European Proceedings of
Social and Behavioural Sciences
EpSBS

www.europeanproceedings.com
e-ISSN: 2357-1330

DOI: 10.15405/epsbs.2022.01.92

**SLCMC 2021**
**International conference «State and law in the context of modern challenges»**

# PROBLEMS OF RECOGNITION AND PROTECTION OF CROSS-BORDER FAMILY RELATIONS IN RUSSIA

Olga Y. Sitkova (a)*
*Corresponding author

(a) Saratov State Law Academy, 1, Volskaya Str., Saratov, 410056, Russia, olga.sitkova@mail.ru

## Abstract

Family relations are always accompanied by various kinds of conflicts: conflicts between the norms of law and moral norms, conflicts between the interests of the state and individual rights, conflicts of interests of parents and children. When considering cross-border family disputes, the court additionally has to resolve a difficult issue: to recognize the relationship or refuse protection if the application of the norms of foreign law entails consequences that are contrary to the public policy of the country of the court. The aim of the study is to develop elements of the concept of a possible limitation of the operation of foreign law in the recognition of cross-border family relations, taking into account the need to ensure the principle of inviolability and stability of traditional family values. To achieve the goal, the general scientific dialectical method of cognition is used. Scientific information processing is carried out by methods of inductive and deductive logic, analysis and synthesis. The author studied the norms of Russian and international law regulating and guaranteeing family rights, and also researched the concepts of public order. The article states that the norms of family law should be identified with constitutional rights, fundamental human rights. In this case, the national public order will become more universal in its content, which will allow resorting to the public order clause in exceptional cases, and the family rights and interests of citizens will be protected in the best possible way.



*Keywords:* Conflict of laws, family rights, family values, judicial protection, public order

https://doi.org/10.15405/epsbs.2022.01.92
Corresponding Author: Olga Y. Sitkova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

## 1. Introduction

In the modern world in conditions of relatively free migration of the population, the emergence of cross-border family relations is not uncommon. In order to protect the private family interests of citizens, it becomes necessary to recognize the relations that have arisen on the basis of the foreign legal system on the territory of the Russian Federation. This necessity is due to the principle of international courtesy, which acts as a principle of international law and aims to increase the efficiency and frequency of application of the national law of a foreign state when considering and resolving cross-border private law disputes, as well as when recognizing and enforcing foreign judicial acts (Al'kova, 2020).

At the same time, the law, being exposed to the influence of economic, political, social, national, ideological, spiritual factors, reflects the level of development of society in a particular state, indicates the prevailing priorities in it. Therefore, a foreign law, both in content and "in terms of the purpose of its spirit", may have a significant difference from the national law (Kutikov, 1993).

There may be national substantive norms that at the moment do not contain obvious differences from foreign legislation, but over time they may undergo such changes that their application turns out to be in complete contradiction with the local legal order. In this case, the norms of national law, acting in defence of the public interests of the state, limit the operation of the norms of foreign law on their territory. The public policy clause serves this purpose.

In family relations, the question of the application of the order public clause mainly arises when recognizing marriages are concluded abroad, as well as when marriages are contracted by foreign citizens on the territory of the Russian Federation. As a rule, we are talking about the non-recognition of the legal consequences of polygamous marriages and same-sex unions, as well as about the non-recognition of discriminatory conditions of entering to marriage or divorce.

The norms of foreign law by their nature, origin, history of origin, change, purpose are not always able to smoothly integrate into the legal system of any country, they may not correspond to its fundamental principles and thereby cause destabilization, violate the harmony of the entire system (Rabel, 1945). Therefore, on the one hand, the legislator must take into account that the application of foreign legislation in the regulation of cross-border relations can lead to incompatible consequences with the basic principles of building its economic, political, legal system, moral norms existing in society. However, on the other hand, law enforcement agencies have to protect the interests of individuals, and use the principles of international acts of human rights.

In this regard, it becomes necessary to find a balance between the public interests of the state and the interests of individuals.

## 2. Problem Statement

In the modern world in the era of globalization, the same relations are regulated in different ways in different countries. Even in states that have legal systems based on similar principles and traditions, as well as in states that have their own legislation in individual States (for example, the US legal system), the provisions of the law can be very different from each other. In essence, this means that court decisions can differ greatly on the rules of which legal system will be applied, and their implementation in another

https://doi.org/10.15405/epsbs.2022.01.92
Corresponding Author: Olga Y. Sitkova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

country can have shocking consequences in terms of the national values. At the same time, the practice of applying the norms of foreign law is well known, undeniable and does not raise doubts about the need. Therefore, the problem arises of a choice between protecting the interests of the state and the interests of individuals in the issue of the need to recognize and protect family relations that have been based on a foreign legal system, under the influence of the national values.

Conflict laws in regulating such relations allows the use of unilateral rules that establish the application of the law of the country of the court for a certain range of relations, as a rule, very specific and delicate ones. Their implementation avoids the use of foreign law but gives rise to the problem of "lame" relations. There are significantly fewer such unilateral norms than bilateral ones in the Family Code of the Russian Federation (1995), in contrast to the earlier existing Code on Marriage and Family of the RSFSR (1968). Unilateral rules are used in determining the applicable law in cases involving children, probably on the basis that *lex fori* will be best protect of their interests, relating to property located in the territory of the court's country, etc. This approach leads to less frequent use of the public policy clause or completely excludes it. The application of the law of joint residence of the spouses has the same effect.

However, it is important to understand here that we cannot make our law more privileged over all other legal systems, just because it is our own law, limiting or eliminating the application of foreign law. The legislator is forced to use bilateral conflict of laws rules that allow choosing the best law for the parties, even if it is foreign one. Nevertheless, the public interest requires the protection of national family values and principles. At the same time, it becomes obvious that, using exclusively bilateral links to determine the applicable law, the legislator would have failed in regulating a number of issues if he had not left himself a "loophole" in the legal provisions, thanks to which it is possible to return to the law of the country of the court. This "safety valve" is the public policy clause.

The analysis of scientific works indicates an ambiguous attitude to this problem. The available research is characterized by theoretical disunity and lack of a unified attitude not only to the need to harmonize public and private interests in the family sphere, but also to its importance in the mechanism of family legal regulation.

## 3. Research Questions

Does the concept of mechanical application of a foreign law on the basis of a conflict of laws rule correspond to the interests of the country where the dispute is being considered and to the values accepted in it? Is it permissible to refuse to protect the family rights of citizens on the basis of a contradiction to the public order of the country of the court?

## 4. Purpose of the Study

Elaboration of elements of the concept of applying the norms of foreign law in the recognition and protection of cross-border family relations from the position of ensuring the principle of inviolability and stability of family values are the purpose.

https://doi.org/10.15405/epsbs.2022.01.92
Corresponding Author: Olga Y. Sitkova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

## 5. Research Methods

Achievement of the research goal necessitated the use as a basic general scientific dialectical method of cognition, as well as other general scientific theoretical research methods (theoretical analysis and synthesis, analogy, induction, deduction, hypothesis).

Along with general scientific methods of cognition, private scientific methods were used: descriptive, formal-logical, linguistic, historical, comparative-legal.

## 6. Findings

1. In countries in the continental legal system, foreign law will always be used ex lege, whereas in common law countries, in each case of cross-border relations, the possibility of applying foreign law arises only at the request of the parties to the relationship. Foreign law in this context means not only that it is the law of another state, but also that its content is far from the legal traditions, judicial decisions, fundamental principles and protected values (goods) on the territory of the country of the court. At the same time, it is the foreign law chosen on the basis of the conflict of laws rule that should provide the best protection to the interests of the participants in the legal relationship. However, this best protection does not necessarily mean that the decision of the court will be equally best for each of the parties, as well as in the interests of the State of the country of the court and the legal principles established in the territory of that country.

In this context (paradoxical from the point of view of the continental tradition to apply foreign law by force of law), a common law provision that gives the parties freedom to determine their legal position on the choice of applicable law better protects the interests of participants in legal relations. This indirectly gives the subjects of the relationship the right to decide whether to use foreign law (Bagan-Kurluta, 2015).

Consequently, it can be assumed that the tradition that has developed in common law countries regarding the procedure for applying foreign law norms is the best way to protect private interests, allowing citizens to independently determine the appropriateness of applying foreign law norms. At the same time, the question of compliance of the content of the applicable law with the national public order of the country of the court remains open. Thus, the opportunity given to citizens to choose the applicable law does not exclude the possibility that the court will refuse to recognize the relations arising from the operation of these norms on the basis of a contradiction to its national public order.

2. The modern doctrine of public policy is rooted in Roman law. The German researcher Nussbaum (1952), illustrating the refusal to apply the norms of foreign law by the Roman judge, points out: when considering a property dispute arising from family relations, the judge was forced to refuse to recognize Egyptian law (papyrus of the 2nd century), since the latter contradicted the ideas of the Romans about the size and the legal status of the dowry. Further, the institution of public policy was developed in the works of Bartol in the Middle Ages, later in the 17th century in the studies of Ulricus Huber, and, finally, in the 18th century, the category of public policy was reflected in the works of Joseph Storey, Friedrich Carl von Savigny and Pasquale Mancini (as cited in Pilenko, 2013). These studies have acquired a strong liberal scope, going far beyond the framework of public law, including the sphere of the highest

https://doi.org/10.15405/epsbs.2022.01.92
Corresponding Author: Olga Y. Sitkova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

principles of personality and social morality, public mores and such fundamental rights that are inherent in human nature, as well as those freedoms that cannot be denied to a person (Husserl, 1938).

Russian law does not define the content of the public policy clause, securing it in Art. 165 of the Family Code of the Russian Federation, which makes the range of relations to which the clause might apply. The possibility of expanding the issues in which the public policy clause is applied makes the application of the law of the court's country to family legal relations complicated by a foreign element unlimited. This process Lunts (1949) called the "rubber" action of the public policy clause. However, it seems strange that, referring to public order, the court refuses to apply the rule of foreign law and refuses to recognize the relations that have arisen between foreign citizens in accordance with the law of the country of origin of these relations, for example, with the law of the country of the place of marriage.

Family law in each country is highly individualized, because is based on the influence of religion, customs, moral norms that have been developed on the territory of a particular state. It is impossible to impose in such a delicate sphere as family life your customs, traditions, and, consequently, the norms of law that are based on them.

In private law, special attention should be paid to protecting the interests of the individual, even if protection is required by rights arising from the norms of foreign law. If there is a "shocking" collision of foreign legislation and the principles of the country of the court, then maybe it would be best not to apply these principles or change them? After all, it seems not entirely correct for private law to protect the interests of the state, but not of a private person. Moreover, if the law of the court threatens the interests of private persons involved in specific legal relations, then this raises questions about the essence of private law.

Public policy rules protect against negative consequences of the application of foreign law, which means that in the absence of such, there is no need to apply a public policy clause. Particular caution in the application of the public policy clause is justified by the growing importance of human rights and freedoms, as well as the need to preserve cultural diversity (Esteban de la Rosa, 2013) arising from international treaties. Consequently, when constructing legal norms, it is necessary to be guided by principles that would allow avoiding such a collision. We believe that is possible provided that the norms of family law are identified with constitutional rights, fundamental human rights (Tichy, 2014). In this case, the national public order will become universal in its content. That will allow resorting to the public order clause in exceptional cases.

## 7. Conclusion

The family conflict of laws of the Russian Federation is characterized by the lack of an effective mechanism for protecting the rights of citizens who have arisen on the basis of a foreign legal system. This is due to the need to protect the Russian traditional family values. Family law regulation should be based on the harmonization of private and public law principles. It is precisely the consistency, proportionality, and not the balance of private and public interests that is a feature of family law that ensures the effectiveness of the application of family law.

To ensure the effectiveness of the application of foreign family law on the territory of Russia, the author came to the following conclusions:

1. One of the basic principles in the implementation of the protection of family rights should be the principle of inviolability and stability of family values, which will allow Russia to preserve its national identity.

2. It is necessary to change the approach to the application of the norms of foreign family law in favour of the autonomy of the will of the parties when choosing the applicable law in family relations.

3. The rules on public policy protect against the negative consequences of the application of foreign law, the recognition of subjective rights that have arisen under the influence of a foreign legal system. Refusal to recognize such family rights will result in a denial of protection. Particular caution in the application of the public policy clause is justified by the growing importance of human rights and freedoms, as well as the need to preserve cultural diversity. The use of basic principles and standards for the protection of human rights in the construction of the norms of national family law will harmonize private and public interests, thereby limiting the cases of application of a public policy clause and will establish guarantees for the protection of family rights arising from a foreign legal system.

The rules on public order protect against the negative consequences of the application of foreign law, the recognition of subjective rights that have arisen under the influence of a foreign legal system. Refusal to recognize such family rights entails denial of protection. International obligations to preserve cultural diversity and the high importance of human rights and freedoms require caution in applying the public policy clause. The use of the basic principles and standards of human rights protection in the construction of the norms of national family law will allow one to harmonize private and public interests, thereby limiting the use of the public order clause and establish guarantees of protection for family rights that have arisen on the basis of a foreign legal system.

## References

Al'kova, M. A. (2020). Concept and mechanism of application of superimperative norms of private international law. *Siberian legal review, 17*(2), 157–180.

Bagan-Kurluta, K. (2015). *Private international law.* Wydawnictwo C.H. Beck.

Esteban de la Rosa, G. (2013). Application of the New Moroccan Family Code in Spain (with a Gender Perspective). *Beijing Law Review, 4*(4), 147–154.

Husserl, G. (1938). Public Policy and Order Public. *Virginia Law Review, 25*(1), 37–67.

Kutikov, V. (1993). *Internationally private law to the Republic of Bulgaria: General part.* Sofia Sofi0R.

Lunts, L. A. (1949). *International private law.* Legal Publishing House of the USSR Ministry of Justice.

Nussbaum, A. (1952). *Basic principles of private international law, with particular reference to American law.* C.H. Beck.

Pilenko, A. A. (2013). *Essays on the taxonomy of private international law*. International relations.

Rabel, E. (1945). *The Conflict of Laws.* Callaghan & Company.

Tichy, L. (2014). Order Public, Abuse of Rights and Other General Clauses and the New Czech Civil Code. *Elite law journal, 2*, 9–29.