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The development of the family and marriage legislation of the Republic of Kazakhstan

This article is devoted to the development of family law in the Republic of Kazakhstan. The changes of the social and economic of recent years have had a mixed impact on the basic fundamental institution — the institution of the family. Actively implemented reforms in our country didn't take into account the rights and interests of the family, also they didn't solve internal conflicts and external problems that inevitably arise in the era of change. Nowadays, It is obvious that the institution of the family as an economic unit wasn't taken into account in the period of economic reforms such as: privatization, the formation of new property relations, the creation of a new taxation system, and the conditions of medium and small businesses. The current situation of the family requires constant and close attention from the state, development of normative regulation of family-marriage relations, taking into account modern conditions. In this regard, the formation of a thoughtful state family policy will help in solving problems related to the family for the current period. This article discusses issues that traditionally have a decisive significance for the development of family law and family and marriage law as separate branches of law and legislation. The author of the article justifies the position on the independence and difference of the family law from civil law on the basis of the subject, method, principles and objectives of these industries. It is concluded that family law does not fully protect the rights and interests of children, parents, spouses, these and other problems should be the basis for further improvement of marital and marital legislation of the Republic of Kazakhstan.

Keywords: family policy, family, marriage, family law, marital law, civil law, spouses, parents, children.

The significance of the family institution in society defines the significance of family law and the family and marriage legislation. The question of the place of family law in the system of branches of law remains debatable from sixties of last century. This discussion in many respects also defines development of the family and marriage legislation of the Republic of Kazakhstan. The term «family law» has several meanings. It is simultaneously legal science, a branch of law, and a branch of the legislation. In spite of all existing statements, the fact of the significant role that family law plays in regulation of the individual, family, society, state relations is indisputable. «Family law as legal science, branch of law and of the legislation is united by one purpose, it includes: establishment of reasonable balance between the interests of individual, family, the society; state regulation of the family relations; protection of the rights of the family members or persons who are on the threshold of starting it; protection of the children rights» [1]. The relevance of this research is that without definition of the place and significance of family law, without explanation of potential opportunities of family law for achievement of the purposes stated above, without further development of systematic knowledge about family relations during the modern time, it is difficult to solve problems of this branch which are of both theoretical, and practical character. Respectively, it is difficult to claim for efficiency of the family legislation provisions, as well as to keep track of its development perspectives. Family and marriage issues come to be prior for any state. It concerns development of basic provisions of family law as legal science, branch of law and branch of the legislation. The science of family law, as well as any other science, demands comprehension of the current processes on the basis of studying the legal culture of the previous period. Science, adapting to ideological, as well as political demands, gets «impoverished» and doesn't develop, it becomes unmodern, comes off modern knowledge about a person and society, creates contradictions with other branches of the science. Family law like no other has to develop in a close connection with the sciences which are engaged in exploring the human nature, his activity, mission and needs during the modern period. Within works on family law issues, the essence of the family relations, characteristic of modern society, is lost. Is family law a separate branch of law? This matter of the issue has been debatable for many years, both among prominent scholars of family law and many practicing lawyers. There are two absolutely opposite points of view: 1) family law is a separate branch of law, and 2) family law is a part of civil law. Proponents of both opinions give certain arguments in support of each of them. We stick to the point of view concerning independence of family law. At the same time it is surely impossible to bring to naught all arguments of supporters of the opposite opinion, it is necessary to agree with some of them. Sorting the matter, we would like to highlight basic provisions, which form the fundamentals of family law independence. Fami-

ly law undoubtedly occupies a certain place in the system of law, as long as all people and citizens in everyday life face this branch of law provisions. Most of people are in the «family» status. Law undoubtedly cannot and should not regulate all aspects of family life as the family is firstly something private, not taken out on a public. Nevertheless, it is impossible to leave this scope of relations without legal regulation. The state family policy is one of the major political directions as family is a primary cell of society, and society is the main component of the state. Without the state support, family remains unprotected to all external factors which can affect negatively further functioning of family generally and its certain members. The main argument in favor of independence of family law is the subject of regulation of this branch. The subject of regulation appears to be social relations within matrimony, childhood, motherhood, kinship and legal documenting of acts of these states. The relations regulated by family law are of the specific character, different from the relations which come to be a subject of civil law. The relations within family law are of a private character, if not of intimate. The purpose of these relations is a normal functioning of a family, while the purpose of civil legal relations, mainly, is regulation of the cost relations which are expressed in a money equivalent. The analysis of the current legislation allows to draw a conclusion that family law is an independent branch now, however, this does not exclude a possibility of regulation of some family relations by provisions of civil law. Either according to academician M.K. Suleimenov, family law is fairly referred to the category of branches of private law.

According to article 3 of the Code of the Republic of Kazakhstan on Marriage (Matrimony) and Family, the matrimonial legislation of the Republic of Kazakhstan regulates the following types of relations:

- 1) establish the rights and obligations, property and personal non-property relations between family members such as spouses, parents and children, and between other relatives and other persons in cases and within the limits, provided by the marriage and family legislation of the Republic of Kazakhstan;
- 2) establish conditions and procedure for contracting a marriage (matrimony), termination of marriage (matrimony) and recognition of its invalidation;
- 3) determine the forms and procedure for placing children-orphans and children left without a custody of parents in family;
- 4) regulate procedure for the state registration of acts of civil status;
- 5) determine the functions of the state bodies, carrying out the state registration of acts of civil status [2].

The civil legislation shall regulate goods and monetary relations and other property relations based on the premise of equality of the participants, as well as personal non-property relations linked to property relations [3]. However, it is important to mention that according to the family legislation, property and personal non-property relations between family members, which are not regulated by matrimonial and family law of the Republic of Kazakhstan, shall be regulated by civil law, as long as it does not contradict to marriage and family relations. The famous lawyer I.G. Orshansky in his research devoted to the Russian law mentioned: «Marriage is an institute of a natural and moral essence, but not civil and political, intending spouses are considered as people, not as citizens» [4; 5].

As G.K. Matveev notes, the specificity of the family and marriage relations can be explained within following details. Firstly, family and marriage legal relationship arise not from the usual legal facts that are characteristic of civil legal relationship (for example, the one-sided transaction, the contract, delict), but from such special legal facts as marriage and relationship, motherhood and paternity, adoption and patronage. It is important to emphasize that from these facts not only personal non-property, but also property relations arise. They arise from marriage (alimentary obligations of spouses) or from relationship (alimentary obligations between parents and children). That is why family and marriage legal relationship are, as a rule, lasting and connect among themselves not strangers (as in civil law), but family-connected people: spouses, parents, children and other relatives. Secondly, the family and marriage relations are primarily personal legal and only then property relations. Thirdly, the family and marriage rights and duties, as a general rule, are inalienable, «out-of-turnover», that is, non-transferable to other persons: they can't be sold, bought, presented or bequeathed. Moreover, not only the personal rights, but property rights and duties (alimentary) are inalienable as well. The family and marriage rights and duties are kind of merged with the personality and, as a general rule, are inconceivable separately from it [5; 44].

The distinction between subjects of family and civil law is as follows:

- the property relations in civil law, unlike in family law, have generally cost-related character and are formed on a paid basis;
- the property relations regulated by the family legislation are closely connected with personal relations; in civil law there is no such connection;

– family legal relationships develop between strictly determined persons; legal entities don't participate in family legal relationship;

– in many civil legal relationships the term has essential significance; while family legal relationships, as a rule, have the lasting character, and the term isn't specified within them;

– the main form of existence of civil legal relationship is the contract; in family law the application of contracts is restricted: marriage contract, agreement on alimony payment, contract on transferring of children for nurturing to family. It is also necessary to take into account the fact that provisions of family law have deep moral nature. In case of depriving a family law provision of a moral aspect, having replaced with exclusively business interests, then this right will stop being of family law. The question of how the state, by means of norms of family law: provides starting a potentially strong family, regulates family relations, subordinates them to the certain rules allowing not to violate the rights and the interests of each family member, has a principled character. The more actively the person and his rights is accepted by the state, the more precisely provisions, defining the interests of this person within family scope, in the relation with society, are created. The personal and confidential character defines properties and essence of family relations, whereas in the civil relations it is more like an exception. However, the subject of family law regulation are also marriage relations, the relations on children placement. These relations have both private and public character, but are unified basing on the fact that they arise within the same field of functioning — family. The coverage of family law goes beyond the scope of private law. Moreover, the relations regulated by provisions of family law include the interest of both the state and society (in the specific public functions fulfilled by family). The significance of interest in determination of an entity, the legal nature of these or those relations is important as long as any interest as a legal category is not only the purpose, but is also a premise of existence of the subjective right. It is possible to conclude that the interest which is present within relations impacts on a method of legal regulation as well. The interest of the subject entering the civil relationships considerably differs from the interest of the subject of family legal relationships [5; 13].

The analysis of the principles of civil and family law also gives awareness of distinction between these branches of law. An important role in defining the place of a branch of law in the system of such plays the existence of a certain regulatory legal act. In some European countries there is no separate act regulating family legal relationships at all, the family and marriage relationships are regulated by provisions which are contained in special sections of civil codes. In Article 27 of the Constitution of the Republic of Kazakhstan it is specified that marriage and family, motherhood, paternity and the childhood are under the state protection [6]. In our state there is also a special regulatory legal act governing the marriage and family relations — the Code of the Republic of Kazakhstan On Marriage (Matrimony) and Family, dated December 26, 2011.

The marriage and family legislation of the Republic of Kazakhstan shall be based on the principles of:

- 1) voluntariness of marriage (matrimonial) union between a man and a woman;
- 2) equality of marriage and family rights in family;
- 3) inadmissibility of arbitrary interference by someone in the family affairs;
- 4) solution of intra family's issues by the mutual agreement;
- 5) priority of the family nurturing of children, carrying for their development and prosperity;
- 6) priority protection of rights and interests of minors, elderly and disabled members of family;
- 7) securing of unimpeded exercise of the rights by members of family, possibility of judicial protection of these rights;
- 8) wellness maintenance of all family members;
- 9) recognition of marriage (matrimony) approved only by public authorities.

Civil legislation shall be based on the principles of the equality of the all parties before the law, the inviolability of property rights, freedom of agreement, prohibition of arbitrary interference of in personal affairs, necessity of free exercise of civil rights, provision for the restitution of violated rights and their defense in the court [3].

The method of civil law is a dispositive method, whereas in family law the method has specificity in connection with the high specific weight of imperative norms. In the family legislation all circumstances are considered and the decision on each question is passed individually and depending on a situation. Thus, it is possible to talk about a situational method of family law. For example, while transferring the child for adoption, guardianship and trusteeship body authorities, as well as court consider individually health, age and other qualities of a child and financial position, the status in society, characteristics of potential parents. When determining amount of alimony for maintaining children over 18 years studying full-time, the claimant (one of parents) specifies the amount of payment of alimony in a firm sum of money in the claim; court, con-

sidering this claim along with calling the defendant (the second parent) and taking into account all circumstances, in each separate case makes various decisions and awards a certain sum.

The main institutes of the family and marriage legislation are characterized by stability and conservatism. Nevertheless, definitions and characteristics of distinct institutes have developed. For example, the conceptual apparatus of the family and marriage legislation has been expanded and specified. Article 1 of the Code of the Republic of Kazakhstan On Marriage (Matrimony) and Family, dated 26.12.2011, consolidates new definitions, such as:

- guest family — the family which has temporarily accepted on nurturing orphan children, children left without parental support staying in the organizations of all types (educational, medical and others), during the periods which aren't connected with educational process (vacation, days off and holidays);

- identification document — a tangible object of a standard form with information on private data of an individual, attached on it, permitting to confirm a personality and legal status of its owner for the purpose of evidence of identification;

- a child (children) being in a difficult period of life — a child (children), whose vital activity is broken as a result of existing circumstances and that is not able to overcome these circumstances by himself (herself) or with the help of family; a child (children) staying in the special organizations of education, the organizations of education with a special maintaining regime. The number of subparagraphs and subparagraphs has considerably increased in the last Code.

Regarding distinct institutes additions, for example, concerning persons who can't officially get married have also been made. According to the legislation of the Republic of Kazakhstan, a union with equal rights between a man and a woman concluded at the free and full consent of the parties in an order established by the law, for the purpose of creating a family, creating the property and personal non-property relations between spouses is recognized as marriage. Such formulation of marriage is traditional for family law of the Republic of Kazakhstan; in the domestic legislation this definition of marriage was brought for the first time in the Law of the Republic of Kazakhstan dated December 17, 1998 On Marriage and Family». The union of a man and a woman displays the stability of relationship, its lasting character. Other criteria are characteristic signs of the union which is of the civil nature and is the transaction. This definition reflects, in our opinion, nowadays needs of the society. Article 11 specifies that marriage (matrimony) between same-gender persons isn't allowed. The unions of same-sex couples exist, due to the nature of relationship they can be similar to the traditional marriage relations. However, they aren't accepted by the major part of society and aren't widespread enough to be legalized.

In the Republic of Kazakhstan the principle of a monogamy is proclaimed: a person, who is already engaged in the marriage registered by the authority, cannot be engaged in another marriage, without having terminated the previous one. It is clear, that this imperative quite often creates difficulties in life; the legislator cannot encourage polygamy whereas this phenomenon takes place in real life. The Republic of Kazakhstan is a secular state, however the polygamy is also characteristic of adat (common law of Kazakhs many rules of which are still accepted by persons to this day). The demographic situation, objective laws of society development, subjective experiences of people form and will infinitely create various models of interaction of men and women which cannot be kept within a framework of the legislation, moral standard and morality. Without finding particular permission within the legislation, a person, nevertheless, independently regulates established relations. It is not about purposeful implementing provisions on polygamy, but about the fact that the possibility of various marriage models does not contradict human nature. Perhaps, some compromise solutions, which simply allow people to be happy, despite the legislative bans, can be found. In this case for lawyers compliance with the legislation is important, whereas for persons, who made a decision on any form of «consensual» marriage, mindfulness, ability to take the responsibility irrespective of legal provisions remains important.

We can one-sidedly discuss this problem, as well as pretend it doesn't exist, but lack of strategy in development of the family institution in Kazakhstan is a payment too high and unattainable for our society. In our opinion, it is expedient to bring an imperative in Article 12 concerning medical examination of people intending to get married. Medical and medical genetic examination of the persons marrying in modern times has to become obligatory. The health condition of citizens demands attention from citizens themselves, but reproductive health matters also for society in general. Apparently, to find out about the health condition, especially reproductive, and its issues is better before marriage. It is also necessary for intending spouses to predict future relationship and an opportunity of problems solution. Generally, provisions on marriage highlights essential details for this institute. The civil nature of the marriage agreement is based on a parity and

the principle of permissibility. However, the marriage status is of a nature of special complex social and legal institute. Development of the legislation on marriage and family is necessary, it is expedient that this development considered theoretical research of issues arisen within family law [7; 87].

The definition of family has always been so vague, that it has not been consolidated within the legislation yet. However, such definition is necessary for legal regulation within different branches of law: civil, housing, labor, administrative, criminal etc. Definition of family has to be created within family law and be legislatively consolidated in the Code On Marriage (Matrimony) and Family. Perhaps, it is expedient to complement the section 3 of the Code with the provision that the family is the main social institute of the Republic of Kazakhstan, either to complement Article 2 of the Code with such provision. Definition of family hasn't changed; family is a group of people connected with each other by property and personal non-property rights and duties, following from marriage (matrimony), relationship, adoption or other form of acceptance of children on nurturing and designed to contribute to strengthening and the development of the family relations. The family as a special legal institute demands legislative consolidation. The lack of unified definition of a family in law and the legislation gives the chance of a flexible regulation of the relations. Various approaches to a concept of family within different branches of law is justified and reasonable. The broadest interpretation of a concept of family is present within family law. There is a unique situation when the legislator, using the concept «family», but not explaining it, kind of counts on the correct understanding of this concept by a subject which in this case has direct relationship to the matter. Legal consolidation of the family concept makes up issues within regulation due to too broad or unfairly narrow interpretation. Former definitions of family concept went beyond legal approach. The complex nature of institute, its various forms and social significance objectively complicate an opportunity of formulating the definition which would reflect also a legal approach, remaining at the same time a complete definition of family. Approach to family as to a distinct legal entity would solve a legal problem, however economic and social conditions contradict this approach in modern time. Possibly, the question is what is the nature of a relationship between a family and the state at the present time, and to what extent this institute as a distinct subject is advantageous for the state. It is wrong to challenge the importance of the family institution as the social phenomenon, which forms the personality, satisfies basic needs of the person. To which extent, at what level and with what purposes family and the state are ready to interact with each other. The understanding family as a distinct specific subject sometimes is traced in some legislative provisions. In our opinion, the following tendencies are shown up: to stop marking out sociological and legal aspects in the family concept, perceiving this phenomenon as complete; then to consolidate in the family legislation provisions defining family as the major special social institute exposed to legal regulations in particular cases, at the same time without giving strictly issued definition of the family concept. As a legal concept, family has a meaning of the uniting (integrating) factor for other legal entities, without it many categories of family law subjects cannot be determined, in this connection it is necessary to comprehend that family is a subjective category though it is not a legal entity itself. The analysis of the family legislation allows to say that it is not fully provides protection of the rights and the interests of children, parents, spouses.

There is no proper protection of the rights and the interests of parents and spouses. There is no accurate regulation of the relations regarding protection of the personal non-property rights of parents. There is no adequate solution of a disputes resolution issues, arising between parents concerning children nurturing, defining the place of their residence. Protection of property rights of children, parents and spouses is also carried out inconsistently. There are gaps in the legislation that cause difficulties with resolving disputes between spouses. A number of problems is characteristic of protection of property rights of the spouses following from the relations of community property, as well as from the premarital agreement. These and other problems have to become a basis for further improvement of the family and marriage legislation of the Republic of Kazakhstan.

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М. Жаскайрат

Қазақстан Республикасының неке-отбасы заңнамасының дамуы

Мақала Қазақстан Республикасындағы отбасы құқығы мәселесіне арналды. Соңғы жылдардағы әлеуметтік және экономикалық өзгерістер отбасының негізгі іргелі институтына өзінің әсерін тигізді. Мемлекетте белсенді енгізілген реформалар отбасының құқығы мен маңызын ескермеген, заман өзгерген сайын туындайтын ішкі қатығыстар мен сыртқы мәселелерді шешпеген. Әлбетте, экономикалық реформалау кезеңінде отбасы экономикалық бірлік ретінде есептелмеген: жекешелендіру, жаңа меншік қатынастарын қалыптастыру, жаңа салық салу жүйесін құру, орта және шағын кәсіпкерліктің шарттары қазіргі отбасы жағдайы мемлекеттен тұрақты назармен қадағалауды талап етеді, қазіргі заманғы шарттар есебімен отбасы-некелік қатынасы нормативті реттеудің өркендеуі орын алған. Осыған орай мемлекет пен отбасы құруға ойластырылған саясат қазіргі кезеңге байланысты отбасылық мәселелерді шешуге көмектеседі. Автор отбасы құқығының дамуы және отбасы-неке заңнамасының дербес құқық пен заңнама салаларының дәстүрлі белгілі бір мағынаға ие сұрақтарын жан-жақты қарастырды. Сонымен қатар отбасы құқығы мен азаматтық құқықпен айырмашылығын, дербестігін негізгі пән, әдіс, қағида белгілі мақсатты салаларымен ұстанымын негіздейді. Осыдан шығатын қорытынды: отбасы құқығы балалар қызығушылығы, ата-аналар, жұбайлар және осы т.б. мәселелер ҚР неке және отбасы заңнамасының одан әрі жетілдіруінің негізі болуы керек.

Кілт сөздер: отбасы саясаты, отбасы, неке, отбасы құқығы, неке және отбасы заңнамасы, азаматтық құқық, жұбайлар, ата-аналар, балалар.

М. Жаскайрат

Развитие семейно-брачного законодательства Республики Казахстан

Статья посвящена проблеме развития семейного права в Республике Казахстан. Социальные и экономические изменения последних лет неоднозначно отразились на основном фундаментальном институте — семье. Активно проводимые в стране реформы не учли права и интересы семьи, не решили внутренние конфликты и внешние проблемы, неизбежно возникающие в эпоху перемен. Очевидно, что семья как экономическая единица не была учтена в период экономических реформ: приватизации, формирования новых отношений собственности, создания новой системы налогообложения, условий среднего и малого предпринимательства. Современное положение семьи требует от государства постоянного и пристального внимания, развития нормативного регулирования семейно-брачных отношений с учетом современных условий. В этой связи формирование продуманной государственной семейной политики поможет в решении проблем, связанных с семьей в данный период. Автором рассматриваются вопросы, традиционно имеющие определяющее значение для развития семейного права и семейно-брачного законодательства как самостоятельных отраслей права и законодательства. Обосновывается позиция о самостоятельности и отличии семейного права от гражданского права на основании предмета, метода, принципов и целей данных отраслей. Сделан вывод о том, что семейное право не в полной мере обеспечивает защиту прав и интересов детей, родителей, супругов. Эти и другие проблемы должны стать основанием для дальнейшего совершенствования семейно-брачного законодательства Республики Казахстан.

Ключевые слова: семейная политика, семья, брак, семейное право, семейно-брачное законодательство, гражданское право, супруги, родители, дети.

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