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### SOME LEGAL FEATURES OF MARITAL PROPERTY MATTERS UNDER THE SPANISH LAW

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#### **ABSTRACT**

One of the key legal problems of family disruption is the problem of marital property matters regulation. The social processes of globalization over the past decades caused an increase in interstate migration flows and forced a revision of approaches to the determination applicable law in the division of joint property by spouses. The general rule in severance of a jointure, which has long a long history, does not always include all the factors that influence the equitable distribution of material benefits. Therefore, the change of approaches to this issue of Spain's inclusion to the migration interstate cycle is a matter of interest. The subject of this study is the collision norms of Spanish legislation that indicate the law applicable to the property relations of spouses, as well as in case of situation with a marriage contract. In addition to the legal norms, we also study the practice of Spanish courts and doctrinal sources – scientific papers of scientists in the field of private international law and civil law.

#### **INTRODUCTION:**

Economic conversion of recent decades required social transformations and revision of long-standing legal family norms. The expansion of economic, social, and political relations requires the consideration of international norms not only in traditional areas of law, but also within the branches of law that one considers to be exclusively the internal sphere of national regulation. After the economic and political changes in the territory of the Soviet Union, along with Russia, there was formation of many Post-Soviet States whose citizens actively began to emigrate to Russia for permanent residence. In this regard, the issue of determination in respect to the proper law and order applicable to the marital property relations has become particularly important for Russian lawmakers in recent years. In addition, in 1995, the Russian legislation introduced the institution of agreement-based regulation of marital property relations (marriage contract). Despite the long development of legal norms, the application of the

marriage contract in practice has multiple difficulties, which led to a sharp negative attitude of the population on the territory of the Russian Federation to the possibility of property relations settlement through extrajudicial procedures. Therefore, the experience of foreign legislation in regard to wide and successful application of contractual regulation of marital property relations is quite relevant.

The subject of the research is the legal norms of the Kingdom of Spain, case law, and theoretical research on this issue. The topic of this paper is relevant not only from a theoretical frame of reference, but also from a practical point of view. One should note that the influence of Spanish law on the legal acts of the countries of South, Central America, the Caribbean<sup>1</sup> and Mexico is not only a historical fact, but also a modern trend. Numerous marriages between citizens of Russia and Spain, as well as other countries, whose legal systems formation traditionally relates to the influence of Spanish law, require a certain synchronization of legal concepts and approaches to the regulation control of marital property relations.

The purpose of the research is to study theoretical and practical issues of legal regulation, doctrinal decision and practical implementation of legal institutions that ensure the equitable distribution of marriage material benefits.

## INTRODUCTION

If you make a research of the modern Spanish legislation, it is necessary to consider the significant influence of the European Union legal norms within the scope of the past decade. With the signing and entry into force on 1 January 2009 of the Treaty of Lisbon (Treaty on the Functioning of the European Union) of 13 December 2007,<sup>2</sup> the legal regulation in the EU member States passes the significant changes. EU directives addressed to the EU Member-States should pass the legal implementation on the level of national legislation. The deadline and result become mandatory, but the choice of forms and methods of action belongs to the EU Member-States.<sup>3</sup> The regulations address to all legal entities and have direct force. In this regard, Spanish lawyers note that " quantitative changes passed along with the changes in quality – at the EU level, norms of the direct effect, that assumed the replacement of rules established by the provisions of national legislation."<sup>4</sup> The Spanish legislation, which is a typical example of continental law, was also under the influence of the Anglo-Saxon legal system<sup>5</sup> If the continental concept of the legal regime of marital property bases on the regulation of property relations exclusively during the existence of marriage and on the principally bilateral nature of the marriage contract (with the exception of maintenance obligations and hereditary legal relations), the Anglo-Saxon

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<sup>1</sup> The Spanish Constitution of 1812 (Constitución de Cádiz) at the beginning of the 19th century, it operated on the territory of Costa Rica and the countries of Central America.

<sup>2</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 13/12 / 2007 Official Journal of the European Union C 303, 14.12.2007, p. 1.

<sup>3</sup> Frolova E.E., Zankovsky S.S., Dudin M.N., Zinkovsky S.B., Kirsanov A.N. Studying concepts of the breakthrough economic reforms in selected developed and developing countries and regions of the world: economic and legal aspect. // Journal of Advanced Research in Law and Economics. 2018. V. 9. No. 4. P. 1236-1242.

<sup>4</sup> Campuzano Díaz, B., "La política legislativa de la UE en DIPr de Familia. Una valoración de conjunto", Cuadernos de Derecho Transnacional, octubre 2013, vol.5, nº2, p.234-264,

<sup>5</sup> Yulia Artemyeva, Natalya Ivanovskaya, Valentina Koncheva, and Elena Sitkareva. Current Problems of Concluding an Agreement on the Alimony Payment for Minors in Russia. Advanced Research in Law and Economics, [S.l.], v. 9, n. 3(33), p. 859-869, June 2018. ISSN 2068-696X.

model includes in its scope, firstly, terminated marital relations, and secondly, assumes the rights' existence of third parties in relation to the marital property. There is a potential conflict of legal conditions which is to resolve either through collision norms or by the harmonization or unification in respect to the norms of substantive law. Thus, it is interesting to see how the national Spanish family law passes transformation within the significant influence of EU legislation.

## METHODOLOGY

The authors conducted and designed this very paper in order to to systematize and study the problem, which is typical not only for the Russian Federation, but also for foreign countries, and to find effective methods of the property interests legal defense in relation to family members in case of family disruption. The international migration mobility of the population, which was the characteristic of recent decades, and the significant increase in the number of international marriages, determine the requirement to develop academic knowledge that allows to study the legal problems with consideration of positive and negative foreign experience.<sup>6</sup> One should agree that the European countries have accumulated much more experience in regulation of marital property relations than Russia, which had only the attempts to introduce the institution of marriage agreement for the past twenty years. The development of economic interaction areas requires academic legal science in order to increase its knowledge of foreign legislation, not only in the field related to economic activity, but also in industries that indirectly affect the economic processes. It will allow Russia not only to successfully interact with other countries, but also to improve its legislation with consideration of national, historical and economic characteristics in accordance with such papers as Frolova E. E., Zankovsky S. S., Dudin M. N., Zinkovsky S. B., Kirsanov (2018),<sup>7</sup> Frolova E. E., Polyakova T. A., Dudin M. N., Rusakova E. P., Kucherenko.<sup>8</sup>

The authors applied to general information about the modern approaches to the study of the divorce legal consequences by Debrina Washington (2018)<sup>9</sup>, Wellbank A.B., Ball J (2017), Brough M. (2018) ,<sup>10</sup> Carrascosa González, J (2000)<sup>11</sup>, Gardeñes Santiago, M. (2017)<sup>12</sup> and others in order to provide a comprehensive analysis of existing approaches in Spain to the problem of the property interests legal defense in case of family disruption.

## RESULTS

### *The legal regulation development of marital property relations in Spanish law*

<sup>6</sup> Sitkareva Elena V. , Yulia A. Artemyeva, Svetlana Mendosa-Molina. Corporate migration in cross- border bankruptcy // Abstracts & Proceedings of INTCESS 2019- 6th International Conference on Education and Social Sciences, 4-6 February 2019- Dubai, UAE. P. 989-995. ISBN: 978-605-82433-5-4.

<sup>7</sup> Frolova E.E., Zankovsky S.S., Dudin M.N., Zinkovsky S.B., Kirsanov A.N.. Journal of Advanced Research in Law and Economics. 2018. V. 9. No. 4. P. 1236-1242.

<sup>8</sup> Frolova E.E., Polyakova T.A., Dudin M.N., Rusakova E.P., Kucherenko P.A. Information security of Russia I digital economy: the economic and legal aspects // Journal of Advanced Research in Law and Economics. 2018. V 9. No. 1. P. 89-95.

<sup>9</sup> Debrina Washington. Failure to Pay Child Support. 6 Potential Penalties for Parents Who Don't Pay.// The balance small business. 2.09.2018/ [Electronic resource]. - URL: <https://www.thebalancesmb.com/failure-to-pay-child-support-penalties-2997972>. (Mode of access: 1.06.2020).

<sup>10</sup> Brough M. Child Support Handbook: 2018/2019. // CPAG; 26 ed edition (10 July 2018). ISBN-10: 1910715379

<sup>11</sup> Carrascosa González, J., Matrimonio y elección de ley. Estudio de Derecho Internacional Privado, Comares, Granada 2000.

<sup>12</sup> Gardeñes Santiago, M., «El método de reconocimiento desde la perspectiva del Derecho internacional privado europeo y español»// AEDIPr., vol. XVII, 2017.

The first historically established indication of the law and order applied to the settlement of marital property relations are the Siete Partidas of king Alfonso X the Wise<sup>13</sup> - Partida IV, Title IC, Law 24 referred to "the custom of the land where [the spouses] married" (*costumbre de aquella tierra do fizieron el casamiento*). In the nineteenth century, as a result of the personal statute expansion, the consequences of marriage (as well as property) became subject to the *lex patriae* of the husband. Its reflection is in article 9 of the original version of the Spanish civil code of 1889 (Código Civil Español).<sup>14</sup> In 1974, within the trend of gradual formal gender equality, this collision factor underwent the major changes – part 2 of article 9 of the civil code of Spain which determined the law applicable to personal relations of spouses, referred to the law of the last common nationality of the spouses during marriage and at its absence or inavailability of probable identification, one could determine a marital personal relationships by the law of *lex patriae* as from the date of conclusion of marriage. Part 3 of article 9 of the civil code, which defines the applicable right to the regime of marital property, fixed a blank rule with reference to part 2 of the same article of the Spanish Civil Code and allowed the possibility to change it by preservation of a clause about the right under the legal application in the contract between the spouses a clause on the applicable law, which would indicate a different legal order.

With the enactment of the Spanish Constitution of 1978,<sup>15</sup> these conditions of the Spanish civil code came into conflict with its article 14, which established the gender equality, but preserved legal force until 1990. In addition, the repealed rule remained in force with the regulation of property relations that passed enactment in the period from 1974 to 15.10.1990<sup>16</sup>. In order to avoid the legal conflict with the Constitution, the courts applied the legal norm of article 107.1 of the Spanish civil code, which indicates the legal application of State law to the issue of divorce under the condition of common citizenship legal order, and if it is impossible to establish the citizenship - such legal application refers to the right of the participatory permanent residence<sup>17</sup>. The Constitutional Court of Spain (El Tribunal Constitucional) only in 2002, by its decision No. 39/2002, declared article 9, paragraph 2, of the Spanish civil code, under the amendment of 1974, as unconstitutional and discriminatory on the basis of gender, and abolished the possibility of its application by courts and tribunals since the date of its enactment.<sup>18</sup>

After the amendments to these legal norms by the Law No. 11/1990 dated by 15.10.1990 on the reform of the Civil code<sup>19</sup>, the property consequences of marriage came under the regulation of the law determined by a set of collision norms. As a general rule, the determination of these norms refers to a *lex personalis* that is common to the spouses at the time of the marriage conclusion

<sup>13</sup> Siete Partidas of king Alfonso X the Wise. Translation from Spanish and proslution by A. V. Marea. Translation assessor O. V. Aurov. (The beginning) // the Ancient law. Ivs antiqvvm. - M.: Spark, 2005, № 1 (15). - p. 226-243.

<sup>14</sup> Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil. Gaceta de Madrid» núm. 206, de 25/07/1889.

<sup>15</sup> Constitución española 1978. BOE núm. 311 de 29 de Diciembre de 1978. Pág. 29313 – 29424.

<sup>16</sup> SAP Baleares de 10 de septiembre de 2002, № 542/2002). <http://www.poderjudicial.es/search/indexAN.jsp?org=ap-ts&comunidad=04> (dated by 08.06.2020)

<sup>17</sup> Carrascosa González, J., Matrimonio y elección de ley. Estudio de Derecho Internacional Privado, Comares, Granada 2000, p.123.

<sup>18</sup> Sentencia 39/2002, de 14 de febrero de 2002. Cuestión de inconstitucionalidad 1724/95 BOE núm. 63, de 14 de marzo de 2002, páginas 113 a 120.// <https://www.boe.es/buscar/doc.php?id=BOE-T-2002-5097>(dated by 08.06.2020)

<sup>19</sup> Ley 11/1990, de 15 de octubre, sobre reforma del Código Civil, en aplicación del principio de no discriminación por razón de sexo. BOE núm. 250, de 18 de octubre de 1990.// <https://www.boe.es/buscar/doc.php?id=BOE-A-1990-25089> (dated by 08.06.2020)

- the law of the home country. In the absence of a *lex personalis* – personal law and the law of permanent residence in respect to any of them by the decision of the spouses. This choice can belong to the parties to the marriage together directly at the time of conclusion of marriage. In the absence of such option, the local law regulates the property consequences of marriage. Judge Francisco de Borja Iriarte Ángel Francisco de Borja notes that one can reliably identify the place of conclusion of marriage in 100 percent of cases "...until the conclusion procedure of marriage will start to happen in the "Internet"<sup>20</sup>. In technical sense, one applies the norm of an international Treaty in case of spouses' dual citizenship, and in cases without such a norm - the citizenship associated with the last place of permanent residence, and in his absence or inability to identify such condition in relation to both spouses –one may apply to the last received citizenship of both spouses, in the absence of any citizenship – one applies to the legislation of the last residence of both spouses. The reference to the general marital *lex personalis*, which appeared as a result of the withdrawal of the male spouse's link to the *lex personalis* in 1990, does not apply in cases where the citizenship of the both spouses is the legal consequence of the marriage. The absence of a common *lex personalis* for the spouses entails the principle of autonomy of the will among the parties of marriage. However, this autonomy has limitations on the basis of the possibility to select one of the existing legal regimes: the law of the home country or the law of the permanent residence in respect to any of the spouses at the time of the conclusion of marriage. Whereby, the both spouses must notarize this decision before the marriage. The spouses can not change the more late decision, which makes it possible to speak about the occurrence of a specific collision "*ius connubii*". Professor Rodríguez Pineau, Elena underlines that, on the one hand, this approach satisfies the constitutional principles of equality and freedom of the individual, on the other – one adheres to the principle of legal certainty, which in this case is not imposed by law<sup>21</sup>. The well-known legal theorists José Carlos Fernández Rozas and Sánchez Lorenzo, highlight that the legal protection of the time criterion in respect to the moment of conclusion of marriage by the legislator, as a result of which the *lex personalis* of the spouses (spouse) suspends its legal effect, provides legal certainty of the necessary law and order.<sup>22</sup> Angel F. Leal, in his critics of this approach, notes that "legal certainty complicates the economic turnover every time"<sup>23</sup>. In accordance with the author of this paper, the decision of the legislator considered the current economic and social situation and allowed maximum legal defense in relation to the interests of spouses in a difficult situation of family disruption, minimized the consequences of the "mobile conflict" problem in case when the spouses change their citizenship after the marriage. Currently, with respect to the development of migration processes, the increase of remote opportunities for labor and electronic document management, this approach certainly does not meet the requirements of modern realities. The time design of the spouses choice in respect to the applicable law also causes a lively discussions. Formally, the Spanish civil code indicates that this choice must occur before the marriage.<sup>24</sup> However, article

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<sup>20</sup> Francisco de Borja Iriarte Ángel Competencia de los tribunales españoles y ley aplicable a los efectos del matrimonio// Revista de Derecho UNED, núm. 16, 2015.

<sup>21</sup> Rodríguez Pineau, Elena Régimen económico matrimonial. Aspectos Internacionales, Comares, Granada, 2001, p.31.

<sup>22</sup> José Carlos Fernández Rozas and Sánchez Lorenzo, S: Derecho internacional privado. 7ª edición. Madrid, 2013, p. 446.

<sup>23</sup> Angel F. Leal. Divorce of foreign citizens. // <https://www.angelleal.com/en/>. ( dated by 1.06.2020)

<sup>24</sup> Calvo Caravaco, A. L. y Carrascosa Gonzalez, J., Derecho internacional privado. Granada 2014, 15ª edición, Vol. III p.160.

1334 of the Spanish civil code provides for the following rule: the terms of preliminary marriage contracts lose the binding force if there is no conclusion of the main marriage contract within 1 year from the date of the preliminary contract's conclusion. Thus, the deadline for the selection of applicable law is one year before the date of the marriage contract's conclusion. The definition of *lex personalis* as the *lex patriae* suffers the criticism of the citizens of countries, where one can acquire the citizenship by the virtue of birth on their territory or by the virtue of descent from parents who are citizens of this state, whereby such persons may never have resided on the territory of these countries.<sup>25</sup>

In accordance with part 3 of article 9 of the civil code of Spain, the law recognizes the marriage contract as valid if it complies with the legal order, which determines the marital property consequences and the *lex patriae* or the law of the place of primary residence in respect to any of the spouses at the time of the contract's conclusion. This statutory restrictions in respect to the choice of the legal order by spouses that regulates their property relations obstructs the choice of the State law. In this regard, we consider the State which has no any connection with any of the spouses in order to realize the unlawful avoidance of law. Carrascosa González does not agree with such opinion, J who believes that one cannot assess it as avoidance of law, because in this case it is impossible to establish the norm that the spouses try to avoid<sup>26</sup>.

We should note that over the past decade, many countries have abandoned the criterion of a factual connection in favor of a defense clause in respect to the norms of direct applicability or state preemptory rule closely related to the relationship. One should note that Russian legislation has not escaped such changes. In 2013, by the clause 5 of article 1210 of the Civil code of the Russian Federation the Russian legislation got the amendments, and one changed the criterion of factual connection of relationships with the only one country to the criterion of close connection at the time of choice.<sup>27</sup>

### ***Right of permanent residence.***

The right of permanent residence (domicile) under Spanish law applies almost without alternative to the property of stateless persons and one can apply it in the absence or inability to identify a *lex personalis* – by joint choice of the spouses. The link of the property legal regime of spouses to the right of permanent residence aims to assimilate the married couples in the correspondent territory. The clause within the collision norms in regard to the property legal regime of spouses at the time of conclusion of marriage is a guarantee of legal regulation stability, since one cannot change the registered time of marriage conclusion procedure.<sup>28</sup>

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<sup>25</sup> Frolova E.E., Zankovsky S.S., Dudin M.N., Zinkovsky S.B., Kirsanov A.N. Studying concepts of the breakthrough economic reforms in selected developed and developing countries and regions of the world: economic and legal aspect. *Journal of Advanced Research in Law and Economics*. 2018. V. 9. No. 4. P. 1236-1242.

<sup>26</sup> Calvo Caravaco, A. L. y Carrascosa Gonzalez, J., *Derecho internacional privado*. Granada 2014, 15ª edición, Vol. III p.160. 134-135.

<sup>27</sup> Yulia Artemyeva, Natalya Ivanovskaya, Valentina Koncheva, and Elena Sitkareva. Current Problems of Concluding an Agreement on the Alimony Payment for Minors in Russia. *Advanced Research in Law and Economics*, [S.l.], v. 9, n. 3(33), p. 859-869, June 2018. ISSN 2068-696X.

<sup>28</sup> Frolova E.E., Polyakova T.A., Dudin M.N., Rusakova E.P., Kucherenko P.A. Information security of Russia I digital economy: the economic and legal aspects // *Journal of Advanced Research in Law and Economics*. 2018. V 9. No. 1. P. 89-95.

The identification of the concept "common place of permanent residence" refers to the case law. The higher first instance court of the autonomous community of Asturias, in its Decision of 06.11.2012, in regard to the question of applicable law in the absence of common citizenship of spouses that had no Spanish citizenship, made a decision as follows: "Both spouses are the British citizens and have been permanently residing in Spain for a long time. At the time of the conclusion of marriage, the wife had lived in England for a long time, but was a citizen of Venezuela. Therefore, the applicable law in this case is English, at the place of marriage conclusion procedure."<sup>29</sup>

## CONCLUSIONS

Under the analysis of Spanish legislation in terms of the legislation choice which governs the marital relations of spouses, one can note that the regulation of *lex personalis* in respect to citizens depends on the migration processes within the country. Within the mass labor emigration of Spaniards to the EU countries, in order to ensure the interests of the spouses, the authorities enacted the norm that allowed to use the Spanish law in relation to Spanish emigrants on the territory of other countries. By the end of the XX-beginning of the XXI century, on the contrary, Spain became the country which receives a lot of migrants, which caused a change in approaches and the appearance of a collision link to the law of permanent residence in relation to spouses. The Spanish civil law considers the legal regime of marriage and the legal regime of marital property as a whole. Thus, the above-mentioned trend is also typical for the agreement-based regulation of marital property relations. Except as when in the marriage contract the spouses make a choice in favor of the *lex patriae* or the local law of permanent residence.

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<sup>29</sup> Francisco de Borja Iriarte Ángel Competencia de los tribunales españoles y ley aplicable a los efectos del matrimonio// Revista de Derecho UNED, núm. 16, 2015. ECLI: ES: APO: 2013:2344.

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