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COMMENTS

ON THE INTERPRETATION OF THE KAZAKH CONSTITUTION CONCERNING THE PARTICIPATION IN THE CUSTOMS UNION WITHIN THE EURO-ASIAN ECONOMIC COMMUNITY

AMICUS CURIAE BRIEF

FOR THE CONSTITUTIONAL COUNCIL OF KAZAKHSTAN

by
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TABLE OF CONTENTS

I. Introduction

1. On October 9 at Venice Commission 80th Plenary Session Chairman of the Kazahstan Constitutional Council Mr. Igor Rogov February 2009 requested the Venice Commission to provide an amicus curiae opinion on the conformity of the constitutional requirements of the conformity of constitution with The Treaty on the Commission of the Customs Union to be before its ratification

2. Three questions were put to the Commission:

1.On the transfer of certain powers of sovereign nation states to international organizations (о передаче определенных полномочий суверенными государствами международным организациям;)

2.On the status and the legal binding force of the executive bodies decisions (о статусе решений исполнительных органов международных организаций);

3.On the relationship between the executive international organization bodies to the national domestic legislation and especially on the binding force of the international organization acts and priority (hierarchy) between them and the national legislation (соотношении актов исполнительных органов международных организаций и национального внутреннего законодательства, в частности, обязательности актов международных организаций и приоритетности)

4.Electronic Messages were exchanged and the Russian Versions of the Constitution, Relevant treaties and some of the decisions of the Kazah Constitutional council were received.

In view of the urgence of the case pending to be decided by the Kazah Constitutional council Mr. Rogov asked to receive preliminary opinions by the rapporteurs on this issue by October 26 latest.

II. Methods of Fostering Compliance Between National and Supranational Legal Orders in Contemporary World

Two types of Relationship between national law and supranational Legal orders can be identified beyond Federal Unions at the turn of the XXieth and the first decade of the XXI century.

The first of them has been associated with the principle of primacy of international law found in the treaties and for some states of the general principles of international law and international customary law, recognized by the contemporary democratic international community. Although most of contemporary nation state constitutions proclaim the principle of primacy of international law over the domestic (municipal) legislation approaches to the issue of hierarchy vary in the different constitutions.

The fourth generation national constitutions[1], or the post World War II nation state basic laws have been drafted in a globalized world in which primacy of international law has been recognized as an indispensable element of the rule of law. The constitutions of the emerging democracies adopted after the fall of Berlin wall reflect the international and standards and democratic traditions of European Constitutional heritage.

[1]See **S.E. Finer**, Notes Towards a History of Constitutions, in Constitutions in Democratic Politics, ed. V. Bogdanor, Aldershot, 1988, 17-32; also Constitutions and Constitutional Trends Since World War II, ed. A. Zurcher, Greenwood Press, 1955

The systems of implementing the treaty obligations however are different due to the choice of monistic or dualistic system in the national constitutions.[2] Incorporation of the treaties provisions follows two types of procedures.[3] A brief comparative overview of the relevant approaches in the national constitutions would provide the following picture.

According to the dominant in Europe monistic system the international treaty becomes an integral part of the national law after having been ratified. When a country has adopted dualism implementation of treaty obligation can take place not by ratification but by drafting a special law or including a provision in the existing national legislation.

Comparative analysis of European systems demonstrates another type of difference due to the position of the international treaties in the national legal order.

In some countries like Belgium, Luxembourg and Netherlands the international treaties provisions have supranational effect and stand above the legal system superseding the authority of constitutional norms.

According to the constitutional practice of other countries like Austria, Italy and Finland the treaties having been ratified with parliamentary supermajority vote have the same legal binding effect as constitutional provisions.

The third type of implementation of treaties obligations under the monistic system in Europe places them above the ordinary parliamentary legislation but under the national constitutions according to their legally binding effect. This is the current practice in Germany, France, Greece, Bulgaria, Cypress, Portugal, Spain and others.

In Czech Republic, Lichtenstein, Romania, Russia, Slovak republic only the treaties relating to human rights stand above the ordinary legislation.[4]

The primacy of international law standards should always be regarded as a minimum, and if especially in the area of human rights and the electoral law national constitutions establish more democratic standards the national provisions should be preferred and would not be considered as a breach of treaties.

1991 Bulgarian constitution proclaims primacy of international law treaties which have legally binding force and supersede the contradicting provisions of the national legislation. Under the monistic approach International treaties, constitutionally ratified, promulgated, and having come into force as for the Republic of Bulgaria, shall be a part of the domestic law of the country. They shall take precedence over any conflicting legal rules under the domestic legislation.

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[2]See for different legal orders in dualistic system and integrating the both legal orders in monism **M.Kumm ,** Towards a Constitutional Theory of the Relationship between National and International Law International Law Part I and II, National Courts and the Arguments from Democracy, p. 1-2, www.law.nyu.edu/clppt/program2003/readings/kumm1and2.pdf ; **L.Wildhaber**, Treaty-Making Power and the Constitution,Bazel,1971, 152-153

[3]**P. van Dijk, G. , J. H. van Hoof,** Theory and Practice of the European Convention on Human Rights, Boston,1990, 11-12; **A.Drzemczewski**, European Human Rights Convention in Domestic Law, Oxford, 1985, 33-35

[4]**C. Economides**, The Elaboration of Model Clauses on the Relationship between International and Domestic Law, The European Commission for Democracy Through Law, Council of Europe, 1994, 91-113, 101-102 ; **L.Erades**, Interactions between International and Municipal Law , T.M.C. Asser Institute – The Hague, 1993 ; The French Legal System: An Introduction, 1992,45; **Й.Фровайн,** Европейската конвенция за правата на човека като обществен ред в Европа,София,1994, 32 ; **Л.Кулишев**, Прилагането на Европейската конвенция за правата на човека в българския правен ред, сп.Закон, бр.2,1994, 3-25

The Constitutional Court of Republic of Bulgaria in an interpretative ruling has extended the validity of this constitutional provision i.e. art 5, par.4 to include all the treaties which were signed before the entry in force of the Constitution if they fulfill the requirements of art. 5, par.4.[5]

Interpretation of art. 85, par. 3 and art.149, par.1, 4 in connection with art 5, par. 4 makes apparent that the 1991 Constitution of Bulgaria has situated treaties only second to the Constitution itself but above all the national legislation.[6] In this way the primacy of international law has complied with the requirements of art 2 of the UN Charter respecting the nation state sovereignty.

Second type of relationship between supranational and national legal orders is exemplified by EU and member states of the EU national law.

The process of implementing treaty in the national legal system is different from interaction between EU legal order and EU member state domestic legal systems. Of course supranational, direct, immediate and horizontal effect of EU law requires introduction of EU clause in the Constitution providing for transfer of sovereign powers to the EU and its institutions.

The founding Treaties or primary law (forming the so called EU unwritten constitution), and part of secondary law, enacted by the EU institutions (mostly reglaments and some of the directives) due to the transfer of sovereignty prevail over the national constitutional norms and have legal binding effect after the EU member states have been notified. Therefore contrary to the international law treaties it does not need a ratification by the nation states or enacting or amending domestic law to be enforced. That is why implementing of the international treaties standards bears no similarity to obligation to comply with acquis communautaire in adapting the national constitutions and approximation of legislation in order to provide supranational direct immediate and horizontal effect of primary and institutional EU law. This follows from EU law supranational, direct, immediate and universal effect on all national legal subjects within the territory of European Union member states.[7]

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[5]The Constitutonal court ruled that the legal effect of treaties signed and ratified before 1991 Constitution entered in force is determined by the regime that was in effect at that time and especially according to the requirement for their publication. The treaties are part of the Bulgarian legal system if they are published or if there was no requirement to be published. If they are not published they do not have primacy to the contravening provisions of the national legislation. They might acquire the superseding effect over the contravening norms of Bulgarian legislation from the moment of their official publication. вж. **Мотиви на Решение N 7 от 1992 г. по к.д. N 6 1992 ., ДВ, N 56, от 1992 г.**

[6]Article 85.(1) The National Assembly ratifies or denounces with a law international treaties that:
1. Are of a political or military nature;
2. Concern the participation of the Republic of Bulgaria in international organizations;
3. Call for corrections to the borders of the Republic of Bulgaria;
4. Contain financial commitments by the state;
5. Stipulate the participation of the state in any arbitration or court settlement of international disputes;
6. Concern basic human rights;
7. Affect the action of a law or require new legislation for their implementation;
8. Specifically require ratification.

(2) Treaties ratified by the National Assembly may be amended or denounced only in accordance with the procedures stipulated in the treaties themselves or in accordance with the universally accepted provisions of international law.

(3) The signing of international treaties that require constitutional amendments must be preceded by the passage of such amendments.Article 149.(1) The Constitutional Court:

4. Rules on the consistency between the international treaties signed by the Republic of Bulgaria and the Constitution, prior to their ratification, as well as on the consistency between the laws and the universally accepted standards of international law and the international treaties to which Bulgaria is a signatory;

[7] These undoubted characteristics of the European law are formulated by the Court as early as the beginning of the 60s, N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos, v. Netherlands Fiscal Administration; Case 26/62; Costa v. ENEL; Case 6/ 64. See in a detail **E. Stein**, Lawyers, Judges and the Making of a Transnational Constitution, American Journal of International Law, vol.75, January 1975, N 1, 1-27; **P. Pescatore**, The Doctrine of Direct Effect, European Law Review, 8, 1983, 155-157 ; **J. Weiler**, The

In order to apply this mechanism, by other supranational legal entities, the principles of open statehood, transfer of sovereignty (sovereign powers from national institutions to the supranational organizations and their institutions) , pooling of sovereignties of member states to meet the challenges of contemporary globalization and acquis communautaire should be consented, embraced by the member states and provided in the founding treaty of such a supranational organization. Further such a supranational entity and its institutions should conduct its activity strictly on the principles of conferral of power, subsidiarity and proportionality. Adapting of the national to the supranational legal order is to be achieved by ratification of the founding treaties, by approximation of legislation and by equipping the supranational judiciary to enforce fines and other sanctions in the case of breach of obligations of a member state of the community. Finally, national courts when adjudicating cases should enforce primary and secondary law (law enacted by the institutions of a supranational organization) provisions when provisions of national legislation are in contradiction with the supranational law.

Supremacy of supranational law in the case of the EU, and if this model should be used by other supranational organizations, is achieved in the agreed areas by transfer of sovereign powers which can be strictly defined in explicit constitutional provisions or by stipulation in the constitutions of the member states and authorization of national parliaments to adopt certain organic or constitutional laws by qualified majorities establishing the areas of delegated national powers to the Union and its institutions, the methods of control by national legislatures and other details. Unless these principles and mechanisms have not been introduced in the supranational entity founding treaty the relationship of national and supranational legal systems remains within the realm of international law.

III. The Kind of Interrelationship Established Between the National Legal Orders of the Member States and Legal System of Euro Asian Economic Community and Compliance of the Kazah Constitution

From materials sent by Kazah colleagues and from the Russian version of the decisions of the Constitutional Council of the Republic of Kazahstan found on the site of the Constitutional Council of the Republic of Kazahstan (http://www.constcouncil.kz/) and the site of Euro Asian Economic Community [8] where Russian versions of the founding treaties might be found it seems that the intention of the parties has been to apply the primacy of international law provisions in the constitutions of the member states to implement the obligations that follow from the international treaties.

However, there are some deviations from traditional method of implementing international treaty obligations contained in the art 4 of Constitution of the Republic of Kazhstan which has introduced typical monistic version of implementing international treaties in domestic legal system by ratification and not by adopting or introducing amendments in the acting national legislation.

Therefore a comparison of leggal instruments brings to a conclusion that in a certain sense Customs commission decision are less and in the other they are more legally binding than the usual international treaties.

Community System: the Dual Character of Supranationalism, Yearbook of European Law 1, 1981; **A. Easson**, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI , Florence, 1994-1995

[8] **Евразийское экономическое сообщество** (ЕврАзЭС) - Договор об учреждении **Евразийского экономического сообщества**
www.ipaeurasec.org/evra/?data=evra

Their legal force is more intensive than the international treaty according to the content of art.2 of the text of the Treaty on Customs commission which has provided for the principle of voluntary gradual stage by stage transfer of parts of member states governmental bodies powers to the commission. However, this transfer has not been provided in the constitution of Kazah republic. (Like for example has been done in most of the written constitutions of the EU member states which provide for transfer of parts of soverign state powers or ***parts of state and not popular sovereignty*** while at the same time they preserve state sovereignty in all the other areas. Provision opens the statehood but safeguards limitation or encroachment of sovereignty in the areas wher it is not conferred). The safeguard against abdication of powers could be found in the established vote weight in the article 7 and the requirement that the decisions are to be taken with qualified majority of two thirds. Kazah republic has no liberum veto on the decision by other two member states. There is also appeal procedure provided in the next paragraf of art. 7 to which Kazah republic might resort in case of disagreement by referring the issue in commission's decision to be decided by uninanimity at the level of the Customs union supreme organ consisting of the Heads of states.

There is another provision worth mentioning which differentiates the established Customs union legal system from the EU law. In art. 16 of the Treaty on customs commission all disputes connected with interpretation or enforcement of the current treaty are to be decided in consultation or negotiation of the interested parties and if an agreement is not achieved to be adressed to the Court of Euro Asian economic community.

According to the art.8 of the Treaty Establishing Euro Asian economic community signed in Astana on 10.10.2000 which has been stated (in the preamble) as a basis of the current Treaty on the Customs commission pending to be decided on conformity with the Kazah constitution, powers and jurisdiction of the Court of Euro Asian economic community has been drawn. Besides securing uniform interpretation and enforcement of the treaties the court has been authorized to ajudicate on disputes between the parties on the issues of enforcement of the Euro Asian economic community institutions decisions. The court has been also charged with deciding cases on conformity of the customs union institutions acts to the founding treaties which establish the legal basis of the customs union, to interpret the treaties forming the basis of the customs union and the acts which have been adopted by the customs union institutions. The court is also to decide disputes between the Customs Union commission and the member states and on the obligations of the member states acording to the treaties. However, contrary to ECJ the court has not been entrusted with the power to impose sanctions and fines on the member state for non performance of duties according to the international treaties.

If we accept that the implementation of the treaty on establishing the Customs commission in Kazah legal order should be treated in the context of primacy of the international law provided in article 4 of Kazah constitution it is very difficult to apply any of the legal methods of interpretation to secure the legal binding force of the acts of the Customs commission.

In two interpretative decisions of Kazah constitutional council on the content of art.4 par.3 (see postanovlenie N 18 / 2 2000 and postanovlenie N2 2006 explicitly state that only ratified international treaties have priority to national legislation and are directly enforceable in case they contradict and should prevail over to a provision of a national legislation.

Two important conclusions that can be related to the curren case have been made in these two decisions of Kazah Constitutional Council.

1.If there is a contradiction between the international treaty and Kazah constitution the constitution should prevail and the treaty provision will not be enforced.

2.If a treaty has not been ratified international law should be obeyed and eenforced as long as it does not contradict the domestic legislation.In case of contradiction between the domestic legislation and a treaty provision national law should prevail and the international law should not be enforced.

Both of these conclusions emphasize the significance of ratification under the monistic system – to clear contradictions between the treaty the constitution and the domestic legislation before the entry in force of the treaty and as a sine qua non to the principle of primacy of the international law.

Since the acts of the customs commission will not be subject to ratification they should be enforceable only as long as they do not contradict national legislation. There is a speculative way of legal reasoning which I would not advise to follow. Supremacy of the acts of customs commission might be be derived from the ratification of treaty on the customs commission on which they will be founded. Further the procedure to secure conformity of commissions acts to the Treaties that have been ratified by the Court of Euro Asian economic community is available too. However this interpretation is not persuasive and is too speculative to be taken for true.

IV. The 3 questions put by the Kazah Constitutional Council to the Venice Commission

1.On the transfer of certain powers of sovereign nation states to international organizations
(о передаче определенных полномочий суверенными государствами международным организациям;)

It seems to me it is far from being sufficient to have the transfer of sovereignty in the treaty alone.

In order the treaty to be in conformity with the constitution, the constitution should explicitly provide the possibility for transfer of some powers to the international organizations and their institutions, like it has been done in the onstitutions of the EU member states.

2.On the status and the legal binding force of the executive bodies decisions (о статусе решений исполнительных органов международных организаций);

Acts of the Customs commission should be directly enforceable and will have priority before national legislation in case of conflict if there is a transfer of sovereign powers provision in the constitution, or each of the decisions of the commission should undergo a procedure of ratification which seems to be too cumbersome and is almost to impossible to be applied.

3.On the relationship between the executive international organization bodies to the national domestic legislation and especially on the binding force of the international organization acts and priority (hierarchy) between them and the national legislation (соотношении актов исполнительных органов международных организаций и национального внутреннего законодательства, в частности, обязательности актов международных организаций и приоритетности)

It follows that unless these preconditions i.e.– transfer of sovereignty or ratification are missing, acts of the commission will be enforced if they do not contradict Kazah national legislation.

V. Conclusions

It seems to me that on the constitutional side the adapting of the national legal systems for a supranational union has not been finished and some further steps like constitutional transfer of sovereignty should be done.

Unless the national constitutions are not prepared such relationship should be regulated by the principle of primacy of international law .