



MARRIAGE INVOLVING FOREIGN ELEMENTS UNDER VIETNAMESE LEGAL SYSTEM AND PRIVATE INTERNATIONAL LAW

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***Abstract** -Marriage is the establishment of a legal relationship between two partners to achieve the purpose of uniting their life economically and emotionally. From this perspective, marriage is a complex issue which is related to human rights and civil rights under international treaties. Therefore, in the progress of the current migration and globalization, marriage is not only limited within a sovereign of a country, but also expands internationally in which partners are of different nationalities, the place of domicile and even the place of marriage celebration. At present, the number of marriages with foreign elements have gradually increased. Therefore, a comprehensive legal framework in every country should be established to solve conflicts of rules among national laws. Through surveys, doctrinal and comparison in legal research, this article will elaborate on marriage in private international law under Vietnamese laws and other legal systems in the world.*

***Keywords:** foreign, marriage, conflict of laws, private international law, nationality.*

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INTRODUCTION

Marriage with foreign elements can lead to conflicts among legal systems worldwide. This makes partners difficult to fulfill their obligations and ensure their rights in the marital relationship. To solve this problem, countries need to feasibly determine not only the choice of relevant laws, jurisdictions but the methods of resolving conflicts of law, which is still challenging in private international law.

In Vietnam, regulations on marriage issues with foreign elements are recognized in national laws and international treaties that Vietnam has signed with other countries. In fact, Vietnamese legal system provides substantive and conflicting rules that determine applicable laws to remove barriers to conflicts of law and protect happiness in marriage. However, some aspects have not yet been clearly stipulated, leading to difficulties in marriage recognition. There are some studies about marriage with foreign elements in Vietnam. Particularly, Luong (2015) clarified some risks, including responsibilities of unions and social organizations, language barriers, family pressure and

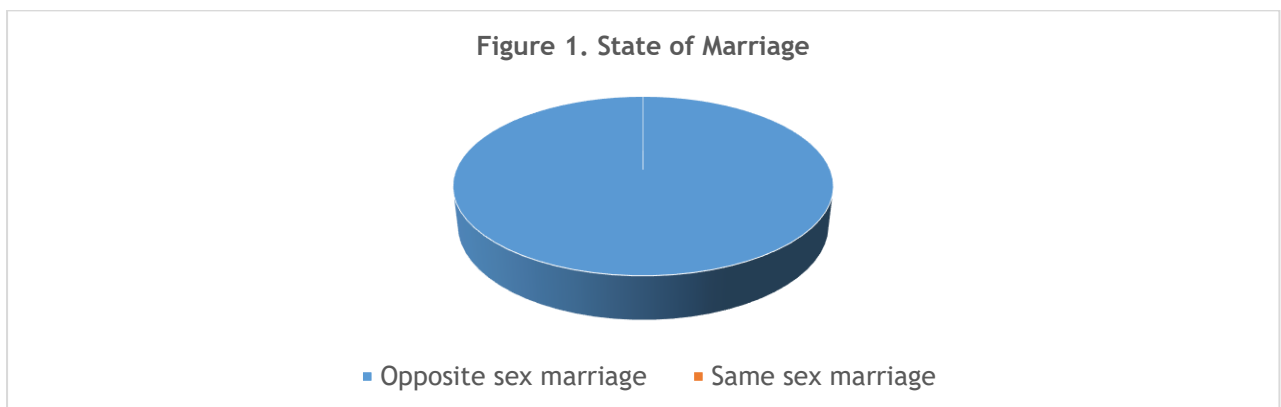
information of status in the relationship¹. However, the study has not emphasized legal risks and provided reasonable methods of resolving conflicts of law. Tran (2016) mentioned the choice of applicable laws in civil relations with foreign elements, including marriage with foreign elements. Yet, the study is silent on conflicts of law in this relation and relevant jurisdictions. Thus, this paper will elaborate on unsolved issues of previous studies before delivering a reasonable conclusion².

METHODOLOGY

Legal research methods are applied to obtain purposes of the study, which comprises questionnaires, doctrinal, and comparison. At first, the research uses a list of questions to evaluate the understanding of foreign partners on conflicts of law on marriage relationships and approachable solutions under Vietnamese Law on Family and Marriage 2014. Subsequently, the study identifies relevant issues regarding private international law on marriage by interpreting substantive and conflicting rules under domestic laws. Finally, there is a legal comparison between Vietnamese and other legal systems in the law application on marriage with foreign elements. By virtue of this, the research will determine and evaluate crucial criteria in determining which countries have jurisdiction on this relation.

RESULTS

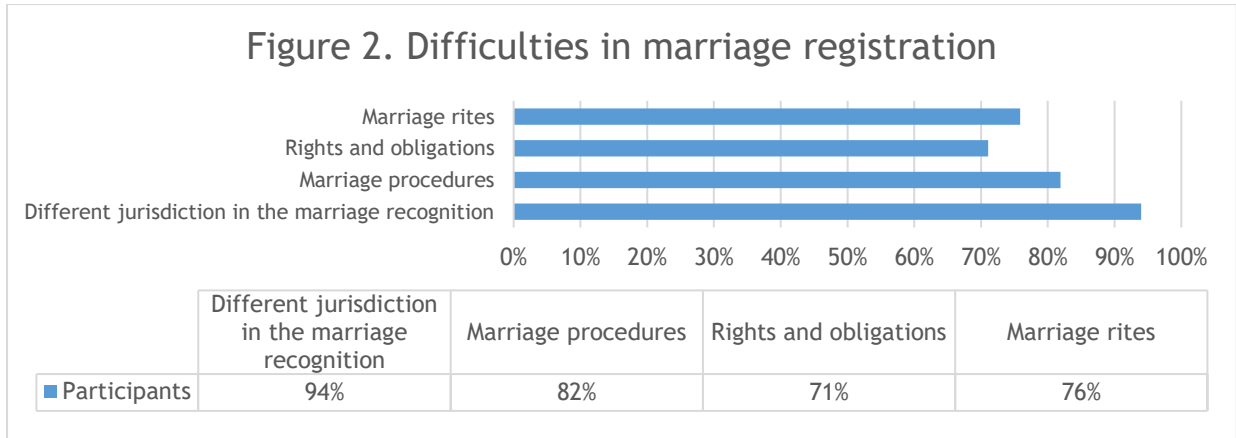
The survey was conducted at the beginning of June 2022 with 315 married foreigners living in Vietnam who have a marital relationship with a Vietnamese citizen. Therein, Figure 1 shows that 100% of their marriage relationship is heterosexual, but there is no same-sex marriage, which is not officially recognized under Vietnamese laws.



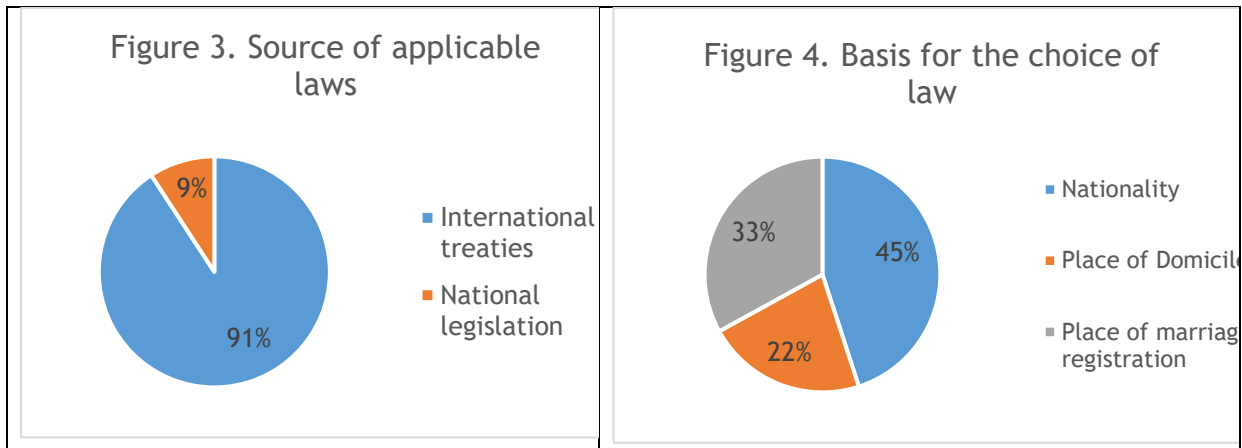
When asked about marriage registration, respondents had difficulty determining which jurisdiction would recognize their marriage relationship, with about 296 responses (93, 96%). In addition, they also encountered other legal problems in the marriage relationship, including marriage procedures, marriage rites and rights and obligations of each partner with 82%, 76% and 71% respectively under Figure 2.

¹ Luong, T. (2015). Vietnamese women marrying foreigners: a view from studies. *Social Sciences Information Review*, 36-44.

² Phuong, T. (2016). Vietnam's New Law on the rights of Parties to choose applicable Law in civil relations involving foreign elements. *Journal of Politics and Law*.



When asking foreigners about relevant factors such as gender, age, marital status, and behavioral capacity in marriage, about 308 people said that regulations on these elements are different according to socio-cultural conditions in various countries, which occupies the majority. Therefore, the survey led to a question for the participants whether a relationship with a foreign element legally recognized in one country would inevitably be recognized in other countries. Based on the actual experience of the surveyors, there are about 13 people who determine that this recognition is inevitable with 9% and up to 303 people think that the recognition is in accordance with national regulations and relevant international treaties with 91%, as indicated in Figure 3. When asked about the basis for determining the applicable law, participants chose nationality as the most critical basis with 45% which is nearly a half of the total number of participants and more than the number of people choosing the place of marriage registration (33%) and the place of domicile (22%) under Figure 4.



DISCUSSION

Requirements of marriage

Requirements of marriage are understood as the set of rules that the state requires subjects to ensure their marriage purpose under the laws. Depending on jurisdiction, culture and custom in each country, the requirements of marriage may be stipulated in similar or different manners to ensure basic rights of their citizens, one of which is the demand of happiness. In fact, there are many criteria that each country sets domestic rules to ensure that the marriage of citizens is reasonable and lawful. However, a question is raised whether all domestic requirements of marriage are applicable to marriage relations with foreign elements. To solve this problem, most countries are moving towards the development of the choice of law rules that allows relevant subjects to choose the applicable laws to regulate their marriage relations. Typically, the number

of issues that lead to conflict of laws in marriage requirements include gender, marriage status, age, and capacity of subjects.

Related to gender, most state laws still recognize marriage as a relationship established between a man and a woman, which are two subjects of different genders (Opposite sex marriage). Nonetheless, with today development of society, the attitude of human has become markedly improved and they have gradually accepted marriage between people of the same gender (Same-sex marriage). According to World Health Organization, homosexuality has been eliminated as a mental illness. Simultaneously, the United Nations Human Rights Council has recognized the equality of people regardless of sexual orientation³. The acceptance of same-sex marriage is widespread in many countries. Specifically, there are now 29 countries legalizing this relationship in national legislation, including developed countries such as Australia and the United States⁴. For example, under the Marriage Amendment (Definition and Religious Freedoms) Act 2017, the recognition of same-sex marriage is confirmed via the expansion of the scope of legal marriage relationships, which are two partners (may be the same or opposite sex) instead of husband and wife as previously⁵.

In the US, in the case of *Obergefell et al. v. Hodges* [2015] 576 U.S. 644, the ruling of the Supreme Court requires 50 states to license same-sex marriage and guarantee their rights and obligations as the same as heterosexual marriage⁶. Some other countries have gradually accepted same-sex marriage relationships and removed prohibition under national laws such as Vietnam, China, India⁷. Due to the approval and disapproval of same-sex marriage under national laws, conflict of laws occurs in marriage with foreign elements, leading to administrative or criminal violations in some countries. In the European Union, some countries allow marriage between people of the same sex, but others do not⁸. In the case that Mr. Adrian of Belgian nationality marries Mr. Austin of Austrian nationality, a question is raised whether this couple can reside and his marriage is recognized lawfully in Italy or not. In fact, Austria and Belgium are two countries accepting same-sex marriage; however, the couple has chosen Italy to conduct and recognize their marriage, which has not yet allowed same-sex marriage under domestic laws. Therefore, the marriage of this same-sex partner will not be recognized legally. Notwithstanding this, Italian law allows the couple to have the rights and obligations of a registered partnership. In Vietnam, same-sex marriage has not been recognized under national jurisdiction, which is one of the requirements for marriage under Article 8 of the Law on Marriage and Family 2014⁹. Therefore, when a same-sex marriage in another country has been recognized lawfully, the Vietnamese legal system has not confirmed this relationship to grant rights and obligations as heterosexual marriage¹⁰.

Regarding the marital status of subjects, according to the progressive thought of society, most of national legal systems in the world respect the principle of monogamy marriage (bigamy). Prior to marriage, not only citizens but also foreigners who get married in host countries are required to prove they are single (Singh, Khan and Singh, 2022)¹¹. For example, in the US, before getting married, a foreigner needs to submit an Affidavit of Eligibility to Marry, which is required to declare current marital status. Similarly, in Australia, the Marriage Act 1961 also requires a couple before marriage shall prove their marital status and submit a Certificate of no Impediment to ensure that the monogamous marriage is not violated. Nevertheless, not all countries have adopted this principle in

³ Gerstmann, E. (2017). *Same-Sex Marriage and the Constitution*. Cambridge: Cambridge University Press.

⁴ Marcén, M., & Morales, M. (2019). *The effect of same-sex marriage legalization on interstate migration in the United States*. Essen: Global Labor Organization (GLO).

⁵ The Parliament of Australia, *Marriage Amendment (Definition and Religious Freedoms) Act 2017*

⁶ US Supreme Court. *Obergefell v. Hodges* [2015] 576 U.S. 644.

⁷ Phuong, N. (2014). *Law on Marriage with Foreign Elements in Comparison With Countries Around the World*. Graduation Thesis. Faculty of Law, National University.

⁸ Shuilleabháin, Máire. (2021). *Cross-Border (Non-)Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law*.

⁹ National Assembly of Vietnam. (2014). *Law on Marriage and Family 2014, Article 8*

¹⁰ See Phuong, above n.7.

¹¹ Singh, Nituja & Khan, Faheem & Singh, Anushka. (2022). *Matrimonial Causes & Choice of Law under Private International Law*. VEETHIKA-An International Interdisciplinary Research Journal. 8.

marriage relations. Currently, some countries and territories still maintain polygamy marriage, especially under laws on marriage for Muslims in Indonesia, Yemen, India¹². An issue may arise from which applicable law can govern in case a Muslim marries a foreigner of a different religion or both Muslims marry abroad. This can only be explained by conflicts of laws among countries regarding marital status. In *People v. Ezeonu* [1992] 588 NYS2d 116, the defendant is a Muslim Nigerian who has asked the New York Court to recognize his marriage with his second wife, a Muslim Yemeni¹³. He also disagreed with being accused by prosecutors of child rape. He claims that his marriage is lawful in a Muslim state of Nigeria where polygamy is accepted, and the age of marriage is only 12 years old. However, the Court rejected his request when his criminal act was committed in New York, and his marriage was also not recognized. This is because getting marriage with more than one person is against the laws of New York. In the same manner as same-sex marriage, Vietnam does not recognize polygamy in all cases. Therefore, any marriage that fails to comply with the monogamous marriage under Vietnamese law shall be prohibited and sanctioned by the national authority.

In respect of the age of marriage, laws of all countries set limits to recognize a lawful marriage. Based on human psychology and reproductive health, each country stipulates a certain legal age for marriage under domestic laws¹⁴. Specifically, pursuant to Clause 1, Article 6 of Marriage Law 1980 of China, men must be 22 years old, and women must be 20 years old at least, both of whom are allowed to get married¹⁵. Meanwhile, the age of marriage in Japan is lower by providing men under 18 years old and women under 16 years old, either of whom has no right to get married (Article 731 of the Japanese Civil Code 1896)¹⁶. In addition to the age limit, some countries also include some exceptions for defense. According to articles 12 and 13 of the Australian Marriage Act 1961, the legal age of marriage is minimum at 18 years old. However, in case men are allowed to get married from the age of 16 and women are 14 years or older with the consent of parents or guardians, which the Court recognizes. Obviously, different regulations on the legal age of marriage under various jurisdictions have led to conflicts of laws for applicability. Unlike marriage status and gender, age depends on a timeline and physical development. As a result, some countries have made exceptions that allow certain conditions to be changed or remedied at the time of recognition¹⁷. Specifically, according to Vietnamese law, in case there is a breach of the marriage requirements; nonetheless, consequences of the violation have been remedied at the time of requesting the marriage recognition. As a result, marriage is also recognized. Regarding the age, a marriage between a Vietnamese and a foreigner is conducted in a country that recognizes a lower marriage age than Vietnam. The marriage is considered as lawfully when both partners have satisfied the marriage age at the time of registration under Vietnamese Family and Marriage law. For example, Mr. A of Iranian nationality, 21 years old, married to Ms. B of Vietnamese nationality, 16 years old, registered his marriage in Iran. Pursuant to the Iranian legal system, the marriage age is lawful when a female is full 15 years or older. However, Ms. B is not old enough to get married under Vietnamese jurisdiction. To recognize this marriage in Vietnam, Ms. B must wait until she is 18 years old or older and request the competent authority for recognition and registration in Vietnam.

In private international law on marriage, conflicts of law may be resolved by the applicability of law based on the place of domicile, place of marriage, and nationality¹⁸. In the United States and South American countries, the law of the place of marriage where both partners choose is normally

¹² O'Sullivan, Kathryn & Jackson, Leyla. (2017). Muslim marriage (non) recognition: implications and possible solutions. *Journal of Social Welfare and Family Law*. 39. 1-20.

¹³ Supreme Court of New York. *People v. Ezeonu* [1992] 588 NYS2d 116.

¹⁴ See Singh, N, Khan & Singh, A, above n.11.

¹⁵ National Assembly of the Republic of China. (1980). *The Marriage Law 1980*, Article 6.

¹⁶ National Diet of Japan. (1896). *The Japanese Civil Code 1896*, Article 731.

¹⁷ Atnashev, Vadim. (2022). *Legal Regulation of Marriage Relations with Foreign Citizens (on the Example of Vietnam)*. *EURASIAN INTEGRATION: economics, law, politics*. 98-105.

¹⁸ See Singh, N, Khan & Singh, A, above n.11.

applied¹⁹. Meanwhile, in the UK, the law of the place of domicile of both partners will bind their obligations and rights in marriage relationship. Normally, these countries will stipulate the number of days that foreigners reside locally in the establishment of their marital relationship to determine the place of the domicile²⁰. For most nations following the civil law system, requirements for marriage with foreign elements are dependent on the nationality of both partners. For example, Article 13 of the German Civil Code provides that requirements of marriage are governed by the law of the place where the parties to the marriage relationship have the nationality, except in certain cases where German laws will apply. In the same manner to Germany, the marital relation with foreign elements under Vietnamese law is also based on nationality to set rules²¹. Article 126 of the Law on Marriage and Family 2014 stipulates that in case of a marriage between a Vietnamese citizen and a foreigner, each party shall comply with the law of place where they have nationality on marriage requirements. Provided that the marriage is registered at a competent Vietnamese state agency, the foreigner must also comply with the provisions under Vietnamese Laws on marriage requirements²².

RITES OF MARRIAGE

The marriage rite is a formality for legalizing the marriage relationship, which binds on rights and obligations of each party. In the world, rites of marriage in each country have certain similarities and differences among culture, religion, law and history. However, in general, when establishing a marriage relationship, each party shall ensure that procedures of a marriage certificate need to comply with relevant national jurisdictions. Most countries allow both parties to choose applicable laws to govern this issue, which respects will, voluntary and mutual consent in a marriage relationship according to the principle of equality of nations in international law. At present, most domestic laws on marriage rites normally stipulate the place where the marriage takes place (*lex fori celebration*). For example, under the Australian Marriage Act 1961, the place of marriage will be only binding if an Australian citizen marries a foreigner, or both are foreigners celebrate their marriage in Australia in the same way as for Australian citizens. Accordingly, both parties must send a notice of marriage for one month to a selected wedding celebrant who can confirm the voluntary will of marriage and organize a statutory wedding ceremony. However, some countries also consider the nationality of the parties or the place of domicile to resolve conflicts of law on rites of marriage²³. For example, in Thailand, in addition to the place where the marriage is conducted, law of nationality is applied when Article 1459 of the Civil and Commercial Code²⁴ provides that marriage ceremony between a Thai people with foreigners or between two Thai people organizing their marriage abroad shall comply with Thai laws²⁵.

In Vietnam, the marriage rite is established when both men and women register their marriage via a representative of a competent authority. However, one limitation is that marriages with foreign elements under Vietnamese Marriage and Family Law 2014 only stipulates authorities in charge of registering foreign marriage but not states applicable laws on the marriage rite²⁶. Accordingly, Vietnam only identifies the competent authority for marriage registration with foreign elements, including the district-level People's Committee for domestic domicile and the embassy and consular offices for foreign domicile²⁷. In addition, the Law only provides additional documents

¹⁹ Tandon, U. (2013). *Validity of Marriage Under International Private Law with Special Reference to 1978 Hague Marriage Convention: Towards Harmonization and Unification of the Rules of International Private Law Relating to Marriage*. *Journal of Campus Law Centre*, 32-47.

²⁰ *Ibid.*

²¹ German Empire. (1900). *the German Civil Code 1900*, Article 13

²² National Assembly of Vietnam. (2014). *Law on Marriage and Family 2014*, Article 126

²³ The Parliament of Australia. (1961). *The Marriage Act 1961*, Article 12 and 13

²⁴ The King of Thailand. (1925). *The Thai Civil and Commercial Code*, Article 1459

²⁵ Terapachalaphon, Chawinroj. (2017). *Marriage Equality for Sexual Diversity People in Thailand*. *Educational Researcher*. 22. 92-104.

²⁶ See Phuong, above n.7.

²⁷ Atnashev, Vadim. (2022). *Legal Regulation of Marriage Relations with Foreign Citizens (on the Example of Vietnam)*. *EURASIAN INTEGRATION: economics, law, politics*. 98-105.

for registering marriage with foreign elements such as passports, certificates of marital status and translated copies. Different from Australia, marriage procedures with foreign elements will be based on the law of marriage celebration. If the parties choose Australia as the place of marriage, their foreign marriage procedures will be applied in the same manner as those of Australian citizens. Obviously, without provisions in the law applicable to marriage rites, marriage procedures related foreigners fail to be consistent with the requirements for legalizing the marriage relationship under the Vietnamese legal system.

RECOGNITION OF MARRIAGE WITH FOREIGN ELEMENTS

Recognition of marriage with foreign elements under a jurisdiction is also one of the issues that need considering when there are differences in marriage customs and requirements in the laws of different countries²⁸. In fact, the requesting parties must meet these legal aspects from not only the country where they get married, the country where they are citizen or even where they are domiciled. In case the parties fail to satisfy under applicable laws, their marriage is not recognized and nullified²⁹. To resolve the conflicts over the recognition of foreign marriage, most countries often consider whether a marriage involving a foreign element meets the requirements of procedures and rites of marriage in the relevant countries or not³⁰.

Typically, countries will have three principles to choose the applicable laws for marriage recognition. the law of the place where the marriage is celebrated, the law of the domicile of the parties and, and the law of nationality³¹. In fact, some countries only choose one of the three principles. For example, countries under the Hague Convention on Marriages of 1978 choose only the law of the place of celebration to recognize marriages with foreign elements. Accordingly, Australia is a member to this convention and the Australian Marriage Act 1961 provides the law of the place where the marriage took place will apply to recognize a marital relationship with foreign elements legally in Australia. Suppose the parties marrying overseas want to be recognized their marriage in Australia. In that case, either party must prove that their marriage is legal in the country where they get married, and at the same time this marriage satisfies the requirements for marriage in Australia. Therefore, their marriage is automatically recognized without registration in Australia³². Meanwhile, some other countries apply two of the three principles at the same time. For example, in the UK, a marriage with foreign elements is considered according to both laws of the place of celebration and domicile. Accordingly, regarding marriage rites, the parties must comply with the law of the place of celebration. In terms of civil abilities of each party, the law of the place of domicile is applied, and simultaneously the marriage also adheres to the laws of the UK for recognition³³. In Japan, recognition of a marriage with foreign elements will be pursuant to the law of the place of celebration and nationality. Pursuant to Article 24, Chapter 5 of the Act on General Rules for Application of Laws 2006 of Japan, a marriage with foreign elements is recognized in Japan, marriage rites must satisfy the following requirements: the law of the place where the marriage takes place the law of the nationality of each party. If a marriage with foreign elements is organized in Japan or one of the parties has Japanese nationality, marriage conditions are also in compliance with laws of Japan³⁴.

Vietnamese law only chooses the law of the place of celebration and nationality to recognize marriage with foreign elements regarding marriage requirements. In addition to Article 126 of the Law on Marriage and Family 2014, Article 36 of Decree 126/2014/ND-CP stipulates provisions and measures to implement the Law on Marriage and Family, the recognition of marriage with foreign elements in Vietnam needs to comply with foreign laws and Vietnamese law on Marriage and Family

²⁸ Julia.M. (2017). *Marriage, Law and Modernity: Global Histories*. Bloomsbury.

²⁹ Beaudin, L. (2017). *Marriage equality and interstate migration*. *Applied Economics*, 2967.

³⁰ Atnashev, Vadim. (2022). *Legal Regulation of Marriage Relations with Foreign Citizens (on the Example of Vietnam)*. *EURASIAN INTEGRATION: economics, law, politics*. 98-105.

³¹ See Singh, N, Khan & Singh, A, above n.11.

³² The Parliament of Australia. (1961). *The Marriage Act 1961*, Article 88C

³³ The King and the Parliament of Great Britain. (1906). *British Foreign Marriage Act 1906*

³⁴ National Diet of Japan. (2006). *the Act on General Rules for Application of Laws 2006*, Chapter 5, Article 24

2014³⁵. In the marriage period, there are any violations against requirements under Vietnamese law, the consequences of which are remedied, and the recognition of marriage protects the interests of women and children. In case of a request for recognition, marriage is also recognized in Vietnam³⁶.

In respect of marriage rites, Vietnamese law still does not clearly stipulate the applicable laws to recognize marriages with foreign elements, except for some articles on invalid marriage due to violations of marriage rites under international treaties that Vietnam has signed such as Agreement on legal assistance between Vietnam and Hungary (Article 34), with Ukraine (Article 26) and with Mongolia (Article 27)³⁷. Therefore, a question is raised in case a Vietnamese citizen and a foreigner, or both Vietnamese citizens domiciling overseas, perform marriage rites in a foreign country. Then, when both return to Vietnam, a concern is which law will be applicable to legalize marriage procedures in Vietnam. On the other hand, under Vietnamese laws, they only need to ensure marriage requirements to be recognized lawfully without marriage rites.

CONCLUSION

From the foregoing, there are still many difficulties in resolving legal conflicts among countries regarding marriage with foreign elements. In fact, countries are trying to harmonize domestic laws to reduce differences on marriage requirements, marriage rites and even procedures of recognition to ensure basic rights and needs of happiness for human being. However, due to differences in the history, ideology and culture of each country, this process requires more time to improve. From the perspective of international law, three main principles are currently applied to solve rules of conflict in marriage with foreign elements, including the law of the place of celebration, domicile, and nationality. The choice of principles for applicable laws in each country is not the same, which leads to no consensus except for a few countries that have signed international treaties with each other. In Vietnam, marriage needs to ensure both legal requirements and marriage rites in accordance with the law of the place of celebration and nationality.

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³⁵ Government of Vietnam. (2014). Decree 126/2014/ND-CP dated December 31, 2014, detailing a number of articles and measures for implementation of the Law on Marriage and Family, Article 36.

³⁶ Ibid.

³⁷ See Phuong, above n.7.

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