

The problems of coordination of the international duties of the Kazakhstan Republic in the social-labour sphere and national law

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ABSTRACT

Background/Objectives: The research topicality is conditioned by the fact that the labour secure of the social and labour human rights is realized not only by the national law but also by the international law that is usually more progressive and establishes the generally accepted standards and norms of human rights in the social-labour sphere. But the specificity of the mentioned sphere of social relations does not permit in most cases to realize direct, immediate action of the international regulations at realization of social or labour rights because the implementation of setting and realizing the generally accepted norms into the national law system is demanded. The mentioned above condition makes it difficult for the Kazakhstan republic (hereinafter - RK) to observe the taken international duties to provide social and labour human rights. **Methods/Statistical Analysis:** The methodological basis of the research were scientific methods of theoretical research (analysis, synthesis, interpretation, comparison, classification, synthesis, simulation, etc.), empirical methods (observation, documentation), as well as statistical methods (quantitative and qualitative data analysis). The theoretical basis of the research were the works of scientists in the field of international and social rights. **Findings:** As the analysis result the conclusions are made that the obligatory financial provision of realizing the universal social-labour rights condition a complex of measures to establish in the national law system the sources of laws finance and also measures to secure their functioning. In spite of the national law regulation of the general order of the interstate use of the international norms to solve the issue of using the definite norm in the analyzed sphere depends on the normative guarantees set that are needed and the social and financial-economic conditions of its realization. **Application/Improvements:** The report contains provisions that can be used in the practice of law. The analysis results can be used to improve the sources of Kazakh social and labor law, the definition of the provisions of international legal acts in the system of national law, to identify the specifics of the transformation of international standards into domestic law.

KEYWORDS

Social human rights, labour human rights, international regulation, international state's duties, social standards

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Introduction

Recently the sphere of the social and labour law of KR has undergone drastic changes and the system of the corresponding normative acts has become more qualitative and effective due to the codification and unification, organized reform of the guaranteed actions of the social citizens' secure. Nevertheless, despite the significant quality improvement of the social and labour human rights secure the Kazakhstan law in this sphere is not enough correspondent to the generally accepted standards and the international duties taken by the state remain fulfilled not in full. Moreover, the scientific interest to this topic is conditioned by the fact that the legal secure of social and labour human rights is performed not only by the national law but also by the international one that is usually more progressive and establishes the generally accepted standards and norms of human rights in the social-labour sphere. However the specificity of the mentioned sphere of social relations does not permit in most cases to realize direct, immediate action of the international regulations at realization of social or labour rights because the implementation of setting and realizing the generally accepted norms into the national law system is demanded. The mentioned above condition makes it difficult for the Kazakhstan republic to observe the taken international duties to provide social and labour human rights.

The process of real execution by the states taken on them international duties is a logical result of participating in the international relations, joining to the generally accepted norms and standards of the social-labour human rights secure. SV. Chernichenko says: «Lack of agreement between the national and international laws must lead to the state's break of its international duties and impossibility to realize its international rights» (SV. Chernichenko, 1999). This process of execution can be treated as an authorized by the state the immediate law use of the international norms in the national law system and also in the frames of agreement procedures of the international and national legal norms. Harmonization is a form of approximation of the international and national law and is expressed in adopting the total measures to realize the international law regulations.

The significance of the harmonization of the mentioned legal systems is that «...at present the successful legal regulation of the interstate relations becomes more dependent on harmonization of the national and international law norms. The necessity of such harmonization is conditioned by the following factors: recognition of human values priority, respect of human rights and main freedoms, necessity of support the international peace, safety and justice, stability and democracy; secondly, harmonization of interstate and international law is dictated by the economic factors, in particular, by increasing the internationalization industry and exchange, technology and science. The modern market's economy demands that each country should harmonize their national law with the international law» (NA. Salibaeva, 2004). These factors that provide the harmonization meaning should be accompanied by the following points: firstly, it is reaching of the common goal that is in observing by the state all its international duties, secondly, it is establishing the state's status on the international society, adherence to the generally accepted values and principles, thirdly, harmonization provides real possibilities for the state's participation in the world law process, formation and dynamic of the international legal system development. It is important to note that the international trust to the KR will grow mostly due to the approximation of the Kazakh national law and inner



realities of the country to the generally accepted standards of the international law.

The main research task is to do a theoretical analysis of the international and national law interaction parameters in the sphere of social-labour human rights secure. For this it is necessary to define the object and limits of the international-legal regulation of the social-labour sphere of social relations; to study the interaction of the international acts forms in the social-labour sphere and the law system of the KR.

2. Materials and Methods

As the author's concept concerns defining and comprehending of the international standards transformation regulation to provide the social-labour human rights in the national law of the KR then the main methods are to describe and analyze the situations conditioned by the social-economic peculiarities of the geopolitical national environment and also the comparative analysis methods.

3. Results

Realization of the inner state finance measures to provide the harmonization of the international duties of the Republic and the inner law is the most important but also derived aspect in the complex with the necessary to realize legal, managerial or other social activities. So that on the territory of Kazakhstan the International pacts of human rights start work it is necessary to adopt the inner normative acts – The KR laws on this or that aspects to observe and protect human and citizens rights in Kazakhstan. We would suggest formulating and adopting the following laws: the act on civil rights, the act on political rights, the act on economic rights, the act on social rights, the act on cultural rights. Every act must describe in detail the procedure of realization of every person and citizen's rights. The core issue of the international guarantees of social, labour human rights in the national law is that the detailed mechanisms of the right realization must be assigned and really functioned. Thus, to the system of the international legal secure of the social-labour rights cannot be applied in most cases the general characteristic of the international acts: their immediate action and use because «in the national law can be absent the directives concerning the subject of regulation. That is why a special approach requires the situations when the rule of the international treaty does not correspond to the law rule. The law gap must not be considered as an obstacle to use the treaty rule using a kind of «priority analogy» (AS. Khamzin, 2009). The gap in the social-labour law is an obstacle to use the norms of the international act.

The specificity of harmonization of the international norms and inner legal system providing the guarantees of the execution and full realization of the social-labour rights is conditioned by the fact that the international guarantees cannot be used directly requiring a complex of legal, managerial, financial and economic actions in the corresponding national sphere of social relations. The obligatory financial secure of the social-labour rights conditions taking a complex of measures to assign in the national law the sources of rights finance and also measures to provide their functioning. In spite of defining by the national law the general regulation of the international norms use to solve the issue of applicability of the concrete norm in the studied sphere depends on the normative guarantees assigning of the necessary social and financial economic conditions for their realization.

4. Discussion

«The state, that has taken duties to observe and bona fide execute the international-legal acts, must harmonize its national law with the international law. All subjects of the inner law must support the effective use by the state its rights and its honest observation of the international duties. All further acts of these subjects must be harmonized with the international law acts. The legislator takes measures to harmonize its national law with the international law. Such methods (ways) of harmonization that are practiced by different countries are: a) renvoi; b) reception; c) unification; d) transformation; e) creation of special law regime; f) abrogation of the inner state acts that» (NA. Salibaeva, 2004). Not to sound categorical about the problem of types, content and essence of harmonization ways we should say that all existing theories devoted to this topic have a right to exist. But in our opinion the most effective in the harmonization process are the revoi, incorporating and legitimating that permit to create the most harmonic conditions to realize the international and national laws.

The preconditions of the analyzed harmonization process are not only the mentioned above aspects of the state status as a subject of the international law but also those that have collisions. «The so called collisions of the international and inner state law take place because of the negligent observation of the international treaties and not because of the «technical» non-coordination of the inner state acts and the international norms. Mismatch of the international and national legal norms can be explained by the fact that the state-subjects of the international relations are very often on the different stages of social-economic, political and cultural development. The international and inner state laws collisions are always present; they are come over and appear again to be overcome» (MI. Abdullayev, 1993). Moreover, collisions appear as a rule because of the higher level of the set in the international law generally accepted principles and norms or other social relations spheres in comparison to the inner state law system that demand a number of national measures execution. K. Tokayev makes a reasonable conclusion that: «States must observe the international law and they cannot justify their neglect of the international duties by the references to the Constitution or national laws. Having ratified the international treaties the state must harmonize its own inner legal acts with it. ...As opposed to the civil and political rights, the economic, social and cultural rights must be realized gradually both by the legal acts so as by other initiatives» (K. Tokayev, 2004).

In fact, the mentioned peculiarity of the harmonization process of the international law to secure social, labour, economic and cultural rights is, to our mind, in specificity of their realization in the inner law conditioned by the fact that the mentioned international guarantees cannot in most cases be used directly because they demand to do a complex of legal, managerial actions in the corresponding sphere of the social relations.

Obligatory financial support of the social rights realization conditions a complex of measures to establish in the national law the sources of financing laws and also measures to provide their functioning. If, for example, the international treaty stipulates social insurance, social secure rights for the work-migrants then the stated legal rights need a number of legal and managerial actions because directly they cannot be fulfilled. So, according to the KR law about the obligatory social insurance the stated rights are recognized exclusively in relation to working and being self-engaged citizens of the Republic and also those foreigners and people without citizenship who constantly live on the territory of the KR. The international treaty regulations cannot be applied to the work-migrants because



the direct action of the international act practically cannot be executed without the corresponding inner state legal secure, harmonization of the international and national acts.

The said above aspect of harmonization of the international and national norms in the regulation sphere of the social-labour human rights of work-migrants is logically driven from the fact that Kazakhstan has set a regime of social rights for the work-migrants on the basis of national law demands that in most cases does not consider such subjects as participants of relations to give social secure. The analysis of the Kazakhstan laws in this sphere has shown that the work-migrants have no social rights except for the right to a temporary disability allowance on account of the employer.

Moreover, one should pay attention to the fact that the given by us case of non-coordination of the inner law of the KR and the international duties, the volume of our work has not permitted to point out all numerous collisions conditioned by the lack of a legibly established function of the government bodies to secure adoption and execution of the international treaties on the social-labour human rights and legal cooperation in this sphere of the KR with other foreign countries. The body of coordination to observe the international duties of the KR is the Ministry of Foreign Affairs of the KR (farther – MFA KR) that is assigned a task to coordinate the international activity of other central government bodies of the KR in order to provide a common foreign-policy, economics-policy and investing-policy of the KR in relations with the foreign countries and international organizations and also execution of the functions to organize negotiation process and treaties conclusion of the KR; preparing suggestions of conclusion, execution, change, suspension and cessation of the international treaties, submit them for consideration in the set order to the President or the KR Government; to participate in measures developing to secure the rights and freedoms of the Kr citizens, its defense and national security, law enforcement, developing and expansion of trade, economic, finance, science and science-technology, cultural and other relations of the KR with the foreign countries and international organizations; execution of the general observation and coordination of the KR's government bodies activities to implementation of the international treaties the participant of which the KR is. The organs of justice in the sphere of legal secure of the international treaties , coordination of the foreign legal assistance have functions to prepare, organize, conclude and execute in accordance to the KR law the international treaties of the legal assistance and legal cooperation with the foreign countries; to analyze the harmonization issues, unification of the Kr law system and foreign countries and also implementation of the accepted by Kazakhstan the international norms into the law of the KR; they have a function to perform the juridical assessment of the international projects.

The done by us analysis of the existing collisions of the international and national law in the studied sphere can allow making a conclusion that the activity of the mentioned authorized bodies does not fully correspond to the concerned government bodies, there is no interconnection in the frames of securing the social-labour human rights between the MFA KR , the Ministry of Justice of the KR and Ministry of Health and social development of the KR. In our opinion it is demanded and proved by the assigned to the Ministry of Labour and Social Secure of the Citizens of the KR the function of a special coordinating body that monitors the preparing suggestion on the law making activity directed to the

implementation, execution of the duties of Kazakhstan to secure the social-labour human rights.

Kazakhstan in accordance to the KR Law on 14.12.2000 № 119-II has ratified the Convention of the International Labour Organization № 88 on organizing the employment service (San-Francisco, 17 June, 1948). The acts of this international law assign the demand of a complex legal, managerial measures to create the corresponding government employment system, to provide it with broad power authorities, development and execution the government employment programs, the social secure of unemployed. Thus, the realization of the ratified international act in the sphere of the social-labour human rights in the national law system supposes not only expression of agreement with the Convention but also mutual work of all concerned governmental bodies to secure the established guarantees by the international act the labour rights realization.

The ratified by the KR in accordance to the KR Law on 20.07.99 № 444-1 the Convention of the International Labour Organization № 111 on discrimination in the labour and employment sphere (Genève, 25 June, 1958) in articles 2-4 specifies the state's duties to define and provide the national policy directed to encourage together with the national conditions, practice and methods, equality of possibilities and application in regard of labour and engagement in order to eliminate any discrimination; it is obliged by the methods that correspond to the national conditions and practice: a) to aspire to provide the cooperation of the entrepreneurs and workers' organizations and also other corresponding bodies to support adopting and observing this policy; b) to introduce such law and encourage such educational programs that will be able to provide adopting and observing this policy; c) to abolish any legal acts and change any administrative instructions or practices that contradict to this policy; d) to carry out the established policy in the labour sphere under the government power control; e) to provide observation of the established policy on the activity of the institutions of professional orientation, professional training and employment under the government power control; f) to point in its annual report on the Convention use the activities that have been done according to the mentioned policy and the results that have been achieved due to these measures. Any measures directed against the person in respect of whom there are reasonable suspicions or has been proved that they are engaged in the activity that undermines the state's security are not considered as discrimination on condition that the concerned person has a right to apply to the competent body made in accordance to the national practice. The mentioned demands of the international act cannot be applied immediately and need reflection in the national law that completely relevant in the system of the KR labour law.

Kazakhstan has joined the Convention on the refugee's status (Genève, 28 July, 1951), article 24 of this act assigns the following duties for the state to provide the refugees who legally live on its territory the same position as the citizens in regard with the following:

a) recompense for labour including family allowance, if such allowances are part of the labour payment, the work day hours, overtime work, paid leave, limit of domestic labour, minimal age of the people who work for hire, apprenticeship and professional training, women's and teenagers' labour, and use of the collective agreement advantages because these issues are regulated by the laws and directions or controlled by the administrative bodies;



b) social security (statutes concerning accidents at work, professional diseases, maternity, disease, disability, old age, death, unemployment, family duties and other cases that according to the inner laws or directives are assigned by the social secure system with the following restrictions: i) it is possible that the proper order of preserving the achieved rights and the rights that are in the process of achieving; ii) laws and directions of the abode country can assign the special order to receive full or partial allowance that is paid completely from the state fund and allowances paid to the people who have not fulfilled all conditions in regard with the contributions that are required to receive the normal pension.

The done analysis of the social and labour law shows that refugees in the KR are not considered as subjects of the social rights excluding relations to provide the target social assistance; the labour right allows receiving by the refugee a status of a worker, an employer, giving them the corresponding rights but to pretend on other social secure form including conditioned by the labour activity as, for example, loss of wages by women in case of pregnancy and delivery, the social payments in case of disability from the Social Insurance Fund the refugees cannot have. The given examples illustrate a specific mechanism of transformation the international standards to provide the social-labour human rights in the national law of the KR that is based on fact that in spite of assigning by the national law the general order of the inner state use of the international norms, to solve the issue of using the definite international norm it is necessary to make the required legal, managerial, financial-economic conditions for its realization. Necessity and exceptional quality of the latter conditions have a special significance, so let us give a practical example.

In accordance to the Act of the KR's President on 11 December, 2008 № 711 the Convention on disabled people's rights has been signed (New-York, 13 December, 2006) and a Facultative protocol to it. The mentioned international acts assign for the state such rights of the disabled people in the social-labour sphere as the right of the disabled people on labour equally with other people; it includes the right on receiving a possibility to earn their living by labour that the disabled person has chosen or on which they have agreed in conditions when the labour market and industrial sphere are open, inclusive and available for disabled people. The states, that are participants of the process, provide and encourage the realization of the right on labour including the people who receive disability during their work by adopting, also by law, the proper measures.

It should be empathized that such measures realized by the state in order to provide the labour rights such as giving the disabled a possibility of effective access to the common programs of technological and professional orientation, employment service and professional and continuing study; widening on the labour market the possibilities of employment and promotion of the disabled and also assisting them in search, receiving and renewing their work; hire the disabled in the state sector; stimulate hiring the disabled in the private sector with the help of the inappropriate strategies and measures that can include the programs of positive actions, stimuli and others; provide the disabled people a sensible adjustment of their working place; encourage the disabled people to have working experience in conditions of the open labour market; encourage the programs of the professional and qualified rehabilitation, job protection and job renovation for the disabled that require not only managerial, legal but also financial measures to provide functioning the source of their financing.

The mentioned above Convention assigns for the states duty to recognize the right of the disabled people on the sufficient living level for them and their families including sufficient food, clothing and housing and continuing improvement of the living conditions and it takes the proper measures to provide and realize this right without discrimination by the disability indication. Unfortunately, in the KR the law does not establish the sufficient living level not only in regard to the disabled people but also the citizens who do not belong to this group. Only the size of the minimum of subsistence is defined and the monthly calculation index that are not effective parameters of establishing the sufficient living level corresponding to the generally accepted standards. The mentioned conditions need realization of a complex of the governmental measures that are not only in developing the economically reasonable standards of the sufficient life level of the disabled but also in their harmonization with other given guaranteed by the state social allowances that above all conditions the revision of the financing system of these social activities.

In accordance to the Convention ILO «On minimum norms of the social secure» on 28 June, 1952 № 102, a woman in case of the temporary loss of wages as the result of pregnancy, delivery and their consequences the allowance is given as a periodically paid payments during all length of the case but not less than the period of 12 weeks.

The Convention of the International Labour Organization № 103 on the maternity secure (Genève, 28 June, 1952) assigns that on giving the medical certificate that proves the estimated term of her delivery the woman has a right for a pregnancy and delivery leave. The length of the pregnancy and delivery leave constitutes at least 12 weeks and includes the period of obligatory after delivery leave.

The length of the obligatory after delivery leave is established by the law of each country but it in no case can be less than 6 weeks; the rest part of the whole pregnancy and delivery leave can be used before the date of the supposed delivery or after the term of the obligatory after delivery leave, or part of it can be taken before the term of the supposed delivery date and another part after the termination of the obligatory after delivery leave depending on how it is assigned by the country's law. In case of disease caused by the delivery as it has been proved by the medical examination the woman has a right to prolong her after delivery leave, the maximum length of which cannot be established by the competent authority body. When the woman is on the pregnancy and delivery leave given to her in accordance with the points of article 3, the act of her dismissal given by the entrepreneur during her absence or the term of which coincides with her absence is illegal. If the woman nurses her child, she has a right to interrupt her work for this for one or several breaks the length of which is established by the country's law.

According to the social-labour law of Kazakhstan the woman is paid the pregnancy and delivery allowance on the basis of the average payment, the period of 70 days before delivery and 56 days after delivery in total is established. Realization of the mentioned international standards of the social-labour rights is possible on condition of the following: assigning in the national law the guarantees of the rights realization; creating managerial and financing mechanisms of their secure.

According to the Convention on maternity protection requirements the woman who is on the set by the law pregnancy and delivery leave has a right to



receive money allowance and medical assistance. The money allowance amount is established by the country's law so that to provide the woman and her child good from the point of hygiene living conditions and the proper life level.

The money allowance and medical assistance are given on account of the system of the obligatory social insurance or on account of the state funds; in both cases they are given to all women who correspond to these conditions. When the money allowance sum given on account of the obligatory social insurance is calculated on the basis of the previous wages it is not less than two thirds of the woman's previous payment that is registered with this purpose. In no case the entrepreneur has a personal responsibility as to the expenditures of giving such allowances for the women who engaged at work.

The stated universal standards of the material provision of women are not completely realized in Kazakhstan. So, the allowance on child's care till their being one year old is paid only since 2008 out of the Fund of the obligatory social insurance, before the corresponding law changes this type of the social protection was financed on account of the employer that according to the international standards is impermissible.

The transformation of the payment system of the allowance on child's care into the sphere provided by the Fund of the social insurance finances was accompanied with the establishing the limit of the given allowance: forty per cent of the average payment and the average payment taken as the calculation base cannot be more than ten times minimum payment. The set limit of the allowance does not correspond to the standards in this sphere that is one of the vectors to improve the law in the studied sphere of the social-labour rights.

The Convention on the maternity protection imperatively assigns that the money allowance amount is set by the country's law so that to provide the woman and her child good from the point of hygiene living conditions and the proper life level. At this, in accordance to the existing law the allowance amount of the child's care depending on the child's birth order is in money equivalence from 60 to 90 US dollars.

It is natural that the sum of the allowance cannot be qualified as «providing the woman and her child good from the point of hygiene living conditions and the proper life level» that is they do not correspond to the universal standards that can be realized only by introducing complex mechanisms of legal, managerial and financing secure.

Ratified by the KR in accordance to the Supreme Council act of the KR on 28 February, 1995 № 315-XIII Treaty on the state's social assistance to the military family's members who were killed in Afghanistan and other countries where the military actions were taken (Moscow, 24 September, 1993) is assigned that its Sides recognize it rational to provide the preferential conditions of the pension provision of the military men's family members, killed or died as the result of wounds, injures, contusions, diseases received during the period of military actions in Afghanistan or other countries where the military actions were taken. However, the mentioned act has not been realized in the KR in spite of being established in the international law the said right of the family's members can be used by the citizens only after its being assigned in the national inner law and creation of the finance guarantees to realize this right.

The significance of the finance guarantees to realize the social rights has been empathized by us in the published before works (AS. Khamzin, 2009): all legally assigned social rights lose their significance and acquire a declarative character

if there is no reference to the source of their finance, the accepted by the Republic international duties in the sphere to provide these or those subjects the rights on definite types of the social secure are no executable if the employer has not introduced them into the national social-labour law and established the source of their financing. Moreover, the peculiarity of financing procedure of the social measures is not only in the necessity to discuss the source of the finance provision but also in the corresponding fund, budget and to stipulate the money for the payments otherwise the normatively set system of the social secure loses its meaning and becomes practically non executable.

5. Conclusion

The author's concept of transformation regularities of international standards for social and labor rights in the national legislation of the Republic of Kazakhstan is based on the following node positions. National law defined the general procedure for the domestic implementation of international norms. For the realization of social and labor rights guaranteed in international instruments requires regulatory securing the necessary social, organizational, financial and economic conditions for the exercise of the rights. Without a comprehensive transformation of international norms, including the system of internal measures of a different orientation, the implementation of the rights provided by them is not feasible.

The value of the international social and labor standards is:

in the development of intra-law in the direction of its compliance with the universally recognized norms and universal;

the provisions of the standards are the basis for the construction of the relevant legislation systems.

Disclosure statement

No potential conflict of interest was reported by the authors.

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