
The Principle of Equal Rights for Women and Men in Family Relationships

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Abstract:

Based on the achievements of the national jurisprudence the article briefly analyzes the history of the principle of equal rights for women and men in family relationships, which shows that this process has absorbed the views of virtually all legal systems: ancient law, Islamic law, Russian imperial law, socialist law and the law of modern Tajikistan.

According to the authors, it makes it possible to draw some ambiguous conclusions about the studied issue, since the above-mentioned legal systems have great differences in their content.

However, the authors consider it necessary to further improve the state policy in the sphere of the equality of rights of women and men in society, in particular, in the matter of creation of a strong family.

At the same time, the authors draw attention to the fact that the national values formed in the course of the long history of development of the principle of equal rights for women and men in family relationships should be the core of this policy.

Keywords: Principle, Equality, Rights, Women and Men, Family Relationships.

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1. Introduction

The principle of equal rights for women and men in family relationships is one of the important principles according to the current legislation of the Republic of Tajikistan. It is the foundation of a family as the basis of society. This principle is meant to serve for the creation of conditions strengthening a family, which manifests itself in all areas of family relationships.

However, it is important to determine whether in the past our ancestors were equal in family relationships, when for the first time the equality of women and men in marital relations was recognized as a fundamental principle of law, how the idea of equality of spouses developed on the territory of historical Tajikistan, what is the content of this principle today? We will try to find answers to these questions by using, primarily, the achievements of the national science and reconsider many phenomena in the present and the past of the Tajik people. Therefore, opening a new page in the domestic jurisprudence, we would like to involve a wide circle of scientists for the further discussion of the history of the principle of equal rights for women and men in family relationships.

2. Methodology of the Research

2.1 The principle of equal rights of spouses in family relationships

This principle takes its origin from the general idea of human rights. In his work "Human rights in the history of social thought", Dinorshoyev (2013), analyzing the ideas of human rights in the writings of the prominent philosophers and thinkers of the West and the Muslim East, believes that the ideas of equality, justice, social support for the needy and philanthropy are among the central issues of political and legal thought.

As one of the first forms of the union of a man and a woman, family and family relationships were regulated by ancient law, which, for a long period remained the law of many peoples in the world, including our ancestors. Having a religious coloring, the ancient law, acting on the territory of historical Tajikistan, absorbed the norms established by Avesta – the main source of law of that time. The ancient law of the Tajiks paid special attention to the regulation of family relations. Therefore, Avesta tried to combat all backward institutions of the clan system in this field.

2.2 Peculiarities of the principle of equal rights for women and men in the family from the sources of the ancient law that have been preserved to our days

1. The equality of rights for women and men in the ancient Tajik law was recognized and established by the official authorities in the form of a fundamental principle of regulation of family relationships. The consolidation of this principle in Avesta

testifies that a family as the basis of society was given an important role in the development of society and the state.

2. Avesta established the same marrying age for men and women – 15 years. Given the existing knowledge of the general history of law, the above age, in our opinion, was consistent with the socio-economic conditions that were prevalent in those days. However, in practice there were cases of weddings in different ages – from 9 to 30 years. From this we can conclude that:

1) the 15-year-old age of marriage did not have an imperative force. This conclusion is the closest to the Tajik custom called "gavhorabahsh", according to which parents could announce the engagement of their children and with the attainment of a certain age the registration of marriage relations through the wedding was considered a technical issue. Since the Avesta made it necessary to fulfill promises under the penalty of sin, this provision ensured the unquestioning fulfillment of the conditions of "gavharabash" in the future (Khalikov, 2005).

or 2) people resorted to the violation of the law on the basis of certain life circumstances. If we assume that the this, second, conclusion is correct, then one should know about the existing punishment for violations of the marital age in spite of which people still circumvented the law depending on specific circumstances. However, no punishment was established.

Most likely, *both 1) and 2) conclusions* were relevant for the ancient Tajik society. After all, the Avesta, as the main source of Zoroastrian law, was characterized by a casual character, i.e. its norms were not based on any common ideals and goals. They regulated the relationships on the basis of life experience, specific situations and circumstances. If in the beginning the principles of family building were much more liberal based on dis-positive methods of regulation of family relations, then on later stages there is a tendency to establish peremptory norms as it is described below. According to I. B. Buriyev (2016a), one can see that a 15-year-old legal age of the Tajiks was zealously and strictly observed until the beginning of the 6th century. Moreover, the scientist believes that, contrary to the above-mentioned opinion, the Avestan society led not only to the strengthening of the institution of family, but also recognized the greater role of women in society establishing for her a high and worthy place in it.

3. The freedom of marriage in the ancient period, as it seems to us, was conditional. In the beginning of development of the ancient law marriage was encouraged by the Avesta by giving people certain advantages in society if they were married without denying other personal conditions (celibacy, poverty, etc.). However, in later periods marriage became mandatory upon reaching the marriageable age. According to Buriyev (2016a), despite the establishment of the obligation of marriage, in any case, it was considered a virtue. If we develop this idea, then in accordance with the legal system, which later replaced the ancient law on the territory

of historical Tajikistan, marriage contributed to the strengthening of faith and, therefore, was approved in every possible way. At the same time, according to the Avesta, marriage was confined to one religion and social stratum (Khalikov, 2005), excluding the equality of persons at a time of conclusion of marriage regardless of their social origin and their attitude to religion.

3. Chronological Literature Review

3.1 In the ancient Tajik society

There were certain forms and types of marriages in ancient times where the principle of equality of women and men in family relations was observed. Even in such marriage as "*Podshohzan*" (i.e. a marriage in which a woman was considered more equal with her husband and, therefore, conditionally called a queen of marriage), a wife could not independently dispose of her property, concluding transactions only jointly with her husband or with his special permission. Although formally the wife possessed a sufficient number of property and non-property rights to enjoy full rights in marriage (Khalikov 2005). Under the penalty of capital punishment the Avesta obliged a husband to support his wife during her pregnancy. However, in this situation the liability incurred only after a harm to the child was caused or after his death, but not for the refusal to maintain the wife during her temporary incapacity to work.

In the ancient Tajik society, the poverty and lack of rights underlined by some domestic historians (Olimova & Shamolov, 2010) influenced the principle of equality of women and men in family relationships. The growth of inequality could not but reflect on the family relations of the ancient Tajik society. It was not a question of the limited equality of spouses, but of the conditional, formal consolidation of the principle of equal rights for women and men, which "de facto" did not exist and which ultimately led to the creation of the new legal system – the Islamic law and its principles.

3.2 Period of proliferation of the Islamic religion and assertion of the Islamic law

The Islamic legal system on the territory of historical Tajikistan had been functioning for a long time. The development of the principle of equal rights for women and men in family relationships took place under new conditions. The new religion, taking into account the existing customs and traditions of the Tajik people, was very careful in disseminating the Islamic law.

The method of "kiyas" chosen by the legal scholars of law, i.e. the analogy (mainly used by representatives of the Hanafi religious-legal school), to some extent made it possible to implement and transform the local customary norms. In the opinion of Khalikov (2005) the development of Islamic law did not affect the authority of a father in the family as established by the customary norms and extending to the restriction of the freedom of the parties in marriage. From this statement one can conclude that in comparison with the norms of the official (religious) law the customs still prevailed

in certain aspects of family relationships. The Islamic law could not eradicate the harmful practices on certain family issues, in particular, the equality of spouses. However, we believe that the above-mentioned conclusion, in some way, should be considered conditional. According to Buriyev (2016b), the numerous norms of the Islamic law on the legal status of women in family relationships were designed to protect women from the absolute power of men by defining their rights and freedoms. It should be noted that the Islamic law provides for the norms aimed at protecting women's rights in family relationships, which not only have a theoretical value, but also the practical application both during the time of formation of the Islamic law and subsequent periods as evidenced by various sources of the Islamic law – the Koran, sunna, ijmah, etc. Therefore, contrary to the erroneous opinion of some authors (Mullaev, 1967) that in the Islamic law marriage is regarded as something formal, we believe that, in fact, marriage in the Islamic law is considered as a voluntary, nonviolent, based on mutual consent and love, an informed and free union between a husband and a wife (Khairulloev, 2017).

Studying Khudo Burkhanuddin Marginani (Saidov, 2010) written in the 12th century, which is still studied and serves as the main guide in Central Asia, which contains fairly reliable information on the principle of equality of rights in family relationships on the territory of Central Asia, in particular in the section "On equality ("kufv" - the authors) in marriage" one can see that the principle of equality in marriage on the territory of historical Tajikistan had some peculiar features:

1) only equal persons can fully benefit from the desired consequences of marriage – conjugal relations, communication and friendship, etc.

2) under such equality Hidoya understands the necessary equality of tribe or gender, faith, freedom, morality, status, titles. Such definition of Hidoui has a recommendatory character, which does not oblige future spouses to comply with these provisions. In the recent past some domestic authors considered this provision of the Islamic law for women to be extremely humiliating, implying inequality of women and men in family relationships (Mullaev, 1967). However, it is obvious that such judgments are far from the truth and are related not to the understanding of the essence of law, but to the assessment of the actual actions of people, who sometimes are not connected with the formal requirements of law.

3) according to Abu Hanif, violation of the above-mentioned equality was possible in exceptional cases, with a good reason, for example, when the father married his underage son to a slave. Otherwise, marriage was considered invalid (Saidov, 2010).

In the chapter "On Marriage" of Kabusnama written in 1082-1083 it is worth mentioning the admonition of his son by Unsuralmaliali Kaikousus with the following words: "... when you marry, maintain your wife well. Though wealth should be cherished, but not as much as the wife ... " (Akramov and Gol'ts, 1986). Moreover, according to the studies of Buriev (2016b) and Saidov (2014), which are confirmed by archival materials, in Tajikistan there were cases when a judge in disputes between

spouses on various issues of family relations made decisions in favor of women. And yet, according to Saidov (2014), the traditional rules veiled as religious norms and perceived by people as such were consistently observed by the big part of the population in the Bukhara emirate. Moreover, according to Usmonov and Mahmudov, (1994), in the event when the custom corresponded to the interests of the ruling class, it received recognition and was defended by the emirate state through its Shariah justification.

According to the shrewd remark of Rakhmonova (2012), rights and freedoms that were provided by the Islamic law did not have appropriate means of implementation, which resulted, for example, in complete disregard for the consent of women at a time of marriage and its termination (divorce) (Rakhmonova, 2012). This state of affairs can still be seen today. This is evidenced by the problem of do-mestic violence in our society (The problem of violence..., 2007), one of the reasons of which is an attempt of men to impose their power over women on the religious basis. It is important to note that the stereotypes that have developed in this area run counter to the Islamic understanding of the principle of equal rights for women and men in the family.

Moreover, we can agree with Khalikov (2005) that in comparison with the ancient law, Islam managed to go several steps forward in solving the problem of equality of rights of women and men. In any case, further development of the principle of equality of men and women in family relations shows that problems with the observance of the principle of equality in Tajikistan were so urgent that they subsequently became the cause of radical changes in the public and state life of the Tajik people. This is confirmed by the statement of Academician Makhmudov (Usmonov and Mahmudov, 1994), who believes that inequality of men and women in family relationships was established in the feudal period. Other researchers also note that polygamy flourished among the feudal elite citing the example of the last Bukharian emir, whose harem in 1920 had 112 wives and concubines. In many cases the latter could not stand humiliation and often committed suicide. As a comparison, one can give a similar example of Turkey, which in 1926 adopted a family law of the European model, thus breaking with some traditional Muslim concepts. As a result, it condemned polygamy, unilateral dissolution of marriage by the husband, unequal division of inheritance between sons and daughters of the deceased (David and Geoffrey-Spinoza, 1999). This situation clearly demonstrates that in the beginning of the XX century the observance of the principle of equality of women and men was indeed in a critical situation, which led to intolerance of the population of Central Asia, including Tajikistan, to the traditional forms of family relationships.

3.3 Period when Central Asia was annexed to the Russian Empire

A special place in the development of the principle of equal rights for women and men in family relationships belongs to this period. After the formation of the Governorate General of Turkestan in 1867, which included the northern part of the present-day Tajikistan, the process of changing the state and social system began. In the opinion

of the prominent Tajik scientists Tohirov (1994) and Makhmudov (1994), the Russian-imperial law had a progressive significance for the future of the family law, including the principle of equal rights for women and men in family relationships. In particular, the abolition of sharia norms on the slave trade, as well as the presence of the Russian-speaking population had a positive influence on the aspiration of local women toward freedom from slavery when they became the full subjects of family and legal relationships. Suffice it to state that the decision of local courts on marriage and family affairs could be challenged in the Russian administration.

However, despite its progressive significance, the imperial law did not eliminate the actual inequality of women and men in family relationships. The marriage age for men and women was not the same – 12 years for men and 9 years for women. The marriage of minors, polygamy, buying a wife and other family relationships were still governed by the Muslim law

3.4 The Soviet period

This period of development of the principle of equality of women and men in family relationships on the territory of Tajikistan was not unambiguous. The northern area of Tajikistan was part of the Governorate General of Turkestan, which was part of the Russian Empire. Therefore, in this part of Tajikistan the establishment of the Soviet law is associated with the October Revolution and the first Soviet regulations could not bypass the Governorate General of Turkestan, which on April 30, 1918 by the 5th Congress of Soviets of the Turkestan Territory was proclaimed by the Turkestan Republic as an autonomous part of the Russian Federation. Prior to the adoption of the first Soviet Constitution, which came into force on July 19, 1918, the basis of the family law was determined by the Decree on civil marriage, children and books of civil registration of December 18, 1917, and the Decree on the dissolution of marriage of December 16, 1917. In case of mutual consent of spouses marriage could be dissolved at the registrar's offices. Moreover, previous obstacles to the dissolution of marriage were abolished.

It should be noted that the first Soviet Constitution proceeded from the principle of equality of genders, equality of women and men. However, there was no special article on this issue in the Constitution. On September 16, 1918, on the basis of the existing Constitution, the All-Russia Central Executive Committee of the Russian Federation adopted a new Code of Laws on civil registration as well as marital, family and custodian laws. An important aspect of this code was that for the first time it had a provision by virtue of which the change of citizenship could happen only by the express desire of the bride and the groom. According to Semiderkin, *"after 40 years the fixed principle became the norm of international law and was included in the Convention on the Nationality of Married Women (1957) developed and adopted within the UN framework"* (Chistyakova and Kukushkina, 1986). In other parts of Tajikistan (eastern, southern and central towns and districts), the Soviet law began to function in September 1920, when the Emir and his power were overthrown as a result

of the revolution in Bukhara. This stage was associated with the formation of the Soviet family law and was accompanied by a radical change in marriage and family relationships.

According to Academician Tohirov, *"the emancipation of women of Tajikistan from violence and lawlessness, the provision of legal and de facto equality with men was one of the important issues in the solution of women's problems"* (Tohirov, 1994). This is demonstrated by the appeal adopted by the Presidium of the Central Executive Committee of the USSR of February 13, 1925 *"On the Rights of Working Women of the Soviet East and on the need to combat all forms of discrimination against women in the sphere of economy, family and daily life"*.

At the same time, one of the peculiar features in the development of the principle of equality of rights of women and men in family relationships on the territory of the Soviet Tajikistan was the fact that after the revolution the Muslim law was preserved, since the majority of the population (the peasants) was strongly influenced by the clergy. The latter preached that the new government wanted to take away the Muslims national customs of fathers and grandfathers from the local population, thereby misinterpreting religion as the national way of life. Under these conditions, within the bounds defined by the official authorities, it was decided to allow the creation of the Sharia and Adat courts, which did not contradict the spirit of the existing proletarian law and decrees of the workers' and peasants' government and under the control of the Soviet state. For example, in the system of judicial bodies the post of "people's kazi" was introduced, which had to possess the following qualities: to have a consciousness, to be respected by the population and to be a scholar of the Shariah (Central State Archive ... Therefore, if we proceed from the content of Part 4, Article 10 of the Criminal Code of Tajikistan it becomes clear that the Muslim law was in effect until December 19, 1929. In spite of this, a "state marriage" was opposed to a religious marriage, i.e. the marriage registered in state bodies, which later will become the only official marriage.

We agree that the solution of the problems of the family law, including the development of the principle of equal rights for women and men in family relationships, took place in a very difficult political, economic and social situation. However, the gradual development of the principle of equal rights for women and men was nevertheless justified and was democratic taking into account all local traditions. It should be noted that prior to the adoption of the Marriage and Family Code of the Tajik SSR on June 19, 1969, which came into force on January 1, 1970, the territory of Tajikistan was governed according to the Code of laws on marriage, family and guardianship of the Uzbek SSR of October 1, 1928. This situation was the result of external interference in the process of developing a draft of the Tajik marriage and family Code; however, for quite a long time the content of the principle of equality of spouses in family relationships was determined not by a sovereign family law. In spite of this, according to Academician Makhmudov (Usmonov and Mahmudov, 1994), the Code of Laws on Marriage, Family and Guardianship of the Uzbek SSR of October

1, 1928 was of great importance for the Tajik society, as households continued to experience domestic crimes that violated the equality of women and men in family relationships.

The Code of Marriage and Family of the Republic of Tajikistan of 1969 relying on such constitutional principles as:

1. equality of men and women in solving family issues;
2. equality of citizens in family relationships, regardless of nationality, race and attitude to religion, determined the following principles:
 - 1) in accordance with the equality of men and women provided by the Basic Law of the Republic of Tajikistan, men and women have equal personal and property rights in family relationships (Article 3 of the Code);
 - 2) at the time of marriage and family relationships (Article 4 of the Code).

According to Academician Makhmudov, during 70 years of the Soviet era family life was under the strict control of state-and-party structures, which was expressed in the non-observance of legality (Mahmudov, 2009). As a result of perestroika and the events of the early 1990s significant changes took place in the former USSR.

3.5 Period of The Republic of Tajikistan

Like all other union republics, The Republic of Tajikistan first proclaimed its independence and then obtained it entering a new stage of its development leading to further development of the principle of equality of spouses in family relationships, i.e. the modern stage of development of the studied principle. In spite of the fact that on Sept. 9, 1991 at the session of the Supreme Council (the country's parliament – the authors) the Statement and the Resolution "On the State Independence of the Republic of Tajikistan" (Resolution of the Supreme..., 1990) were adopted, however, with the beginning of the civil war, which lasted for long five years, life was accompanied with many serious problems (Zoirov, 2014) leading to the suspension of the process of development of the family law for an indefinite period (Saidov *et al.*, 2011).

Only after the signing of the "General Agreement on Peace and National Accord in Tajikistan" in Moscow on June 27, 1997, the conditions were created for the adoption of a new Family Code of the Republic Tajikistan. Already in the following year - on November 13, 1998, the Family Code of the Republic Tajikistan was adopted, which established the principle of equality of spouses as one of the main one in family relationships. Today, the content of the principle of equal rights for spouses includes both personal non-property rights and property rights of spouses. Moreover, as can be seen from the meaning of Part 3 of Article 32 of the Family Code of the Republic Tajikistan, the principle of equal rights of spouses also covers the duties of spouses, for example, to build their relationships in the family on the basis of mutual respect and mutual assistance, to promote the well-being, to strengthen the family and to take care of the development of children.

4. Conclusions

In its development the principle of equality of women and men in family relationships has passed a long period: from the ancient law to the modern law. During this time it was influenced by various legal systems: the Zoroastrian law, the Islamic law, the imperial law, the Soviet law and the modern Tajik law.

1. *Ancient law*: stable traditions that Zoroastrianism inherited from the patriarchal form of family relationships ultimately did not solve the problem of inequality in family relationships. Women's lack of rights in the ancient law was formalized in the form of subordination of the wife to her husband with the disobedience leading to terrible punishment (Khalikov, 2005).

2. *Islamic law*: in comparison with the ancient law makes it possible to conclude that Islam managed to go a few steps forward in solving the problem of equal rights for women and men.

3. *Soviet period*: the struggle continued to remove the remnants of the unequal status of women in everyday life. However, it is obvious that it was not possible to completely overcome the inequality of women and men in family life. For example, despite all the coercive measures the state failed to eradicate such a negative phenomenon as the payment of ransom for the bride (kalym). Covered by the national traditions this kalym exists even today.

4. *Modern Tajik society* has not yet freed itself from inequality of women and men in family relationships making this problem relevant. The long influence of the traditions of inequality of women and men within families on the consciousness of people is so deeply ingrained at the level of their subconscious that it requires a serious approach to solving this problem.

The principle of equal rights for women and men in family relationships was only formal and its actual application in life occurred in isolated cases. Moreover, if the problem of realization of the principle of equal rights for women and men in family relationships does not find its practical solution this will not change the conditions in our society, in which, for a long time, a formal equality of spouses did not have any legal effect in real life. According to the psychologist Davlatov, it is the historical inequality of spouses that "in the Tajik family contributed to the emergence of the harmful tradition of unquestioning obedience and the dominance of men over women" (Davlatov, 2011), which today, as in the beginning of formation of the Soviet family law, is disguised by the national customs – the traditional way of life.

However, we should not forget that the vestiges of the family relations of the past years are a big problem in solving one of the primary tasks of our state – the creation of a just society. The national traditions should be exempt from all backward vestiges. And yet, the national values formed in the course of a long history of development of the principle of equal rights for women and men in family relationships should be the core of the state's policy on the issue of equal rights for women and men in family relationships.

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