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Tusupova Zh., Rahimbaeva R.M.

**International Treaty in the
System of the Sources of the
Constitutional Law**

With the adoption of the Constitution of the Republic of Kazakhstan as of 1995 the significance of the interplay of National Law including Constitutional and International Law has increased. There appeared the necessity to bring the provisions of national law in conformity with the general recognized principles and norms of International Law, international treaties of the RK, as well as further taking into consideration of the indicated international regulators in the law enforcement activities. Researches of issues of a general theoretical nature pertaining to define the status of international treaties in the Republic of Kazakhstan, in its legal system are relevant up to the present. The Constitution of the Republic of Kazakhstan strengthens the priority of the international treaties ratified by the states before national law. In this connection the present work deals with the legal nature of international treaties their place in the system of current national law including the system of sources of the Constitutional Law, correlation of International and National Law.

Key words: Constitution, sources of the Constitutional Law, International treaty, National Law, Constitutional Law, International Law.

Тусупова Ж., Рахимбаева Р.М.

**Халықаралық шарт
конституциялық құқықтың
қайнар көздерінің жүйесінде**

1995 ж. Қазақстан Республикасы Конституциясының қабылдануымен ұлттық, соның ішінде конституциялық құқық пен халықаралық құқықтың өзара әрекеттесуінің маңызы арта түсті. Халықаралық құқық нормалары мен жалпыға танымал қағидаларына, ҚР халықаралық шарттарына ұлттық құқық ережелерін уақытылы сәйкестендіру, сондай ақ белгіленген халықаралық реттеу құралдарын құқық қолдану қызметінде есепке алу қажеттілігі қажеттілігі туындады. Қазақстан Республикасындағы халықаралық шарттардың мәртебесін анықтауға қатысты жалпытеориялық мәселелерді зерттеу оның құқықтық жүйесінде қазіргі кезге дейін өзекті болып табылады. ҚР Конституциясы Республика бекіткен халықаралық шарттардың Республика заңдарынан басымдығы болатындығын бекітті. Осыған орай мақалада халықаралық шарттардың заңи табиғаты, олардың қолданыстағы ұлттық құқық жүйесіндегі, оның ішінде конституциялық құқықтың қайнар көздерінің жүйесіндегі орны, халықаралық және ұлттық құқықтың арақатынасы қарастырылған.

Түйін сөздер: конституция, конституциялық құқықтың қайнар көздері, халықаралық шарт, ұлттық құқық, конституциялық заңнама, халықаралық құқық.

Тусупова Ж., Рахимбаева Р.М.

**Международный договор
в системе источников
конституционного права**

С принятием Конституции Республики Казахстан 1995 г. возросло значение взаимодействия национального, в том числе конституционного, права и международного права. Возникла необходимость своевременного приведения положений национального права в соответствие с общепризнанными принципами и нормами международного права, международными договорами РК, а также дальнейшего учета обозначенных международных регуляторов в правоприменительной деятельности. Исследования проблем общетеоретического плана, касающиеся определения статуса международных договоров в Республике Казахстан, в ее правовой системе, являются актуальными до настоящего времени. Конституция Казахстана закрепляет приоритет ратифицированных государством международных договоров перед национальным правом. В этой связи в работе раскрывается юридическая природа международных договоров, их место в системе действующего национального права, в том числе и в системе источников конституционного права, соотношение международного и национального права.

Ключевые слова: конституция, источники конституционного права, международный договор, национальное право, конституционное законодательство, международное право.

**INTERNATIONAL
TREATY IN THE SYSTEM
OF THE SOURCES OF
THE CONSTITUTIONAL
LAW**

International Treaty of the Republic of Kazakhstan is an international agreement concluded by the Republic of Kazakhstan with a foreign state (or states) or with an international organization in written form, which is regulated by the International Law. It despite of the fact that such an agreement can be found in one document or in several related documents connected with each other as well as irrespective of its particular title [1].

Constitution of the Republic of Kazakhstan of 1995 is the basic source of the Constitutional law. It "carries out a role ... of a link between the national legal system and the system of international law" [2, p.5].

National literature on the Constitutional law has repeatedly described the international treaties, which are referred to the sources of the Constitutional law, but without a detailed analysis of the given issue.

Thus, S.K. Amandykova says, "international treaties ratified by the Republic of Kazakhstan have a priority before its laws and are used directly" as the sources of constitutional law [3, p.15].

G.S. Sapargaliyev defined that "the sources of the Constitutional law are the norms of international legal acts recognized by the Republic of Kazakhstan. They may contain legal norms of the constitutional meaning: on human rights, public education, etc. "[4, p.9]. A.T. Ashcheulov indicates sources of the Constitutional law from among the international – legal treaties as "first of all ... acts which contain generally accepted constitutional principles and norms of the International law". Above-mentioned author says that Kazakhstan is a member of the CIS, and acts of the CIS Common law are the sources of the Constitutional law [5, p.34].

Thus, the international treaties are the sources of the Constitutional law in cases when they regulate constitutional issues and their direct application is legislatively provided.

As is known, the first constitutional acts of independent Kazakhstan were the Declaration of KazSSR on state sovereignty of the Kazakh Soviet Socialist Republic (October 25, 1990) and the Constitutional Law of the RK (December 16, 1991) "On State Independence of the Republic of Kazakhstan". These constitutional acts became a basis on adoption of the first Constitution of Kazakhstan (January 28, 1993). However, the question of place of international law in the

legal system of the Republic of Kazakhstan was not raised because of the declared Kazakhstan's adherence to generally accepted principles and the norms of international law.

The Constitution of the RK as of 1993 consolidated the position that international contractual and other obligations of the Republic must comply with the Constitution. At the same time, it did not contain the provisions allowing carrying out the hierarchy of international treaties and other acts of domestic law. This meant that any kinds of agreements of the Republic (both ratified and not the subject to ratification) have to comply only with the norm of the Constitution. On March 31, 1993, the Republic of Kazakhstan ratified the Vienna Convention on the Law of Treaties (as of May 23, 1969). Article 27 of the above Convention, reveals the imperative requirement, which states that "a participant cannot refer to the provisions of the internal law as a justification for non-performance of the treaty by the participant". [6] Otherwise, it will be a violation of the international law principle – "contracts have to be observed" ("pacta sunt servanda"). Coming from this provision, all types of the international agreements which have been concluded prior to the adoption of the current Constitution of 1995 should be recognized as a priority over the laws of the Republic of Kazakhstan. [7]

The article 4 of the Constitution of the RK of 1995 establishes the position that international treaties and other obligations of the Republic of Kazakhstan are the law in force of the country and after their ratification possess a priority before its laws, except cases when according the contract its application requires the publication of the law. If we consider the practice of foreign countries, according to the article 15 of the Constitution of the Russian Federation, generally recognized principles and norms of the International law and the international treaties of the Russian Federation are an integral part of its legal system. If the international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty are applied. The Basic Law of the Federal Republic of Germany contains a provision that the general rules of the International law are an integral part of national law of this country and have priorities over its laws and directly create rights and duties (Article 25). The Constitution of the French Republic stipulates that treaties ratified or approved "have a power beyond the power of domestic legislation since the publication ..." (Article 55). Such norms are enshrined in the Spanish Constitution (Article

93-96.); Greece (Art. 28); Japan (Art. 98).

In accordance with the Resolution of the Constitutional Council "On the official interpretation" as of October 28, 1996 under the №6 / 2, Article 4, paragraph 1 and Article 12 paragraph 2 of the Constitution of the Republic of Kazakhstan under the "effective law" should be to understand the norms of the Constitution and other listed normative legal acts in this article, as well as the international obligations of the Republic which at a particular moment is not canceled and international obligations are not terminated". In this regard, according to the S. Zh. Aydarbayev opinion the outside composition of "existing law" were "other obligations", which are enshrined in the text normally paired with "international treaty obligations of the Republic" and in this case we should talk about the State's obligations under the international legal traditions [8].

In accordance with the Article 8 of the Constitution, "The Republic of Kazakhstan shall respect principles and norms of the International law ...". It meant "its desire to take them into account when creating the internal state law. At the same time, the existing law of the Republic of Kazakhstan has to meet the standards of the Constitution and only the international treaties ratified by the Republic have priority over the laws"[9]. If the international treaty of the Republic of Kazakhstan stipulates other rules than those stipulated by the law, the rules of the international treaty are applied. Provisions of the officially published international treaties of the Republic of Kazakhstan, not requiring publication of internal regulations for their use, can act directly. Proposals on amendments and additions to the legislation of the Republic of Kazakhstan in connection with the conclusion of international agreements shall be made in accordance with the Article 22 of the Law "On international treaties".

As K.K. Aitkhozhin notes, that from the RK Constitution and the content of article 4, paragraph 3 come international treaties ratified by the Republic which have priority only in the respect of the laws and cannot prevail over the provisions of the Constitution itself. In addition, the priority of the RK Constitution derives from the content of Article 4 paragraph 1, according to which the provisions of the international treaty and other obligations of the Republic must comply with its Constitution. [10] In this regard, we should agree with the opinion of S. Zh. Aydarbayev, that there is no definite answer to the question to what category of laws the ratified international treaties have a priority, i.e. whether it is a law introducing constitutional amendments, either

constitutional laws or it refers only to common laws. As a result, until now the problem of a ratio of the international treaty and custom with the standards of internal law in the legislation of Kazakhstan didn't get its logical and final permission. In his view, the treaty and customary rules of the International law shall have precedence over all blocks of Kazakhstan legislation, except only the Constitution. [11]

In the official interpretation of paragraph 3, Article 4 of the Constitution of the Republic of Kazakhstan the Constitutional Council of Kazakhstan notes: "As for the non-ratified international treaties, they ... don't possess a priority before the internal law. All the international treaties signed by Kazakhstan after the adoption of the Constitution of 1995 which are not the subject to ratification, must be carried out to the extent that while they are not in contradiction with the laws of the Republic. In the event of a collision, the treaty parties may, in accordance with applicable law resolve them via the conciliation procedures". Second paragraph of the Constitutional Council enactment explains that "the predominant legal force before the legislation of the Republic of Kazakhstan has not only ratified international treaties and international agreements which do not provide ratification as a condition for the entry into force, concluded before the adoption of the 1995 Constitution ..." They "are active and have priority over the legislation of the Republic, if such a priority for these international agreements is expressly provided by the Republican laws, which are governing the respective spheres of legal relations". However, this item contradicts Article 92, paragraph 4 of the RK Constitution. It also contradicts paragraph 1 of the Constitutional Council Resolution of the Republic of Kazakhstan "On the Official Interpretation of Paragraph 4, Article 92 of the Constitution of the Republic of Kazakhstan" dated June 15, 2000 № 8/2.

According to the decision of the Constitutional Council as of May 18, 2006 № 2

"On the Official Interpretation of Subparagraph 7 of the Article 54 of the Constitution of the Republic of Kazakhstan" the instruments of ratification of international treaties and acts of accession to international treaties are equal in their legal force and legal consequences. In this regard international treaties, obligation of which for Kazakhstan is established by the normative legal acts on accession to the international treaties adopted by the Supreme representative body of the Republic, which is carrying out legislative functions and the decrees of the President of the Republic with the force of law, and are equated to the ratified international treaties.

In the considered Resolution of the Constitutional Council of Kazakhstan it is revealing the ratification of international agreements and accessions them as the acts of national law. The author comes to the opinion that the norms of the international law and national legislation of the Republic shows that in the international legal aspects, accession, on condition of implementation by its Parliament by means of adoption of law involves the same legal consequences, as ratification. Laws on ratification of the international treaty and laws on accession to the international treaty which are the subject to ratification undergo identical procedure of acceptance in the Republic of Kazakhstan. Therefore, they are equal in their legal force and legal consequences. [12]

Resolution of the Constitutional Council of the Republic of Kazakhstan as of November 5, 2009 № 6 "On the Official Interpretation of the Provisions of Article 4 of the Constitution of the Republic of Kazakhstan with the Regard to the Order of Execution of Decisions of International Organizations and Their Bodies" says that ... the provisions of Article 4 of the Constitution of the Republic of Kazakhstan on the priority of the ratified international treaties over the national law and the direct application of such solutions in the Republic of Kazakhstan are spread on the decisions of international organizations and their bodies formed in accordance with international treaties of the Republic of Kazakhstan. At the same time, in accordance with paragraphs 1 and 2 of Article 4 of the State Law, decisions of international organizations and their bodies formed in accordance with international treaties of the Republic of Kazakhstan may not contradict the Constitution of the Republic of Kazakhstan. Decisions of international organizations and their bodies, member of which the Republic of Kazakhstan is, may acquire legal properties of the ratified international agreement of the Republic, in the case of a direct indication of the binding decisions of the data of Kazakhstan in an international treaty ratified by the Republic of Kazakhstan [13].

The next problem to be revealed is devoted to the use of international treaties provisions by the subjects of the Constitutional Law. Thus, three bases should be indicated here.

1. International Treaty as a mean of determination of the status of certain categories of the population and protection of the legitimate rights of citizens. So, treaties with foreign countries are of paramount importance for the solution of questions of citizenship. This institution was first established in the Law of the Republic of Kazakhstan "On

Citizenship of the Republic of Kazakhstan” as of December 20, 1991 [14].

The bases for acquisition of citizenship of the Republic of Kazakhstan provided by international treaties are provided by various international agreements. For example, the Agreement between the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation on the facilitation of the acquisition of citizenship of February 26, 1999, ratified by the Law of the Republic of Kazakhstan as of December 30, 1999 № 17-2. Thus, according to the Article 16, paragraph 2 of the Law “On Citizenship” Citizenship matters of servicemen who are on military service and stationed in the territory of the Republic of Kazakhstan shall be determined by interstate treaties of the Republic of Kazakhstan. Among the bases on which the loss of citizenship of the Republic of Kazakhstan is provided, the bases for the loss of citizenship is stipulated by interstate treaties of the Republic of Kazakhstan. The international treaties may relate to the issues of the identification of the status of foreign citizens and stateless persons. This also includes international legal instruments on the protection of rights and freedoms of a person and a citizen. In 2003, Kazakhstan joined to the “International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights”, adopted on December 19, 1966 by the UN General Assembly. Kazakhstan finally joined the specified pacts after their ratification, but with the reservations considering features of the national legislation in the sphere of protection of the rights and freedoms of the person and citizen [15].

Ratification of the Optional Protocol to the International Covenant on Civil and Political Rights as of February 11, 2009, opened the citizens of the Republic of Kazakhstan the possibility to lodge complaints to the UN Committee on Human Rights [16], which is an additional incentive to improve domestic human rights mechanisms in line with international standards.

2. International Treaty as a basis for the international activities of the state is an effective means of civilized protection of national interests.

The status of the state border of the Republic of Kazakhstan and questions of territorial delineation of Kazakhstan with other countries are determined with the help of the international treaty norms. Sovereign rights of state and its jurisdiction in the exclusive economic zone and the continental shelf, the issues of asylum, extradition of persons accused of committing a crime, the transfer of sentenced to serve their sentences in other states

are also exercised by them. Implementation of these and other aspects of foreign policy is impossible without an appropriate legislative and contractual framework. The example of it is the interstate relations of the Republic of Kazakhstan on the issue of the extradition of criminals.

Foreign experience shows that the introduction and widespread extradition is an effective tool in the fight against terrorism, organized crime, drug trafficking, i.e. serious crimes. At present, this issue is regulated by criminal and criminal procedural legislation, and according to the resolution of the Prosecutor the General of the Republic of Kazakhstan “On the Questions of Extradition, Arrest and Extradition of Criminals” from 08.09. 1998 № 56/36. In this area, Kazakhstan is working on a contractual basis with many countries. Among them are the CIS countries, as well as India, China, North Korea, Lithuania, Mongolia, Pakistan, Iran, UAE, Turkey, Germany and others. Relevant bilateral acts declare the principles of reciprocity and non-extradition of its own citizens.

3. Multilateral Convention on the struggle with the certain types of crimes, as well as bilateral agreements on legal assistance.

System of bilateral and multilateral agreements on legal assistance in civil, family and criminal cases has developed in the practice of cooperation of Kazakhstan with foreign countries. The example of it is the enclosed Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal cases concluded in Kishinev, on October 7, 2002 by the CIS Member States, which was ratified by the Kazakhstan Law as of 10 .03 2004 [17]. Norms of such international treaties and agreements do not violate the national sovereignty of countries; each State decides independently the question of frames and scope of legal aid.

One of the current problems, which are at the crossroads of national and international law, is the ratification process, which is regulated by the Constitution of Kazakhstan, legal norms, relevant international legal standards.

The most important issues of international relations in the Republic of Kazakhstan needed to be ratified. All agreements pass this official procedure, the list of which is set in the Article 11 of the Law “On International Treaties of the Republic of Kazakhstan”. Law which is received in the connection with the ratification of an international treaty can be considered as a special kind of legislation, but it has a narrow purpose: to provide the effect of the Republic of Kazakhstan signed an international treaty. The peculiarity of such law

is, firstly, that it is the source of an international treaty, and secondly, such a law cannot be amended, additions to the treaty, and, thirdly, it is a subject to the procedure for the adoption of laws of the Republic of Kazakhstan.

Installed ratification procedure is complicated in the Republic of Kazakhstan, but logically it corresponds to the standard international practice and allows the country to implement actually the commitments on obligations it has undertaken, thereby ensuring the priority of law over politics. Legally and practically only ratified, promulgated and entered into force treaty has priority within the collision with the law.

Not only the international treaties and foreign policy of a defensive nature, but also intergovernmental agreements on social, economic and financial issues are presented to be approved by the Parliament of the Republic of Kazakhstan. Their purpose is to increase the level of guarantees for foreign citizens, corporations and international organizations, and to create a favorable "climate" for foreign investors. This trend in the ratification process of international treaties is typical for developed countries, and it is approved in the Republic of Kazakhstan. Particular interest is given to the problem of the constitutional control over the ratified international treaties, as the recognition of the international treaty inconsistent with the Constitution cannot lead to a change in the contract, but to change the Constitution. It is known that the revisions of the Constitutions of France, Germany, Ireland and other countries preceded the ratification of the Maastricht Treaty on the creation of the European Union signed in 1992.

According to the Article 12 of the Law "On International Treaties of the Republic of Kazakhstan", the Constitutional Council considers international treaties on their compliance with the Constitution of Kazakhstan before the ratification. The period of ratification of international agreements is suspended

in the case of appeal to the Constitutional Council. International treaties recognized not corresponding to the Constitution of the Republic of Kazakhstan, may not be ratified and put into effect.

Special attention should be paid to the place of international treaties in the hierarchy of normative legal acts. The Law of the Republic of Kazakhstan as of March 24, 1998 "On Normative Legal Acts" established hierarchy of acts in terms of their legal force [18]. Non-identity of classification of normative legal acts set out in the Constitution of the Republic of Kazakhstan, the one that is enshrined in law is referred to the imperfection of the given law. In particular, 2 paragraph of the Article 4 of the Law defines that no place is defined for international treaties and agreements as sources of law in force in the hierarchy of acts.

Thus, although international contractual and other obligations of the Republic are included into the running law (paragraph 1 of Article 4) by the RK Constitution, there is still the problem of correlation of international treaty and custom with the norms of the national law in the legislation of Kazakhstan, it is controversial and has not received final approval. We consider that contractual and customary norms of the International Law must have priority over the all unit of national legislation, the exception is the Constitution of the Republic of Kazakhstan. In the case of the adoption of this proposal there is the necessity to make the appropriate amendments and additions to the Article 4 of the law "On Normative Legal Acts".

In conclusion, the legal nature of international treaties of the Republic of Kazakhstan, their special place in the existing national law, including source system of the Constitutional Law, the hierarchy of types of international agreements and their relationship with the legislative and other normative legal acts clearly demonstrate that international agreements should be formalized in the hierarchy of sources of the running law "On Normative Legal Acts".

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