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**PROBLEMS OF APPLYING THE NORMS
OF THE FAMILY LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN
TO THE LEGAL RELATIONS ARISING FROM THE REGISTRATION
OF A MARRIAGE COMPLICATED BY A FOREIGN ELEMENT**

Abstract. This article analyzes the specifics of marriage complicated by a foreign element. In accordance with the national legislation of the Republic of Kazakhstan, even stateless persons and foreign citizens who have confirmed their belonging to a foreign state are equally subject to protection in matters of family and marriage with citizens of the Republic of Kazakhstan. The application of the family law of the Republic of Kazakhstan in the presence of foreign elements is impossible without reference and appeal to the norms of international treaties, especially in the context of p. 3st.4 of the Constitution stating that the "...International treaties ratified by the Republic have priority over its laws". It follows that in case of collision of provisions of the national legislation of the Republic of Kazakhstan and norms of the international Treaty ratified by Kazakhstan regulating the same question of marriage and family relations, the norm of the international Treaty will have priority action.

Currently, the Republic of Kazakhstan has ratified, through the adoption of the relevant law, a significant number of international treaties in the field under study.

As for marriages between foreign citizens or stateless persons and citizens of the Republic of Kazakhstan, concluded outside Kazakhstan, but in compliance with the current legislation of the state in whose territory they were concluded, are recognized as valid in the Republic of Kazakhstan. At the same time, conceptually important is the fact of compliance with the requirements of the relevant norms of the CMF RK.

Key words: Marriage, family, foreign element, registration, conflicts.

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**Қазақстан Республикасының отбасы заңнамасының нормаларын
шетелдік элемент асқынған некені тіркеу кезінде туындайтын
құқықтық қатынастарға қолдану мәселелері**

Аңдатпа. Бұл мақалада шетелдік элемент асқынған неке қиюының ерекшелігі талданады. Қазақстан Республикасының ұлттық заңнамасына сәйкес, тіпті азаматтығы жоқ адамдар және өзінің шет мемлекетке тиесілігін растаған шетел азаматтары Қазақстан Республикасының азаматтарымен тең дәрежеде отбасы және неке мәселелерінде қорғалуға жатады. Шетел элементі болған жағдайда Қазақстан Республикасының Отбасы құқығы нормаларын халықаралық шарттардың нормаларына жібермей және жүгінбей қолдану мүмкін емес, соның ішінде «...Республика бекіткен халықаралық шарттардың оның заңдары алдында басымдығы бар» деп көрсететін ҚР Конституциясының 3-б.4-т. контексінде. Осыдан келіп шығатыны, Қазақстан Республикасының ұлттық заңнамасының ережелері мен Қазақстан ратификациялаған халықаралық шарттың неке-отбасы қатынастарының бір мәселесін реттейтін нормалары соқтығысқан жағдайда, халықаралық шарттың нормасы басым күшке ие болады. Қазіргі уақытта Қазақстан Республикасы тиісті заңды қабылдау арқылы зерттелетін саладағы халықаралық шарттардың едәуір санын ратификациялады. Шетелдік азаматтар не азаматтығы жоқ адамдар мен Қазақстан Республикасы азаматтарының арасындағы Қазақстаннан тыс жерлерде қиылған некеге қатысты, бірақ олар аумағында жасалған мемлекеттің қолданыстағы заңнамасын сақтай отырып, Қазақстан Республикасында жарамды деп танылады. Бұл ретте, ҚР КоБС тиісті нормаларының талаптарын сақтау фактісінің тұжырымдамалық маңызы бар.

Түйін сөздер: неке, отбасы, шетел элементі, тіркеу, коллизия.

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**Проблемы применения норм семейного законодательства
Республики Казахстан к правоотношениям, возникающим
при регистрации брака, осложненного иностранным элементом**

Аннотация. В данной статье анализируется специфика заключения брака, осложненного иностранным элементом. В соответствии с национальным законодательством Республики Казахстан, даже лица, не имеющие гражданства, и иностранные граждане, подтвердившие свою принадлежность иностранному государству, равным образом с гражданами Республики Казахстан подлежат защите в вопросах семьи и брака. Применение норм семейного права Республики Казахстан при наличии иностранного элемента невозможно без отсылки и обращения к нормам международных договоров, тем более в контексте п.3ст.4 Конституции РК, указывающего, что «...Международные договоры, ратифицированные Республикой, имеют приоритет перед ее законами». Из чего следует, что в случае столкновения положений национального законодательства Республики Казахстан и норм ратифицированного Казахстаном международного договора, регулирующих один и тот же вопрос брачно-семейных отношений, приоритетное действие будет иметь норма международного договора.

В настоящее время Республикой Казахстан ратифицировано, посредством принятия соответствующего закона, значительное количество международных договоров в исследуемой области.

Что касается брака между иностранными гражданами либо лицами без гражданства и гражданами Республики Казахстана, заключенного за пределами Казахстана, но с соблюдением действующего законодательства государства, на территории которого он был заключен, то он признается действительным в Республике Казахстан. При этом, концептуальное значение имеет факт соблюдения требований соответствующих норм КоБС РК.

Ключевые слова: брак, семья, иностранный элемент, регистрация, коллизии.

Introduction

The current family legislation regulates not only marriage and family relations between a man and a woman who have Kazakh citizenship, but also similar legal relations in the case when one of the spouses has Kazakh citizenship, and the other – the citizenship of a foreign state (or is a stateless person). However, given the different approaches to legal regulation, and in principle to the institution of marriage in different States, in practice, there are many problems, the solution of which depends on the national legislation of each individual state, and on the norms of international law.

Research methodology

The methodological basis of this study consists of such General scientific methods as dialectical and deductive methods, systematic approach and analysis, methods of epistemology, formal logic, and social management.

In addition, special research methods were used: comparative legal and statistical methods, including a detailed analysis of the existing practice of developed countries with the reorientation of the main findings on the legal system of the Republic

of Kazakhstan, as well as specific sociological and formal legal methods.

Discussion

This problem has been studied both by specialists of the Republic of Kazakhstan and foreign civilists, whose works are devoted to family law and / or private international law. Among such authors we can note: L.P. Anufrieva (Anufrieva, 2000), B. Audit (Audit, 2000), M.M. Boguslavsky (Boguslavsky, 2011), E.E. Veselkova (Veselkova, 2014), V.V. Gavrilov (Gavrilov, 2002), Zh.S. Kaipbergenova (Kaipbergenova, 2009), L.A. Lunts (Lunts, 2002), G.K. Praliev (Praliev, 2007), L.R. Kiestra (Kiestra, 2014), N.J. Osmonalieva (Osmonalieva, 2013), U. Magnus, P. Mankowski (Magnus, 2012), P. Gannagé (Gannagé, 2019), M.-C. Najm (Najm, 2005) and others (Steffek, 2013).

The conclusions described in the works of these authors were useful both in improving the national legislation of the Republic of Kazakhstan on the legal regulation of family and marriage relations complicated by a foreign element, and in further studies of various aspects of these legal relations.

Currently, the legal basis for the regulation of family relations complicated by a foreign

element are, first and foremost, the Constitution of the Republic of Kazakhstan (Constitution of the Republic of Kazakhstan, 1995), the Code of the Republic of Kazakhstan “On marriage (matrimony) and family” (Code On marriage (matrimony) and family, 2011) and the decree of the President of the Republic of Kazakhstan having the force of law “On legal status of foreign citizens in the Republic of Kazakhstan” (Law on legal status of foreign citizens in the Republic of Kazakhstan, 1995), international agreements and treaties, ratified by the Republic of Kazakhstan in accordance with the established procedure.

According to the Law of the Republic of Kazakhstan “On Citizenship,” dual citizenship is not recognized in the Republic of Kazakhstan (Citizenship Law, 1991).

The norms of the current family legislation of the Republic of Kazakhstan are aimed at legal regulation of marriage and family relations of persons who have citizenship of Kazakhstan, but who have registered family relations under the laws of a foreign state. However, we must not forget about the existence of a provision according to which a marriage will not be recognized if it contradicts the current legislation of the Republic of Kazakhstan (public order clause) (clause 2 of article 229 of the Code on marriage (matrimony) and the family of the Republic of Kazakhstan)

With regard to the operation of the family law of a foreign country, according to article 230 of the Code on marriage (matrimony) and the family of the Republic of Kazakhstan, they regulate the legal relations of citizens of Kazakhstan that we study exclusively within their jurisdiction. But it is worth noting that only in cases where persons entering into marriage have established marriage and family relations in accordance with the legislation of these states. This is what determines the application of the family law of a foreign state in accordance with the national family law of Kazakhstan (Law on the Legal Status of Foreign Citizens in the Republic of Kazakhstan, 1995).

It is worth emphasizing that according to the national legislation of Kazakhstan, even persons without citizenship and foreign citizens who have confirmed their belonging to a foreign state, are equally protected with citizens of the Republic of Kazakhstan in matters of family and marriage (Nukusheva, 2007: 87).

In this regard, continuing the reasoning started by A.A. Nukusheva, we can agree with the point of view of another author, namely M.Zh. Mukanov, indicating the conditional presence of three groups

of foreign persons who marry and citizens of the Republic of Kazakhstan: oralmans, citizens of the near abroad (CIS) and citizens of the far abroad (Mukanova, 2010).

Thus, considering the first group, which includes oralmans, it is worth noting that in recent years, this category of citizens in a significant part of them returned to their historical homeland, that is to say Kazakhstan. Given that most of them were married under the legislation of a foreign state (where they and / or their ancestors were forced to move in the early 20th century), which in turn has a number of distinctive features, there was a need to activate the legal mechanism for the recognition of such marriages in the territory of the Republic of Kazakhstan when they change their citizenship to the citizenship of the Republic of Kazakhstan.

A similar mechanism was the current Code of the Republic of Kazakhstan dated 26 December 2011 No. 518-IV “On marriage (matrimony) and the family”, which regulates the family rights and obligations of persons belonging to the category of oralman.

The second group, as we noted above, consists of citizens from the States of the former USSR, who until 1991 were citizens of one country, and after the collapse of the USSR became citizens of different States. This category of citizens actively participates in public relations of marriage and family nature, which leads to the emergence of mutual rights and obligations.

However, the legislators of these states, many of which are members of the CIS, have adopted a number of bilateral and multilateral treaties and agreements, the norms of which regulate marriage and family relations between spouses with different nationalities of the CIS member states.

The third and most significant group of foreign citizens contains non-CIS citizens living or temporarily staying for a specific purpose on the territory of the Republic of Kazakhstan (Law on the Legal Status of Foreign Citizens in the Republic of Kazakhstan, 1995).

In the case of registration of marriage with a person from the third group, the spouses on an equal footing (similar to citizens of the Republic of Kazakhstan) will acquire family rights and obligations in the event of marriage and divorce, conclusion and dissolution of a marriage contract, rights and obligations towards children (including adopted) in the manner prescribed by the law of the Republic of Kazakhstan), payment of alimony, separation of property, etc.

This aspect is of particular relevance when regulating the current Code of the Republic of Kazakhstan dated December 26, 2011 No. 518-IV "On marriage (matrimony) and the family", marriage and family relations complicated by a foreign element.

Separately, it is worth noting persons who do not have the citizenship of any state, or who do not have the opportunity to confirm their belonging to any state – stateless persons (Tamaru, 2012). A similar point of view is supported by a number of scientific experts, including foreign countries (Bogdan, 2011). Despite the small composition of this category of citizens, their marital and family relations taking place on the territory of the Republic of Kazakhstan, or if they are married by citizens of the Republic of Kazakhstan, will also be regulated by the norms of the Code on marriage (matrimony) and the family of the Republic of Kazakhstan.

Considering the problems of recognition of marriage and family relations with the participation of a foreign element in the Republic of Kazakhstan, it is important to note that, as A.S. Kenzhebaev rightly notes, it is necessary for current notaries to remember that dual citizenship is not recognized in Kazakhstan, therefore, a foreign citizen having such the form of citizenship should provide only one document, which indicates its belonging to any one state. Moreover, when a citizen presents documents other than Kazakhstan, the notary should find out his proper citizenship (Kenjebayeva, 2015: 12).

The application of the norms of family law of the Republic of Kazakhstan in the presence of a foreign element is impossible without reference and appeal to the norms of international treaties, especially in the context of clause 3, article 4 of the Constitution of the Republic of Kazakhstan, indicating that "... International treaties ratified by the Republic have priority over its laws" (Constitution of the Republic of Kazakhstan, 1995).

From which it follows that in the event of a clash of the provisions of the national legislation of the Republic of Kazakhstan and the norms of the international treaty ratified by Kazakhstan, governing the same issue of marriage and family relations, the norm of the international treaty will have priority.

Currently, the Republic of Kazakhstan has ratified, through the adoption of the relevant law, a significant number of international treaties in the studied area (Law on the Accession of the Republic of Kazakhstan to the Convention on the Collection of Alimony Abroad, 1999).

But despite this, the basic mechanisms and conflict-of-laws rules applicable in the event of a

discrepancy between rules RK and norms of foreign family law contained in the criminal Code of the Republic of Kazakhstan "On marriage (matrimony) and family" (Code on marriage (matrimony) and family, 2011).

So, according to the legislation of the Republic of Kazakhstan, "...for the conclusion of marriage (matrimony) is required the full and free consent of men and women entering into marriage (matrimony), marriageable (marriage) age" (article 9 of the Code of the Republic of Kazakhstan "On marriage (matrimony) and family") (Code On marriage (matrimony) and family, 2011).

Registration of marriage and family formation in the Republic of Kazakhstan with a foreign element are created in accordance with the same Code of the Republic of Kazakhstan "On marriage (matrimony) and the family". This applies to all aspects, including form, order, and marriage age, which is set at 18 years old, regardless of whether a marriage is made between citizens of the Republic of Kazakhstan or one of the potential spouses has foreign citizenship.

Similarly, equal requirements are established with respect to the fact that spouses should not be in another marriage and not be direct relatives, as well as be capable persons.

Regarding the conditions of marriage in the Republic of Kazakhstan, they are established for everyone and everyone who marries. Moreover, as most civilians note, a personal law for a person is determined in accordance with his citizenship at the time of marriage, unless otherwise provided by an international treaty ratified by both states to which the couple belong (Kudashkin, 2004), with the obligatory observance of the requirements of the relevant norms Code of the Republic of Kazakhstan "On marriage (matrimony) and family".

The conditions for registering a marriage by a stateless person in Kazakhstan are determined by the legislation that was in force at the time of registration of cancer in the state – the permanent residence of this stateless person. According to the Family Code of the Republic of Kazakhstan: "Divorce between citizens of the Republic of Kazakhstan and foreigners or stateless persons, as well as marriage between foreigners on the territory of the Republic of Kazakhstan, is carried out in accordance with the family legislation of the Republic of Kazakhstan."

Foreign citizens on the territory of a state have the right to enter into and terminate a marriage with citizens of that state and persons with citizenship of other states, and also have the same family legal personality provided by applicable law and international treaty norms (Kuznetsov, 2010).

As for the category of “stateless persons”, persons falling into this category temporarily residing in the Republic of Kazakhstan present an identity document issued by the competent authorities of their country of residence and registered in the established procedure with the internal affairs bodies of the Republic of Kazakhstan.

A foreign citizen, along with presenting a passport (identity document), must submit a notarized translation of its text in the state or Russian languages. The translation is also certified by the Consulate (embassy) of the state of which the person is a citizen (the country of permanent residence of the stateless person) or by the Ministry of Foreign Affairs of that state. It is possible that the authorities registering acts of civil status of a foreign state under the legislation of this state have the right to require the competent authority to obtain a special permit to marry a foreigner. If a foreign national such permission has not, on the records of acts of civil status upon receipt of the application should explain to persons entering marriage and first citizen (citizen) of the Republic of Kazakhstan that their marriage can be declared invalid in the country which citizen is the person you marry.

If, despite such explanations, the applicants insist on the registration of a marriage, the marriage is registered and the record of the marriage certificate makes a note that the persons entering into the marriage are familiar with the procedure and conditions of marriage with foreigners in force in the relevant state (Pointer, 2004).

If a citizen of the Republic of Kazakhstan at marriage adopted the surname of the spouse, the civil registry office, which registered the marriage, recommends him to exchange an identity card, passport, and a foreign citizen – a residence permit. Registration of marriage of citizens of the Republic of Kazakhstan with persons who have returned to their historical Homeland (oralmans) and have not taken citizenship of the Republic of Kazakhstan shall be made on a General basis”. (Government Decree, 1999).

Results

Thus, from an analysis of the norms of international law and the national legislation of the

Republic of Kazakhstan, it follows that marriage between citizens of the Republic of Kazakhstan who live in the territory of a foreign state can be concluded at embassies or consular offices of the Republic of Kazakhstan located abroad. Between foreigners, a marriage may be concluded in the Republic of Kazakhstan at foreign embassies or at consular posts of that state, which is recognized on a reciprocal basis in the Republic of Kazakhstan, if these persons were citizens of this foreign state at the time of marriage.

As for marriage between foreign citizens or stateless persons and citizens of the Republic of Kazakhstan, concluded outside Kazakhstan, but subject to the current legislation of the state in whose territory they were concluded, are recognized as valid in the Republic of Kazakhstan. At the same time, the fact that compliance with the relevant norms of the Code on marriage (matrimony) and the family of the Republic of Kazakhstan, “... in relation to circumstances giving the right to marry is of conceptual significance. Marriages registered between foreigners concluded outside the territory of Kazakhstan in compliance with the laws of the state in the territory of which they are concluded are recognized as valid in the Republic of Kazakhstan” (Explanatory Letter from the Ministry of Justice, 2000).

Divorce is similar to the conclusion, can be carried out by citizens of the Republic of Kazakhstan with a spouse living outside the territory of Kazakhstan, regardless of his citizenship, in a court of the Republic of Kazakhstan.

If the legislation of the Republic of Kazakhstan provides for the possibility of dissolution of a marriage with a foreign citizen or a stateless person in the registry office, then this marriage may be dissolved in embassies or consular offices of the Republic of Kazakhstan. If the divorce between citizens of the Republic of Kazakhstan and foreigners or stateless persons, which took place on the territory of a foreign state, but in compliance with the legislation of the corresponding foreign state, it is also recognized in the Republic of Kazakhstan. Similarly, the issue of dissolution of marriage between foreign citizens or stateless persons that took place on the territory of a foreign state is resolved.

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