

# PRINCIPLES OF KAZAKHSTAN LABOR LAW: OVERVIEW AND PROBLEM ANALYSIS

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## ABSTRACT

*This manuscript investigates the extent to which the legal framework in independent Kazakhstan comply with international law instruments applicable in enforcement of the right to treatment of foreign worker in the area of social security. In particular, the manuscript looks at how the social security legal frameworks comply with and promote the international standards of equality of treatment in social security for foreign worker and which specific conditions existing in Kazakhstan that affect the rights to equal treatment in social security for workers. The methods used were doctrinal legal scholarship that applies normative analysis of legal content; the human rights research methodology as emerging discipline that examines the impact of international human rights treaties on domestic jurisdictions; comparative legal analysis and some empirical methods. The results show legal framework of Kazakhstan has inefficient compliance with international and regional instruments relating to equal protection nationals in social security. The manuscript recommends adoption of strong supranational legislation that ratified international instruments to directly and effectively apply in national jurisdictions. In addition, a clear policy is required to compel Kazakhstan to ratify all international instruments affecting country's objectives such as observance of equal treatment, human rights, social justice, and rule of law.*

**Keywords:** Labor Legislation, Foreign Workers, Social Security, Kazakhstan.

## INTRODUCTION

The international scholar community defines equality as the right of different groups of people in a community or society to have a similar social position and receive the same or similar treatment (Feldstein, 1974; Dreze et al., 1991; Boldrin & Rustichini, 2000; Van-Ginneken, 2003). The concept of equality is described well in terms of a principle. Thus, the "equality principle" is described in philosophical, moral, and legal doctrine by asserting that all human beings are equal and that they ought to be treated "equally" under the law (Van-Ginneken, 2003). Equality of treatment concept has generated a lot of controversial legal scholarship surrounding it. Thus, the traditional concepts of consistent treatment (procedural aspects) that have been used over a long period of time in various countries in their Constitutions as well as in legal instruments such as those found in the European Community law embody a perception of matters of procedural justice instead of substantive justice. In fact, it is improper to generalize the application of the concept of equality because it is highly likely that procedural

justice may not necessarily guarantee any particular outcome that can be called substantive equality (Boldrin & Rustichini, 2000). There is still deep-seated conceptual confusion and a lack of consistency in interpretation and application of the concept of equality. Nevertheless, a legal framework to decide on the legitimacy of discriminatory practices facilitates the acceptance of intervention not only by the judiciary, but also by others who know the law and can prevent discriminatory actions by referring to it.

As such, the rights-based approach to social security is two-pronged; firstly, the ILO approach and international human rights approach to social security. The latter affirms that the right to social security has been strongly affirmed in international law while the former approach recognizes the fact that, the human rights dimensions of social security are traceable from the international declaration on human right which called for the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care. The declaration concerned with the aims and purposes of the ILO. The ILO affirmed that social security is an indispensable part of government policy because it was declared a fundamental human right intended to build human dignity, equity, and social justice (Kaganovich & Zilcha, 1999; Feldstein & Liebman, 2002). Under the international human rights framework, social security is recognized as a human right in the Universal Declaration of Human Rights in which it is stated that everyone, as a member of society, has the right to social security. The OECD also provides that everyone has the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. According to the OECD social protection for foreign workers consists of four main components. These components may be described as: labour market conditions in host countries and the recruitment process in the origin country; access to informal networks to support foreign workers and their family member; access to formal social protection which implies social security and social services in foreign workers' receiving (host) countries and foreign workers' sending (origin) countries; and portability of vested social security rights between foreign workers' receiving (host) and sending (origin) countries (Organisation for Economic Co-operation and Development, 2017).

According to the ILO and OECD, it is provided that the partner states have agreed to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the community. This includes harmonising their labour policies, programmes and legislation including those on occupational health and safety and to maintain common employment policies. provides that in honouring the international organisations and development partners, partner states shall honour their commitments in respect of other multinational and international organisations of which they are members, of which most international human rights instruments emphasize the observance of rule of law by national states (Buribayev & Khamzina, 2019). Despite the fact that, the concept of equality of treatment is a noble concept among common humanity, in practical terms, it seems to contribute to stable labour market in Kazakhstan (European Training Foundation, 2000). To what extent foreign workers enjoy equal treatment is an issue to be investigated particularly in context of the rights to social security. This research attempts to investigate and establish to what extent the Kazakhstan comply with international principles of equality of treatment in social security for foreign workers. A profile of compliance is sought to be drawn and gap identified for possible amelioration of the state of social insecurity for foreign workers in Kazakhstan.

## METHODOLOGY

In order to accomplish this study, a number of methodologies and sources have been utilized. A traditional doctrinal legal scholarship which applies various legal concepts in the subject, values and norms, and other precepts for this specific study, have been used (Galiakbarova & Nurgaliyeva, 2016; Ibraev et al., 2017; Kurmanalina et al., 2020). The researcher analysed the primary legal authorities which are basic constitutions, statutes, authorized statements of law issued by governmental and regional bodies, treaties, conventions, protocols, charters, codes or subsidiary legislations or regulations or rules, orders, decided cases (court opinions and other similar documents that carry the force of law. These primary authorities which can be either mandatory (binding) or persuasive (non-binding) were critically analysed in order to generate a synthesized qualitative report. Thus, doctrinal legal research provided an understanding of the basic types of law, legal resources, and subject terms that aided the process of interpretation (Nurgaliyeva & Khassenov, 2015; Ryskaliyev et al., 2019). Doctrinal legal research is the methodology most used by legal scholars and it may be combined with non-doctrinal (socio-legal) research methodology. This combined or mixed method of research is essentially an intellectual and practical synthesis based on qualitative research. Mixed method research recognizes the importance of traditional research but also offers a powerful third paradigm choice that often provides the most informative, complete, balanced, and useful research results (Akhmetbaev, 2008; Artykbaev et al., 2020). Thus, legal research is the search for authority that can be applied to a given set of facts and issues. The universe of potentially useful authority is vast, and good researchers have well-developed analysis skills in addition to an understanding of the techniques and efficiencies of doing legal research using special tools and techniques, both print and electronic (Mukhamadiyeva et al., 2017; Movkebayeva et al., 2020). Analysis of important classes of legal secondary sources of law which include received laws, international law (treaties, charters, conventions, and protocols issued by United Nations bodies), international reports, legal periodical articles, bills, guidelines, legal treatises, restatements, and loose-leaf services, were employed. All these provided insights to the author while addressing the aim and objectives of the study. Also, the doctrinal legal scholarship approach involved critical examination or intellectual analysis (Doskaliyeva et al., 2018), which involves clarification of key legal instruments including the use of electronic research systems that offer tremendous advantages to researchers by offering large databases of both primary sources and secondary sources.

## OVERVIEW AND PROBLEM ANALYSIS

The main legal regulation of foreign workers issues is the Constitution of the Republic of Kazakhstan, in accordance with which foreigners and stateless persons use the rights and freedoms in the Republic of Kazakhstan, and also bear obligations established for citizens, unless otherwise provided by the Constitution, laws and international treaties (Mukhamadiyeva et al., 2017). The Constitution of Kazakhstan was adopted in 1995 by nationwide referendum and declares that Kazakhstan is a democratic, secular, legal and social state whose highest values are the individual, and rights and freedoms (Aktymbayeva et al., 2020). In Kazakhstan, labour relations are regulated by the regulatory legal instruments, individual contract of employment and, if one exists, a collective labour agreement. The labour laws and regulations of the Republic

of Kazakhstan are based on the Constitution of the Republic of Kazakhstan and include the Labour Law and other legal instruments, which regulate labour relations of some separate categories of the employees. The major sources of labour legislation are laws adopted by the Parliament, and technical acts, passed by the governmental agencies. According to Article 3 of the Labour Law of Kazakhstan, the labour law regulations in Kazakhstan are applicable to all workers who have entered into employment relations with employers. The most important legal enactment, which regulates labour relations in Kazakhstan, is the Labour Law of 1999, which came into force on 1st January 2000 and replaced the amended old Labour Code dating from 1972. The Law regulates social relations arising in the course of implementation of the citizen's constitutional right to the freedom of labour, stipulated in Article 24 of the Constitution. The Labour Law consists of 12 chapters and 108 articles.

There are also a number of other legal acts, which regulate the labour and industrial relations, not covered by the Labour Law, such as: Law on Collective Labour Disputes and Strikes, Law on Collective Agreements, Law on the Occupation of the Population, Edict on Approving a Position on Qualification Classes of State Employees, Law on Employment of Population, Law on State Service. According to Article 2 of the Labour Law, international treaties ratified by Kazakhstan prevail over the Labour Law and other regulatory legal instruments for labour, and are applied directly except in cases where the international treaty implies that its application demands publication of a corresponding law of the Republic of Kazakhstan. The labour law regulations in Kazakhstan are also applicable to employment relationships with foreigners and persons without citizenship, unless otherwise provided by a federal law or an international treaty of Kazakhstan (Galiakbarova et al., 2016).

The Labour Law of Kazakhstan provides for different settlement procedures depending on whether the dispute is individual or collective. Individual dispute settlement is regulated mostly by the Labour Law, while collective labour disputes are resolved in accordance with two laws, the Law on Collective Labour Disputes and Strikes, and the Labour Law (Nurgalieva, 2011). Labour Law provides that disputes may be resolved by agreement between the parties or through the courts of general jurisdiction (Galiakbarova et al., 2016; Guzal & Sholpan, 2016). The Law on Collective Labour Disputes and Strikes provides several specific possibilities of resolving collective labour disputes, such as labour arbitration and mediation. According to Article 98 of the Labour Law, labour disputes may be considered by a conciliation commission if the parties reach such agreement. The conciliation commission is formed on parity basis from the equal numbers of representatives of the employer and employees by a mutual decision of the parties (Bidaishiyeva et al., 2018). The employees' representatives are elected to the conciliation commission by a general meeting (conference) of the establishment (Nurgalieva & Mamedova, 2013). The employer's representatives are appointed by the director of the establishment. Organizational and technical support of the conciliation commission is to be provided by the employer.

The problem analysis of current labour law framework has revealed that the administration of national social security schemes in Kazakhstan remains nationally focused and fragmented in nature without international social security coordination instrument under the ILO legal procedure (Nurgaliyeva & Khassenov, 2016). It has been shown that, social security law in Kazakhstan does not have legal provision on mechanism for foreign workers to access benefits when they join other different social security schemes. The study has shown that foreign workers have been subjected to national law. In the absence of international social security coordination

instrument and in the absence of comprehensive harmonisation of social security laws, foreign workers continue with the risk of losing their past contribution periods earned. The analysis has also demonstrated that, the Kazakhstan law permits foreign workers to register with national social security schemes. At the same time, in the absence of comprehensive harmonisation, it is most relevant for Kazakhstan to develop a network of social security agreements. These agreements create an effective enforcement of international human rights norms. The national instruments set general benchmarks of implementation of social security provisioning to foreign workers based on equality principles, rule of law, social justice, promotion and protection of human and people's rights in accordance with the international instruments which prohibit discrimination of peoples based on nationality (Beissenova et al., 2013).

Furthermore, the analysis has shown that national instruments for effective and comprehensive implementation of coordination of social security benefits remain unclear. Apparently, it is unclear if at all there are specific and consistent operating legal rules or principles of enforcement of social security rights based on equality principle. This apparent gap is microscopically viewed through various legal provisions in different national social security legislation of Kazakhstan (Khasenov, 2016; Jussibaliyeva et al., 2019). But also gap is viewed in the context of status of compliance with international human rights instruments, international labour standards that have a bearing on the right to equal treatment in social security as between nationals and foreign workers. This research investigates, among other things, national legal framework and related conditions pertaining with compliance to standards of legal protection of foreign workers in social security rights based on application of equality principles in conformity to international legal norms.

Moreover, there have been some apprehensions among the citizens of the community that, foreign workers in Kazakhstan are, inter alia, not treated as equals with nationals in social security benefits accessibility in benefits exportability, qualifying for long term benefits and other benefits (Kozhirova & Ospanova, 2014). Some complaints among citizens crossing borders for doing business in partner states suggest a state of unstable economic integration due to continued impediments arising from non-tariff barriers and continued failure by partner states to abolish work permits (Buribayev et al., 2016; Zhetpisbayev et al., 2017). There are still impediments to the free movement of goods, labour and services, as partner states continue to erect non-tariff barriers. Some of these challenges retard the country's integration. Some of these challenges make harmonization of laws a difficult endeavour to achieve.

## **DISCUSSION & CONCLUSION**

The choice of Kazakhstan was based on various factors. Kazakhstan was selected because it is the biggest economy within the Central Asian region that has been named as having joined the group of upper-middle income countries since 2010. Further, Kazakhstan is considered as a hub of international foreign workers within the region and has a relatively large number of foreign labours working in the Central Asian countries. Due to expansion of foreign direct investment in Kazakhstan's oil and gas sector (Karatayev & Clarke, 2016; Aktymbayeva et al., 2020), there has been an influx of foreign labour forming a growing number of foreign workers coming from all over the globe (Mamedova & Balgabayeva, 2014). The outcome of this study has added knowledge on the nature and extent of existing gap within the social security legal frameworks of Kazakhstan pertaining equal social security benefits provisioning for foreign

workers in relation to treatment of national workers. It has also shed light on the regional bloc's state of compliance with international standards on social security and human rights principles. Social security principles (the principle of solidarity fund, principle of replacement of income, and the principle of equality) as enshrined in various international human rights instruments and international labour conventions have been shown to have a bearing on equal social security rights between foreign workers and nationals. Since Kazakhstan has agreed to promote free movement of labour, persons, capital, goods and services and the right of establishment and residence, this study is significant. The extent to which Kazakhstan has attempted to review their social security laws towards harmonisation in line with international law has been demonstrated. However, the study has shown the state of continued predominance of application of national social security laws.

The justification of this study and its nature lays in the reason that, the movements towards reaching comprehensive harmonisation or coordination of laws for free movement of labour, goods, services and capital as well as the right of residence and the right of establishment have created the wave of foreign workers to Kazakhstan. However, the desire to attain full harmonisation of laws has not seen much progress in place regarding harmonisation of national laws towards comprehensive legal framework for social security rights in Kazakhstan for advantages of migrant workers. This manuscript has looked into the conceptual and theoretical framework of international labour and social security as they impact on application of principles of equality of treatment of foreign workers (Osanova, 2017). Various concepts of social security, equality of treatment and theories of initiation and continuity of international labour have been described. Conceptual problems involved in understanding social security models and its implementation in the context of international labour have been underpinned. Among others, the manuscript has shown that the right to social security remains obscure as a human rights issue. This is because it is largely endorsed as a social welfare issue if it caters for any imminent contingency. The manuscript attempts to assume that social security is a human rights issue and therefore a rights-based approach to social security is adopted as the mainstream research approach. This has advantages of inviting broader approaches to social security provisioning within reaches of governments.

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