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The sources of migrational law as the object of theoretical and legal research

This work is devoted to determining the source of the migration law. This paper analyzes the sources in the field of immigration legislation in the Republic of Kazakhstan and the main international documents. In the international acts are considered the main provisions relating to the protection of migrants' rights. Also defines the role of other sources, such as case law, legal practice and judicial decisions of the International Court of UN in the migration law.

Key words: Immigration Law, regulations, sources of immigration law, legal practice, legal precedent, the UN Convention on the Reduction of Statelessness, migration policy, international regulations.

In the modern state one of the important directions of the organization of society and the maintenance of order is to regulate the flow of population movement. This activity is also important for the national security. Migration as a process of population movements between different regions is one of the most important sources of population around the world.

By the beginning of the third millennium, the phenomenon of migration has become a major factor in many of the global problems. This situation requires new approaches to legal migration policy, to the definition of priority sources of contemporary migration law at the international and at the national level.

The fundamental place among international instruments, which are basis for the international migration law, takes Universal Declaration of Human Rights, which set forth the rights relating to immigration, including: the right to freedom of movement and residence within the borders of each state; the right to leave any country; the right to seek asylum in other countries and enjoy asylum and so on. Although the Declaration was adopted as a statement of political intent, and not as a legally binding treaty, it has important meaning as the first international instrument to enshrine the person's right. It should also be noted that since the adoption of the Declaration many of its principles have been reiterated in legally binding documents and acquired the status of customary general rules [1; 306].

Analyzing the sources of immigration law, it can not be paid attention to their characteristics such as ambivalence. It consists in the fact that on the one hand, these are the sources of international agreements, customs, judicial decisions, and on the other — legal norms, customs and judicial practice of individual countries. Therefore, in the constitutions of national law and other regulations, as a rule, are fixed the legal validity of norms of the Basic Law of the State and the acts adopted on their basis and of the international treaties. The hierarchy of legal force of legal norms is fixed in the constitutions of many countries.

Vienna Convention on the Law of Treaties 1969 defines a treaty as an international agreement concluded between States in written form and governed by international law, regardless of whether such an agreement is contained in one, two or more related documents and whatever its particular designation [2].

With the creation and activities of international organizations on certain issues of migration had intensified the development and adoption of relevant conventions. Thus, among the international treaties in the field of international migration law must be mentioned the international treaties of regulating the problems of refugees. The Convention on the Status of Refugees and the 1951 Protocol in 1967 are the universal treaty establishing a specific legal regime for those in need of international protection, «Personal refugee status determined by the laws of its country of domicile or, if it has not, by the law country of residence. Previously acquired by refugee rights relating to personal status, in particular the rights arising from the marriage, shall be respected by Contracting States to implement, if necessary, with the formalities required by the law of that State, provided that the relevant law is one of those rights, that would have been recognized by the law of that State if he had not become a refugee». These documents reinforce the ban on the return of refugees and asylum seekers, where they will face persecution (principle of non-reciprocal expulsion or non-refoulement — refusing from expulsion of refugee to a country where he faces persecution on grounds of race, membership of a particular ethnic or social group, political opinion or religion, or there is a potential

threat to the proceedings), the requirement of non-discriminatory treatment of all refugees, standards of treatment with them, the responsibilities of refugees to the country of asylum, and so on.

Important contribution to strengthening human rights and freedoms in the field of migration relations have made the United Nations Convention on the Reduction of Statelessness 1961 Convention aims at reducing and eliminating statelessness and establishes a list of reasons that the State party should grant citizenship to a person who otherwise would be stateless, or already it is not. Also, determine the cases where a person may be deprived of citizenship, ILO Convention concerning Migrations in Abusive Conditions and the Promotion of migrant workers equal opportunity and treatment in 1975, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in 1990. The main objective of Convention is to promote respect for human rights of migrant workers. Migrants should be treated not only as workers but also as individuals. The Convention does not create new rights for migrants but aims to ensure equal treatment and working conditions for migrants and nationals of the host country. The Convention is based on the fundamental notion that all migrants should be given a certain minimum protection of their rights. The Convention recognizes that legal migrants should have a large set of rights than illegal, but stresses that in respect of illegal immigrants must respect fundamental human rights.

At the same time, the Convention proposes to take measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families, in particular by:

- Combat misleading information, as well as inciting people to illegal immigration;
- The application of sanctions against individuals, groups or entities which organize, operate or assist in the organization of illegal migration, including through measures to employers of illegal migrants.

Main article: The Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families, established to monitor implementation of the Convention by States parties. The Committee shall consist of fourteen experts to be of high moral character, impartiality and recognized competence in the field covered by the Convention. The Committee shall consider the reports of States — Parties to the Convention on compliance with its provisions. In accordance with Article 73 of the state — parties of the Convention are required to submit an initial report on the measures taken to consolidate the recognized rights in the Convention and on the progress made in the implementation of these rights, within one year after the entry into force for the State — participant, than - every five years.

Article 77 provides the right for the committee to consider complaints from individuals under the jurisdiction agreed on individual complaints of the participating countries, the countries of violations of their rights enshrined in the Convention, but the entry into force of this article is linked with the consent of 10 countries for the consideration of complaints. In October 2012 a corresponding statement was made only Guatemala, Mexico and Uruguay. Currently, 42 states have ratified the convention.

In addition, now the international community has made great efforts to deal effectively with illegal migration. This problem is widely taken into account in the development of international legal instruments on combating international crime in the framework of the UN. A vivid illustration of that is the UN Convention against Transnational Organized Crime, 2000 and its two protocols: Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent Trafficking in Persons, especially women and children [3].

The fundamental place among the documents which are the base for Migration Law of the Republic of Kazakhstan takes the Constitution of the Republic of Kazakhstan adopted in a national referendum on 30 August 1995. The rights and obligations of persons who find themselves under the jurisdiction of Kazakhstan as a result of voluntary or forced migration, legal guarantees for their political, economic and social rights enshrined in Chapter 2 of the Constitution of the Republic of Kazakhstan. In addition, the Preamble to the Constitution states that the people of Kazakhstan, united by a common historical destiny, are building a state on the indigenous Kazakh land. Thus, at the constitutional level is fixed commitment of our country to unite all the Kazakhs, who wish to return to their ancestral homeland [4].

In addition to the Constitution of 1995, the foundations of legal regulation of migration issues in the Republic of Kazakhstan were established in the Constitutional Law on the independence of 16 December 1991.

The constitutional law of 16 December 1991 Article 7 provides: «The Republic of Kazakhstan has its own citizenship. For all Kazakhs were forced to leave the territory of the Republic and living in other states have recognized the right of citizenship of the Republic of Kazakhstan along with the citizenship of another state, if it does not contradict the laws of the State of which they are.

The Republic of Kazakhstan regulate migration processes. The Republic of Kazakhstan creates conditions for the return to its territory of persons forced to leave the territory of the republic in the period of mass repressions, forced collectivization, as a result of other inhuman political actions, and their descendants, as well as the Kazakhs living in the former Soviet republics [5].

After the adoption of the Law of RK «On Migration» in July 2011, began a new phase of state regulation of migration relations in the Republic of Kazakhstan. The purpose of the law was declared regulation of public relations in the field of migration, the definition of legal, economic and social foundations of migration processes, as well as the creation of the necessary conditions of life in a new place for individuals and families returning to their homeland. It was significantly expanded conceptual framework introduced new articles, greatly extending the provisions of the Law «On migration» of 1997.

In addition to this law were adopted the following regulations: Law of the Republic of Kazakhstan «On citizenship» of 20 December 1991, Presidential Decree «On the Legal Status of Foreign Citizens in the Republic of Kazakhstan» dated 19 June 1995.; Decree of the President of the Republic of Kazakhstan «On the procedure for granting political asylum to foreign citizens and stateless persons in the Republic of Kazakhstan» on July 15, 1996.; Decree of the President of the Republic of Kazakhstan «On the order of consideration of issues relating to the citizenship of the Republic of Kazakhstan» on September 27, 1996, and others.

In the field of migration relations Kazakhstan has the following multilateral agreements within the CIS:

– Agreement on visa-free movement of citizens of the CIS states on the territory of its members in 1992. The Agreement on visa-free travel to confirm the right of citizens of the CIS countries to enter and leave their country freely move within the territory of the CIS countries without visas in the presence of the relevant documents [6].

– The Convention on the simplified procedure of acquiring citizenship by citizens of CIS member states in 1996. The Convention provides that the parties under certain conditions will provide persons serving for permanent residence in other CIS countries, a simplified procedure for renunciation of citizenship and the right to acquire citizenship in a simplified (registration) order [6].

It should be noted that the Citizenship and Migration between the CIS member states in this or that aspect were concluded several agreements: Agreement on assistance to refugees and internally displaced persons (1993); Convention on the Rights of Persons belonging to national minorities (1994); Agreement on the departure of nationals of the CIS member states in the non-CIS countries, and out of them (1997).

Agreement on cooperation of CIS member states in the fight against illegal immigration in 1998. It brings together 9 of the CIS states, including Russia (except for Georgia, Turkmenistan, Uzbekistan).

Legal (legal) precedent is the ruling government body (usually an administrative or judicial) of any particular case, which then becomes obligatory when considering similar cases. Legal precedent is not as widespread in the Republic of Kazakhstan in the countries of the Anglo-Saxon legal system. With regard to the migration law has a legal precedent in international relations of the Republic of Kazakhstan [7; 9].

International Court of Justice is the principal judicial organ of the United Nations, is the resolution of legal disputes between Member States, and advisory opinions are of the UN and its agencies. Thus, despite the fact that the decisions of international courts act as auxiliary sources of law, they have an impact on the subsequent practice of States and international organizations.

International jurisprudence carried by three major international courts: the International Court of Justice in The Hague, the European Court of Human Rights in Strasbourg and the European Court in Luxembourg. The most effective, in terms of international migration law, is the work of (rule-making) of the European Court of Human Rights. It regularly takes decisions on violations of the countries of their obligations under international law in the field of human rights enshrined in the European Convention on Human Rights. The number of judges is determined by the number of members of the Council of Europe. In contrast to the work of the International Court of Justice, that should only accept applications from countries, the intensity of the European Court of Human Rights is constantly increasing, due to the possibility of individual access to the European human rights system.

With regard to international migration law should note the decision of the International Court of Justice on the claim of Mexico against the United States in 2004 was the crux of the matter is that the US authorities have arrested, detained, convicted and sentenced to death 54 Mexican citizen and thus failed to fulfill obligations According to Article 36 of the Vienna Convention on Consular Relations of 1963 (about consular notification about the arrest and detention). In the present case the International Court of UN concluded that the

US obligation to provide review of sentences handed down by Mexican nationals, in connection with the violation of international law [8].

Legal custom as a source of migration law, although it is distributed mainly to the international activity of the Republic of Kazakhstan. So, with regard to migration law it can be said about this custom as the ban on the return of any person to where he as a result of his race, religion, nationality, membership of a particular social group or political opinion, are at risk of torture or cruel, inhuman or degrading treatment or punishment. This principle of non-refoulement is the basis of the feedback of the international protection of refugees, recognized by States «in theory» and works in practice. To the custom in immigration law can be attributed the consolidation of the legal system of the priority of right blood and the right soil with regard to nationality.

Customs is an influential fact in the old days. Magna Carta in 1215 refers to the ancient customs of merchants. Magna Carta (Latin. Magna Carta Libertatum, English. The Great Charter) is a certificate signed by English King John Landless (King John) June 15, 1215, and it later became one of the fundamental constitutional acts of England. Most of the items of the Charter was revoked later Acts of Parliament; remain unchanged, paragraph three of the sixty-three.

The institution of asylum, which accompanies human society at all stages of its development, and there is developing among the rules relating to customs. In common law jurisdictions (UK, USA) rules relating to customs are in force even at present times.

International custom, that is a norm of international law, may be repeated for a long time in the same situation rule of conduct subjects of international law, which is recognized and executed by the subjects of international law in their international practice as an ordinary rule of international law. Accordingly, referring to the international custom in the field of international migration law, it should be borne in mind the rules of conduct that are entrenched as a result of the movement of people, in other words, during the migration process.

Qualification rules of behavior as a habit is a complex process, since in contrast to the conventional rules custom not issued any single act in writing. Therefore, to establish the existence of customary auxiliaries are used, listed in Article 38 of the Statute of the International Court of Justice: judicial decisions and the teachings of the most recognized experts in the field of international law in different countries. In theory, as additional sources for the determination of the international custom and use the decisions of international organizations and unilateral acts and actions of state [7; 11].

Thus, although we can not talk about the widespread use of legal custom in the migration law, it can be designated as a separate source of law [7; 15].

In the jurisprudence has always played a huge role theory of law — legal doctrine. Proceedings of the outstanding scientists in the field of international migration law, such as T.Aleynikoff, R.Appleyard, V.Cheteyl, K.Bretel, G.Gudvin-Gill, R.Perrushu, R.Chelovinski, often seen as a source of migration law. It is worth noting that the doctrine (even the most highly qualified in the field of law) can only serve as aids to determine the exact content of the positions of subjects of law in the application and interpretation of legal norms. Although at present we can not exclude the value of the doctrine of migration law, as, where appropriate, it contributes to the elucidation of certain legal provisions [7; 19].

Undoubtedly, an important role in addressing international migration plays a UN Special Rapporteur on the human rights of migrants. Its main task is to study ways and means of overcoming existing obstacles to the protection of migrants' rights. The mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. One of the main functions of the Special Rapporteur is to formulate the necessary recommendations for the adoption of concrete measures to prevent violations of the rights of migrants at the national, regional and international levels. Thus, acts of special rapporteurs, although not binding for their execution, are reference points for decision-making bodies of the UN and the actions of the states [9; 18].

Thus, the sources of modern Kazakhstan migration law include a legal act, the regulatory contract, legal precedent, legal practice, legal doctrine and rules of «soft» law.

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А.Божжараулы, Я.Савицкий

Көші-қон құқығының қайнар көздері құқықтық-теоретикалық зерттеу объектісі ретінде

Мақала көші-қон заңнамасының қайнар көздерін жан-жақты анықтауға арналған. Халықаралық нормативтік құжаттардағы бекітілген ережелер мен Қазақстан Республикасы көші-қон заңнамасы саласындағы қайнар көздерін талдауға бағытталған. Халықаралық актінің негізгі құжаттарында мигранттардың құқықтарын қорғау қарастырылған. Сондай-ақ қосымша қайнар көздер ретінде көші-қон құқығы жүйесіндегі БҰҰ Халықаралық сотындағы сот шешімдері және құқықтық әдет-ғұрып, заңдық прецеденттер зерттелген.

А.Божжараулы, Я.Савицкий

Источники миграционного права как объект теоретико-правового исследования

Данная работа посвящена определению источников миграционного права. В работе проанализированы источники в сфере миграционного законодательства в Республике Казахстан и основные международные нормативные документы. В международных актах рассмотрены главные положения, касающиеся защиты прав мигрантов. Также определена роль дополнительных источников, таких как юридический прецедент, правовой обычай и судебные решения Международного суда ООН в системе миграционного права.

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Репозиторий Қарғу