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SOURCES OF INTERNATIONAL FAMILY LAW: A POSSE AD ESSE NON VALET CONSEQUENTIA

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The sources of international family law are not accurately defined in Russian legislation and legal doctrine, and are often misinterpreted in practice as well. The subject of this study, therefore, is the legal form of private international law norms, to determine the set of sources to be used to resolve cross-border family disputes in Russia. The research methodology adopted by the author includes the logical methods of analysis and synthesis, as well as formal, legal and comparative private scientific methods.

A logical result of insufficient attention to the sources of private international law is the persisting ambiguity in their composition, which has manifested into the analysis of the sources of international family law.

The author concludes that the broad understanding of private international law sources proposed by legal doctrines and the Supreme Court of the Russian Federation does not find full confirmation in resolving cross-border family disputes in practice.

Outdated regulation does not allow international treaties to maintain precedence in the system of sources. Despite the Ruling of the Supreme Court of the Russian Federation on the procedure for its application, the use of international treaties has not become widespread in resolving cross-border family disputes by Russian courts.

The inconsistency of Russian legislation with the generally recognized principles and norms of international law has sparked academic discussion regarding their regulatory impact. This, however, did not prevent the highest court from referring to them as the sources of private international law for the Russian Federation. This study demonstrates the lack of convincing evidence for their use as a source of international family law.

Acts of international organizations, when provided in the form of an international treaty or regulation, can serve as a basis for resolving cross-border family disputes. Acts that do not have a similar expression are not sources, but can influence the legislator due to their recommendatory nature.

The domestic legislation of the Russian Federation comprises a large number of Acts containing the norms of international family law. While agreeing with the idea of its codification as a whole, the author opines that it requires not only a thorough analysis of *de lege lata*, but also a balanced approach to *de lege ferenda*.

Customs recognized in the Russian Federation have the potential value of a source of international family law. However, at the same time, their use in resolving cross-border family disputes is not supported by empirical data.

Foreign law, including foreign customs, is the set of rules that can be applied in resolving disputes, subject to regulatory permission. They should be distinguished from the sources of law of the national legal system. Therefore, it is incorrect to consider them as sources of private international law of the Russian Federation.

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1. Introduction

The development of research in the field of private international law is a specific feature of the developments in legal science as a whole; one that meet modern challenges and emphasizes the study of practical, often niche issues, albeit often at the cost of fundamental concepts.. One of such casualties is the sources, in consideration of which, according to the fair remark of L.P. Anufrieva made almost thirty years ago, there is no intensity, consistency, complexity and continuity, linkage with the achievements of other legal sciences, which cannot but affect both the development of the theory of private international law and the practical side of things when solving relevant issues of international cooperation [1, p. 60, 62].

Even today, in Russian legal science, there are obvious shortcomings in such studies. And although the literature does not ignore the sources of private international law, works specialising in their individual types are still few [2]. The phenomenon under consideration is also overlooked by foreign science- a cursory review of publications of which preceded the present analysis. And this is against the backdrop of an increasing number of cross-border disputes considered by Russian courts every year, where not only the question of the law to be applied is relevant but also which of the several existing sources contains the rules necessary to resolve the case.

In this regard, the problem of the “duality” of sources of private international law and the correlation of national and international acts, so familiar to domestic academic research of the post-Soviet period, with its undoubted importance, fades into the background. Some key issues of direct practical importance for resolving disputes comprising a foreign element that require theoretical understanding are: what is the normative composition of the sources of private international law? Does an international treaty fulfill the role of the dominant form of law? Which domestic acts contain rules on the definition of competent law, and which are used to resolve the dispute on the merits? What is the impact of legal custom on the regulation of cross-border relations?

The reason for raising these questions was the adoption of the Decree of the Plenum “On the application of the norms of private international law by the courts of the Russian Federation” on July 9, 2019[1] (hereinafter - Plenum No. 24) by the Supreme Court of the Russian Federation, which became the most important step in the formation of the practice of resolving cross-border disputes in Russia. However, this paper shall demonstrate an alternative conceptual approach to sources by distinguishing between applicable rules and rules on determining the applicable law. To what extent does this approach ensure uniform application of the law? Let's try to evaluate it in the context of resolving cross-border family disputes by Russian courts.

The appeal to international family law is due not only to an increase in the volume of normative material (although this aspect undoubtedly requires careful analysis), but also to a variety of practices that signal the effectiveness of sources, their regulatory impact, and the possibility of classifying among them those legal forms, the application of which in these conditions causes reasonable doubt.

The subsequent consideration of the sources of international family law of the Russian Federation will correspond to the traditional classification of domestic private international law into international and domestic.

2. International sources

a. Generally recognized principles and norms

As we know, the formal-legal approach to the definition of sources of law allows us to include among them a normative legal act, a legal custom, a judicial precedent and a normative contract [3, p. 219]. In this case, the generally recognized principles and norms of international law do not acquire the qualities of a source of law. However, their regulatory properties is clear, which, apparently, was the reason for their inclusion in the so-called "atypical sources" [4, p. 9]. “A feature of the principles of international law is that they extend their effect to the entire sphere of legal regulation of international relations, that is, not only to public international law, but also to transnational

[1] Rossiiskaya gazeta. 2019. July 17.

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(including private international) law and process," rightly notes L .N. Galenskaya [5, p. 55].

The category under consideration caused a lively discussion among specialists in the legal sciences [6; 7], which representatives of domestic private international law did not join. The assignment of the universally recognized principles and norms of international law to the number of applicable norms by Decree No. 24, however, makes their role and significance an urgent issue on the agenda of interdisciplinary research, which conflictists have yet to figure out.

The need to apply generally recognized principles and norms in resolving specific disputes is beyond doubt. At the same time, however, a review of judicial practice shows that courts rarely turn to them [5, p. 56]. Perhaps the reason for this is that the rule of paragraph 1 of Art. 6 of the Family Code of the Russian Federation reproduces the provision of Part 4 of Art. 15 of the Constitution of the Russian Federation only partially, establishing as a general principle the priority of the norms of international treaties over domestic legislation, while paragraph 1 of Art. 7 of the Civil Code of the Russian Federation is consonant with the constitutional norm.

One gets the impression that through its "legitimation" of principles and norms in the Civil Code of the Russian Federation (which, as you know, can be used to regulate family relations, including those of a transboundary nature), Decree No. 24 is a tribute to the legal tradition of introducing a category into circulation, which did not give any tangible results for the doctrine and practice of private international law. It seems that the automatic extension of the universally recognized principles and norms of international law to the marriage and family sphere is nothing more than a legal dogma. The doubts expressed in the literature only reinforce this impression. For example, res judicata- believes B. Stark, when establishing guardianship in one state, may be contrary to the best interests of the child in another [8, p. 8].

b. International treaties, acts of international organizations

Starting with the concept of private international law by P. Mancini and the adoption of his idea by the Institute of International Law in 1874-1875, treaties began to be considered the best tool for overcoming undesirable differences between internal norms [9, p. 122]. Because of this, the collisionists of the 19th and 20th centuries, striving to harmonize the scope of national and foreign laws, began to attach great importance to unification, although its undoubted success was increasingly being questioned. In Europe, for example, the obvious competition to conventions are regulations, the number of which is increasing every year [10, p. 504].

In Russia, there are many international treaties concluded by the Soviet Union. "It is necessary to take into account - notes N.I. Marysheva, that Russia, with the demise of the USSR, continues to exercise the rights and obligations stipulated by such treaties" [11, p. 24]. Most of these are devoted to legal assistance and legal relations and contain mainly general conflict of laws provisions; the proportion of treaties containing substantive and procedural prescriptions is negligible.

While assessing the use of treaties as a source of international family law, it should be noted that in modern Russian practice courts prefer other forms, which makes an international treaty an insufficiently effective instrument for regulating cross-border family relations [12, p. 175-176]. Also notable in this context is the incompleteness of conventional regulation, possibly due to the obsolescence of such agreements (most of which were adopted at the end of the last century) requiringgreater interstate cooperation, which could be led in the post-Soviet space by the Inter-Parliamentary Assembly of the Member States of the Commonwealth of Independent States.

Among the most influential international organizations within the context specified in the article are, for example, the United Nations, the Council of Europe, the Hague Conference on Private International Law, and the International Commission on Civil Status, etc.

Furthermore, the United Nations[2] (UN) has prepared several conventions, the most significant

[2] URL: https://www.un.org/ru/documents/decl_conv/hr.shtml .

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of which are the Convention on the Recovery of Alimony Abroad of 1956, the Convention on the Nationality of the Married Woman of 1957, the Convention on Consent to Marriage, Age of Marriage and the Registration of Marriages of 1962, Convention on the Elimination of All Forms of Discrimination against Women 1979, and Convention on the Rights of the Child 1989.

For more than 40 years, through its development of several conventions and resolutions on this issue, the Council of Europe has been working on the harmonization of policies and the adoption of common standards and practices in the member States in the field of family law, which has made a decisive contribution to strengthening the legal protection of the family. The European Union Regulations and their application has been intensifying research in the field of regulating cross-border family relations for over a year now. However, while on the one hand this have reformed conflict approaches and simplified the "circulation" of court decisions in the Member States while maintaining differences in the regulation of family relations, on the other, it has complicated the resolution of cross-border disputes.

The Hague Conference on Private International Law [3] (HCCH) is a permanent international intergovernmental organization whose family law conventions are among the most widely ratified.

The International Commission on Civil Status[4] (ICCS) aims to assist States in establishing, recognizing, and verifying vital records or any other type of official documents used as birth, marriage, divorce or death certificates[5]. The results of the commission's work were mentioned in 34 conventions and protocols concerning the circulation of civil status documents and cooperation between competent authorities, as well as the harmonization of private international law in matters of names.

The Commission on European Family Law[6] (CEFL) compiles, analyzes and compares family law approaches and solutions in European jurisdictions with the aim of developing non-binding principles of European Family Law. In doing so, CEFL supports reform efforts to modernize national family law.

While summarizing the above information about international organizations and some results of their activities, it should be noted that, firstly, the value of the source should be recognized only for those acts that have the form of an international treaty, regulation or other legal document. Secondly, recommendatory acts can be considered as a guide for the development of positive law or "harmonizing impact on national legislation" [13, p. 55]. The development of both is largely facilitated by representatives of the academic community involved in the activities of the offices of international organizations and working groups.

3. National legislation

The national regulation of cross-border family relations in the Russian Federation comprises a plurality of sources. At the same time, it is necessary to single out those that allow the determination of the law to be applied, as well as the sources necessary to resolve the dispute on its merits.

The basis of conflict regulation in the Russian Federation is the Family Code of the Russian Federation (Article 3). Section VII, "Application of family law to family relations involving foreign citizens and stateless persons" (Articles 156-167), along with the actual conflict of laws norms, contains provisions on the recognition and enforcement of the content of foreign family law and public order. "The conflict of laws rules included in the Family Code of the Russian Federation are a system of conflict regulation of marriage and family relations. While on the one hand, this system has autonomy in relation to the general system of conflict regulation of various types of private law relations, on the other, it is an integral part of the conflict law of the Russian Federation" [14, p. 14-15]. Despite the obvious "conflict breakthrough" in comparison with the Code of Marriage and Family of the Russian Soviet Federative Socialist Republic of 1969, the current Law neither fixes the goals and objectives of the normative regulation of international family relations, nor legalizes the

[3] URL: https://www.hcch.net/en/instruments/conventions
[4] URL: https://www.ciec1.org/
[5] The Russian Federation has the status of an observer.
[6] URL: http://ceflonline.net/principles/

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concept of "foreign element". It lacks constructions of general concepts of private international law [15, p. 132], which makes its reformation relevant.

The norms of Section VII of the Family Code of the Russian Federation are special and therefore have priority over the general conflict of laws provisions of the Civil Code of the Russian Federation (Section VI). The Supreme Court of the Russian Federation drew attention to this circumstance in a civil case on a claim for recognition of property rights: "the judgments of the court on the application of Russian legislation, namely, the provisions of paragraph 1 of Article 1205 ... of the Civil Code of the Russian Federation, are incorrect, since in this case the dispute arises from family legal relations »[7].

The provisions of Section VI of the Civil Code of the Russian Federation fill in the gaps in statutory family law regulation (Article 4 of the Family Code of the Russian Federation). So, in the Family Code of the Russian Federation, a rule similar to Article 1192 of the Civil Code of the Russian Federation is not fixed. However, Decree No. 24 "legalized" the application of the said article to marriage and family relations complicated by a foreign element [16, p. 16]. An example of such norms, the Plenum notes, are the provisions of Russian legislation that determine the circumstances that prevent a foreign citizen from entering into a marriage on the territory of the Russian Federation (Article 14, Clause 2, Article 156 of the Family Code).

The adoption of part 3 of the Civil Code of the Russian Federation and active work on codification in a number of foreign jurisdictions was accompanied by a doctrinal discussion about a single codified act (law or code) containing the necessary norms of private international law [19]. In general, supporting this idea, we note that today it needs not only a thorough analysis of *de lege lata*, but also a verified approach to *de lege ferenda*.

There exists literary opinion about the inclusion of laws that contain substantive norms and regulate private law relations in general in the normative structure of international family law - for example, the application of the provisions of the Civil and Family Codes of the Russian Federation may be due to the choice of law through conflict of laws regulations [17, p. 46]. Without sharing this position, we note, paraphrasing L.A. Lunts [18, p. 36], that the above path blurs the boundary between private international, civil and family law, leads to an unreasonable expansion of the range of sources of international family law, unjustifiably includes acts that are subject to application per the principle of national treatment, and lacks general or special conflict regulations.

Procedural rules also constitute the source base of international family law, which is due to the classification of private international law as a branch of domestic jurisprudence [18, p. 37], traditionally including procedural provisions applicable to cross-border family matters.

4. Custom

A legal custom is an objectively established rule of social behaviour formed as a result of repetition, based on considerations of its expediency and usefulness, which is recognized by the state as a source of law [4, p. 14]. Custom recognized in the Russian Federation is a source of private international law.

Obviously, it means international custom and custom of the national legal system. Regarding the first L.A. Lunts noted: "Only a few issues of conflict of laws can be based on international custom as a source of law" [18, p. 116]. In practice, the custom of international trade and merchant shipping, traditionally offered as an example of international custom, have received a relatively wide application [20, p. 73]. Rule Part 3 Article 16 of the Universal Declaration of Human Rights, according to J. Adolf, has become international customary law. Therefore all States are obliged to promote, protect and give preference to the natural family over the so-called "new family forms" [21, p. 400-402].

The context of paragraph 1 of Article 1186

[7] Determination of the Supreme Court of the Russian Federation of January 21, 2014 No. 78-KG13-35 [Electronic resource] The document was not published. Access from reference - legal system "ConsultantPlus". A similar approach: Appeal ruling of the Moscow City Court dated March 18, 2015 in case N 33-8548/2015 [Electronic resource]. The document was not published. Access from reference - legal system "ConsultantPlus".

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of the Civil Code of the Russian Federation indicates the ability of custom to determine the law to be applied. At the same time, E. Rabel wondered about the existence of international conflict of law established by customs within the international community of States. Consideration of the rules on *lex rei sitae*, *lex delicti*, and *les loci actus,* led the author to the idea that these rules established by statutist doctrines are national, and that the law of nations was never their source [22, p. 44]. A different view is held by L.N. Galenskaya, noting that domestic legislation containing similar rules (conflict rules on determining the applicable law) can serve as confirmation of custom [3, p. 227].

The recognition of international custom as a source of private international law is beyond doubt, and the practice of international commercial arbitration confirms this [23, p. 95-97]. As for cross-border family disputes, neither doctrine nor judicial practice offers convincing evidence of the application of international custom, including for determining the applicable law.

Russia is a multicultural society in which the identity and uniqueness of ethnic groups can be expressed in national custom, which is understood as a rule of conduct that has developed and is widely used in any area, not provided for by law, regardless of whether it is recorded in any document (Article 5 of the Civil Code of the Russian Federation). In the Family Code of the Russian Federation, the custom is not named as a source, although it is mentioned in Article 58. Since Article 5 of the Family Code of the Russian Federation does not exclude the possibility of applying civil law norms to family relations by analogy, then consideration of custom as a source of family law, which, undoubtedly, is a form of expression of a legal norm, is possible.

The foregoing allows us to conclude that a national custom can potentially be a source of international family law in the Russian Federation. As for foreign customs, being sources of foreign law, they are applicable in the Russian Federation (part 5, Article 11 of the Civil Procedure Code of the Russian Federation) in cases where the court considers that within the framework of a particular dispute, custom should be followed. For example, a Russian deciding court on the validity of a marriage entered into by a Nigerian citizen, should take into account that, according to Yoruba custom, a widow must marry the younger brother of her deceased husband or another close relative of his [24, p. 296].

5. Foreign law

Domestic studies of foreign law are mainly associated not with the context of the sources but with the establishment of its content of foreign law, which is certainly justified. At the same time, the problem of competition between applicable foreign norms and the forum's conflict of laws rules requires a separate analysis. Unfortunately, domestic practice illustrating it is not presented in available sources, but foreign practice is of undoubted research interest. In Farah v. Farah (1993), marriage by proxy was declared invalid [25, p. 504]. By contrast, in a recent decision, the German Federal Court upheld the validity of proxy marriages performed abroad, provided that they comply with the formal requirements of the applicable foreign law.[8].

Domestic legal norms of other States are not named among the sources of private international law in Art. 1186 of the Civil Code of the Russian Federation. Their “reconstruction” took place in the well-known Plenum, which explained to the courts the need to apply foreign norms in resolving disputes complicated by a foreign element, despite the fact that part 5 of Art. 11 of the Civil Procedure Code of the Russian Federation establishes: “The court, in accordance with federal law or an international treaty of the Russian Federation, applies the rules of foreign law when resolving cases”, which, within the meaning of this provision, are “legal regulators of public relations” [7, p. 130]. They should be distinguished from the sources of law of the national legal system. Therefore, the assignment by the Plenum of foreign norms to the number of forms of existence of the norms of

[8] Decision of the German Federal Court of 29 September 2021 in case XII ZB 309/21 URL: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=124098&pos=18&anz=832

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private international law of the Russian Federation should be interpreted in the sense that their substantive (in most cases) and conflict (as an exception - Art. 1190 of the Civil Code of the Russian Federation) prescriptions may be the legal basis for resolving a particular dispute.

6. Conclusions

Thus, the natural result of insufficient attention to the issues of private international law sources is the differences in approach to their composition in Russian legislation, law enforcement and doctrine, which manifest in the consideration of the sources of international family law.

The analysis showed that it is necessary to distinguish between the sources of private international law containing rules on the choice of applicable law, as well as sources applicable to resolve disputes complicated by a foreign element.

The inconsistency of Russian legislation with regard to the generally recognized principles and norms of international law led to a doctrinal discussion regarding their regulatory impact, which, however, did not prevent the highest court from classifying them as applicable norms. The research demonstrates the lack of convincing evidence of their use to resolve cross-border disputes.

Outdated international legal regulation does not allow the treaty to maintain leadership in the system of sources. Despite the detailed explanations of the Supreme Court of the Russian Federation on the procedure for its application, the use of this form has not become widespread in resolving cross-border family disputes by Russian courts.

Acts of international organizations can serve as a law-enforcement basis, provided that they are presented in the form of an international treaty, regulation or other legal document. Acts that do not have a similar form of expression, albeit not sources, influence the legislator due to their recommendatory nature.

The domestic legislation of the Russian Federation is rather a diverse palette of acts containing the norms of international family law, which make it possible to establish a competent legal order, as well as the norms applicable to resolve disputes complicated by a foreign element on its merits. As a whole, while agreeing with the idea of codifying Russian legislation, the author believes that not only is a thorough analysis of *de lege lata* required, but also a balanced approach to *de lege ferenda*.

The significance of the source is the custom recognized in the Russian Federation. At the same time, its use in resolving cross-border family disputes is not supported by empirical data.

Foreign law, including foreign custom, as rules that can be applied in resolving disputes by virtue of regulatory permission, should be distinguished from the sources of law of the national legal system. Therefore, their classification as sources of private international law of the Russian Federation is incorrect.

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