



Matrimonial Property in Europe: A Link between Sociology and Family Law

Branka Rešetar*

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1. Introduction

A limited form of the community of property based on the principle of equality and emancipation was introduced for the first time in Europe in the Soviet Union in 1926, replacing the 'separate property' regime.¹

Under the influence of the Soviet Union's example, the eastern European states introduced the limited community of property after World War II, as did a number of other countries which had also moved to some form of the limited community of property (e.g., France, Italy, Spain, Belgium, Portugal and Malta).²

The problem of inequality was also, almost at the same time, being resolved in another part of Europe by introducing deferred community systems which were first developed in the Nordic region from 1920 to 1929. Such systems were later introduced in Germany, Austria, Greece and Switzerland.³

The common goal of these regimes was to ensure the economical protection of the weaker spouse, i.e., women, in cases of divorce or the termination of marriage. The intention was to equalize the position of women and men in the traditional sense of marriage with a male breadwinner and a female housewife, which was common at that time.

* Branka Rešetar LL.M. is lecturer at the Faculty of Law, J.J. Strossmayer University, Osijek, Croatia.

¹ "In the Soviet Union, one realized that, in terms of property relations, normative equalization of spouses by introducing a separate property system had not provided expected results. At that time there were no economic and social conditions which could enable realization of normative equalization. Formal equalization regarding matrimonial property and mutual independence of spouses in a separate property system put woman into a de facto unfair position.", GAMS, A., *Bračno i porodično imovinsko pravo (Matrimonial and Family Property Law)*, Naučna knjiga, Beograd 1966, p. 19-20; ANTOKOLSKAIA, M., "Harmonisation of Family Law in Europe: A Historical Perspective", Intersentia, Antwerp/Oxford, 2006, p. 240. and BRADLEY, D., *Convergence in Family Law: Mirrors, Transplants and Political Economy*, Oxford University Comparative Law Forum (2001), www.ouclf.iuscomp.org.

² ANTOKOLSKAIA, M., (note 1), p. 456-461.

³ ANTOKOLSKAIA, M., (note 1), p. 238 and 461.

These deferred and limited community systems and the completely different marital property system of the common law countries (the separation of property system) have created a picture of matrimonial property systems in Europe that remains colourful to the present day.⁴

From today's perspective of the harmonization of family law in Europe, the deferred and the limited communities of property are found to be equally capable of reaching the objectives of present-day matrimonial property law.⁵ Some research pointing out the desirability of a unified model of matrimonial relations at a European level prefer the limited community of property system since it appears to be the most acceptable and most frequent form of the regulation of matrimonial property relations in Europe.⁶

However, the contemporary notion of marriage does no longer describe marriage as only the traditional relationship with a male breadwinner and a housewife but also as modern union with an equal division of labour inside and outside the home.⁷ This difference between old and new concepts of marriage and matrimonial relations inside and outside the home requires re-questioning the community of property as the most acceptable form of the regulation of matrimonial property relations in Europe today.

A common feature of community of property from the first half of the 20th century and of contemporary communities of property (deferred and limited) is the recognition of the value of indirect contributions with regard to the acquisition and division of matrimonial property. The principle of equal sharing between spouses regardless of the type of contribution is the general rule, not only in the limited and deferred community systems today; it also seems to be in use in the present English system of separation of property. Accordingly, indirect contributions appear to be the essence of the justification.⁸

As the essential relevance of the indirect contribution element is singled out, the first part of the paper deals with the indirect contribution element within the framework of various European matrimonial property regimes. Considering the fact that the science of family law favours interdisciplinary research,⁹ the second part presents new sociological research on the fundamental components of the notion of indirect contributions, which includes the division of households and childrearing tasks between men and women in Europe.

The conclusions drawn by means of the comparative and interdisciplinary research of indirect contribution serve as foundations for a position on the acceptability of community of property in Europe today.

However, the tendencies described in the final part of the paper relating to the division of households and childrearing tasks as well as to the field of matrimonial contracts may point in a different direction: Is the system of the community of property likely to be abandoned in the future and replaced by a system of separate matrimonial property?

⁴ PINTENS, W., "Europeanisation of Family Law", in BOELE-WOELKI, K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Antwerp/Oxford/New York, 2003, p. 9-11.

⁵ See ANTOKOLSKAIA, M., (note 1) p. 483-484; PINTENS, W., (note 4) p. 9-12.

⁶ HEINRICH, D., "Zur Zukunft des Güterrechts in Europa", *FamRZ* 2002, p. 1524.

⁷ The references outline that "due to women's emancipation, increasing female employment and the progress of social welfare, the function of the family as provider of financial means and security has diminished. This development has contributed to an attitudinal shift in the emphasis of marriage, from communitarian to personalistic.", see ANTOKOLSKAIA, M., (note 1) p. 273-275.

⁸ SVEDRUP, T., *Maintenance as a Separate Issue – The Relationship Between Maintenance and Matrimonial Property*, in Boele-Woelki, K. (ed.) *Common Core and Better Law in European Family Law*, Intersentia, Antwerp/Oxford, 2005, p. 122-127 and ANTOKOLSKAIA, M., (note 1) p. 478,479.

⁹ SCHWENZER, I., "Methodological Aspect of Harmonisation of Family Law", in BOELE-WOELKI, K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Antwerp/Oxford/New York, 2003, p.155.

2. The Common Element of Different Matrimonial Property Systems: Indirect Contribution

Indirect contribution will be analyzed through three commonly accepted basic models: the separation of property with judicial adjudication; the deferred community of property; and the limited community of property.¹⁰ Indirect contribution under the unique Dutch system of universal community of matrimonial property will be analyzed separately.

2.1 Systems of Separate Property: England and Wales

The matrimonial property regime is an institution unknown to English law,¹¹ although English law is remarkable in the extent of the court's statutory powers to make financial provision orders, property adjustment orders or sale orders in divorce proceedings (ancillary relief proceedings). It is the court's jurisdiction to deal with all of the economically valuable assets of the two spouses.¹² Section 25 of the Matrimonial Causes Act 1973 (M.C.A. 1973) states principles governing the exercise of the court's discretion with no hierarchy, one of which is: "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family" (M.C.A. 1973, s.25 (2)(f)). Over the last three decades, the courts have had problems in determining financial and non-financial contributions to family welfare. The highest appellate interpretation of section 25(2)(f) was the House of Lord's ruling in *White v. White* (2001) 1 AC 596. It has undoubtedly affirmed the "yardstick of equality" – in effect, equal shares.¹³ In this case Lord Nicholls stated that the equal division should be departed from only if, and to the extent that, there is good reason for doing so. This standpoint was confirmed in the 2002 *Lambert v. Lambert* case by the Court of Appeal. Thorpe LJ specifically clarified that "it is unacceptable to place greater value on the contribution of a breadwinner than that of the homemaker".¹⁴

However, the Law Society's Family Law Committee¹⁵ has pointed out the difficulties in dealing with the width of discretion open to different judges and the task of predictability in outcomes even after *White v. White*. Nevertheless, the Family law Committee's working party rejected the replacement of discretion by formula, and also rejected a straightforward equal division of assets as potentially unfair where the parent with custody needs to retain the former matrimonial home – the only significant asset in many cases – as a home for the children.¹⁶

¹⁰ See ANTOKOLSKAIA, M., (note 1) p. 455.

¹¹ CRETNEY, S., MASSON, J.M. and BAILEY-HARRIS, R., *Principles of Family Law*, Sweet&Maxwell, London 2003, p. 89.

¹² *Ibid.*, p. 330.

¹³ LOWE, N. and DOUGLAS, G., *Bromley's Family Law*, Oxford University Press, Oxford 2007, p. 1082.

¹⁴ For more on the principle of equal division under English law, see ANTOKOLSKAIA, M., (note 1) p. 470-471; CRETNEY, S. et al. (note 11) p. 346-352 and PINTENS, W. (note 4) p. 11-12.

¹⁵ Law Society, *Financial Provision on Divorce: Clarity and Fairness – Proposals for Reform* (2003).

¹⁶ LOWE, N. and DOUGLAS, G., (note 13) p. 1083.

2.2 Systems of Deferred Community of Property: Norway, Denmark, Sweden, Germany, Austria and Greece

In Scandinavia, spouses have separate property during marriage, but an equal division takes place upon divorce.¹⁷

Under *Norwegian* law community property assets are, in principle, to be equally divided between the spouses after the termination of the marriage. The “rule of unequal division” is only a general principle which may be set aside if it leads to an obviously unfair result.¹⁸ In 1975 the Supreme Court of Norway acknowledged an indirect contribution in the form of childcare and housework, and there was no distinction between entitlement and quantification. In the so-called “Housewife case” the Supreme Court ruled that a housewife caring for young children could become the co-owner of the house bought during the marriage by her husband with his income. This method of acquisition departs from the traditional methods of acquiring ownership. The above rule was developed in Supreme Court case law and appeared in the new Marriage Act of 1991. Co-ownership is established on the basis of the parties’ shares in the acquisition of the property. A wife’s indirect contributions, in terms of childcare and housekeeping, and/or the payment of household expenditure, are normally sufficient to constitute her as the co-owner of a house purchased by the husband with his income during the marriage. A similar legal development, departing from the property law concept of acquisition, was in progress in the lower courts of Denmark and Sweden.¹⁹

Danish law determines the deferred community of property (the net estate) to be divided under the principle of the equal division of property, which happens most often in practice. An exception is an unequal division where the marriage has been of short duration and an equal division would be unjust (as one spouse brought into the marriage a larger share of the estate than the other). Where spouses own property separately and in special circumstances, the court has the discretion to take into consideration the duration of the marriage and the economic circumstances of the spouses, the economically weaker spouse’s need to obtain new housing and any contribution in money or money’s worth made by that spouse to the acquisition of the property owned by the other party. The provision widely used in practice is indirect contributions to the house; looking after the home and family.²⁰

The specificity of *Swedish* law is what is known as hidden joint ownership, which may arise according to case law when only one of the spouses has bought and paid for an item or an estate. The purpose of this exception from the main rule is to prevent an unfair division of property.²¹ Upon divorce, all marital property is in principle to be divided equally, except in

¹⁷ SVEDRUP, T. (note 8) p. 123.

¹⁸ LØDRUP, P. in HAMILTON, C. and PERRY, A. (ed.) *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 501-509.

¹⁹ SVEDRUP, T. (note 8) p. 123 and SVEDRUP, T., *Compensating Gain and Loss in Marriage: A Scandinavian Comment on the ALI PRINCIPLES*, FRETWELL WILSON, R. (ed.) *Reconceiving the Family*, Cambridge University Press, 2006, p. 475-477.

²⁰ NIELSEN, L., National report Denmark, in Consortium Asser-UCL, *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, European Commission, http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/denmark_report_en.pdf (2003), p. 12. and NIELSEN, L. in HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 72-82.

²¹ SCHIRATZKI, J., National report Sweden, in: Consortium Asser-UCL, *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, European Commission, http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/sweden_report_en.pdf (2003), p. 7. and SALDEEN, A. in HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 638.

cases when such a division would be unjust. In certain instances an equal division of matrimonial property may be considered to be inequitable towards one spouse with regard to both the length of the marriage and circumstances generally. Thus, the court can adjust the shares that parties receive on the division of property following divorce. The recommendation is that one-fifth of matrimonial property should be entered into the property division for each year of the marriage.²² However, in legal practice the application of the rule in question is much freer.²³

The *German* system of separation during marriage with equalization of accrued gains upon divorce, provides for the statutory regime called the community of gains. Upon the termination of the regime by divorce each spouse is under a duty to account for the increase of his or her property between the beginning and the end of the regime. The difference between the resulting amounts will be split, and the spouse whose increase was less than the other's will have the right *in personam* to claim up to one half of the difference from the other.²⁴ The only possibility of departing from the rule is if the claimant spouse culpably fails to promote the economic or other interests of the matrimonial venture during the marriage. Therefore, the claim must be defeated or curtailed on the grounds of gross inequity. Also, the judge may give weight to other facts, such as adultery or cruelty.²⁵

Under *Austrian* law, if the marriage is terminated, the spouses are entitled to share each other's wealth.²⁶ If spouses reach no agreement, the court has to decide upon the application of the division of their property according to the principle of equity. Assets are to be divided, taking into account the contributions of each spouse to the acquisition of the assets, children's welfare and the debts connected to the expenses of conjugal life, including maintenance, housekeeping, the upbringing of children and assistance in general. The judge can order the transfer of property or expectant rights, of movables and even of real estate, if an equitable partition cannot be achieved otherwise.²⁷ The general quota determined by the court is 50:50. However, the quotas 1:2 or 1:3 are also possible, depending on the financial possibilities of the spouses or the triple burden thereof.²⁸

When a marriage is dissolved under the Law of *Greece*, each spouse may make a claim for a distribution of profits and gains deriving from the property of the other spouse, to which he or she has contributed. On such occasions, every kind of assistance, direct or indirect, could be taken into account. Such assistance can include the performance of the household work, help given to the other's profession, the psychological strengthening of the spouse, the creation of a pleasant family ambiance enabling the other spouse to be very efficient in his/her profession, providing ideas for the development of business activities, and

²² SCHIRATZKI, J., National report Sweden, (note 21) p. 18.

²³ SALDEEN, A., (note 21) p. 640-641.

²⁴ SCHWEPPE, K., in HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 301-302; MARTINY, D., *Family Law*, in ZEKOLL, J. and REIMANN, M. (ed.), *Introduction to German Law*, Kluwer Law International, Netherlands 2005, p. 256-258.

²⁵ SCHWEPPE, K., (note 24) p. 302-309.

²⁶ VERSCHRAEGEN, B., *Family Law Reforms in Austria from 1992 to 1999*, The International Survey of Family Law 2001 Edition, Bainham, E. (ed.), Jordan Publishing Limited, Bristol, 2001, p. 40-42.

²⁷ RECHBERGER, W., National Report Austria, in: Consortium Asser-UCL, *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, European Commission, http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/austria_report_en.pdf (2003), p. 19; KRIEGLER, A., HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 24.

²⁸ RECHBERGER, W., National Report Austria, (note 27) p. 20.

the improvement of social relations which influence favourably the other spouse's profession.²⁹

Such an approach corrects "injustices" of the system of the separation of property. Regarding difficulties when defining the contributions of each spouse, the law establishes a rebuttable presumption that the contribution amounts to one-third of the profits and gains.³⁰ A Greek judge has the discretionary power to determine the modus of division: via monetary compensation or via division in kind (*in natura*).³¹

2.3 Limited Community of Property: France, Italy, Spain and Croatia

In *France*, community of property is addressed to both spouses jointly and is administered by both spouses in equal terms.³² The particularity of the French system is compensatory transfers (*prestation compensatoire*), a combination of matrimonial property law and maintenance.³³ In most cases, the court makes compensatory orders, which can be made over and above the distribution of community of property to compensate as far as possible any disparity in the standard of living of the spouses. The purpose of this order is to maintain the financially weaker party to the best standard possible in the circumstances. The law also authorizes the transfer of real estate owned by one spouse to the other as a valid form of compensatory allowance.³⁴

Under the *Italian* legal matrimonial system both spouses own property (immovable and movable) jointly during marriage, regardless of whether or not the property was purchased jointly or separately. Property belonging personally to a spouse (e.g., by gift or inheritance), or of a strictly personal use, or property used in a particular profession (such as a business established and managed by either spouse) are not included. Profits from property during marriage and income from the separate profession of each spouse are owned separately by each spouse during marriage, but on dissolution of the community, they become part of the community of property.³⁵ When the community of property comes to an end, each party becomes the owner of 50% of the family assets. Separate ownership of property can be proved "by any means", otherwise property is presumed to be owned jointly.³⁶

²⁹ MOUSTRAIRA, E., National report Greece, in Consortium Asser-UCL, Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law, European Commission, http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/greece_report_en.pdf (2003), p. 14-16.

³⁰ KOUNOUGERI-MANOLEDAKI, E. in HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 333-341.

³¹ ANTOKOLSKAIA, M., (note 1) p. 466.

³² CHAUVEAU, V. and CORNEC, A. in HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 261.

³³ BOELE-WOELKI, K., FERRAND, F., GONZÁLEZ BEILFUSS, C., LOWE, N., MARTINY, D. and PINTENS, W., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, Intersentia, Antwerp-Oxford 2004, p. 70.

³⁴ CHAUVEAU, V. and CORNEC, A., (note 32) p. 275.

³⁵ CESCHINI, R., in HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 414.

³⁶ *Ibid.*, p. 425-426.

Spain is a plurilegislative state in civil law matters with different matrimonial property regimes.³⁷ The Spanish Civil Code provides a regime of the community of property which spouses own equally.³⁸ One of the most important institutions under the Catalan Family Code, which provides separate property, is an economic compensation on grounds of invested labour. In cases of judicial termination of marriage, the spouse who has worked for the household or for the other spouse without receiving any retribution or who has received an insufficient retribution shall be entitled to receive economic compensation from the other spouse. This fact has produced a situation of inequality, which in turn implies an unfair enrichment.³⁹ If there is no agreement regulating ancillary matters upon divorce, the judge may make orders in respect of financial provision, the matrimonial home and in respect of any children.⁴⁰

Under the 2003 Croatian Family Law Act, both the limited community of property and separate property are at the disposal of spouses. Community of property involves the property acquired by the spouses with respect to labour during the existence of their marital union⁴¹ and of the income derived from that property.⁴² There are two cumulative conditions for community of property under Croatian law: the property must have been *acquired by the labour* of both spouses, and it must have been acquired *during the marital union*. The labour of the spouses may be of any type: individual or joint, direct or indirect, as long as it creates a new value.⁴³ Thus, indirect contribution – labour that does not directly create a new value but enables the other spouse to increase the value of the property (e.g., taking care of the children, doing housework, providing moral support) – is considered to be a contribution to the community of property.⁴⁴ Legally, the spouses are co-owners of the community of property in equal parts, unless they have agreed otherwise.⁴⁵

³⁷ The Spanish plurilegislative reality offers an interesting frame to contrast and compare the diverse models and its different consequences. While in Catalonia and in the Balearic Islands separate property is the default rule, in the other territories of Spain – including the civil law regimes in Aragon, Galicia, Navarre and the Basque Country – community property is the default rule. ROCA, E., in HAMILTON, C. and PERRY, A. (ed.), *Family Law in Europe*, Tottel Publishing Ltd, West Sussex 2002, p. 599. and LAMARCA, A., FARNÓS, E., AZAGRA, A. and ARTIGOT, M., *Separate Property and Family Self-Determination in Catalonia: A Peaceful Model under a Change?*, Working Paper of Catalan Law No:164, InDret 04/2003, Barcelona 2003, p. 2-3.

³⁸ ROCA, E., (note 37) p. 598-599.

³⁹ LAMARCA, A., FARNÓS, E., AZAGRA, A. and ARTIGOT, M., (note 37) p. 12-13.

⁴⁰ ROCA, E., (note 37) p. 608-609.

⁴¹ Under the Croatian law, a marital union includes an actual relationship and not the existing marital status.

⁴² Material benefit gained with respect to copyrights and copyright-related rights and winning prizes are also included in matrimonial property (Arts. 252 and 254 2003 Family Act).

⁴³ ŠARČEVIĆ, P., *Property Rights in the Family*, Croatia in International Encyclopaedia of Laws, Family and Succession Law – Suppl. 27 (July 2005), Kluwer Law International, The Hague 2005, p. 180 and KORAC, A., *Imovinski odnosi bračnih drugova (Matrimonial Property)* in ALINČIĆ, M., HRABAR, D., JAKOVAC-LOZIĆ, D and KORAC, A., *Obiteljsko pravo (Family Law)*, Narodne novine, Zagreb 2006, p. 495.

⁴⁴ ŠARČEVIĆ, P. (note 43) p. 180; KORAC, A., (note 43) p. 496. The recognition of indirect contribution in terms of the acquisition and division of matrimonial property has been present in Croatian legislation for over 60 years. The first evidence of the term can be found in the Yugoslav Marriage Basic Act of 1946. The legal theory sees it as “a support that spouses provide to each other regarding households, which is primarily related to housewives taking care of food, cleanliness, upbringing and child’s care. Women’s in-house labour enable men to make money working outside their place of living since it relieves them from taking care of their basic needs, satisfaction of which would be otherwise impossible without outsourcing. It is clear that the position of employed women also taking care of household is unique since they give double contribution to their families.”, PROKOP, A., *Komentar Osnovnom zakonu o braku I*, (Comment to The Marriage Basic Act I), Školska knjiga, Zagreb 1959, p. 36.

⁴⁵ Art. 149 2003 Family Act.

2.4 The Netherlands: Universal Community of Property

The matrimonial property regime in Netherlands, which recognizes the complete community of property from the moment of the solemnization of the marriage by the operation of law, is unique in Europe.⁴⁶ The principle of community of property is simple: both parties become owners of all assets gained before and during marriage.⁴⁷ Still, there are some exceptions, such as property acquired pursuant to a hereditary succession, a testamentary disposition, the vesting of a beneficial interest subject to a testamentary obligation of a gift, and pension rights. Spouses have an equal share in a dissolved community of property unless otherwise provided for in a contract or by an agreement entered into between the spouses in writing. In case of disputes concerning property and finances that occur upon the termination of marriage, the court has wide discretionary powers to make orders in respect of finance and property adjustment in ancillary proceedings.⁴⁸ Since spouses often enter into a (pre)nuptial covenant, excluding community of property,⁴⁹ it seems that in the Netherlands spouses create a “prime regime” themselves.

If the different legal techniques comprised in detail in previous research are disregarded,⁵⁰ it can be assumed that indirect contributions in the form of housework and child rearing is recognized by all the analyzed legal systems, so it can be in principle compared with direct contribution.

Depending on the type of matrimonial property regime, there are two basic differences regarding the regulating of indirect contributions: a) time of recognition; and b) way of recognition. The recognition of indirect contributions in the systems characterized by the limited community of property is basically determined in advance or *ex nunc*, from the moment of the conclusion of the marriage, unlike the systems with separate property and deferred community which define indirect contributions at the moment of marriage termination and division of property – irreversibly or *ex tunc*. Indirect contribution is presumed in some systems by the law in a way that, in principle, spouses are legally equal with regard to the economic consequences of the marriage, mostly by the general rule of equal division (Norway, Denmark, Sweden, Germany, France, Italy, Spain, Croatia), while in other systems the key role in recognizing indirect contributions is a discretionary judgment of the court, according to which the indirect contribution is recognized in judicial proceedings pursuant to the principle of equality (Austria, Greece, United Kingdom).

Various systems, some under the law and others by court order, actually equalize the value of indirect and direct contributions, which lead to the functional equality of different European property regimes.⁵¹ Thus, all systems protect the principle of spouse equality and correct the *de facto* inequality of spouses.

⁴⁶ BOELE-WOELKI, K., The Road Towards a European Family Law, Electronic Journal of Comparative Law vol. 1.1. November 1997, <http://www.ejcl.org/11/art11-1.doc>, p. 12; SUMNER, I. and WARENDORF, H., Family Law Legislation of the Netherlands, Intersentia, Antwerp-Oxford-New York 2003, p. 60 and VAN DER BURGHT, G., Overview of Matrimonial Developments in International Survey of Family Law 2007, ATKIN, B. (ed.), Jordan Publishing Limited 2007, p. 209.

⁴⁷ SUMNER, I. and WARENDORF, H., (note 46) p. 66. and BOELE-WOELKI, K., (note 46) p. 12.

⁴⁸ REINHARTZ, B.E., in HAMILTON, C. and PERRY, A. (ed.), Family Law in Europe, Tottel Publishing Ltd, West Sussex 2002, p. 447.

⁴⁹ VAN DER BURGHT, G., (note 46) p. 211.

⁵⁰ See ANOKOLSKAIA, M., (note 1) p. 475-480 and SVEDRUP, T., (note 19) p. 475-479 and the sources quoted there.

⁵¹ ANOKOLSKAIA, M., (note 1) p. 473-480.

Despite the declarative equalization of the position of spouses regarding the economic outcome, almost all systems provide the court with a certain level of discretion. The court may correct a possible injustice arising from the application of the principle of equal division of property.

The relevance and meaning of indirect contributions in the acquisition and division of matrimonial property with regard to all European systems necessitate a closer look at its basic elements: households and childrearing, not only in the field of law but also in the field of sociological research – the topic of the next section.

3. Comparative Sociological Research on Household Labour and Childrearing Tasks Between Men and Women

Looking at a legal definition only provides a halfway solution, since social facts and human behaviour partially determine what is important for the law; not only the law itself.⁵²

The formal legal equality of the spouses is deeply rooted in all European systems, but the image with regard to *de facto* equality of spouses is relatively blurry.⁵³ The real picture of *de facto* equality of spouses according to two essential elements of indirect contribution (household labour and childrearing tasks) will be outlined in this section.

Family researchers have been studying married couples and processes within their households for a number of years. Thus, there is a huge number of comparative sociological evidence which consistently shows the same outcome. Only the most recent evidence is taken into account. The fact that women do most of the housework for their families, even when holding down full-time employment, has led to the introduction of the term of a wife's "second shift" of unpaid work.⁵⁴ Research on the division of household labour in 22 countries⁵⁵ shows that women do more housework than men do in all of the surveyed countries.⁵⁶ Empirical studies that span the last several decades have found that even though women are doing less housework than they did in the past and men are doing slightly more, women still do at least twice as much housework as men do.⁵⁷ Sociologists who have comparatively examined the effect of wives' employment on the division of housework in 10 countries, including some European⁵⁸ ones, have demonstrated the wife's dominant share of

⁵² SCHRAMA, W.M., "General Lessons for Europe Based on a Comparison of the Legal Status of Non-Marital Cohabitants in the Netherlands and Germany", in BOELE-WOELKI, K. (ed.) *Common Core and Better Law in European Family Law*, Intersentia: Antwerp-Oxford, 2005, p. 258.

⁵³ ANTOKOLSKAIA, M., (note 1) p. 475.

⁵⁴ BUBER, I., *The influence of the distributions of household and childrearing tasks between men and women on childbearing intentions in Austria*. Max-Planck-Institute for Demographic Research; Working paper, January 2002. Available at: <http://demogr.mpg.de>.

⁵⁵ Norway, United States, Sweden, Canada, East Germany, Israel, New Zealand, Great Britain, Slovenia, Hungary, West Germany, Netherlands, Austria, Russia, Bulgaria, Poland, northern Ireland, Czech Republic, Australia, Ireland, Italy and Japan.

⁵⁶ BATALOVA, J.A. and COHEN, P.N., *Premarital Cohabitation and Housework: Couples in Cross-National Perspective*, *Journal of Marriage and Family* 64 (August 2002): 743-755.

⁵⁷ *Ibid.*, p. 746. According to researches of Bittman and Pixel, 1997; Coltrane, 2000; Maddock, Hogan, Antonov and Matskovsky, 1994.

⁵⁸ Norway, Sweden, Germany, Austria, Ireland and Hungary.

housework in every developed country.⁵⁹ This thesis is supported by research conducted in all EU countries⁶⁰ as well as by other research showing the same result, regardless of women's employment status.⁶¹

As for childrearing in practice, legal principles concerning the joint exercise of parental responsibility are common in Europe. The introduction of two Dutch longitudinal studies involves an assumption based on international references on fatherhood, according to which, men are not very much involved in caring for their children. Furthermore, Dutch fathers do not differ very much from fathers in several other countries.⁶² One of the key findings based on work undertaken in fourteen European countries⁶³ referring to the period from 1994 to 2001 is that mothers across Europe still spend much more time caring for their offspring than fathers do.⁶⁴ One of the key findings of recent research in the United Kingdom is that time spent by fathers with their children accounts for about one-third of total parental childcare time.⁶⁵ Research undertaken in Austria shows that childcare tasks are shared to a greater extent by both partners: eight out of ten women have reported that they share at least one of the four childcare tasks with their partner.⁶⁶ The same conclusion about the dual burden of women and their dual presence in the family and on the labour market has been drawn in recent Italian research.⁶⁷ Despite a rapid rise in mothers' labour force participation, the time spent with their children has turned out to be quite stable over time. Therefore, it has been suggested that mothers, on average, have not reduced their time with their children.⁶⁸

In the field of family law research, it has been found that around 90% of children live with their mothers after divorce, also in countries where a greater majority of married women have paid work.⁶⁹ The results of recent comparative law research on this issue are as follows. Children in Europe—from the “progressive” northern Europe to the “conservative” South—

⁵⁹ FUWA, M. and COHEN, P.N., Gender segregation regimes and the division of household labour. 2004. Available at <http://pao2004.princeton.edu/download.asp?submissionId=41896>.

⁶⁰ DAVIS, S.N., GREENSTEIN, T.N., GERTEISEN MARKS, J.P., Effects of Union Type on Division of Household Labor, *Journal of Family Issues*, Vol. 28, no. 7, September 2007, p. 1529.

⁶¹ GEIST, C., The Welfare State and the Home: Regime Differences in the Domestic Division of Labour, *European Sociological Review*, Vol. 21, no. 1, February 2005, p. 23-27.

⁶² SPRUIJT, E. and DUINDAM, V., Was there an increase in caring fatherhood in the 1990s? Two Dutch longitudinal studies, *Social behaviour and personality*, 2002, 30(7), p. 683.

⁶³ The countries that have been included in the research are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom.

⁶⁴ However, fathers in the Nordic countries spend the most time caring for children and fathers in Greece and Portugal spend the least. Also, an interesting key finding is that on average, fathers who spend more time with children also earn more per hour and work fewer hours than those fathers who spend less time with their children. SMITH, A., Working fathers in Europe earning and caring?, Centre for research on families and relationships, Research briefing 30, The University of Edinburgh, January 2007. Available at: http://www.sps.ed.ac.uk/_data/assets/pdf_file/0004/6538/rb30.pdf.

⁶⁵ O'BRIEN, M. and SHEMILT, I., Working Fathers: Earning and Caring, University of East Anglia, Equal Opportunities Commission 2003. Available at: <http://www.workingbalance.co.uk/pdf/ueareport.pdf>, p. 23.

⁶⁶ BUBER, I., (note 54) p. 14.

⁶⁷ ROSINA, A. and SABBADINI, L., Diventare padri in Italia, Fecondità e figli secondo un approccio di genere, *Argomenti* n. 31-2006, Istituto nazionale di statistica, Roma 2006, p. 152. Available at: http://www.istat.it/dati/catalogo/20051020_00/Arg_ediz_prov_vdiventare_padri.pdf.

⁶⁸ There is a question: How could the time investments in children be so similar for employed and unemployed mothers? One possibility is that working mothers may “shed load” in other areas, reallocating priorities to protect time with children. Employed mothers report less sleep, spend slightly fewer hours in personal care and report significantly fewer “free-time” or “leisure” hours. BIANCHI S.M., Maternal employment and time with children: dramatic change or surprising continuity? *Demography*, Vol. 37, no. 4, November 2000, p. 401, 406-410.

⁶⁹ SVEDRUP, T., (note 8) p. 134.

live primarily with their mothers after divorce or after the dissolution of a cohabiting relationship: Sweden 83%; England 80%; Germany 85%; Italy 85.5%; and Croatia 82.9%.⁷⁰

Since “abstracting from details sometimes reveals the general lines more clearly”,⁷¹ it may be useful to abstract some differences among different countries concerning the amount of time spent on household chores or looking after children by men.⁷² Concentrating on the same common problem still present in Europe at the beginning of the 21st century, empirical research in Europe conclusively and consistently shows the reality in families concerning housework and childrearing (as elements of indirect contribution to matrimonial property): there is still no *de facto* equality between spouses. Regarding the EU, the same conclusion has already been emphasized in theory by the “dominant ideology of the family” which determines the husband as the main breadwinner and the wife as the primary carer of children and other dependants.⁷³ This conclusion is not a new one, but it can help in determining the preferred purpose and concept of matrimonial property systems in Europe: regulation of the modern model of partnership or protection of the weaker party?

4. Matrimonial Property Regimes: Regulation of the Modern Model of Partnership or Protection of the Weaker Spouse?

Is it possible today to talk about marriage as a modern model of partnership which should be based on the independent positions of husband and wife, autonomy and negotiated division of labour outside and inside the home?

On the one hand, recent law references point to the “modern model of partnership marriage, where each spouse is availed an equal share of family assets regardless of the way he or she contributes to their acquisition: child rearing and household work or paid jobs and business activities”.⁷⁴ Furthermore, in modern marriages, paid employment is a plausible alternative for the wife working in the home. Spouses adjust their careers to the fact that they have children and that there are two breadwinners in the family. Their economy is adjusted according to the total amount of income, investments and expenditure whereas their lifestyles, work patterns, investments and consumption are adjusted in accordance with the rationale of their needs.⁷⁵ Matrimonial law is based on the principle of partnership that initially introduced a departure from the patriarchal principle, where the husband was considered to be the head of the family, towards a partnership principle, according to which both spouses are equal and have the same rights and duties.⁷⁶ A different source says that today’s family functions mainly as an equal partnership for sexuality, feelings, children and consumption.⁷⁷

⁷⁰ REŠETAR, B. and EMERY, E. R., Children’s rights in European legal proceedings: Why are family practice so different from legal theories?, *Family Court Review*, Vol. 46, No. 1, January 2008, p. 65-76.

⁷¹ ANTOKOLSKAIA, M., (note 1) p. 475.

⁷² E.g., there are considerable differences between countries in the percentage of fathers who spend substantial paternal time with children under six years old. For example, 43 % in Denmark and only 8% in Portugal; in Finland 30% and in Greece 11%, SMITH, A., (note 64) p. 2-3.

⁷³ McGLYNN, C., *Families and the European Union. Law, Politics and Pluralism*, Cambridge University Press, 2006, p. 23.

⁷⁴ VERBEKE, A., cited in ANTOKOLSKAIA, M., (note 1) p. 478.

⁷⁵ SVEDRUP, T., (note 6), p. 132-133; SVEDRUP, T., (note 19) p. 479.

⁷⁶ RECHBERGER, W., (note 27) p. 6.

⁷⁷ NIELSEN, L., (note 20) p. 4.

On the other hand, some authors, concerning matrimonial property legislation, do not refer to marriage as a modern model of partnership but mostly talk about legal protection of the weaker or homemaking spouse.⁷⁸ Some authors emphasize that family practices today are the continuing reality of women's economic disadvantage and vulnerability within both families and the labour market.⁷⁹

A sociological approach might explain the relationship between spouses and increase understanding of the needs and demands of law and policies when dealing with families in the future.⁸⁰ Thus, recent sociological research states that important determinants of division of housework between partners are micro-level processes⁸¹ such as a) gender ideology, b) relative resources and c) time availability.⁸²

The gender theory is based on gender-specific behaviour and roles, with labour being divided to express gender differences symbolically. It should be kept in mind that diverse social structures incorporate gender values and convey gender advantages.

According to the relative-resources explanation, the individual with the most resources (education, earnings, occupational prestige) uses those resources to negotiate his or her way out of housework and spend less time on domestic activities, which is consistent with the neoclassical economists' idea that families look for rationality to maximize the potential earnings of the entity.⁸³

According to the time-availability theory, persons in the labour market and, in particular, those who work long hours have less time on their hands for household tasks, especially when both spouses are employed.

Despite the validity of all three approaches, gender remains the dominant and most important determinant of the division of housework.⁸⁴

⁷⁸ DETHLOFF, N. and KROLL, K., *The constitutional court as driver of reforms in German family law*, Bainham, A. (ed.), *The International Survey of Family Law*, 2006 Edition, Family Law, Jordan Publishing Limited, Bristol, 2006; p.232; PATTI, S., *Diritto privato e codificazioni Europee*, Giuffrè Editore, Milano 2007, p. 263 and LAMARCA, A., FARNÓS, E., AZAGRA, A. and ARTIGOT, M. (note 37) p. 13.

⁷⁹ McGLYNN, C., (note 73) p. 32-33.

⁸⁰ *Ibid.*, p. 30.

⁸¹ On the other hand, macro-level differences (different welfare state regimes) in the division of labour across regimes cannot be explained by differences in levels of individual characteristics. Equal sharing of housework by both partners is rare in conservative countries, regardless of their relative resources, time availability and gender ideology, suggesting that the division of labour at home is not only negotiated by two partners, but also shaped by contextual factors. GEIST, C., (note 61) p. 23.

⁸² BUBER, I., (note 54) p. 8; GEIST, C., (note 61) p. 23 and DAVIS, S.N., GREENSTEIN, T.N., GERTEISEN MARKS, J.P., (note 60) p. 1247-1250.

⁸³ KREMER, M., *The Cultural Dimension of Welfare States Ideals of Care and Women's Work*, Paper presented at the ESPA net Conference 2005 September 22-24. University of Fribourg, Switzerland, p. 9-11. "Nobel prizewinner Becker (1981) argues that when decisions are made within the family, people behave altruistically and aim at the best financial profits for the family as a whole. This decision-making process within households is different from market processes. In families, people's actions are not based on straightforward individual calculations as in the marketplace: household behavioural rules are altruistic. The person with highest productivity in the household will specialise in household tasks (women), the other person will enter the labour force (men). This explains why women and men sometimes act contrary to their individual economic self-interest, as they are thinking about the economic profits of the family as a whole." *Ibid.*, p. 10.

⁸⁴ *Ibid.*, p. 9-13 and BUBER, I., (note 54), p. 10. For example men who were dependent on a woman on financial grounds did less housework. This phenomenon has been characterized as gender-deviance neutralization. Further, cohabiting men report performing more household labour than do married men, and cohabiting women report performing less household labour than do married women., DAVIS, S.N., GREENSTEIN, T.N., GERTEISEN MARKS, J.P., (note 60), p. 1249.

Unlike the above sociological theories, legal theories particularly emphasize the Beckerian theory of *homo economicus* (i.e., relative-resources theory). They also point out the fact that the accommodation of spouses with respect to their economic behaviour has little to do with dependence and the lack of equality between men and women.⁸⁵

Sociological empirical findings contradict this approach showing that wives do more housework than husbands even when wives earn more than their husbands.⁸⁶ Thus, researchers in the field of sociology have also drawn the conclusion that the concept of individual, autonomous choice is not the right word for the process of decision-making on caring (and housework). The concept of individual preferences is inadequate to understand women's and men's lives. Hence, rather than describing dependence within households as an altruistic heaven, as Becker does, households are better presented as an arena of cooperative conflict.⁸⁷

The aforementioned evidence for the *de facto* non-equal starting position of spouses and the sociological explanation for such human behaviour show that marriages in Europe today are very rarely based on the modern model of partnership which requires equality, autonomy and independency. This assumption is in accordance with the prevalent EU ideology of the family, claiming that the husband is the main breadwinner and the wife the primary carer of children and other dependants.

Accordingly, the idea of community of property, which was historically introduced for the protection of women (as housewives),⁸⁸ seems to be the most appropriate system even today.⁸⁹ That is not only because it is the most common system in Europe but also as it is "the best solution" for the evident inequality between spouses with respect to Europe, all based on the dominant EU ideology of the family.

Surprisingly, some indications in the field of matrimonial contracts as well as in the field of the division of households and childrearing may identify new trends that could influence different matrimonial property relations in future.

The following section will deal with the results of research conducted in the field of matrimonial contract law and sociology.

5. New Trends Concerning Matrimonial Contracts, Households and Childrearing

The first part of this section specifies the preferred regime of matrimonial contracts, while the second part outlines new trends in the divisions of households and childrearing. The one question that remains is whether the observed indications of *de facto* equality between spouses influence a modern approach towards matrimonial property relations?

5.1 What is Happening in the Field of Matrimonial Contracts?

Traditional *English* law does not enforce, and statute law renders void, any provision in an agreement in terms of matrimonial contracts. An agreement for the compromise of an ancillary relief application does not give rise to an agreement enforceable in law and is not governed by ordinary contractual principles; the award is always fixed by the court. A private

⁸⁵ SVEDRUP, T., (note 8) p. 130-131.

⁸⁶ DAVIS, S.N., GREENSTEIN, T.N., GERTEISEN MARKS, J.P., (note 60), p. 1249.

⁸⁷ KREMER, M., (note 83) p. 12.

⁸⁸ See history of community of property in ANTOKOLSKAIA, M., (note 1) p. 456-460.

⁸⁹ The advantage of limited community systems is reflected in the fact that they provide better protection for the weaker spouse with respect to other systems. It grants spouses equal rights and improves the position of a housewife were resolved from the outset. ANTOKOLSKAIA, M., (note 1) p. 460.

agreement could be achieved by asking the court to embody the parties' agreement in a court order (the consent order).⁹⁰

Under *Danish* law, spouses can enter into contract with each other and opt for totally or partially separate property which, in practice, is often done. Only 1% of disputed settlements end up in the probate court.⁹¹ Matrimonial contracts in *Sweden* are allowed and are frequently made.⁹²

Apart from the statutory regime in *Germany*, the Civil Code provides for two other types of matrimonial settlement: a) pure and simple separation; and b) community. In practice, separate property is rather frequent and community very rare.⁹³ Most marriage contracts only modify the statutory regime or opt for the separation of property. The community of property is mainly chosen in rural areas, if at all. Divorced spouses tend to opt for a strict separation of goods.⁹⁴ Although marriage contracts are not frequently made, it seems the number of contracts defining pure and simple separation of property is increasing.⁹⁵ The marriage contract in *Austria* has to aim at an extensive regulation of the economic relations of the marriage. In case of divorce, the goods have to be divided by spouses in consent. About 90% of divorces end up by consent. The regime of separation is the most commonly used matrimonial property system.⁹⁶ In *Greece* – from 1989, when the specific public book, in which contracts, constituting the community of property regime, are registered, came into force, until 1997 – only three such contracts had been registered. The institution of community of property remains undeveloped. These types of regime have no roots in Greek society.⁹⁷

In *French* legal practice, only about 10% of spouses make pre-nuptial agreements, which usually happens only when large and important assets are involved, especially regarding second marriages.⁹⁸ *Italian* spouses may, by means of a contract, choose an applicable property regime. However, they have a limited possibility of contracting since they can neither make contracts which are not foreseen by the law nor adjust contracts to their needs and make “atypical” contracts.⁹⁹ The number of contracts made in Italy is increasing as is the use of a separate property regime.¹⁰⁰ The dissimilarity in the practice in matrimonial contracts between *Catalonia* and *Spain* is mainly due to the different matrimonial property default regimes (separate property regime in Catalonia, and community property regime in other territories of Spain), as well as to different social and economic traditions. The great majority of matrimonial contracts concluded under the community property regime aim to circumvent that matrimonial property regime. Therefore, self-determination in community

⁹⁰ CRETNEY, S. et al. (note 11) p. 321-323 and LOWE, N. and DOUGLAS, G., (note 13) p. 1012-1015.

⁹¹ NIELSEN, L., National report Denmark, (note 20) p. 11.

⁹² SCHIRATZKI, J., National report Sweden, (note 21) p. 7.

⁹³ SCHWEPPE, K., (note 24) p. 302-309.

⁹⁴ COESTER-WALTJEN, D., COESTER, M., National report Germany, in: Consortium Asser-UCL, Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law, European Commission, 2003,

http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/german_report_en.pdf. (2003), p. 4.

⁹⁵ HEINRICH, D., (note 6) p. 1525-1526 and HEINRICH, D., *Comunione dei beni e comunione degli incrementi: un confronto critico*, Familia 4-5/2004, Giuffrè Editore, Milano 2004, p. 828.

⁹⁶ RECHBERGER, W., National Report Austria, (note 27) p. 19.

⁹⁷ MOUSTRAIRA, E., National report Greece, (note 29) p. 8.

⁹⁸ CHAUVEAU, V. and CORNEC, A. (note 32) p. 261.

⁹⁹ CESCHINI, R., (note 35) p. 414; PATTI, S., (note 78) p. 259-268 and PATTI, S., *Regime patrimoniale della famiglia e autonomia privata*, Familia 2/2002, Giuffrè editore, Milano 2002, p. 288-293.

¹⁰⁰ PATTI, S., (note 78) p. 259-268 and PATTI, S., (note 99) p. 288-293.

property territories in practice implies the adoption of the separate property regime.¹⁰¹ Contemporary *Croatian* legislation grants spouses the possibility to modify and terminate the legal property regime (i.e., the limited community of property).¹⁰² Restraints in terms of marital contracts have been minimized and contract freedom is huge. Nevertheless, the practice of making marital contracts has not been popular.¹⁰³

Spouses in *the Netherlands* often enter into prenuptial covenants (contracts), excluding the community of property. During the last 50 years netting covenants have become increasingly popular.¹⁰⁴ The netting covenant system may be applicable where there is a partial or an entire separation of property. A very popular version is the so-called Amsterdam-netting Covenant. Over 75% of marriage covenants contain such a system. Couples marry without any community of property and the covenant stipulates that, each year, the surplus of the incomes of both parties will be netted on a 50:50 basis, after the costs of joint households have been deducted.¹⁰⁵

It may be concluded that deferred community of property systems such as those of Denmark and Sweden often include making premarital contracts which opt for partial or total separation of property. Germany does not show a high frequency of premarital contracts, but there has been a rise in contracts opting for the strict separation of property. In Austria extensive regulation of the economic relationship of the marriage is common, as is the separation of property. Greece has hardly developed its community of property system. Referring to the group of countries with the limited community of property, there has been an increase in the contractual regulation of matrimonial relations and a tendency towards the separation of property. The Spanish studies, characterized by different property regimes, have also shown a tendency towards the separation of property. In Italy, where making premarital contracts is fairly unusual, contractual regulation of matrimonial relations defining separation of property is gradually becoming popular. In the Netherlands as many as 75% of spouses conclude netting contracts being a prerequisite for partial or total separation of property. The 'picture perfectness' regarding the tendency towards separation of property in this study is only disturbed by France with 10% of concluded premarital contracts and Croatia as a former socialist country with an undeveloped practice of concluding premarital contracts.

¹⁰¹ LAMARCA, A., FARNÓS, E., AZAGRA, A. and ARTIGOT, M., (note 37) p. 9. One of every three marriages made a marital contract in Spain, where the legal system is community of property, whereas in Catalonia, where the legal system is separate property, almost every tenth married couple conclude a marital contract. In the year 2001 there were 30.83% of spouses who made a marital contract in Spain while, referring to Catalonia, in the year 2002 there were 12.12% of the married couples who concluded marital contracts. It is important to remark that the significant number of marital contracts was concluded in Spanish Regions ruled under the Civil Code want to exit the community default regime and to agree upon a separate regime. *Ibid.*, p. 11.

¹⁰² MAJSTOROVIĆ, I., Bračni ugovor – novina hrvatskog obiteljskog prava (Matrimonial Contract – Novelty of Croatian Family Law), Sveučilišna tiskara d.o.o., Zagreb 2005, p. 221-222.

¹⁰³ HRABAR, D., Status imovine bračnih drugova – neka pitanja i dvojbe (The Status of the Spouses Property – Some Questions and Dilemmas), in: Aktualnosti hrvatskog zakonodavstva i pravne prakse (Current Issues in the Croatian Legislation and Legal Practice), Vol. 9, Društvo za građanskopravne znanosti i praksu Hrvatske/Organizator, Zagreb 2002, p. 57.

¹⁰⁴ Under this contract parties are obliged to compensate along lines other than those resulting from property law. These agreements do not change the relationship in terms of property law, they only create contractual duties. The obligation to net shall relate exclusively to income or capital acquired by the spouses while such an obligation existence. The division of income or of capital shall be made 50:50 and shall be made in money. See VAN DER BURGHT, G., (note 46) p. 211. and SUMNER, I. and WARENDORF, H, (note 46) p. 75-76.

¹⁰⁵ In practice, spouses who are married under a periodical netting covenant very rarely settle accounts in time. See VAN DER BURGHT, G., (note 46) p. 211-212.

Despite the reasons for frequent contractual regulation of matrimonial relations in terms of the separation of property,¹⁰⁶ the fact remains that European spouses tend to determine their matrimonial property independently, either by a premarital contract or by a division agreement not imposed by court (e.g., in Denmark and Austria). To sum up, the contractual regulation of matrimonial property relations in Europe shows a clear tendency towards the separation of property.

5.2 The New Generation Has a Different Approach to Family Life

Despite the continuing reality of women's economic disadvantage and vulnerability within homes and families (including the labour market),¹⁰⁷ it seems that younger generations have a different approach to family life. These generations are not imprisoned by their parents' traditional roles of being breadwinners and homemakers. Almost all the surveys referred to in this paper indicate that the division of household chores and childrearing is undergoing change. According to some authors, a trend towards increased cohabitation may be part of a broader social trend towards a more egalitarian division of household labour, seen in non-cohabiting as well as cohabiting couples.¹⁰⁸ Father involvement has generally been increasing slowly but surely over the past three decades. It may be said that caring fathers are those who work fewer hours away from home, are younger and who have wives who work more hours away from home and who are relatively young.¹⁰⁹ Within marriage, fathers are spending more time with their children than they did in the past.¹¹⁰ Many men, especially younger consorts, wish to participate more fully in family life. International time-budget studies show an increase in the time fathers spend caring for their children, with the increase in father involvement greatest where both partners work.¹¹¹ It is very likely that young husbands will not have the same role as their fathers since they are aware of their role in their children's development. Simultaneously, they are going through changes in terms of their role as breadwinners.¹¹² It is clear that the classical ideology of a traditional family is changing.¹¹³

¹⁰⁶ E.g., in Germany: the lack of knowledge about the contracting possibilities, the wealth of spouses, if one of the spouses is an entrepreneur or has been divorced on a former occasion and therefore had already to cope with the financial consequences of divorce. COESTER-WALTJEN, D., COESTER, M., (note 94) p. 4. If financial means are not evenly distributed between spouses in the beginning of marriage. Consequently, the debenture of a spouse regardless of the fact whether it arose during marriage or prior to its conclusion, can be covered from the total matrimonial property. HEINRICH, D. (note 95) p. 826-829; in France usually only when large and important assets are involved, especially on second marriages. CHAUVEAU, V. and CORNEC, (note 32) p. 261; in Spain creditor claims, high divorce rate and the growing tendency of divorce make individuals conclude premarital contracts. LAMARCA, A., FARNÓS, E., AZAGRA, A. and ARTIGOT, M., (note 37) p. 15 and in the Netherlands one of the reasons is that they want to avoid recourse for creditors if one of them goes bankrupt. VAN DER BURGHT, (note 46) p. 211.

¹⁰⁷ McGLYNN, C., (note 73) p. 30-35. Empirical work on heterosexual couples routinely continues to find that men exercise more power than women in partnerships, for example by having greater choice regarding domestic work and childcare and by having greater control of family finances. *Ibid.*, p. 31.

¹⁰⁸ BATALOVA, J.A. and COHEN, P.N. (note 56), p. 743.

¹⁰⁹ SPRUIJT, E. and DUINDAM, V., (note 62) p. 694.

¹¹⁰ BIANCHI S.M. (note 68) p. 401.

¹¹¹ "This generation of fathers express a strong, family-based temporal conscience that keeps them vigilant in their fathering commitment. The value of spending time with the children has not been inherited from their own fathers but, rather, has been embraced in response to a new set of cultural conditions." O'BRIEN, M. and SHELILT, I. (note 65) p. 1.

¹¹² ROSINA, A. and SABBADINI, L. (note 67) p. 155.

¹¹³ See a Roadmap for equality between women and men 2006-2010 /SEC(2006)275/ which outlines six priority areas for EU action on gender equality for: equal economic independence for women and men; reconciliation of private and professional life; equal representation decision-making; eradication of all forms of gender-based

If factual equality of spouses within and beyond the family really comes to existence in the future, the element of indirect contribution will lose its current importance. Until then, it will not be possible to talk about marriages as a modern model of partnership which should be based on the independent positions of husband and wife, autonomy and negotiation of the division of labour inside and outside the home. Such a modern marriage would also require a modern approach towards matrimonial property relations. Therefore, the need to take the element of indirect contribution into account would only be an exception and not the principle. The system of the community of property could, under such circumstances, be found obsolete and patriarchal.

6. Conclusion

The Russian attempt at equalizing spouses in terms of matrimonial property by introducing a system of separation of property in the first half of the 20th century was a failure. That system of separate matrimonial property put women in a *de facto* unfair position as compared to men. This flaw was corrected by replacing the above system with a limited form of community of property which was also adopted by other eastern European countries after World War II. The legal matrimonial property system was intended to deal with the problem of *de facto* social inequality of men and women. The essence of such systems was the recognition of the value of indirect contributions regarding the acquisition and division of matrimonial property, which has remained an important feature of systems of community of property to the present day.

Even today, the value of indirect contributions and its equalization with direct contributions in terms of the acquisition and division of matrimonial property are recognized as the common element of all European matrimonial property systems. Moreover, they are deemed the main factors in leading to the functional equalization of different European matrimonial property systems. While some systems implement the equalization of direct and indirect contributions by means of the law, other systems leave that to the courts. In that way, the basic principle of the equality of spouses is preserved in all the European legal systems and their *de facto* unequal position is corrected. Another common element in these systems is a judiciary discretion with respect to all cases in which the even division of property (by equalizing direct and indirect contributions) may lead to obvious injustice. It may be concluded that the law successfully adjusts itself to social and family reality in various ways.

In spite of the existence of different marriage models and the search for a new concept of marriage,¹¹⁴ the issue of family realities concerning households and childrearing (as elements of indirect contribution to matrimonial property) in Europe indicates the persistence of an old problem: there is still no *de facto* equality of spouses. This same conclusion has already been emphasized in legal theory by the “dominant European ideology of the family” where the husband is the main breadwinner and the wife the primary carer of children and other dependants.

In terms of the harmonization and unification of European matrimonial property systems, there is a search for a solution that would best fit the needs of modern-day families. The needs of these families and of spouses can only be understood through interdisciplinary research.

violence; elimination of gender stereotypes; promotion of gender equality in external and development policies. COM(2006)92.

¹¹⁴ “E.g. a traditional marriage with a male breadwinner and a housewife, a modern marriage with an equal division of labour in and outside the household...”, ANTOKOLSKAIA, M., (note 1) p. 273.

The sociological explanation of the behaviour of spouses presented above shows that marriages in Europe today are hardly ever based on the modern model of partnership which requires equality, autonomy and independence. Accordingly, the concept of community of property, which was originally introduced to protect women, seems to be the most appropriate system even today. That is not only because it is the most common property system in Europe but also as it is “the best solution” for the most current problems: *de facto* non-equality between men and women and the dominant EU ideology of the family.

However, what must not be neglected is that new, different trends are emerging. European spouses are striving for independent regulation of matrimonial property relations in terms of separation of property. The other trend appearing on the horizon with regard to younger generations (members of which are probably younger than most members of law commissions) and their division of housework and childrearing may induce the modification of the classical ideology of the traditional family. The same tendency may be observed in EU policy. These indicators all suggest the feasibility of factual equality of spouses. Only when that has been achieved will it be possible to talk about marriage as a modern model of partnership which should be based on the independent positions of husband and wife, autonomy and negotiated division of labour inside and outside the home. Such a modern marriage or partnership would require a modern approach towards matrimonial property relations. That approach would definitely not involve the system of community of property that has primarily served as an instrument of artificial corrective justice of factual inequality of spouses, both within and beyond the family.

It may be utopian to imagine a future matrimonial property system based on the autonomy and responsibility of spouses with the concept of corrective justice through state interference being the exception. Nevertheless, everything seems to call for it.¹¹⁵

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¹¹⁵ See SCHWENZER, I. in collaboration with DIMSEY, M., *Model Family Code - From a Global Perspective*, Intersentia, Antwerp-Oxford 2006.