failure – that goes without question. Certainly, as societies and states develop, their ideals may not remain the same; they will be subject to change, evolution and crystallization. The problem of achieving those ideals, though, will remain constant. But that is not to say their achievement is impossible.

To many, civil society would appear as an ideal form of society while State of Law would represent an ideal modern state. There is nothing wrong with looking at these two notions in this way. By the same token, any suggestion that one be realistic in seeking to achieve these ideals does not imply the reverse, viz., that one must be skeptical about any such efforts. It constitutes nothing more than the acknowledgment that these ideals might not be fully reachable and that it takes constant, systematic, and regular effort over generations to establish the rule of law and a proper legal framework, raise the level of legal culture, assert the supremacy of human rights, consistently implement the separation of powers and independence of the judiciary, promote democratic principles and true constitutionalism. Patience, time and unswerving belief in the *Rechtsstaat*'s ideals are needed.

This is fully pertinent to the Central Asian states. The formation of the State of Law and civil society in this region has only just begun. There are currently many problems at the local and regional levels (see below) that will have to be overcome if the states here are

serious in the intentions proclaimed in their respective constitutions and other laws. The solution of those problems will eventually depend not only on the states themselves, but also on their societies and specifically on the individuals who comprise those societies. Simply put, building up a successful *Rechtsstaat* will have to be a collective effort. That is what the states in this region need to realize beyond mere proclamations and statements.

One of the major challenges in those developments includes a general perception of law on the side of the governments and population of these countries. Law is sometimes regarded by certain authorities as merely an instrument, i.e., a functional tool to support exclusively the State system and national interests but not as a value on its own or a means to help improve the well-being of the society. This, along with a traditional conformist mentality and general distrust of the people towards legal rules as serving only the interests of the State, results in attitudes such as legal nihilism and low legal culture. Adding to this is an underestimation of the influence and power of the respective progressive academic schools of legal thought which are not sufficiently represented by prominent academics and lack proper tools, textbooks, individual and collective monographs, reference editions, etc.

While the constitutional systems of all post-Soviet States include elements of the democratic, liberal, secular and social State, and encompass most of the categories of fundamental constitutional / human rights (civil, political, economic, social and cultural) in their respective Supreme Laws, their implementation in practice remains another major challenge. This in large part may be attributed to the preponderance of statist and positivist approaches to the law in almost all countries of the region.

Results of the research

1. The concept of State of Law is usually defined not as a contextualized notion but as an idealized representation of what the state should be.

2. Several key democratic features of *Rechtsstaat* include rule of law, supremacy of human rights and freedoms, mutual responsibility of the state and the individual, separation of powers, advanced legal culture and civil society.

3. The building of a State of Law and civil society will necessarily imply narrowing the scope of state regulation of the life of members of society.

4. The list of pre-conditions for building a successful State of Law in any Central Asian country would encompass (1) high level of political and legal awareness of the people, (2) just and realistic legislative framework, and (3) existence of a strong civil society.

5. The solution of major problems in the way of constructing States of Law in the region (such as general distrust towards the law, its over-instrumentalisation, positivistic approaches in law, legal nihilism) will depend on both the states and individuals, i.e., general population.

6. Achieving the true States of Law in Central Asia is very difficult but possible.

Discussion

The legal theory in the post-Soviet countries mostly adheres to a formalistic view whereby rule of law is defined as domination of law in all spheres of public life. At that, law in this connotation is understood as *lex*, i.e., the positive normative act of highest degree and force. In accordance with this position, no state body, or state official, or a collectivity,

or public organization, or any individual is free from the obligation to comply with the law. Some theorists even highlight that the rule of law is not to be confused with the rule of *ius*.[31] Laws regulate the most important spheres of life of a society. All legal acts issued by state power bodies must of necessity correspond to the laws and they may not contradict them.[32] Some positions offer certain specifications or compromises. For example, one author argues that it is not enough for the State of Law that all of its subjects obeyed the laws; it is necessary that those laws be in accord with *ius*.[33] In other words, the legislative acts must be just, they must conform to the requirements of law as a universal, necessary form and equal measure of the freedom of individuals. To reach that, the state must proceed based on the principles of law (*ius*) when formulating its legislative acts and enforcing their implementation.[34] But in general, the interpretation of the notion of the rule of law in the post-Soviet space remains largely formalistic, or positivistic.

As it was stated above, the formation of the State of Law and civil society in this region has only just begun. The challenges and problems described in the preceding sections will have to be overcome if the states here are serious in the intentions proclaimed in their respective constitutions and other laws. Building up a successful *Rechtsstaat* will have to be a collective effort in any one of the Central Asian countries. That is, again, what the states in this region need to realize beyond mere proclamations and statements.

To overcome these problems and apply the law appropriately, a proper – and comprehensive – theoretical, doctrinal as well as practical dissemination and coverage of legal principles in a systematic manner appears necessary. These countries need to further develop and expand their respective schools of legal thought which could contribute to strengthening the role of the law and its efficiency, not only for the sake of State interests but, first and foremost, for the benefit of the society. This view in no way rejects the instrumentalist function of the law but instead, makes it stronger. Key values, concepts and principles – *Rechtsstaat*, rule of law, individual freedom, civil society, human rights and true constitutionalism could be better and more objectively explained by a bigger variety of available and actively competing schools / doctrines of law.

Even more importantly, the dissemination of legal values and ideas needs to be integrated early in the educational system. This is not only a question of developing schools of legal thought. If the understanding of law as a basic value, and not just a tool, along with the efficient explanation of the idea of human rights, true constitutionalism and civil society, are not covered already during the early stages of education (high school), then that contributes to thriving conditions for lacunae in the legal awareness and legal culture. Understandably, where the members of the society regard violations of law as something acceptable or deny the law its key role in the life of that society, no proper development of civil society,

[31]Марченко М. Теория государства и права. Элементарный курс [Theory of State and Law. An Elementary Course]. М.: Норма, 2019. С. 304. This author thinks otherwise: "rule of law" is to be equated to "rule of ius", and not the other way around.

[32]Ибраева А.С. Теория государства и права [Theory of State and Law]. А.: Жеті жарғы, 2017. С. 344.

[33]Нерсесянц В.С. Общая теория права и государства [Common Theory of Law and State]. М.: Норма; ИНФРА-М, 2016. С. 560.

[34]Ibid.

and establishment of the rule of law, and correspondingly successful building of *Rechtsstaat* could be imagined.

Conclusions

Based on the foregoing review and analysis, the following main conclusions can be offered. First, the concept of *Rechtsstaat* has turned out to be one of the most influential ideas in law that affected legal and political developments in different regions of the world. Many outstanding historic individuals have contributed to the process of its shaping out and evolution. In turn, that process was significantly impacted by the ideas of natural law, human rights and freedoms, and the latter's inalienable character. Second, to many, the State of Law represents an ideal version of what a modern state should be or strive to become – even if the idea itself often might come out as naïve or idealistic despite being included in multiple (supreme) laws throughout the world. Third, the building of a State of Law and civil society will necessarily imply narrowing the scope of state regulation of the life of members of society which is connected with the fact that in a true *Rechtsstaat* the individual and the state are equal partners. Fourth, there are at least three important objective and subjective conditions that need to be taken into account by the Central Asian states when trying to build up *Rechtsstaat* in their respective territories: achieving a high level of political and, by extension, legal awareness and culture among people; creation of a just, fair, unified, harmonious and realistic legislative framework; and existence of real civil society. Fifth, such efforts are needed in order to overcome the several existing problems in the countries of the region. Those problems include: perception of the law as only an instrument but not a value on its own, and general distrust towards legal rules; underdevelopment of academic schools of legal thought; dominance of positivist approaches to the law; insufficient dissemination of legal principles and ideas in the educational systems. Finally, a successful building of States of Law in Central Asia can not only depend on the state alone; it needs to be a collective effort. It means contribution from all key actors are necessary: the states, the societies, and the population in general.

Having said that, one thing must be kept in mind. There is no state in the world that can fully claim it has become a State of Law. The process of establishing it is very difficult despite its strong idealistic appeal. Putting in place necessary institutions, making the system work and ensuring a proper democratic decision-making as well as fair representative and just legislative processes can take decades if not centuries. Hence, one needs to be aware of this and be patient when discussing the problems with implementation of the *Rechtsstaat* in the region such as Central Asia, with its own unique and diverse history, different cultures, traditions and languages. Many generations may pass before the dream comes true. However, this author thinks that dream is not unrealistic. A true establishment of the States of Law in Central Asia is hard and long but still possible.[35] There are hurdles

[35]This conclusion is based not only on the author's own individual / subjective reflection; it flows out from the results of discussions and interviews with legal experts (both local and foreign), analysis of the opinions of Central Asian scholars and students, scrutiny of legal practices in Kazakhstan and Uzbekistan (judicial work and lawyers' practice) as well as public statements from prominent figures in law in the region. In that sense, it can probably hardly be interpreted as merely an over-optimistic "wishful thinking".

along the way but those are probably not insurmountable. Again, what is needed to achieve such an ambitious purpose is patience, time, determination and a firm belief in the ideas of *Rechtsstaat*. The sooner this thought is fully realized by the decision-makers in Central Asian states the better.

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Орталық Азия мемлекеттерінің кейбірі өздерінің конституциялық заңнамасында өз аумағында құқықтық мемлекет құру ниеті туралы мәлімдегені (Өзбекстан), ал басқалары өздерінің осындай мемлекет екенін хабарлағаны (Қырғызстан, Тәжікстан және Түрікменстан) немесе өздерін құқықтық мемлекет деп жариялағаны (Қазақстан) көпшілікке белгілі факт. Сондай-ақ, бұл мақсатқа жету, яғни толыққанды құқықтық мемлекетке айналу, өте күрделі міндет екені де белгілі. Осы мақалада Rechtsstaat тұжырымдамасы және оның негізгі ерекшеліктері талқыланады, Орталық Азияда тиісті құқықтық мемлекет құру үшін қажетті сыни жағдайлар талданады, осы мақсаттарға қол жеткізу кезінде осы мемлекеттер ұшырасатын түрлі проблемалар, сондай-ақ, оған қол жеткізу мүмкіндігі мәселесі қаралады. Жұмыстағы талқылау тиісті конституциялық заңнамаға, посткеңестік кеңістіктегі құқық теориясы бойынша жетекші ғалымдардың пікірлері мен ұстанымдарына, сонымен қатар халықаралық дереккөздерге негізделген. Мақалада құқықтық мемлекет тұжырымдамасының өзіндік жұмыстық анықтамасы ұсынылады және Rechtsstaat-ты сәтті құру үшін қажетті объективті және субъективті жағдайлардың минималды тізімі келтіріледі. Мақаланың жаңалығы мен өзіндік ерекшелігі – Орталық Азия мемлекеттерінің өздерінің Rechtsstaat-қа қатысты конституциялық ережелерін іске асыру немесе орындау үшін еңсеруі керек проблемалық мәселелерді бірінші рет көрсетуінде. Оның үстіне, түпкі нәтижесінде Орталық Азияда шынайы «құқықтық мемлекеттер» құруға қол жеткізу туралы мәселе өңірлік тұрғыдан бұрын қаралмаған – бұл да осы мақалада жасалған. Мақаланың басты тұжырымы – Орталық Азияда құқықтық мемлекеттердің шынайы құрылуы қиын да ұзақ процесс, бірақ дегенмен бұл мүмкін.

Тірек сөздер: Орталық Азия; құқықтық мемлекет; Rechtsstaat; құқық үстемдігі; азаматтық қоғам; Қазақстан; Қырғызстан; Тәжікстан; Түрікменстан; Өзбекстан.

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Широко известен тот факт, что некоторые из государств Центральной Азии в своем конституционном законодательстве заявили о намерении установить правовое

государство на своей территории (Узбекистан), другие объявили, что они являются такими государствами (Кыргызстан, Таджикистан и Туркменистан), или же провозгласили себя правовым государством (Казахстан). Также хорошо известно, что достижение этой цели, то есть превращение в полноценное правовое государство, является очень сложной задачей. В настоящей статье обсуждается концепция *Rechtsstaat* и ее основные особенности, анализируются критические условия, необходимые для создания надлежащего правового государства в Центральной Азии, рассматриваются различные проблемы, с которыми эти государства сталкиваются при достижении данной цели, также, вопрос ее достижимости в принципе. Обсуждение в работе основано на соответствующем конституционном законодательстве, мнениях и позициях ведущих ученых по теории права на постсоветском пространстве, а также на международных источниках. Статья предлагает собственное рабочее определение концепции правового государства и приводит минимальный перечень объективных и субъективных условий, необходимых для успешного построения *Rechtsstaat*. Новизна и оригинальность статьи состоит в том, что она впервые указывает на проблемные вопросы, которые центральноазиатские государства должны преодолеть, чтобы реализовать или соответствовать своим конституционным положениям, касающимся *Rechtsstaat*. Более того, вопрос о достижимости в конечном итоге построения истинных "правовых государств" в Центральной Азии ранее не рассматривался с региональной точки зрения – что также проделано в данной статье. Главный вывод статьи состоит в том, что истинное установление правовых государств в Центральной Азии – это трудный и долгий процесс, но он все же возможен.

Ключевые слова: Центральная Азия; правовое государство; Rechtsstaat; верховенство права; гражданское общество; Казахстан; Кыргызстан; Таджикистан; Туркменистан; Узбекистан.

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Для цитирования и библиографии: Atadjanov R.B. Building the State of Law (Rechtsstaat) in the Countries of Central Asia: An Unachievable dream or realistic objective? // Право и государство. 2021. № 3(92). – С. 52-70. DOI: 10.51634/2307-5201_2021_3_52

Материал поступил в редакцию 06.09.2021.