ӘЛ-ФАРАБИ АТЫНДАҒЫ ҚАЗАҚ ҰЛТТЫҚ УНИВЕРСИТЕТІ
ХАЛЫҚАРАЛЫҚ ҚАТЫНАСТАР ФАКУЛЬТЕТІ

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PROBLEMS OF IMPLEMENTATION OF INTERNATIONAL LEGAL NORMS IN THE NATIONAL LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN

Түйін. Мақала Қазақстан Республикасының ұлттық заңнамасындағы халықаралық-құқықтық нормалардың тиімділігі мен іске асырылуының теориялық және практикалық мәселелерін зерттеуге арналған. Ішкі заңнама аясында халықаралық құқықтың сақталуын қамтамасыз ету әдістері халықаралық заңгерлердің, соның ішінде Мингазовтың, Мюллерсонның және Гавердовскийдің зерттеулерінің тақырыбы болды. ҚР ұлттық заңнамасы аясында халықаралық-құқықтық нормаларды іске асырудың жекелеген аспектілерін шетелдік сарапшылар да зерттеді.

Түйінді сөздер: халықаралық құқық, ұлттықтан жоғары тетіктер, халықаралық актілер, сыртқы саяси басымдықтар.

Резюме. Статья посвящена изучению теоретических и практических проблем эффективности и реализации международно-правовых норм в национальном законодательстве Республики Казахстан. Методы обеспечения соблюдения норм международного права в рамках внутригосударственного законодательства были предметом исследований юристов-международников, таких как Мингазов, Мюллерсон и Гавердовский. Отдельные аспекты реализации международно-правовых норм в рамках национального законодательства РК изучены и зарубежными экспертами.

Ключевые слова: международное право, наднациональные механизмы, международные акты, внешнеполитические приоритеты.

Summary. The paper is devoted to the study of theoretical and practical problems of effectiveness and implementation of the international legal norms in the national legislation of the Republic of Kazakhstan. The methods for enforcing the norms of international law within the domestic legal framework were the subject of research by international lawyers, including Mingazov, Müllerson and Gaverdovsky. Certain aspects of implementing international legal norms within national legislation of the RK have been also studied by foreign experts.

Key words: international law, supranational mechanisms, international acts, foreign policy priorities.

Providing a qualitative description of the international legal norm, the theory of international law considers it primarily as capable of making impact on certain legal relations. Effectiveness is a manifestation of the ability of the norm of international law to have a positive impact on international relations, the behavior of states and other subjects of law in the direction determined by the purpose of this norm in order to achieve certain social results. [1, p. 177]

Implementation of international law at the national level is the main, but not the only way to implement them. The norms of international humanitarian law provide additional international legal and organizational means for ensuring implementation at the international level, which together constitute an international mechanism for the implementation of international humanitarian law. [2]

The methods of implementation are: incorporation; transformation; General, private or specific reference. When incorporated, international legal norms are reproduced verbatim in the laws of the implementing state without any changes. During the transformation, the norms of the relevant international Treaty are somewhat reworked when they are transferred to national legislation (this is usually due to the need to take into account national legal traditions and standards of legal technology). In the case of a General, private or specific reference, international law the norms are not directly included in the text of the law; the latter only mentions them. Thus, when implemented by reference, the application of a national legal norm becomes impossible without direct reference to the original source – the text of the relevant international Treaty.[3]

In a number of States, ratified international treaties automatically become part of national legislation. Kazakhstan's accession to the Conventions may be it is taken into account when considering cases in the European court of human rights in Strasbourg, in international courts, when considering cases in foreign jurisdiction. At the same time, the conventions describe legal norms, many of which are innovations for Kazakhstan legislation. An important feature of the Conventions is the expansion of the range of offences related to corruption, for which our country, on the one hand, has accepted obligations to criminalize them in national legislation, on the other hand, it has received legal instruments for international cooperation in terms of information exchange, joint investigations, arrest, confiscation and return of assets, and extradition of criminals (this now does not require the conclusion of separate bilateral agreements).[4]

At the moment, the Republic of Kazakhstan is carrying out systematic work on bringing criminal legislation into force of the Republic in accordance with international criminal law. So, recognizing the value of the principles are based on universally recognized norms of international criminal law, which applies the principle of criminal liability for serious violations of international criminal law, our Republic has been undertaken by organizations at the state level, activities aimed on the accession of the separate international treaties and agreements, as well as for the organization of work on making relevant amendments to the national legislation of the Republic of Kazakhstan.[5]

The problem of the implementation on international law into domestic law does not lose its actuality primarily in connection with the application of international law in national courts. There are solid developments of this problem in the modern legal literature of foreign countries.[6]

In the Republic of Kazakhstan, the problems of the implementation of international law into national legislation are not sufficiently studied. The study gains particular importance in the context of the implementation of international standards in the area of human rights. [7]

It is only natural that human rights and freedoms and their protection occupy a prominent place in all new constitutions. Many of them contain references to the international law of human rights and some affirm its primacy over national laws. The incorporation of international law or its constituent parts into domestic law on the basis of parity, without a clear indication as to the primacy of one over the other, poses a difficult issue of choice between conflicting rules of international law and domestic law. In many instances, rules of international law (customary, conventional or both) are recognized as a constituent part of national legal systems and given a higher hierarchical status in the case of a conflict with a national law. [8] The general trend of the new constitutional development, to incorporate international law into domestic law and to affirm the precedence of the former in conflicting situations, is corroborated by the judicial practice of the constitutional courts of the States concerned, especially in relation to human-rights issues. It is too early, however, to draw any conclusions on the extent to which the ordinary courts of first instance or administrative authorities are prepared and willing to directly rest their decisions on the rules of international law. [9]

The ever-growing interdependence of States and peoples, accompanied by the constant 'intrusion' of international law into many national spheres, including those previously reserved for exclusive domestic regulation (from human rights to economy and defence), and the expansion of the prerogatives of inter-State institutions objectively lead to the de facto affirmation of the primacy of international law and induce States to recognize de jure this primacy. The gradual process of 'the de jure recognition' is clearly manifested in the respective stipulations of the new constitutions. The primacy clauses contained in the constitutional texts have been engendered not by the century-old conceptual argument between monists and dualists, but by the objective factors of contemporary life, albeit the above argument could have had some impact on the formulation of the respective clause in a concrete constitution. [10]

Certainly, one can argue that the primacy of international law established by constitutions is relative since, ultimately, it is subject to the provisions of the highest domestic law (the constitution). Moreover, some constitutions expressly establish limits on such primacy, for instance by stipulating that an international treaty may not contravene the constitution. What is important, however, is that the compelling objective factors leading to the current primacy of international law cannot be neglected or disregarded by States at will. [11]

Right to life

1) the UN and the ECHR are opposed to retaining the death penalty. The second optional Protocol of the ICCPR, Protocols 6 and 13 of the ECHR prohibit the death penalty in all circumstances, even during military operations. 2) although the Optional Protocols of the ICCPR are not binding on States parties that have not signed or ratified them, those States parties that have not acceded to the additional protocols are under constant criticism from the UN.

The current moratorium on the execution of death sentences in the Republic of Kazakhstan does not correspond to the widespread international practice on this issue.

As a transitional step towards the complete abolition of the death penalty, it is recommended to consider the possibility of introducing a moratorium on judicial decisions that sentence the death penalty. In the future, we consider it appropriate to join the Second optional Protocol of the ICCPR and exclude capital punishment, since the practice of using the penalty as life imprisonment implements the policy of humanizing the norms of criminal law in the Republic of Kazakhstan.

Right to liberty and security of the person Conclusions Problems Proposals

The Republic of Kazakhstan aims to bring national legislation in line with generally accepted legal norms and standards in the field of human rights protection. This issue is particularly relevant at a time when the country has embarked on a new stage of legal and political reforms. Most violations of article 5 are linked to violations of other articles of the Convention.

1. Violation of the terms of consideration of complaints of detainees about the legality of detention; 2. Violation of the detention procedure, namely, the calculation of the terms of detention from the moment of registration of documents, and not from the moment of actual detention.

Paragraph 2 of article 14 of the criminal procedure code of the Republic of Kazakhstan is proposed to be amended as follows: «2. Detention and house arrest are permitted only in the cases provided for by this Code and only with the approval of a court, with the right of judicial appeal granted to a prisoner in custody or house arrest. Without a court order, a person may be detained for a maximum of forty-eight hours, and a minor may be detained for a maximum of twenty-four hours. Compulsory placement of a person who is not in custody in a medical organization for forensic psychiatric and (or) forensic medical examinations is allowed only by a court decision."

Right to non-interference in private and family life

Under the provisions of the RFP No. 16 of the UN human rights Council, housing should be understood as a place where a person lives or does ordinary business, for example, a place of work.

In accordance with the provisions of national legislation, the main criterion for the definition of "housing" is the condition of permanent residence in a separate residential unit.

Based on the study of international experience in judicial practice, it was recommended to implement the expanded definition of "housing" in national legislation. [12]

Sometimes there is a situation when the legislator, by ratifying international labor standards, turns them into national ones and at the same time does not change the national laws themselves, which continue to operate, as a result of which a previously adopted law and an international Convention that has become law exist in parallel. Discrepancies and contradictions inevitably arise between these legislative acts. This, in turn, requires the state that has ratified the Convention to take additional measures to ensure that the rights of citizens are respected.

Thus, the implementation of international law is impossible without the implementation of certain norms of domestic law.

Legislation often refers to the "direct" application or "direct" operation of international law. Such expressions cannot be taken literally, i.e. they do not imply the direct application or operation of international norms other than the national system, since the norms of international law are incorporated into the country's legal system and act as part of that system. In other words, these rules should be applied in accordance with the goals and principles of the country's legal system, as well as in accordance with the procedure established by it. In this regard, the norms of international law cannot be directly applied in the domestic sphere; the process of their application inevitably passes into the process of implementing the norms of domestic law. [13]

National law should establish a General procedure for the domestic application of international norms. In deciding on the applicability of a particular rule, everything depends on the content of such a rule, which must be sufficiently specific, have the property of generating the rights and obligations of subjects of national law and, consequently, can serve as the basis for individual law enforcement acts of judicial authorities. You need to take into account the fact that it is possible to secure only those rights for which you have created the necessary social and economic conditions.

Adherence to conventions and the development of the most advanced domestic norms do not yet solve the problem of human rights in essence. It is necessary to create a mechanism that guarantees the application of laws and respect for them by all members of society, regardless of their position. Only with this approach to human rights and freedoms can we build a legal state, because the very concept of a legal state means the primacy of the law, the supremacy of universal values over all others.

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