THE PROCEDURE FOR RECOGNIZING THE VALIDITY OF MARRIAGES WITH A FOREIGN ELEMENT

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Summary. *The article considers the collision issues of the procedure for recognizing the validity of marriages, concluded with the participation of citizens of Ukraine in the European Union, under the laws of Ukraine. In the conditions of modern development of society and social relations, new forms of marriages and the procedure of their conclusion are emerging, and later on – their recognition, so the outlined problems require appropriate research for the purpose of the improvement of the proper legal regulation. The presence in the acts of the current legislation of Ukraine of contradictions between the requirements for persons who intend to enter into a legitimate marriage indicates the existence of a scientific problem in the legal literature. In general, positively perceiving the conditions of marriage invalidity established in the Family Code of Ukraine, the authors methodologically built a study in such a sequence (analysis of current legislation of Ukraine on the problems of marriage with a "foreign element", grounds of invalidity of marriage and the recognition of validity of marriages of Ukrainian citizens concluded under the law of a foreign state.*

Keywords: *Marriage, Validity and Invalidity of Marriage, Recognition, Public Order, Limping Marriage, Foreign Element.*

INTRODUCTION

The rapid development of modern society causes significant changes to the institute of family, therefore, new forms of marriage are appearing, which differ substantially in various countries. This leads to legal conflicts from the viewpoint of the implementation of the norms of international private law that is why requires a thorough scientific research and reasonable legal regulation hereafter. The relevance of the subject matter is also confirmed by the extent of topic disclosure, since there is no fundamental work devoted to the possibility of recognition of validity, legitimization of marriages concluded by citizens of Ukraine in accordance with the law of a foreign state.

REVIEW OF THE LITERATURE

A number of scholars have devoted their works to the problem of recognition of validity of marriages with a foreign element, in particular: L. P. Anufrieva, L. Herasymchuk, V. O. Kozhevnykova, D. I. Sydorenko, H. Yu. Fedoseeva and others.

However, while recognizing the scientific progress on this issue, it should be mentioned that certain issues relative to recognition of validity of marriages with foreign element, legitimation of the marriages concluded by citizens of Ukraine in accordance with the law of a foreign state in Ukraine remain open.

RESEARCH METHODOLOGY

The purpose of the article is to determine the collision issues of the procedure for recognizing the validity of marriages, concluded with the participation of citizens of Ukraine in the European Union, under the laws of Ukraine.

The following tasks should be solved in order to achieve mentioned purpose: to analyze the current legislation of Ukraine concerning marriages with a "foreign element", to determine the grounds of invalidity of marriage under Ukrainian legislation, to identify the grouds of the recognition of validity of marriages of Ukrainian citizens concluded under the law of a foreign state.

RESULTS

In the context of recodification of the national legislation of Ukraine to world standards, it is important to review the basic legal approaches to the order, the conditions for the conclusion of marriage, the

grounds of its invalidity and recognition in the science of family law. According to the position of Art. 21 of the Family Code of Ukraine the marriage is a family union of a man and a woman, registered in the state body of registration of civil status acts [3].

D. I. Sydorenko notes, that marriage as a free union of man and woman is an institute, which human society is based on as well as exists in general. That is why every state is interested that such a union as marriage should be long-term, provide the interests of both parties and also correspond to a number of requirements [12], which are established at the legislative level. Ukrainian law recognizes valid marriages between Ukrainian citizens and foreigners, concluded outside the territory of Ukraine in accordance with the law of a foreign state, under the condition of the compliance the requirements of the Family Code of Ukraine regarding the grounds for the invalidity of the marriage concerning the citizen of Ukraine.

In our opinion, we can talk about the "automatic" recognition of reality, without any additional actions realization and without dependence on some competent authority. As for the material conditions, in accordance with the current special law, the only condition for recognizing in Ukraine valid the marriages of Ukrainian citizens concluded abroad in Ukraine is compliance with the requirements of the Family Code of Ukraine concerning the grounds for the invalidity of the marriage (material conditions) relating to the citizen of Ukraine.

It is on the basis of the connecting factor of this norm that we turn to the legal provisions of the Family Code of Ukraine. Thus, there are such requirements in the Art. 22, 24–26 of the Family Code as: 1) marriage age; 2) voluntariness of marriage; 3) monogamy; 4) prohibition on marriage between relatives of a direct line of kinship; sublings and cousins; aunt, uncle and nephew, niece; between the native child of the adopter and adopted child, as well as between the children who were adopted by him/her (except the cases when the permission is given by the court decision), between the adopter and the adopted child (except after the abolition of the adoption) [3; 6].

At the same time, it is advisable to pay attention to the fact that the Law of Ukraine "On International Private law" does not state anything about the rightfulness and validity of the marriages concluded between citizens of Ukraine abroad in the embassies and consular offices (so-called "consular marriages"). Article 57 of the Law of Ukraine "On International Private Law" proclaims that "the conclusion of a marriage in the consular office or diplomatic mission" says only about the possibility of marriage conclusion under the condition that at least one person lives outside Ukraine, and only in accordance with the law of Ukraine [10].

A similar approach is duplicated as well in Article 23 of the Law of Ukraine "On International Private Law", in accordance with which the registration of acts of civil status of Ukrainian citizens who live outside Ukraine can be carried out t a consular office or a diplomatic mission of Ukraine in compliance with the law of Ukraine. We consider that it is due to the reference of these two articles exclusively to the law of Ukraine, the legislator absolutely correctly predicted their "automatic" validity in Ukraine [10].

However, some provisions of the law are a matter of concern as unresolved issues ar the normative level can lead to serious consequences. For example, there is no unambiguous, imperative requirement for the different sexes of those individuals who marry. Indirectly this is stated in the analyzed by us Article 22 of the Family Code of Ukraine, where the marriage age for women and men is set at eighteen years [3].

The necessary unambiguous and imperative requirement is contained in already above-mentioned by us Article 21 of the Family Code of Ukraine "Concept of marriage", according to which "marriage is a family union of a woman and a man, registered in the state body of registration of civilian acts", but the specified article is not among articles, the requirements of which must be carried out by a citizen of Ukraine for the validity of marriage concluded by him/her abroad [3].

After all, as it is known, many states of the European Union provide for the conclusion of same-sex marriages, and citizens of Ukraine, respectively, can conclude such marriages in foreign countries. Will such a marriage be recognized in Ukraine?

On the one hand, the analysis of the current Article 58 of the Law of Ukraine "On International Private Law" indicates that due to the lack of Article 21 of the Family Code of Ukraine among "the grounds of invalidity of the marriage" and the provision "in accordance with the law of a foreign state", there are no normative obstacles for such a marriage being valid in Ukraine. On the other hand, such a marriage is not a "marriage" in the understanding of the family legislation of Ukraine, because it violates the main requirement of Article 21 of the "Concept of Marriage" and the moral principles of Ukrainian society [3; 10].

In our opinion, such a marriage falls under the classic institution of the international private law (so-called "limping marriage"), as well as it corresponds to the statement of Artile 12 of the Law of Ukraine "On International Private Law", "Reservation of Public Order", in accordance with which the norm of the law of a foreign state is not applicable in cases when its implementation leads to the consequences, which are definitely incompatible with the basic legal order (public order) of Ukraine [10].

Such a definition is used by Z. V. Romovska "... in Ukraine same-sex couples are not considered a family mainly because it contradicts the moral principles of Ukrainian society" [11, p. 21] and I. V. Zhylinkova: "The domestic legislation has never recognized the same-sexmarriages" [4, p. 83]. Adaptation of Ukrainian legislation to the legislation of European states, the perception of their approaches (standards) to the settlement of marital relations by persons of one sex, can hardly find its place in the legal provisions of the Family Code of Ukraine, at least in the coming years [9, p. 210].

In our opinion, the violation of the main requirement of the very concept of marriage will be, in fact, the basis of the consequences, "…definitely incompatible with the basic legal order (public order) of Ukraine". In addition, this approach is confirmed by the the provision of Part 2 of Article 21 of the Family Code of Ukraine "living as a family of a woman and a man without marriage is not a reason for the emergence of rights and responsibilities of the spouses", and Part 3 of Article 21 of the Family Code of Ukraine, where the religious ceremony of the marriage "is not the reason for a woman and a man to have the rights and responsibilities of spouses…" [3].

The national legislation of many foreign states provides for the conclusion of religious marriages and enshrines the institute of concubinage at the legislative level. Citizens of Ukraine can also enter into such marriages in foreign countries.

There is a position in the family law doctrine that the form of marriage (civil or religious), direct participation of a citizen in the conclusion of the marriage or his/her action through a representative (so-called "glove marriage"), reaching the required marriage age or not – these and other conditions relating to the form and procedure of conclusion of the marriage, have no legal value for the recognition of such a marriage as valid. The main thing is when concluding the marriage there have to be no violation of the legislation of the state in which territory it is concluded and no established obstacles to its conclusion [1, p. 461].

However, we take the position that the norms of the legislation on mutual consent and marriage age can not be neglected when recognizing a particular marriage valid in the territory of our state, since these norms are constituting the foundations of law and order. Covering the recognition of marriages that are concluded in a foreign state through the prism of public order, one can not agree with the possibility of registration of marriage for citizens without the consent of the bride or the conclusion of a child marriage and violations of the foundations of family law.

This also applies to the need to take into account the provision on the obligation of the one of spouses to inform another spouse about the presence of an incurable illness, compliance with the requirement to register a real marriage rather than a fictitious one, and the very topical issue of compulsory compliance with the requirement of registration of the marriage only between the persons of different sex [5, p. 37].

The main issue of application of this article is an institution of "public order" and the limits of implementation of the rule of public order. Public order, which does not allow the application of foreign law, is a kind of barrier and protection of moral and ethical, social, historical, religious principles and social relations that individualize the state as sovereign with its own economic, social, political, legal system and history of development.

In the context of our study special attention should be paid to the international legal regulation of the recognition of marriages concluded outside Ukraine.

Ending the analysis of the family legislation of Ukraine, attention should also be addressed to the provisions of Article 13 of the Family Code of Ukraine, which provides that if the international treaty of Ukraine concluded in the established procedure contains other rules than those established by the Family Code, the rules of the relevant international treaty are applied Ukraine [3]. That is, if there is a corresponding treaty between Ukraine and a certain foreign state, which provides for the possibility of recognizing the documents on the registration of a marriage between two citizens of Ukraine by the relevant competent body of another state, such a marriage is valid and recognized by our state.

Ukraine as a subject of international law has concluded hundreds of international treaties on legal cooperation in civil and criminal matters. In turn, all international treaties concluded by Ukraine include norms on the recognition of marriages. They are characterized by a different rule than "classic" for domestic legislation, but it has become "classic" for international legal regulation.

Thus, in cases of recognition of marriage, the legislation of a treaty state which was applied to registration of the amarriage have to be implemented, if the parties are satisfied with the requirements for material conditions of the marriage according to legal systems of both treaty states. The competence of the bodies involved in the consideration of cases of recognition of marriages with a foreign element is determined at the same way. All the advantages of such a rule areimmediately clear – both states by bilateral treaty-based approach regulate the main problems and exclude the very possibility of the emergence of the negative side of the institute for the recognition of the validity of a marriage – the consequences of "limping marriage" and non-application of foreign law because of "reservation of public order" [7, p. 153].

It is clear in this regard that there is an urgent need to conclude such treaties with the European Union states and other foreign states.

We consider Ukraine's accession to the UN-proposed multilateral Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages of November 7, 1962, to be another urgent need. More than fifty states are parties to this Convention, including Austria, Germany, Great Britain, Canada, Mexico, etc. The provisions of the Convention are based on the rules of the Universal Declaration of Human Rights, which proclaim the right of men and women of legal age to marry and to create a family without any restrictions on grounds of race, nationality or religion (Article 16) [2; 13].

They are also based on the provision of the Universal Declaration of Human Rights that a marriage must be registered only by free and full consent of both parties that are getting married (Article 16) [13]. The Convention states that it is inadmissible to reg-

ister a marriage without the full and free consent of both parties that they have to declare personally. The marriage should be formalized: in accordance with the law; after proper announcement; in the presence of a representative of authority who has the right to register a marriage; in the presence of witnesses. The Convention allows the absence of one party if the relevant competent representative of authority is satisfied that the circumstances of the person's absence are clear, that he or she wishes to marry and that the absent person has not rejected this wish before the competent representative of authority [2; 8, p. 154].

The Convention also declares the rules adopted by most national legal systems: the establishment by the state of a minimum age for marriage; prohibition of registration of marriage with a person who has not reached the established age of marriage, aside from the cases when the competent authority in the interests of the parties and taking into account good reasons allows to make exceptions. This international treaty does not regulate in detail the form of marriage, but indicates that all marriages are registered by the competent authority in the official register. In general, the norms of the Convention are aimed at eliminating outdated laws and customs on marriage, in particular the complete abolition of marriages between children and agreements between parents of children on their marriage before they reach marriageable age [2; 8, p. 154].

Ukraine's accession as an independent subject of international law to the mentioned Convention, is also, in our opinion, a kind of "panacea" for resolving problems related to regulation of the marriages with a foreign element in Ukraine.

CONCLUSION

It can be inferred that taking into account the modern family law doctrine, the inconsistency of current legislation has a negative impact on the nature and significance of the subjective rights of participants in family relations. The possibility of recognizing marriages concluded in another state directly affects the realization of many rights based on the legal regime of marriage: family, inheritance, property and other.

Collision problems relating to the form of marriage arise very often in connection with the need to recognize or not recognize the validity of marriage in the territory of another state in terms of mismatches of the marriage to the public order of the foreign state, which arises due to the differences in material law, that regulates marriage issues. For citizens of Ukraine who conclude marriages abroad it is extremely necessary to have a correct idea of what awaits them in the future in their homeland: whether their marriage will be recognized valid in all cases, or whether or not the mentiond actions form the "limping marriage" that is deprived of legal value and further legitimization.

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