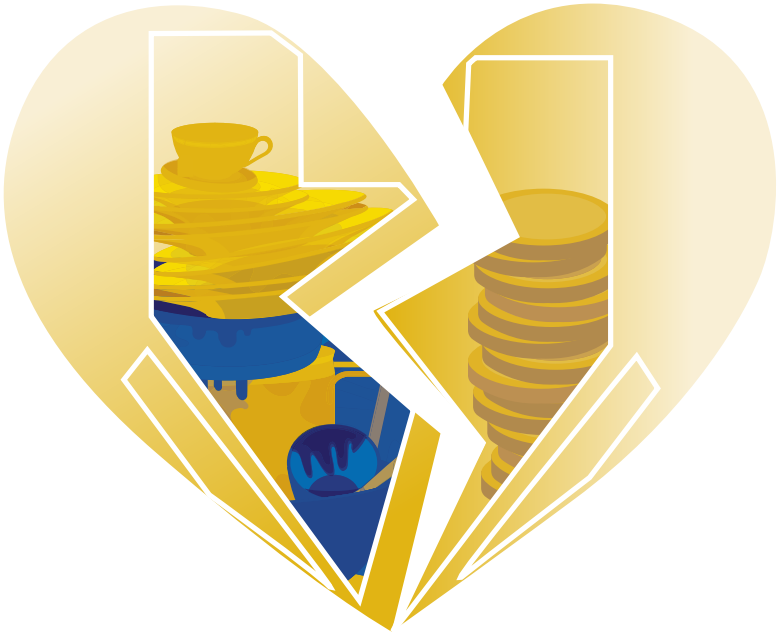

Valorisation of Household Labour in Family Property Law

A Comparative Perspective

Charlotte Declerck and Leon Verstappen (Eds.)

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This book provides a comparative overview of the valorisation and compensation of household labour in property relations between spouses and cohabitants. Academic experts from Belgium (Prof. Charlotte Declerck and Prof. Ingrid Boone), Germany (Prof. Katharina Lugani), England & Wales (Prof. Anne Barlow), France (Prof. Véronique Bouchard-Barabé), The Netherlands (Prof. Leon Verstappen and Prof. Wilbert Kolkman), Norway (Prof. Tone Sverdrup) and Spain & Catalonia (Prof. Josep Ferrer-Riba) examine the topic from the perspective of their particular legal systems. The book concludes with a comparative analysis from Prof. Leon Verstappen and Prof. Charlotte Declerck.

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Preface

This book is the outcome of the first international closed expert seminar of RETHINKIN_, a scientific research network of the Research Foundation Flanders, held in Antwerp on 12 and 13 November 2015. This seminar was dedicated to "Family Studies' Perspectives towards Household Production" and more specifically to "Valorisation and Compensation of Household Labour through Relationship and Property Law". Academic experts from Belgium (Prof. Charlotte Declerck and Prof. Ingrid Boone), Germany (Prof. Katharina Lugani), England & Wales (Prof. Anne Barlow), France (Prof. Véronique Bouchard-Barabé), The Netherlands (Prof. Leon Verstappen and Prof. Wilbert Kolkman), Norway (Prof. Tone Sverdrup) and Spain & Catalonia (Prof. Josep Ferrer-Riba) analysed the topic from the perspective of their particular legal systems.

The scientific research network RETHINKIN_ conducts research activities revolving around the scientific redefinition of family law in the Low Countries and aims to take up an international leading role in this area. Redefining family law is necessary in the light of the societal evolutions undermining the foundations of traditional family law. RETHINKIN_ aspires to be the flagship regarding legal research in the Low Countries by providing new foundations for family law in a constant interplay with other scientific disciplines (intra- and interdisciplinary research) as well as with civil society (transdisciplinary research). Three research questions underlie the activities of RETHINKIN_: 1. What should the competences of the state be with respect to regulation of family relations and what are the most adequate procedural and/or substantive regulatory instruments? Moreover, what position, in the state's normative framework, should the family be granted as the traditional distinction between the domains of the private and the public is being revised? 2. What should the contents of state policy measures be, from the perspectives of citizenship, police power and the "parens patriae"-doctrine? 3. In what respects could/should law and policies be better attuned to social practices and public perception?

RETHINKIN_ is currently joining the entire Flemish academic research regarding family law with the Dutch "Alliantie Familie & Recht" (Alliance Family and Law – ACFL, NIG and UCERF) as "Low Countries".

This volume provides a comparative overview of the valorisation and compensation of household labour in property relations between spouses and cohabitants as well as some analysis. All contributions are peer reviewed. We would like to thank Sophie Liu and Kayleigh Mollema, both notarial students from Groningen University, who helped us editing this book and Stefaan Declerck, for conceptualisation of the cover.

Charlotte Declerck and Leon Verstappen

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A Belgian perspective

*Charlotte Declerck and Ingrid Boone**

I Introduction

This contribution seeks to provide an answer to the question of whether or not household labour is valorised in Belgian property relations between spouses and cohabitants and, if so, how this takes place. To this end, first the terms "household labour" and "property relations between spouses and cohabitants" will be defined. Then, we will examine whether household labour is valorised in the two main categories of property regimes, and we will formulate some considerations *de lege ferenda*. The last part of this contribution will examine the way household labour is valued in Belgian tort law. Although tort law operates in a different setting then relationships property law, the tort law approach shows that the difficulties associated with estimating household labour are not insuperable.

II Scope of research

Maintenance after divorce is beyond the scope of this contribution. For the sake of completeness we note that this mechanism may obviate the lack of valorisation of household labour in property relations between partners in some cases, though often in an imperfect manner.

1 Household labour

Household labour in this article is defined as (1) the performance of typical housework and care of children and any resident third parties, (2) performing do-it-yourself work on a private, common or undivided property and/or (3) performing unpaid work in the company of the partner.

* Charlotte Declerck is Associate Professor Family & Succession Law, Hasselt University. Ingrid Boone is Associate Professor Family Law, KULeuven.

2 *Property relations between spouses and cohabitants*

Under Belgian law, there are three forms of union, being marriage, legal cohabitation and informal cohabitation.

Limited community of gains as of the date of marriage applies for those who enter into marriage without concluding a marriage contract prior to the marriage (art. 1398-1450 Belgian Civil Code). Community property includes all income from professional activities, benefits, income and interests from personal property, gifts and bequests to both spouses and all property not proven to be specific to one of the spouses under any statutory provision. This includes pre-marital property, property gained during marriage pursuant to a gift or inheritance, certain goods which are individual due to their personal nature as well as all goods obtained by substitution of property, investment or re-investment of one's own assets. Reallocations between personal and community property are restored using the technique of compensation rights at the moment of dissolution of the marriage. Using a marriage contract, spouses may also opt for a regime of pure separation of property. In this case, the property consequences of the marriage are reduced to a minimum. Each spouse remains the owner of what he owned before the marriage and what he acquires during marriage, regardless of the manner of acquisition. All income and savings after the marriage remain individual. Therefore, one spouse has no direct benefit from the property inflow of the other spouse.

Since 1998 it is also possible to enter into a legal cohabitation in Belgium. The Belgian legislator has developed the regime of pure separation of property as the default regime for legal cohabitants (art. 1477 Belgian Civil Code). Legal cohabitants can make contrary conventional arrangements, although they cannot opt for a regime of community of property.

The proprietary relationships between informal cohabitants are disregarded by the civil legislator. These relationships are therefore governed by the common law, which is equivalent to a regime of pure separation of property. Informal cohabitants can also make contrary conventional arrangements, although similarly, they cannot opt for a regime of community of property.

III Valuation of household labour under the community of property regime

1 *First hypothesis: a spouse performs typical household labour and is responsible for the care of the children and any resident third parties*

Under a community of property regime, household labour is remunerated by the operation of the system itself.[1] All earnings from work are indeed immediately and legally shared. The same applies to gains, which are all goods acquired for consid-

1. See also e.g. Y.H. Leleu, *Les collaborations économiques au sein des couples séparatistes. Pour une indemnisation des dommages collaboratifs envers et contre tous choix*, Montréal, Éditions Themis, 2014, pp. 59.

eration during the regime to the exclusion of any substitution of property, investment or re-investment of one's own assets. In principle both spouses share equally in the financial accumulation of the community property. The nature, duration or the intensity of the household labour supplied by the spouse is irrelevant in this respect. The division in two halves could be unfair towards the spouse who has generated an extraordinary income (e.g. a football player in the Premier League). Some Belgian authors insist for this reason on the introduction of a maximum cap in order to avoid exaggerations of the role of solidarity within the framework of the partnership.

2 *Second hypothesis: a spouse carries out improvements to goods that belong to the other spouse*

If a spouse performs do-it-yourself work to an individual asset, a compensation will be payable to the community property, to the extent that (1) the efforts made by the spouse exceed the obligation to contribute to the needs of the family (*contribution aux charges du mariage*) and (2) as a result the community property has foregone income. The Belgian *Cour de Cassation* confirmed this view in its judgements of 5 September 2013 and 30 January 2014.[2] Regarding the first condition, it must be assumed that this always requires a specific approach. An analysis shows that Belgian jurisprudence and legal doctrine take, amongst others, into account the use of the goods (family residence, professional purposes, rental or other), the nature of the works performed (maintenance, conservation or renovation work), the total package provided by each of the spouses to contribute to the needs of the family, and the remaining duration of the marriage after the works performed.[3] Regarding the second condition, doctrine disagrees. Some authors are of the opinion that any increase in the community property does in principle give rise to a right to remuneration.[4] Other authors are of the opinion that this condition means that it must concretely be shown that the community property has been deprived of an income in accordance with article 1405 paragraph 1 of the Belgian Civil Code.[5] This would, for example, be the case when a professional house painter paints his personal property and refuses other paid projects to do so. This would also be the case, for instance, if a lawyer renovates his personal property and – in order to have sufficient time to do so – refuses some clients. Reasoning otherwise implies that any effort made by a spouse that results in enrichment of his personal property

2. Cour de Cassation 5 september 2013, *Pas.* 2013, 1567; Cour de Cassation 30 january 2014, *T.Not.* 2014, 468. See however, Cour de Cassation 29 june 2017, C.13.0376/F.
3. See e.g. L. Sauveur, 'Quand le bricolage fait rage et la rénovation déchaîne les passions', *RTDF,* no. 3, 2014, pp. 378.
4. See e.g. Y.H. Leleu, Obs. Cour de Cassation 5 september 2013, *RNB*, 2014, pp. 753; Y.H. Leleu, *Les collaborations économiques au sein des couples séparatistes. Pour une indemnisation des dommages collaboratifs envers et contre tous choix*, Montréal, Éditions Thémis, 2014, p. 35; L. Sauveur, 'Quand le bricolage fait rage et la rénovation déchaîne les passions', *RTDF,* 2014, pp. 379.
5. See e.g. C. Declerck, W. Pintens and K. Vanwinckelen, *Schets van het familiaal vermogensrecht*, Bruges, la Charte, 2015, pp. 140.

will give rise to a right to remuneration, which in view of these judgements by the *Cour de Cassation* cannot be accepted. If both conditions are met, compensation is owned in accordance with article 1432 of the Belgian Civil Code. The specific loss of income is in this case applicable as the minimum amount. In the example mentioned above of the professional house painter this would be fairly easy to estimate. With regards to the example of the lawyer, the specific loss of income consists of the difference between the amount that the lawyer would have had to pay if he had outsourced the renovation project and the amount he would have received if he had not refused the clients. Because the efforts made by the spouse also served to acquiring, improving or maintaining the personal property, this compensation must be revalued in accordance with article 1435, sentence two of the Belgian Civil Code. On the contrary, if a spouse performs do-it-yourself work to a common asset, no compensation will be payable because no transfer of assets has taken place between personal and community property.[6]

3 *Third hypothesis: a spouse cooperates in the business activities of the other spouse*

Performing unpaid labour in the other spouse's business is, in principle, compensated by the operation of the community system.

However, if the business increases in value as a result of this labour, then the said judgements of the *Cour de Cassation* of 5 September 2013 and 30 January 2014 can be applied.[7] Specifically, this means that the spouse who performed the labour, must show that this performance is outside of the context of the obligation to contribute to the needs of the family (*contribution aux charges du marriage*), and the community property thereby sustained a loss of revenue. This may for instance be the case if a spouse cut back his or her paid professional activities in the development and expansion of the other spouse's business.

IV Valuation of household labour under the pure separation of property regime

For spouses married under pure separation of property and for cohabitants, no specific legal basis is available on which a claim for compensation for household labour can be based. This does not mean that the current Belgian jurisdiction entirely ignores to take household labour into account. Firstly, household labour is taken into account as a defence against a claim for repayment of the financing partner (1). Secondly, unjust enrichment can be a successful legal basis for compen-

6. A. Van Thienen, 'Is de klussende echtgenoot vergoeding verschuldigd aan het gemeenschappelijke vermogen voor werken die hij uitvoert aan een eigen onroerend goed?', *in* W. Pintens and C. Declerck (Eds.), *Patrimonium 2015*, Bruges, La Charte, 2015, pp. 172.
7. See. e.g. Y.H. Leleu, *Les collaborations économiques au sein des couples séparatistes. Pour une indemnisation des dommages collaboratifs envers et contre tous choix*, Montréal, Éditions Thémis, 2014, pp. 35 and pp. 59.

sation of household labour (2). Both routes will be discussed and evaluated below. The cases mentioned below should apply to cohabitants as well, *mutatis mutandis*.

1 Household labour as defence against claim for repayment

a Obligation to contribute to household expenses (during marriage or cohabitation)

Based on the duty to contribute to household expenses, case law accepts that proprietary consequences can be linked to household labour. The following factual situation usually applies. Although the family house is acquired by both spouses, the mortgage is paid off exclusively using the husband's labour income. In case of marital difficulties, the husband seeks reimbursement of his payments. He can argue that the payment was a gift that he would like to withdraw pursuant to article 1096 of the Belgian Civil Code. To this end, the spouse must of course first prove the existence of the gift. The Court of Appeal of Antwerp ruled entirely correctly that a transfer of property between separation of goods of married spouses should not *a priori* be qualified as a gift.[8] Often these spouses aim by such a transfer of property to achieve a better balance between autonomy and solidarity. The determining motive of the spouse can moreover be situated in the performance of a perceived imperative moral obligation. In case of reasonable doubt, the qualification as a gift must therefore be rejected. In a judgement of 25 February 2016 the Court of Appeal of Ghent drew the same conclusion.[9] The case law from both courts of appeal must be accepted.

The *Cour de Cassation* also perceived this claim to be unfair and addressed this issue by considering the purchase of the family home as part of the marriage expenses.[10] If the contribution of the wife to the household expenses, through household labour for example, is in equilibrium with the financial contribution of her husband, she will irrevocably be considered a co-owner. In contrast, the husband has a possibility of recovery to the extent he can demonstrate that a balance does not exist between the contributions made by both spouses.

The lower courts are inclined to support the judgement of the *Cour de Cassation*, albeit taking into account the origin of the funds used by the spouse to finance the family home. If this is done through funds from a gift or an inheritance (and therefore not labour), reimbursement is generally considered not to be justified. The authors share this point of view. In this case, spouses married under community property are also entitled to compensation in accordance with article 1432 of the Belgian Civil Code. However, a recent judgement of the Court of Appeal of Ghent shows that a different approach is required as soon as the marriage contract includes a day to day clause. When a spouse invests family capital in the acquisition of undivided real estate, the day to day clause – unless written evidence of the contrary – entails that in the absence of explicit declaration or statement of debt in the deed of sale or in the absence of subsequent written settlement, the assump-

8. Cour d'Appel d'Anvers 3 december 2014, *RW* 2015-16, 666.
9. Cour d'Appel de Gand 25 february 2016, 2013/AR/3248, *unpublished*.
10. Cour de Cassation 22 april 1976, *Arr.Cass*. 1976, 949.

tions of the marriage contract apply in full. Taking into account the fact that the spouses often are no longer aware of their marriage contract – let alone that they still know what clauses their marriage contract contain – this case law appears to be far-reaching. Shouldn't we consider that this clause is applicable to common investments rather than to substantial investments?

The aforementioned cassation judgement relates to the hypothesis of the joint acquisition of the family home. Case law is divided with regard to the extension of this principle in case of acquisition of the family home by one spouse. If a joint mortgage loan is agreed for this, then as a rule only the costs are equated with a rental charge and are considered a marital cost.

The same applies to the extension of this principle to jointly acquired goods other than the family home. This is a point of discussion in the doctrine for many years, either because it is proven that the spouses by acquiring the property intended this acquisition to be considered as a marital cost, or because the acquisition of the property concerned can objectively be qualified as a marital cost.[11] In the latter the French *Cour de Cassation* recently applied this principle to the acquisition of a joint holiday home:

> *"…Mais attendu, d'une part, que la contribution aux charges du mariage, distincte, par son fondement et par son but, de l'obligation alimentaire, peut inclure des dépenses d'investissement ayant pour objet l'agrément et les loisirs du ménage; qu'ayant relevé que l'activité stable de l'époux lui procurait des revenus très confortables lui permettant d'acquérir une résidence secondaire pour la famille, les juges du fond ont pu décider que le financement par le mari de l'acquisition d'un tel bien indivis participait de l'exécution de son obligation de contribuer aux charges du ménage;…".*[12]

The aforementioned principles do not only apply between spouses, but also between cohabitants. The partner who fully financed the purchase and claims reimbursement, should first prove the payment with all legal means and then show a legal basis for his entitlement. If the claiming partner alleges that this relates to a loan or mandate, then proof must be provided through written evidence or documentary *prima facie* evidence. However, if he or she makes a claim to a quasi-contract of agency without authority, undue payment or unjust enrichment, then no written evidence is required, but several elements of the legal mechanism must be proven by all legal means. The case law rightly assumes that in this case the partner-debtor may also defend him or herself by claiming that the payment occurred

11. Y.H. Leleu, 'Liquidation des créances et recompense au titre d'investissements immobiliers', *in* H. Casman, Y.H. Leleu and A. Verbeke (Eds.), *Le droit patrimonial de la famille sans préjugés*, Malines, Kluwer, 2002, p. 49. See also Cour d'Appel de Liège 14 january 2003, *RNB* 2011, 146, note D. Sterckx.
12. Cour de Cassation 18 december 2013, *RNB* 2014, 739, note Y.H. Leleu. See also B. Vareille, 'Régime primaire: la question lancinante du financement inégal d'un bien indivis en régime séparatiste et la contribution aux charges du mariage', *RTDciv,* 2014, 698.

to fulfil the obligation to contribute to the household expenses.[13] Obviously this always requires specific consideration.

b Restitutive gift

Sometimes Belgian jurisprudence and legal doctrine qualify the payment of a spouse as a restitutive gift to the extent that the spouse who performed the household labour contributed more to the costs and expenses of the household than legally required. In this case, this is considered compensation for performances rendered and the gift qualification is excluded.[14] Hence, the payment cannot be recovered.

c Theory on natural obligations

Sometimes Belgian jurisprudence and legal doctrine accept the theory on natural obligations as a defence against the claim of the economically active spouse who purchased the property alone or jointly with the other spouse. It is assumed that the spouse who has performed household labour and who is the (co-)owner under property law, should not pay back the financing because the spouse fulfilled a natural obligation by way of this payment. The voluntary full or partial fulfilment of the natural obligation or the promise to do so, converts the natural obligation into a legal commitment and so, it cannot be recovered as undue.[15]

2 Unjust enrichment as principle for compensation for household labour

Unjust enrichment is used with varying success as a legal basis for compensation for household labour with the following two assumptions: (a) a partner cooperates in the business activities of the other partner; (2) a partner carries out improvement works on goods that belong to the other spouse.

In order to successfully invoke the doctrine of unjust enrichment, five cumulative conditions must be met, namely (1) enrichment of one estate; (2) impoverishment of the other estate; (3) a causal link between this enrichment and impoverishment; (4) the absence of a valid legal cause and finally (5) no other legal action may be available to the impoverished party.

a First hypothesis: a spouse cooperates in the business activities of the other spouse

Some jurisprudence and legal doctrine accept unjust enrichment as an independent basis for the reimbursement of the spouse who has cooperated in the business activities of the other spouse. It is accepted that compensation for unjust enrichment is due to the extent the work performed exceeds the limits of the obligation to contribute to the needs of the family. In a case that was brought before the Court of

13. See e.g. Cour d'Appel d'Anvers 10 october 2012, 2011/AR/2671, *unpublished*; Cour d'Appel de Gand 12 february 2015, *T.Not.* 2015, 851 and 5 march 2015, *T.Not.* 2015, 833.
14. Cour de Cassation 20 october 1978, *Arr.Cass.* 1978-79, 201.
15. See e.g. Cour d'Appel de Gand 5 march 2015, *T.Not.* 2015, 833; Tribunal de première instance de Gand 6 march 2012, AR no 11/0083/A, *unpublished*.

Appeal of Liège, the company belonged to the husband and the wife had worked in this company for almost thirty years.[16] So, the wife had contributed to her husband's asset growth without participating in it herself. The Court of Appeal ruled that all the conditions of unjust enrichment were fulfilled and that the work provided by the wife greatly exceeded the limits of the obligation to contribute to the needs of the family. Therefore the wife was entitled to a compensation that had to be estimated by an expert.

Recently the Court of Appeal of Ghent ruled in the same way.[17] In a case that was brought before the Court the wife had turned in her resignation in order to do unpaid work in the auto repair shop of her husband, and this for a period of more than twenty years. The Court held that the work performed by the wife had a structural and economic nature and as such exceeds the normal marital duties. Therefore the wife was entitled to a compensation that also had to be estimated by an expert.

The spouse who claims this compensation must not only demonstrate that all the prerequisites of the principle of unjust enrichment are met, but also that the work he undertook was beyond any normal duty to assistance and contribution. In the absence of this evidence, no compensation is due and it shall be deemed that the work done categorises under a normal duty to assistance and contribution.

Not everyone agrees with the above.

Certain courts and authors are of the opinion that the application of unjust enrichment is excluded by the contractual nature of the regime of separation of property. In a case that was brought before the Court of Appeal of Antwerp, the wife had acquired a retail business in textiles and footwear from her mother before the conclusion of the marriage.[18] The spouses did not dispute that the business belonged to the wife. The husband (and later his heirs), however, maintained that he was entitled to a compensation on the basis of unjust enrichment because he had cooperated in the business as of the conclusion of the marriage in 1973 until the date of commencement of divorce proceedings in 1986. The Court of Appeal rejects this claim. According to the court, unjust enrichment is an ancillary legal concept which cannot be applied in a contractual relationship. Furthermore, the contractual relationship between the spouses refutes the condition of the absence of a cause between the impoverishment and enrichment. The possible enrichment of one spouse is the result of a conscious choice of the spouses, particularly the marriage contract, and therefore is the will of the impoverished spouse. However, the court is not fully convinced as it is additionally examining whether the performances provided by the spouse do not exceed the boundaries of normal duties to assistance and contribution. The court ruled that in this case, this did not apply in any way, because during the marriage, the husband had also completed his military duty and had taken classes with full-time attendance which necessarily limited his activities in the business and therefore these categorise as part of his duty to assistance.

16. Cour d'Appel de Liège 2 march 2005, *JT* 2005, 557.
17. Cour d'Appel de Gand 9 february 2017, *T.Not*. 2017, 414.
18. Cour d'Appel d'Anvers 30 november 2005, *T.Not.* 2006, 247, note N. Torfs.

Some courts and authors consider that the choice of a clause of assumption of daily settlement in the marriage contract, excludes the application of unjust enrichment between spouses. The Court of Appeal of Ghent held that this contractual clause forms the cause of the transfer of funds between spouses, and the transfer of capital can therefore not be invoked against the terms of the marriage contract.[19] It seems that the mere stipulation of the assumption of daily settlement in the marriage contract cannot necessarily exclude unjust enrichment. What did the spouses intend with the clause? Purely common matters or also substantive issues (*cf. supra*)?

Furthermore, some courts and authors are of the opinion that unjust enrichment cannot be applied to cohabitants either. For instance, it is sometimes assumed that the existence of a cohabiting relationship is in itself sufficient not to apply unjust enrichment. This argument cannot be accepted either. The cause may be in a legal obligation, a contract, a natural obligation or the will of the impoverished party. This must be distinguished from the existence of the affective cohabiting relationship as such which exclusively forms the context within which such enrichment takes place. In other words, the existence of an affective cohabiting relationship between enriched and impoverished can in itself not exclude the application of the doctrine of unjust enrichment. This view was confirmed by the judgement of the *Cour de Cassation* dated 22 January 2016.[20]

Other authors believe that compensation is always payable to the spouse who cooperated in the business of the other spouse for years on end, and such without requiring proof whether or not the boundaries of the obligation to contribute to the needs of the family were exceeded. The work performed by a spouse justifies a compensation as soon as the assets of the other spouse have gained a personal advantage as a result. In contrast, a judgement of the Court of Appeal of Ghent found that no compensation was payable to the spouse who had performed household labour because the cooperation in the business, without the investment of personal funds, was offset by the joint consumption of the proceeds of the business during the marriage.[21]

In order to avoid the thorny issue of unjust enrichment, the courts have developed a number of other structures under which the cooperating spouse may be entitled to compensation. For example, the Court of Appeal of Ghent accepted that the work undertaken by a husband, as it were, produced a new business during the marriage so under the suppositions of joint ownership this business belongs to both spouses. In another case that was lodged before the Court of Appeal of Ghent, the court ruled that placing immovable property in the name of both spouses should be regarded as a payment-in-kind for the household labour done by the husband. Finally, it is argued that the irregular general partnership may apply between the spouses so that both are entitled to the associated profits and gains.

19. Cour d'Appel de Gand 25 february 2016, 2013/AR/3248, *unpublished*.
20. Cour de Cassation 22 january 2016, *JLMB* 2017, 306.
21. Cour d'Appel de Gand 20 february 1998, *TGR* 1998, 113.

b Second hypothesis: a spouse carries out improvements on goods that belong to the other spouse

Some jurisprudence and legal doctrine accept unjust enrichment as an independent basis for the reimbursement of the spouse who has carried out improvements on goods that belong to the other spouse. It is accepted that compensation for unjust enrichment is due to the extent that the work performed exceeds the limits of a normal duty to contribute to the needs of the family. A judgement of the Court of Appeal of Liège on 16 January 2002 serves as a noteworthy example.[22] The wife was operating a catering business. The husband, who was a heating specialist by training, was disabled and enjoyed an unemployment benefit. The couple bought a property. The bare ownership was fully purchased by the wife, while the usufruct was acquired by both spouses, each buying half. A lot of renovations needed to be carried out. Part of this work was carried out by the husband. Afterwards, the house served as the family home. When faced with marital difficulties, the husband not only wanted to receive his share in the usufruct, but also an additional remuneration for the work he carried out in the house. The Court of Appeal of Liège accepts his claim. According to the court, the work carried out by the husband exceeded his duty to contribute to the needs of the family because the property is not a common asset. Moreover, the man had performed essential work to the house so that these works could not be classified as maintenance. The mere fact that the property was used as the family home cannot be regarded as a compensation of these works.

Not everyone agrees. A judgement of the Court of Appeal of Antwerp dated 14 January 2015 is a striking illustration of this.[23] The man claimed he constructed a completely new house on the land belonging to his partner. Shortly before its completion the partner ended their relationship. The man wanted a compensation of 85,000 EUR for the work he performed. The Court of Appeal ruled that unjust enrichment cannot be applied. After all, the man had acted of his own free will. Not only was the exact extent of the work disputed, but the man had also not acted entirely disinterestedly. A letter revealed that he would help the woman with her house in exchange for her help and financial support. If he had not wanted to take this risk, the Court of Appeal reasoned, he should either have refrained from carrying out these works, or established clear agreements in the deed.

As soon as it is accepted that compensation is due pursuant unjust enrichment, the gains and losses on the estate as of the point in time of the conversion of assets must be taken into account when estimating the amount of compensation. In its judgement of 27 September 2012 the *Cour de Cassation* deemed that the claim arising from unjust enrichment constitutes a values-based debt and not a financial debt.[24] However, the said judgement of the *Cour de Cassation* does not give any conclusive ruling on how this principle should be applied in practice. According to the Court of Appeal of Liège it must be assumed that the amount of the claim is equal

22. Cour d'Appel de Liège 16 january 2002, *TBBR* 2004, 324, note N. Torfs.
23. Cour d'Appel d'Anvers 14 january 2015, *RTDF* 2016, 781.
24. Cour de Cassation 27 september 2012, *T.Fam.* 2013, 177, note C. Declerck.

to the amount of the impoverishment, to be increased by additional compensation to offset currency depreciation and interests that the funds could have yielded.[25]

c Third hypothesis: a spouse performs typical household labour and is responsible for the care of the children and any resident third parties

Can a compensation for unjust enrichment be awarded for the performance of typical household labour and taking care of care of children and any resident third parties? I have failed to identify any published case law on this subject. However, it seems to me that in this hypothesis, a compensation may also be due, albeit to the extent this work can be shown to have exceeded the duty to contribute to the household expenses. This requires a specific assessment in which all performances provided by both spouses are identified. Thus the capital transfers that have already occurred during the relationship should also be regarded. Furthermore, the specific substantive scope of the clause of presumption of daily settlement should be taken into account.

3 New legislation?

An analysis of Belgian case law shows that the courts only have a limited number of options available to valorise household labour under a regime of pure separation of property. Several legal instruments are merely defences against claims for compensation from funding partners. Moreover, the question of whether or not compensation for household labour can be based on unjust enrichment is ambiguous.

The resulting inequity and injustice has not gone unnoticed among academics and legal practitioners.[26] For decades, a number of solutions have been proposed, such as (1) the abolition of the pure separation of property regime and the introduction of a mandatory right of participation in any gains and (2) the introduction of stricter information obligations for the notary.

Considering that the introduction of a mandatory right of participation in any gains is unrealistic and that the introduction of stricter information obligations for the notary does not solve the essence of the problem, we advocate the introduction of a right to economic compensation following the Catalan example.[27] The court

25. Cour d'Appel de Liège 18 february 2015, *Act.dr.fam.* 2015, 128, note D. Pignolet.

26. See e.g. C. Declerck, 'Koude uitsluiting: hervormen of afschaffen?', *T.Fam.*, 2012, pp. 30-31; Y.H. Leleu, *Les collaborations économiques au sein des couples séparatistes. Pour une indemnisation des dommages collaboratifs envers et contre tous choix*, *in* Conférences Roger-Comtois, Les éditions Thémis, 2014; A. Verbeke, 'Weg met koude uitsluiting', *WPNR*, 2001, pp. 945-952; A. Verbeke, 'Zuivere scheiding van goederen verbieden', *AJT*, 2001-02, 671-672; A. Verbeke, 'Het wilsgebrek van de liefde', *TEP*, 2015, pp. 100; L. Verstappen and C. Declerck, 'Koude uitsluiting in Nederland en België – een rechtsvergelijkende analyse', *in* K. Boele-Woelki and F. Swennen (Eds.), *Vergelijkenderwijs. Actuele ontwikkelingen in het Belgische en Nederlandse familierecht*, The Hague, Boom Publishers, 2012, pp. 129-161.

27. See art. 232-5 Book II Catalan Civil Code; C. Declerck, 'Naar een beter evenwicht tussen autonomie en solidariteit in het relatievermogensrecht', *T.Fam.*, 2015, 105-107; C. Declerck, 'Een lans voor de huisvrouw in de 21ste eeuw', *T.Fam.*, 2015, pp. 41-44; C. Declerck, 'De normaalste zaak van de

may award compensation for household labour at the expense of the other partner upon termination of the relationship. Not only the nature, duration and intensity of the work done, but also the duration of the relationship and the number of children are criteria to be taken into consideration by the court when estimating the amount of the compensation. Also, this amount may not be more than half of the gains accumulated during the relationship. This proposal has been criticised from several sides. This criticism is linked to, *inter alia*, the difficulties associated with estimating household labour. However, this criticism is unjustified, as explained below.

In the meanwhile the overall reform of the existing relationship and property laws is high on the Belgian political agenda. The minister of Justice even set up a working group of academic experts to formulate a set of priorities. The legislative proposal of 13 December 2017 is a result of the group's efforts.[28] One of the priorities is a better legal framework of the regime of separation of property and of the clauses that spouses may add, such as the clause of participation in acquisitions. One of the other priorities is to give the judge a more general discretionary power to grant a compensation if the marital contract providing for strict separation of property has been rendered unfair considering the overall circumstances of the case. The conditions are very strict causing the chance of success to obtain a compensation for household labour to be very limited. Finally, the introduction of a stricter information obligation for the notary is proposed.

V Valuation and compensation of household labour from a Belgian tort law perspective

This part of the contribution deals with the question how tort law approaches household labour. Compensation being its prime function, tort law has since long become familiarized with valuation and compensation of household labour. Already in 1959 the *Cour de Cassation* of Belgium accepted that a housewife who is no longer able to perform household duties as a result of her physical injuries, is entitled to compensation for the loss of the economic value of her household work.[29] Understanding how tort law approaches household labour, might therefore provide insights that are useful in the area of relationships property law.

A preliminary remark is that the tort law setting differs from the setting in which relationship property law operates. The question of how household labour should be compensated through the tort law system does not usually arise between partners (although the relationship between partners is not excluded from the scope of tort law), but between one of the partners and a third person, more precisely a person who has caused physical injury to one of them. When this person

wereld. Valorisatie van huishoudelijke arbeid in het huwelijksvermogensrecht', *in* W. Pintens and C. Declerck (Eds.), *Patrimonium 2015*, Bruges, La Charte, 2015, pp. 389-392.

28. <www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?legislist=legisnr&dossierID=2848>.

29. Cass. 15 june 1959, 1959 *Arr.Cass.*, p. 845. See also Cass. 7 january 1999, *Arr.Cass.* 1999, p. 7.

is liable for the physical injury, his liability insurer has to compensate the damage suffered by the victim.

Tort law seeks to put the victim in the position he would have been in had the damage not occurred. This is the so-called 'Principle of full compensation'.[30] When the damage consists of personal injury, exact return to the *status ante quo* is impossible. In personal injury cases full compensation is therefore achieved by insisting that the tort benefits represent, as far as possible, the full amount of the loss.

In most cases of personal injury, the victim suffers distinct kinds of damage: non-pecuniary losses (as pain and suffering) and pecuniary losses (such as loss of earnings and medical expenses). The latter are capable of direct translation into money terms. Pecuniary losses may also include household damage. This is the damage resulting from the loss of ability to do the ordinary tasks of daily living in the home, such as cooking, laundry, cleaning, shopping, *etc.* It may also include the care for the children.[31] A medical expert will determine to what extent the victim was unable to perform household work due to the physical injuries, in the period between the day when the victim was discharged from hospital and the date of trial or, in the case of less serious injury, the date of recovery.[32]

Belgian courts approach household damage by considering the estimated value of the household labour that the victim was unable to perform as a result of the injuries.[33] This means that valuation and compensation of household damage in tort law is based upon the valuation of household labour. The remaining question is which value household labour represents.

In some cases professional domestic help is employed to take care of the household while the victim is unable to do so. In those circumstances the injured person is entitled to claim the real cost of employing domestic help. In many cases however the work is done 'for free' by the victim's relatives, who provide domestic help through their natural concern and affection for the victim. Nevertheless Belgian courts consider that the injured person, and not the helping relative, is entitled to compensation for household damage. What is compensated is the victim's loss of ability to perform the household labour, irrespective of whether the work is done

30. H. Bocken, I. Boone and M. Kruithof, *Buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Brugge, die Keure, 2009, pp. 204-205; J. Ronse, L. De Wilde, A. Claeys and I. Mallems, *Schade en schadeloosstelling*, in *APR*, Gent, Story-Scientia, 1984, pp. 172-175; T. Vansweevelt and B. Weyts, *Handboek Buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, pp. 665-666. Common law: S. Deakin, A. Johnston and B. Markesinis, *Tort Law*, Oxford, Oxford University Press, 2013, pp. 803.

31. B. Dubuisson and P. Colson, 'Nomenclature des préjudices réparables. Rapport belge', *in* B. Dubuisson and P. Jourdain (Eds.), *Le dommage et sa reparation dans la responsabilité contractuelle et extracontractuelle. Etudes de droit compare*, Brussel, Bruylant, 2015, pp. 631-632; J-L. Fagnart, 'La perte de la capacité', *in* B. Dubuisson (Ed.), *Le dommage et sa réparation*, Brussel, Larcier, 2013, pp. 63-64; J. Matthys, *Evaluatie en vergoeding van lichamelijke schade*, Gent, Larcier, 2014, p. 416.

32. The ELIDA-scale (Estimation of Loss of Independence in Daily Activities) is a frequently used instrument to measure the loss of independence in daily activities, including household work.

33. Dubuisson and Colson 2015, p. 630; Matthys 2014, p. 417; A. Van Oevelen, G. Jocqué and C. Persyn and B. De Temmerman, 'Overzicht van rechtspraak. Onrechtmatige daad: schade en schadeloosstelling (1993-2006)', *TPR*, 2007, p. 1181.

by relatives.[34] In cases where no professional domestic help was performed, Belgian courts use a rough-and-ready method to value the household damage.

This method is laid down in the so-called Indicative Tabel[35] which is a soft law instrument developed by a group of judges[36] as an answer to the growing need for consistency and comparability in tort compensations. It provides lawyers, insurers and judges with model rules, guidelines and conventional figures for damage that is difficult to assess accurately in money compensation. These figures and model rules are derived from experience or from awards in comparable cases. As they are frequently applied, they guarantee some measure of uniformity and predictability in personal injury cases. The Indicative Tabel also proposes a method for calculating household damage. Although this method is a practical guideline and not a binding rule, it is applied in the vast majority of the cases.[37]

The damages are assessed on the basis of a figure representing the estimated value of the household labour. The guideline is a basic sum of 20 EUR per day (if the victim is fully incapable of performing household labour) for a single person or for an adult in a household without children. The basic sum is increased by 7 EUR per child living in the household of the victim. When the household labour was shared by the victim and his or her partner, a discount is applied to take into account the contribution of each partner. When no specific information is provided, the Indicative Table presumes that the contribution of the wife is 65 % and that of the man is 35 %. This percentage can be adapted to the actual contribution of each partner to the household work.[38] The amount awarded to the victim for the household damage suffered between the date of discharge from the hospital and the date of trial, or, in the case of less serious injury, the date of recovery, is obtained by multiplying the daily sum by the number of days in this period.

E.g. a married woman with two minor children was unable to perform any household work during twelve months, due to physical injuries caused by a third person. No domestic help was employed. According to the rough-and-ready

34. Rechtbank van eerste aanleg Brussel 3 March 2014, 2015 *RGAR*, 15165; Politierechtbank Antwerpen 24 May 2002, 2004 *T.Verz*, p. 604, noot P. Graulus; Fagnart 2013, p. 64; D. Simoens, *Buitencontractueel aansprakelijkheidsrecht,* II, *Schade en schadeloosstelling*, *in Beginselen van Belgisch Privaatrecht*, Antwerpen, Kluwer/Story-Scientia, 1999, p. 220.
35. <www.fcgb-bgwf.be/documents/Indicatieve_Tab_2016.pdf>.
36. Members of the "Unie van de Vrede- en Politierechters" and of the "Nationale Vereniging van de Rechters van Eerste Aanleg".
37. T. Vansweevelt and B. Weyts, 'De Indicatieve Tabel 2012: van (te) normerend naar betwist?', *RW*, 2014-15, pp. 245. See *e.g.* Rechtbank van eerste aanleg Henegouwen, afdeling Bergen, 23 January 2015, 2015 *RGAR*, 15190; Rechtbank van eerste aanleg Antwerpen 17 February 2014, 2015 *T.Verz*., p. 96; Rechtbank van eerste aanleg Brussel 3 March 2014, 2015 *RGAR*, 15165; Politierechtbank Namen 3 May 2013, 2015 *VAV*, p. 65; Politierechtbank Neufchâteau 20 December 2013, 2015 *VAV*, p. 55.
38. E.g. Politierechtbank Brugge 12 December 2005, 2007 *T.Verz*, p. 125: the judge accepted that the victim, a fulltime housewife, took care of the household alone. In another case the court held that the victim (a civil servant) and her husband (a teacher) contributed equally to the household work (Gent 30 June 1998, 1999 *T.Verz*., p. 247).

method, she will receive a compensation of 22,10 EUR per day.[39] For the period of one year the compensation will amount to 8.066,50 EUR (22,10 x 365). In other words, according to the Indicative Table, 8.066,50 EUR would be the (roughly estimated) value of the household labour of a married woman with two children over a period of one year. If the victim was a full-time housewife, who took care of the household alone, her household labour would be valued at 34 EUR per day, or at 12.410 EUR for one year (34 x 365).

An objection to the rough-and-ready method of the Indicative Table is that it does not take into account recent statistic information on the amount of time spent by women and men to the household.[40] According to a large scale time-use survey conducted in Flanders in 2013, the difference between men and women in time spent on household work has become considerably smaller in recent years. While women spend an average of 30 ¼ hours per week on household duties and child care, men perform about 22 ¾ hours per week.[41] This means that, on the average, women are responsible for 57 % and men for 43 % of the household work and child care.

Another remark to take into consideration is that, as the estimated value of the household work (including child care) in a family with two children is 34 EUR per day, this comes up to 238 EUR per week. Given that an average household demands 53 hours of household work on a weekly basis, the value of one hour of (non-professional) household labour would be 4,49 EUR. This seems to be a very moderate estimation of the economic value of household labour. It is suggested that household labour should be valued at least at 10 EUR per hour.[42]

Even though the conventional method of calculating household damage thus might not be perfect, the tort law experience shows at least that household labour can be valued and compensated.

39. This result was obtained as follows: 34 EUR (20 EUR increased by 7 EUR per child) x 65 % (wife's contribution) = 22,10 EUR.
40. See Fagnart 2013, pp. 66-67.
41. Tijdsbestedingsonderzoek TOR 2013 (onderzoeksgroep TOR – Vrije Universiteit Brussel), <www.vub.ac.be/TOR/time-use-survey>.
42. Fagnart 2013, p. 67; Matthys 2014, p. 418.

2 Valorisierung von Haushaltstätigkeit im Güterrecht

Eine deutsche Perspektive

*Katharina Lugani**

I Einführung

Die Valorisierung von Haushaltstätigkeit – im Folgenden verstanden sowohl als Haushaltsführung als auch als Kinderbetreuung – ist im deutschen Recht nicht explizit geregelt. Ausdrücklich angesprochen sind Haushalts- und Erwerbstätigkeit etwa in § 1356 BGB. Indes geht es in dieser Norm nicht um die Valorisierung, sondern um die gesetzgeberische Klarstellung insbesondere dahingehend, dass die Ehegatten die Haushaltsführung im gegenseitigen Einvernehmen regeln und dass beide Ehegatten berechtigt sind, erwerbstätig zu sein.[1]

Doch sind Väter und Mütter gleichwohl bis heute deutlich ungleich erwerbstätig. Nur 60 % der Mütter, aber 84 % der Väter mit minderjährigen Kindern gehen in Deutschland einer Erwerbstätigkeit nach. Dabei handelte es sich bei nur 6 % der Väter, aber bei 69 % der Mütter um eine Teilzeittätigkeit.[2] Auch der Gender Pay Gap ist in Deutschland mit einem um 22 % geringeren durchschnittlichen Bruttostundenverdienst der Frauen noch immer groß.[3]

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1. G. Brudermüller, *in* O. Palandt (Founder), *Kommentar zum Bürgerlichen Gesetzbuch*, München, 2018, § 1356 No. 1; A. Roth, *in* F. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2017, § 1356 No. 1.
2. Als Grund für die Einschränkung des Beschäftigungsumfangs gaben 81 % der teilzeitbeschäftigten Mütter im Jahr 2012 persönliche oder familiäre Verpflichtungen wie bspw. die Kinderbetreuung an. Bei Vätern spielte dieses Motiv mit 25 % eine eher untergeordnete Rolle; Fachbericht des Statistischen Bundesamtes aus dem Jahre 2014 (für das Jahr 2012), abrufbar unter <www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Querschnitt/WegzurGleichstellung5120001149004.pdf?__blob=publicationFile>.
3. Fachbericht des Statistischen Bundesamtes aus dem Jahre 2014 (für das Jahr 2012), abrufbar unter <www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Querschnitt/WegzurGleichstellung5120001149004.pdf?__blob=publicationFile>.

Selbst ohne explizite Regelung lassen sich dem BGB-Familienrecht implizit Wertungen über die Valorisierung von Haushalts- und Erwerbstätigkeit entnehmen. Die *Gleichwertigkeit von Erwerbstätigkeit und Haushaltstätigkeit* ist ein viel bemühter Grundsatz des deutschen Familienrechts.[4] Dieser Grundsatz spiegelt sich bei der Unterhaltspflicht gegenüber den gemeinsamen minderjährigen Kindern (§ 1606 III 2 BGB)[5] ebenso wider wie im Halbteilungsgrundsatz, der dem Zugewinnausgleich (§ 1378 I BGB),[6] dem Versorgungsausgleich (§ 1 VersAusglG)[7] und der Bemessung des nachehelichen Unterhalts (§ 1578 I BGB)[8] zugrunde liegt. Diese Umsetzungen des Grundsatzes der Gleichwertigkeit von Erwerbstätigkeit und Haushaltstätigkeit bringen die Wertschätzung für die Haushaltstätigkeit des kinderbetreuenden und haushaltsführenden Ehegatten nicht nur ideell, sondern gerade in monetärer Weise zum Ausdruck und führen so zu einer Valorisierung der Haushaltstätigkeit. Gegenstand der nachfolgenden Untersuchung ist die Frage, inwieweit das deutsche Güterrecht diesem Grundsatz tatsächlich gerecht wird.

Das deutsche Familienrecht bietet vier verschiedene Güterstände für Ehegatten an:[9] den gesetzlichen Güterstand der Zugewinngemeinschaft, den Wahlgüterstand der Gütertrennung, den Wahlgüterstand der Gütergemeinschaft sowie – seit neuestem – den Wahlgüterstand der Wahl-Zugewinngemeinschaft. Die Ehegatten leben gemäß § 1363 I BGB grundsätzlich im Güterstand der Zugewinngemeinschaft, wenn sie nicht durch formbedürftigen Ehevertrag (vgl. §§ 1408, 1410 BGB) etwas anderes vereinbart haben. Die mit Abstand allermeisten Ehegatten – ca.

4. BT-Drs 7/650, S. 99; BGH, Urt. v. 13.06.2001 – XII ZR 343/99 = *FamRZ – Zeitschrift für das gesamte Familienrecht* 2001, 986.
5. BGH, Urt. v. 02.07.1980 – IVb ZR 519/80 = *NJW – Neue Juristische Wochenschrift* 1980, 2306 = *FamRZ – Zeitschrift für das gesamte Familienrecht*, 1980, 994; W. Reinken, *in* H. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, München, 2017, § 1606 No. 16; B. Heiß, *in* W. Born/B. Heiß, *Unterhaltsrecht*, München, 2017, Ch. 3 No. 226a; F. Klinkhammer, *in* P. Wendl & H.-J. Dose (Eds.), *Das Unterhaltsrecht in der familienrichterlichen Praxis*, München, 2015, § 2 No. 20; W. Born, *in* F. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2017, § 1610 No. 92.
6. N. Siebert, *in* P. Wendl & H.-J. Dose (Eds.), *Das Unterhaltsrecht in der familienrichterlichen Praxis*, München, 2015, § 4 No. 750.
7. *BVerfG, Beschl. v. 28.02.1980 – 1 BvL 17/77; 1 BvL 7/78; 1 BvL 9/78; 1 BvL 14/78;1 BvL 15/78; 1 BvL 16/78; 1 BvL 37/78; 1 BvL 64/78 = FamRZ – Zeitschrift für das gesamte Familienrecht* 1980, 326.
8. BGH, Beschl. v. 13.06.2001 – XII ZR 343/99 = *FamRZ – Zeitschrift für das gesamte Familienrecht* 2001, 986 (unter Aufgabe seiner bisherigen Rspr.; vgl. BVerfG, Beschl. v. 05.02.2002 – 1 BvR 105/95; 1 BvR 559/95; 1 BvR 457/96 = *FamRZ – Zeitschrift für das gesamte Familienrecht* 2002, 527); G. Brudermüller, *in* O. Palandt (Founder), *Kommentar zum Bürgerlichen Gesetzbuch*, München, 2018, § 1578 No. 3; N. Siebert, *in* P. Wendl & H.-J. Dose (Eds.), *Das Unterhaltsrecht in der familienrichterlichen Praxis*, München, 2015, § 4 No. 751.
9. Das Nachfolgende gilt in entsprechender Weise für die eingetragenen Lebenspartner; das Lebenspartnerschaftsgesetz verweist insoweit umfassend auf die Regelungen des BGB: Bei der Lebenspartnerschaft ist die Zugewinngemeinschaft der gesetzliche Güterstand, § 6 S. 1 LPartG (wie § 1363 I BGB). Die §§ 1363 II, 1364-1390 BGB gelten entsprechend, § 6 S. 2 LPartG. Die Partner können ihre güterrechtlichen Verhältnisse durch Vertrag (Lebenspartnerschaftsvertrag) regeln, § 7 S. 1 LPartG (wie § 1408 BGB). Die §§ 1409-1563 BGB gelten entsprechend, § 7 S. 2 LPartG.

93 %[10] – leben im Güterstand der Zugewinngemeinschaft, einige in Gütertrennung. Da der deutsch-französische Wahlgüterstand noch sehr jung ist, ist er noch kaum verbreitet.[11] Ebenfalls kaum mehr verbreitet ist die Gütergemeinschaft.[12] Nur im ländlichen Raum soll sie noch in nennenswertem Umfang genutzt werden.[13]

II Güterstand der Zugewinngemeinschaft, §§ 1363 ff. BGB, und deutsch-französischer Güterstand der Wahlzugewinngemeinschaft, § 1519 BGB i.V.m. Übereinkommen vom 4.2.2010

1 Grundzüge

Die Zugewinngemeinschaft zeichnet sich zum einen dadurch aus, dass die Vermögen von Mann und Frau nach der Eheschließung getrennt bleiben und jeder Ehegatte sein Vermögen selbstständig verwaltet, §§ 1363 II 1, 1364 BGB.[14] Über sein Vermögen kann jeder Ehegatte frei verfügen, § 1364 BGB, es sei denn, es greift eine Verfügungsbeschränkung ein.[15] Es gibt keine güterrechtliche Miteigentümerstellung an dem vorehelich oder ehelich erworbenen Vermögen des anderen Ehegatten. Die „Schlüsselgewalt" nach § 1357 BGB[16] führt nur zu Gesamtschuld-

10. So C. Wippermann, *Partnerschaft und Ehe – Entscheidungen im Lebensverlauf*, Bundesministerium für Familie, Senioren, Frauen und Jugend (Ed.), Berlin, 2014, p. 50.
11. Zu ihm siehe A. Frank, 'Ausgewählte Rechtsprobleme der deutsch-französischen Wahl-Zugewinngemeinschaft', 2017; S. Braun, 'Die Wahl-Zugewinngemeinschaft: Ein neuer Güterstand im deutschen (und französischen) Recht', *MittBayNot – Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern*, 2012, pp. 89; T. Klippstein, 'Der deutsch-französische Wahlgüterstand der Wahl-Zugewinngemeinschaft', *FPR – Familie, Partnerschaft, Recht 2010*, pp. 510; T. Jäger, 'Der neue deutsch-französische Wahlgüterstand der Zugewinngemeinschaft', *DNotZ – Deutsche Notar-Zeitschrift*, 2010, pp. 804; D. Schaal, 'Der neue Güterstand der Wahl-Zugewinngemeinschaft', *ZNotP – Zeitschrift für die Notarpraxis*, 2010, pp. 167.
12. R. Kanzleiter, *in* F. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2017, Vor §§ 1415 ff. No. 21 gibt an, dass statistisch nicht erfasst ist, wie viele Ehegatten in Gütergemeinschaft leben.
13. Diese Zurückhaltung gegenüber der Gütergemeinschaft rührt vor allem aus der Schwerfälligkeit der gemeinsamen Verwaltung der Gesamthand und der Komplexität der Regelungen her, näher J. Gernhuber & D. Coester-Waltjen, *Familienrecht*, München, 2010, § 38 No. 1 ff. Der 21. Arbeitskreis des 16. Deutschen Familiengerichtstags 2005 empfiehlt dem Gesetzgeber sogar, der Wahlgüterstand der Gütergemeinschaft solle in Zukunft nicht mehr vereinbart werden können (These IX), online abrufbar unter: <http://s293942038.online.de/resources/2005_Arbeitskreis_21.pdf>.
14. Dies entspricht Art. 2, Art. 4 des Abkommens über den Güterstand der Wahl-Zugewinngemeinschaft.
15. Vgl. §§ 1365-1369 BGB – eine Verfügungsbeschränkung kann bei Rechtsgeschäften über das nahezu gesamte Vermögen eines Ehegatten oder über Haushaltsgegenstände vorliegen. Vgl. für die dt. franz. Wahl-Zugewinngemeinschaft Art. 5 des Abkommens.
16. § 1357 I 1 und 2 BGB sehen vor: "Jeder Ehegatte ist berechtigt, Geschäfte zur angemessenen Deckung des Lebensbedarfs der Familie mit Wirkung auch für den anderen Ehegatten zu besor-

ner- und Gesamtgläubigerschaft der Ehegatten; die Norm enthält nach h.M. keinen selbständigen Eigentumserwerbstatbestand.[17] Die dingliche Rechtslage richtet sich nach allgemeinen sachenrechtlichen Regeln.[18]

Bei einem Ehegatten eingetretene einseitige Vermögensmehrungen werden bei Beendigung der Zugewinngemeinschaft im Wege eines Zugewinnausgleichs, § 1363 II 2 BGB,[19] berücksichtigt. Es handelt sich bei diesem Güterstand also vom Typus her eigentlich um eine Gütertrennung mit angeschlossenem schuldrechtlichen Ausgleichsanspruch. *Zugewinn* ist der Betrag, um den das Endvermögen (§ 1375 BGB)[20] eines Ehegatten sein Anfangsvermögen (§ 1374 BGB)[21] übersteigt (§ 1373 BGB).[22] Übersteigt der Zugewinn des einen Ehegatten den Zugewinn des anderen, so steht die Hälfte des Überschusses dem anderen Ehegatten als Ausgleichsforderung zu (§ 1378 I BGB).[23]

Der deutsch-französische Wahlgüterstand der Wahlzugewinngemeinschaft wurde durch das Abkommen vom 4.2.2010 zwischen der BRD und der Französischen Republik geschaffen.[24] Die Wahlzugewinngemeinschaft kann durch Ehevertrag von allen Ehegatten vereinbart werden, deren Güterstand dem Sachrecht eines Vertragsstaates unterliegt.[25] Die Wahlzugewinngemeinschaft entspricht im Wesentlichen der dt. Zugewinngemeinschaft mit einigen modernen sowie „französischen" Elementen. Die Abweichungen der Wahlzugewinngemeinschaft nach § 1519 BGB von der Zugewinngemeinschaft nach §§ 1363 ff. BGB haben für die Frage der Valorisierung von Haushaltstätigkeit wenig Auswirkungen.[26]

2 *Motivation des historischen Gesetzgebers: Zugewinn als gemeinsamer Erfolg der Lebens- und Wirtschaftsgemeinschaft beider Ehegatten*

Der Zugewinnausgleich beruht auf dem Grundgedanken, dass typischerweise auch der einseitige Vermögenserwerb eines Ehegatten von Leistungen, Unterstüt-

gen. Durch solche Geschäfte werden beide Ehegatten berechtigt und verpflichtet, es sei denn, dass sich aus den Umständen etwas anderes ergibt." Parallel dazu sieht Art. 6 I des Abkommens vor: „Jeder Ehegatte kann Verträge zur Führung des Haushalts und für den Bedarf der Kinder allein schließen. Diese Verträge verpflichten den anderen Ehegatten gesamtschuldnerisch".

17. BGH Urt. v. 13.03.1991 – XII ZR 53/90 = *NJW – Neue Juristische Wochenschrift* 1991, 2283, 2284 m.w.N.; J. Gernhuber & D. Coester-Waltjen, *Familienrecht*, München, 2010, § 19 No. 52 ff., 56; H. Roth, *in* F. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2017 § 1357 No. 42.
18. Dazu unten V.
19. Diesem entspricht Art. 2 S. 3 des Abkommens.
20. Vgl. Art. 10 des Abkommens.
21. Vgl. Art. 8 des Abkommens.
22. Vgl. Art. 2 S. 2 des Abkommens.
23. Vgl. Art. 12 des Abkommens.
24. Der Text des Abkommens ist erhältlich unter <www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/17_wp/WahlZugewinngem/bgbl.pdf>.
25. § 1519 S. 1 BGB i.V.m. Art. 1 S. 1 des Abkommens.
26. Dieser neue Güterstand wird daher im Folgenden nicht gesondert betrachtet werden, auf Abweichungen wird in den Fußnoten hingewiesen.

zung, Entbehrungen o.ä. des anderen Ehegatten mitgetragen ist.[27] Dieses Halbteilungsprinzip ist insbesondere Ausdruck der Gleichwertigkeit von Erwerbstätigkeit und Haushaltsführung in der „Hausfrauenehe".[28]

3 *Folgen der Schematisierung*

a Zugewinnausgleich ohne zu valorisierende Haushaltstätigkeit

Der Zugewinnausgleich fragt nicht in jedem Fall danach, ob der Zugewinn Resultat der arbeitsteiligen Lebens- und Wirtschaftsgemeinschaft ist. Kennzeichnend für das Zugewinnausgleichsrecht ist vielmehr seine sehr starke Schematisierung.[29] Das kann dazu führen, dass es zum Zugewinnausgleich kommt, ohne dass in der konkreten Ehe zu valorisierende Haushaltstätigkeit erbracht wurde. Dies ist besonders evident in Doppelverdienerehen mit Teilung der Hausarbeit, wenn und soweit die Zugewinndiskrepanz nicht ehebedingt, sondern auf unterschiedliches Konsum- und Sparverhalten oder – von vornherein, nicht ehebedingt – unterschiedlich einträgliche Erwerbstätigkeit zurückzuführen ist.

b Zu valorisierende Haushaltstätigkeit ohne Zugewinnausgleich

Problematischer für die hiesige Betrachtung sind die Fälle, in denen das Zugewinnausgleichsrecht bei dem Versuch scheitert, einen angemessenen Anteil des durch Erwerbstätigkeit erwirtschafteten Vermögens dem haushaltsführenden Ehegatten zukommen zu lassen.

a Grundlegende Schwächen eines Ausgleichs über einen nachträglichen Zahlungsanspruch

Vorab sind noch einmal die grundlegenden Schwächen des Zugewinnausgleichs gegenüber einer dinglichen Beteiligung im Rahmen einer Errungenschafts- oder Gütergemeinschaft hervorzuheben: Es kommt nur zu einem *nachträglichen* und *schuldrechtlichen* Ausgleich, der auf die Zahlung von Geld gerichtet ist, nicht zu einem unmittelbaren Anspruch des haushaltsführenden Ehegatten auf bestimmte Gegenstände.[30] Während des Güterstandes hat der Nicht-Eigentümer/haushaltsführende Ehegatte abgesehen von den Fällen der §§ 1365, 1369 BGB[31] keine Mög-

27. W. Siede, *in* H. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, München, 2017, § 1363 No. 12.
28. E. Koch, *in* F. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2017, Vor § 1363 No. 11; W. Siede, *in* H. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, München, 2-17, § 1363 No. 12.; krit. K. Muscheler, *Familienrecht*, München, 2017, No. 336.
29. W. Jaeger, *in* K. Johannsen & D. Henrich (Eds.), *Familienrecht*, München, 2015, Vor § 1372 No. 5; E. Koch, *in* F. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2017, Vor § 1363 No. 12.
30. Unter Umständen können dem einen – insbesondere dem kinderbetreuenden – Ehegatten die Ehewohnung und Haushaltsgegenstände zugewiesen werden, wenn er auf diese stärker angewiesen ist; jedoch muss dieser Ehegatte in jedem Fall wirtschaftliche Kompensation dafür leisten (§§ 1568a, 1568b BGB).
31. Siehe oben II.1.

lichkeit, auf die *Verwaltung/Veräußerung* bestimmter Vermögensgegenstände des anderen Einfluss zu nehmen. Es besteht insoweit ein dingliches Gefälle.[32]

b Verzerrungen durch Konsum- und Sparverhalten sowie eheneutrale Einkommensdifferenzen

Hier können ebenfalls das unterschiedliche Konsum- und Sparverhalten sowie die ausbildungs- und branchenbedingte Einkommensdifferenz (wie soeben sub a) zu Verzerrungen führen.

c Ähnlich hohe Zugewinne trotz arbeitsteiliger Ehe

Darüber hinaus sind verschiedene Szenarien denkbar, in denen die Valorisierung der Haushaltstätigkeit vereitelt oder erheblich beschränkt wird. Zunächst kommt es dann zu keiner oder keiner annähernd adäquaten Valorisierung der Haushaltstätigkeit, wenn die Ehegatten keinen unterschiedlich hohen Zugewinn erwirtschaftet haben. Wenn also beispielsweise trotz der Haushaltstätigkeit der Ehefrau der Ehemann wirtschaftlich erfolglos blieb, oder wenn er nach der Erzielung von Zugewinn einen finanziellen Rückschlag hinnehmen musste, oder wenn er den erzielten Zugewinn durch übermäßige Ausgaben oder unkluges Sparverhalten wieder verloren hat, schmälert dies unmittelbar sein Endvermögen und somit den Zugewinn.

Selbst wenn der eine Ehegatte durch seine Erwerbstätigkeit einen Zugewinn erzielt hat, so kann die Valorisierung der Haushaltstätigkeit aufgrund der Einbeziehung anderer Posten in das Anfangs- und Endvermögen behindert werden: Nach deutschem Zugewinnausgleichsrecht[33] sind Wertsteigerungen des Anfangsvermögens (§ 1374 I BGB) dem Endvermögen zuzurechnen. Hatte also beispielsweise die Ehefrau zu Beginn der Ehe ein Grundstück im Wert von (inflationsbereinigt) € 100.000, das aufgrund der Marktentwicklung am Ende der Ehe € 150.000 wert war, so hat sie dadurch einen Zugewinn von € 50.000 erzielt; hatte der Ehemann durch die Erwerbstätigkeit ebenfalls einen Zugewinn von € 50.000 erzielt, sind ihre Zugewinne gleich hoch und es kommt nicht zu einem Ausgleich. Entsprechendes gilt für Wertverluste des Anfangsvermögens.[34] Hatte beispielsweise der Ehemann zu Beginn der Ehe ein Grundstück im Wert von (inflationsbereinigt) € 100.000, das aufgrund der Marktentwicklung am Ende der Ehe € 50.000 wert war und hatte er gleichzeitig erwerbstätigkeitsbedingt € 50.000 Kontoguthaben erwirtschaftet, so beträgt sein Anfangs- und Endvermögen gleichermaßen € 100.000, so dass er einen

32. A. Röthel, 'Plädoyer für eine echte Zugewinngemeinschaft – Bemerkungen anlässlich des Regierungsentwurfs zur Änderung des Zugewinnausgleichs', *FPR – Familie, Partnerschaft, Recht*, 2009, pp. 275.

33. Im deutsch-französischen Wahlgüterstand gilt im Grunde dasselbe, vgl. Art. 9 I, Art. 11 I des Abkommens, jedoch wird dort (entsprechend dem französischen Recht) in Art. 9 II 1 eine Ausnahme für Grundstücke und grundstücksgleiche Rechte gemacht; bei diesen wird der Wert angesetzt, den sie am Tag der Veräußerung oder Ersetzung haben. Dies hat den Zweck, die Wertschwankungen des Grundbesitzes, welche nicht auf Leistungen eines Ehegatten zurückzuführen sind, unberücksichtigt zu lassen.

34. Im deutsch-französischen Wahlgüterstand werden derartige Wertgewinne oder – verluste ebenso berücksichtigt – mit Ausnahme der Grundstücke/grundstücksgleichen Rechte.

Zugewinn von € 0 erzielte. Schließlich ist zu bedenken, dass die Vollstreckung des Zugewinnausgleichsanspruchs leicht scheitern kann, wenn der zugewinnausgleichspflichtige, erwerbstätige Ehegatte im Zeitraum nach dem für die Berechnung maßgeblichen Stichtag (Rechtshängigkeit des Scheidungsantrags, § 1384 BGB) über die Rechtskraft des Scheidungsbeschlusses bis zum Vollstreckungsversuch des anderen Ehegatten sein Vermögen erheblich geschmälert oder verloren hat.

d Vermögensbewegungen (weitgehend) im negativen Bereich

Zu einer Valorisierung der Haushaltstätigkeit kommt es nicht, wenn sich der Zugewinn nur im negativen Bereich abspielt (z.B. Verringerung der Schuldenlast von € 100.000 auf € 10.000). Denn gemäß §§ 1378 II, 1384 BGB wird die Zugewinnausgleichsforderung durch den Wert des Vermögens begrenzt, das nach Abzug der Verbindlichkeiten bei Rechtshängigkeit des Scheidungsantrags (im Falle der Scheidung) bzw. bei Beendigung des Güterstands (im Falle des Güterstandswechsels) vorhanden ist.[35] Ist kein Vermögen im positiven Bereich vorhanden, lautet die Zugewinnausgleichsforderung auf € 0.

Ähnliches gilt, wenn sich der Zugewinn weitgehend im negativen Bereich abspielt. Hat z.B. der Ehemann ein Anfangsvermögen von – € 175.000[36] und ein Endvermögen von + € 25.000 (mithin einen Zugewinn von € 200.000) und die Ehefrau einen Zugewinn von 0 €, dann ist gemäß § 1378 II BGB ihr eigentlich auf € 100.000 lautender Zugewinnausgleichsanspruch auf € 25.000, mithin 1/4, begrenzt.

e Kaum Einbeziehbarkeit der vorehelichen Vorgänge

Es kommt hinzu, dass das deutsche Güterrecht sich sehr schwer damit tut, diejenigen Vorgänge abzubilden und mit einzubeziehen, die vor der Eheschließung stattgefunden haben. Vorehelich eingetretener Zugewinn und vorehelich geleistete Haushaltstätigkeit sind nur mit schuldrechtlichen Hilfsmitteln[37] und in sehr eingeschränktem Maße einbeziehbar; aus Perspektive des Zugewinns gelten harte Stichtage.

f Keine positive Härteklausel

Das Zugewinnausgleichsrecht kennt zwar mit § 1381 BGB eine negative Härteklausel[38] – der Schuldner kann die Erfüllung der Ausgleichsforderung verweigern, soweit der Ausgleich des Zugewinns nach den Umständen des Falles grob unbillig wäre –, doch eine positive Härteklausel – der Zugewinnausgleichsanspruch kann erhöht werden, wenn die Billigkeit dies fordert – existiert nicht.

35. Art. 14 des Abkommens sieht für die deutsch-französische Wahl-Zugewinngemeinschaft sogar eine Begrenzung auf den halben Wert des Vermögens des Ausgleichspflichtigen vor.
36. Bis zur Güterrechtsreform im Jahre 2009 blieb die Abtragung von Schulden eines bei Eheschließung verschuldeten Ehegattens unberücksichtigt, da das Anfangsvermögen nicht negativ sein konnte.
37. Einige Beispiele unten sub VI.
38. Eine solche existiert in der deutsch-französischen Wahl-Zugewinngemeinschaft nicht.

g Vertragliche Modifikationen des Zugewinnausgleichsanspruchs

Zu bedenken ist weiterhin, dass die Ehegatten durch Vereinbarungen vor Eheschließung, vor Trennung oder im Laufe des Scheidungsverfahrens den Zugewinnausgleich modifizieren können. Nach der sog. Kernbereichslehre des BGH, die die vermögensrechtlichen Scheidungsfolgen in weniger dispositive (im Kernbereich belegene) und dispositivere (in der Peripherie belegene) Scheidungsfolgen unterteilt, liegt der Zugewinn in der Peripherie und ist relativ weitgehender vertraglicher Einschränkung zugänglich.[39] Hauptgrund hierfür ist, dass die Ehegatten (weitgehend) kontrollfrei sogar gleich die Gütertrennung hätten vereinbaren können und dass somit das Minus dazu – die Beschränkung des Zugewinns – regelmäßig nicht zu beanstanden ist.[40] Wie jeder Scheidungsfolgenvertrag muss sich die vertragliche Modifikation des Zugewinnausgleichs an der Sittenwidrigkeitskontrolle des § 138 BGB[41] und der Ausübungskontrolle des § 242 BGB[42] messen lassen.

h Fazit

Die obigen Beispiele zeigen, dass sehr häufig der Zugewinnausgleich die geleistete Haushaltstätigkeit nicht annähernd präzise wiedergeben kann. Grund hierfür ist neben allgemeinen Risiken eines nachträglichen schuldrechtlichen Zahlungsanspruchs insbesondere die starke Schematisierung der Rechnungsposten und Stichtage des Zugewinnausgleichs. Die historische Ratio für die Einführung des Zugewinnausgleichs muss sich nicht in jedem Einzelfall wiederfinden lassen.

4 Besonderheiten bei der Beendigung des Güterstands durch Tod eines Ehegatten

a Vorgehen bei Beendigung des Güterstands durch Tod eines Ehegatten

Wird die Zugewinngemeinschaft durch den Tod eines Ehegatten beendet, so erfolgt der Zugewinnausgleich i.d.R.[43] durch Beteiligung am Vermögen des Ver-

39. Grundsatzurteil des BGH v. 11.02.2004 – XII ZR 265/02 = BGHZ 158, 81; Entwicklung neuer Maßstäbe in daran anknüpfenden Entscheidung s. BGH, Urt. V. 06.10.2004 – XII ZB 110/99 = *NJW – Neue Juristische Wochenschrift*, 2005, 137; BGH v. 17.10.2007 – XII ZR 96/05 = *NJW – Neue Juristische Wochenschrift*, 2008, pp. 1076; BGH v. 31.10.2012 – XII ZR 129/10 = *NJW – Neue Juristische Wochenschrift*, 2013, pp. 380.

40. BGH, Urt. v. 21.11.2012 – XII ZR 48/11 = *NJW – Neue Juristische Wochenschrift* 2013, pp. 457; Urt. v. 11.2.2004 – XII ZR 265/02 = BGHZ 158, 81.

41. Es erfolgt eine *Inhaltskontrolle* auf wesentliche Benachteiligung eines Ehegatten; diese kann sich ggf. aus einer Kumulation mit Modifikationen im Bereich Unterhalt und Versorgungsausgleich ergeben. Ferner erfolgt eine Kontrolle im Hinblick auf etwaige *Umstandssittenwidrigkeit*, etwa ob der benachteiligte Ehegatte sich in einer besonderen Drucksituation (Schwangerschaft, bevorstehende Hochzeit) befand oder ob ein nicht hinnehmbares Informationsgefälle bestand und ausgenutzt wurde.

42. Hier kommt es darauf an, ob die Berufung auf einen damals angesichts der Planungen der Ehegatten nicht zu beanstandenden Vertrag heute angesichts des tatsächlichen Verlaufs des Ehelebens als treuwidrig empfunden würde.

43. Wenn nicht ausnahmsweise § 1371 II oder III BGB einschlägig sind – überlebender Ehegatte wird nicht Erbe oder Vermächtnisnehmer oder schlägt Erbschaft aus.

storbenen, §§ 1931 III, 1371 BGB in Form einer Erhöhung des Erbteils des Ehegatten um 1/4 (sog. erbrechtliche Lösung).[44] Wenn die Ehegatten Kinder haben, dann erbt der überlebende Ehegatte neben den Kindern (nur) zu 1/4, vgl. § 1931 I BGB.[45] Die erbrechtliche Lösung führt somit im Normalfall zu einer Erhöhung des Erbteils auf 1/2.

Die Gründe für die erbrechtliche Lösung liegen insbesondere in dem Ziel der Kompensation der relativ schwachen Stellung des überlebenden Ehegatten im gesetzlichen Erbrecht und in dem Wunsch, in der Situation der Trauer und angesichts des häufig hohen Alters des überlebenden Ehegatten die Rechnereien und viele Jahrzehnte zurückreichende Nachforschungen über die Vermögensentwicklung zu vermeiden, die ein rechnerischer Zugewinn mit sich brächte.[46]

b Keine Differenzierung nach Tod des potentiell Zugewinnausgleichspflichtigen oder des Zugewinnausgleichsberechtigten

Die oben dargestellte erbrechtliche Lösung greift unabhängig davon, ob der verstorbene Ehegatte überhaupt einen Zugewinn erwirtschaftet hat und unabhängig davon, ob der überlebende Ehegatte gegebenenfalls einen Zugewinnausgleichsanspruch in annähernd ähnlicher Höhe gehabt hätte.[47]

Stirbt der hypothetisch *Zugewinnausgleichspflichtige* zuerst, so kommt es zwar zu einer Kompensation des anderen Ehegatten über die Erhöhung des Erbteils um 1/4, aber durch die Pauschalierung auf 1/4 des Nachlasses wird es dem Zufall überlassen, ob dies in etwa mit dem rechnerischen Zugewinnausgleich korrespondiert oder nicht.

Stirbt zuerst der hypothetisch *Zugewinnausgleichsberechtigte*, so kommt – gänzlich dem ursprünglichen Sinn der Zugewinngemeinschaft widersprechend – der „pauschalierte Zugewinn" dem hypothetisch Zugewinnausgleichspflichtigen zugute (!). Die Erben des hypothetisch Zugewinnausgleichsberechtigten kommen somit nicht in den wirtschaftlichen Genuss des Zugewinnausgleichs.

5 Wahrnehmung in der Bevölkerung

Lange schon wurde über die Fehlwahrnehmung der güterrechtlichen Rechtslage in der Bevölkerung spekuliert. Eine jüngst durchgeführte Studie hat diese Befürchtungen bestätigt. 89 % derjenigen, die in Zugewinngemeinschaft leben, „glauben,

44. Anders liegen die Dinge im deutsch-französischen Wahlgüterstand der Zugewinngemeinschaft, hier ist kein abweichender Berechnungsmodus für den Fall der Beendigung des Güterstandes durch den Tod eines Ehegatten vorgesehen, vgl. Art. 7 Nr. 1, 8 ff. des Abkommens.

45. Neben Verwandten der zweiten Ordnung (Eltern und deren Abkömmlinge, § 1925) oder neben Großeltern erbt der überlebende Ehegatte zur Hälfte, § 1931 I Hs. 2 BGB; sind weder Verwandte der ersten oder der zweiten Ordnung noch Großeltern vorhanden, so erhält der überlebende Ehegatte die ganze Erbschaft, § 1931 II.

46. W. Siede, *in* H. Bamberger & H. Roth (Eds.), *Beck'scher Online-Kommentar BGB*, München, 2017, § 1371 No. 1; E. Koch, *in* F. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2017, Vor § 1371 No. 1; G. Brudermüller, *in* O. Palandt (Founder), *Kommentar zum Bürgerlichen Gesetzbuch*, München, 2018, § 1371 No. 1.

47. Zu dem Themenkomplex siehe insgesamt *K. Heimann* ‚' Tod und Unterhalt', *FF*, 2016, 485.

dass alles, was während einer Ehe erworben wird, beiden Partnern gleichermaßen gehört (93 % der Frauen; 87 % der Männer)" und „65 % vermuten, dass das gesamte Vermögen 'per se' beiden Partnern gemeinsam gehört (69 % der Frauen; 62 % der Männer)".[48] 89 % der Ehegatten im Güterstand der Zugewinngemeinschaft leben vielmehr in einer „gefühlten Errungenschaftsgemeinschaft", 65 % sogar in einer gefühlten Gütergemeinschaft. Dazu mag auch der für einen juristischen Laien irreführende Begriff der Zugewinn*gemeinschaft* beitragen. Diese Fehlvorstellung birgt Gefahren für den wirtschaftlich schwächeren, in der Regel also den haushaltsführenden Ehegatten. Denn er wähnt sich irrig dinglich abgesichert über die Regeln des Güterrechts, während er lediglich den schuldrechtlichen Anspruch auf Zugewinnausgleich hat, der nicht immer zu einer hälftigen Teilhabe führen muss.[49]

III Wahlgüterstand der Gütergemeinschaft, §§ 1415 ff. BGB

Die Gütergemeinschaft kann von den Ehegatten nur durch Ehevertrag begründet werden, § 1415 BGB. Die (vorehelichen) Vermögensmassen der Ehegatten verschmelzen zum Gesamtgut (§ 1416 I 1 BGB) mit Ausnahme des Sonder- und Vorbehaltsguts (§§ 1417, 1418 BGB); ehezeitlich erworbenes Vermögen wird ebenso gdsl. gemeinsames Vermögen. Das Gesamtgut wird nur gemeinschaftlich verwaltet, §§ 1419 I, 1421 BGB, sofern nichts anderes vereinbart ist. Bei Ende des Güterstands kommt es im Grundsatz und grob gesagt zu einer hälftigen Teilung des Gesamtguts. Mangels praktischer Relevanz der Gütergemeinschaft wird auf eine detaillierte Darstellung verzichtet.

IV Gütertrennung

1 Allgemeines

Die Gütertrennung wird im Normalfall durch Ehevertrag (§§ 1408 I, 1419 BGB) begründet.[50] Nach der widerleglichen Auslegungsregel des § 1414 BGB soll die Gütertrennung ferner eintreten, wenn die Ehegatten zwar nicht positiv in die Gütertrennung hineinoptieren, aber, ohne gleichzeitig einen anderen Güterstand zu vereinbaren, den gesetzlichen Güterstand der Zugewinngemeinschaft nach der Eheschließung aufheben oder vor der Eheschließung ausschließen oder wenn sie den Zugewinnausgleich in einem Ehevertrag ausgeschlossen haben (§§ 1371 ff. BGB) oder wenn sie die Gütergemeinschaft aufgehoben haben (§§ 1415 ff. BGB).

48. C. Wippermann, *Partnerschaft und Ehe – Entscheidungen im Lebensverlauf*, Bundesministerium für Familie, Senioren, Frauen und Jugend (Ed.), Berlin, 2014, p. 50.
49. Siehe oben II.3.b.D.
50. Die Gütertrennung tritt als „hilfsweiser gesetzlicher Güterstand" mit Rechtskraft der gerichtlichen Entscheidung, durch die die Zugewinngemeinschaft vorzeitig (§ 1388 BGB) oder die Gütergemeinschaft aufgehoben wird (§§ 1449 I, 1470 I BGB), ein.

Charakteristisch für die Gütertrennung ist, dass die Vermögensbereiche der Ehegatten getrennt bleiben und jeder Ehegatte sein Vermögen selbstständig verwaltet. Die Ehegatten können gemeinsames Vermögen nach dem allgemeinen Zivilrecht bilden.[51] Bei der Eheauflösung findet kein Zugewinnausgleich statt. Gütertrennung bedeutet also praktisch die Abwesenheit besonderer güterrechtlicher Regelungen für Ehegatten.

Jedoch können Ausgleichsansprüche nach schuldrechtlichen Anspruchsgrundlagen, insbesondere nach den Grundsätzen der Innengesellschaft, der Störung der Geschäftsgrundlage, einer ehebedingten Zuwendung oder der Zweckverfehlungskondiktion entstehen.[52]

2 *Besonderheiten bei der Beendigung des Güterstands durch Tod eines Ehegatten*

Lebten die Ehegatten im Zeitpunkt des Todes des Erstversterbenden nicht in Zugewinngemeinschaft, so greift die pauschale Erhöhung des Erbteils um 1/4[53] nicht und der überlebende Ehegatte würde – sofern die Ehegatten lebende Abkömmlinge haben – nur zu 1/4 am Nachlass beteiligt (§ 1931 I BGB). Um diese Härte zu kompensieren, sieht § 1931 IV BGB vor, dass, wenn beim Erbfall Gütertrennung bestand und wenn als gesetzliche Erben neben dem überlebenden Ehegatten ein oder zwei Kinder des Erblassers berufen sind, der überlebende Ehegatte und jedes Kind zu gleichen Teilen erben. Bei einem Kind erben also überlebender Ehegatte und das Kind zu je 1/2, bei zwei Kindern erben diese und der überlebende Ehegatte zu je 1/3, bei drei und mehr Kindern bleibt es bei § 1931 I BGB, so dass bei drei Kindern der überlebende Ehegatte zu 1/4 und die Kinder zu 1/6 erben.

V Eigentümerstellung nach allgemeinen sachenrechtlichen Regeln

Um zu ermitteln, ob ein Ehegatte oder beide (und wenn ja, zu welchen Anteilen) im Güterstand der Zugewinngemeinschaft, der Wahlzugewinngemeinschaft oder der Gütertrennung Eigentümer (§ 903 BGB) derjenigen Vermögensgegenstände geworden sind, welche während der Ehezeit erworben wurden, ist mangels besonderer güterrechtlicher Vorgaben auf die allgemeinen sachenrechtlichen Regeln abzustellen. Insbesondere ist nach allgemeinen Regeln (§§ 133, 157 BGB) die dingliche Einigung, also die Einigung von früherem Eigentümer und Erwerber(n) über den Übergang des Eigentums, § 929 S. 1 BGB, auszulegen. Zu den üblichen Auslegungskriterien gehören die Vorstellung des Vertragspartners,[54] von wem

51. S. sub II.5.
52. Sog. Nebengüterrecht, dazu sogleich sub F.
53. § 1371 I BGB, s. oben.
54. OLG Düsseldorf, Urt. v. 18.12.1991 – 11 U 31/91 = *FamRZ – Zeitschrift für das gesamte Familienrecht*, 1992, 670; OLG Hamm, Urt. v. 07.06.2002 – 29 U 1/02 = *FamRZ – Zeitschrift für das gesamte Familienrecht*, 2003, 529; krit. J. Gernhuber & D. Coester-Waltjen, *Familienrecht*, München, 2010, § 44 No. 12.

der Erwerbsentschluss ausging, wer den Erwerb finanziert,[55] wer den Gegenstand erhält und wer ihn nutzt. Eine gemeinsame Erwerbsfinanzierung ist nicht *conditio sine qua non*. Auf diesem Wege kann also der haushaltsführende Ehegatte je nach den Umständen Miteigentum an ehezeitlich erworbenen Vermögensgegenständen erlangen.

Bei der Auslegung der dinglichen Einigung gibt es keine Vermutung zugunsten des gemeinschaftlichen Eigentumserwerbs durch die Ehegatten, denn durch eine solche würden die Ehegatten in eine faktische Errungenschaftsgemeinschaft gezwungen. Doch es gibt eine andere Vermutung, die letztlich oft ähnlich wirkt: Da die Ehegatten grundsätzlich an allen Gegenständen in der Ehewohnung Mitbesitz (vgl. § 866 BGB) haben, besteht nach allgemeinen sachenrechtlichen Regeln eine Vermutung dahingehend, dass sie an diesen Gegenständen Miteigentum haben (§ 1006 I 1 BGB). Daher muss bei diesen Gegenständen nicht der eine Ehegatte beweisen, dass er Miteigentümer ist, vielmehr obliegt es dem anderen Ehegatten, zu beweisen, dass er Alleineigentümer ist. Bei Mitbesitz wird somit über § 1006 I 1 BGB grundsätzlich Miteigentum nach Bruchteilen vermutet (§§ 741, 1008 BGB), ohne dass eine Vermutung für eine bestimmte Miteigentumsquote bestünde.[56] Wenn keine Anhaltspunkte für eine bestimmte Miteigentumsquote bestehen, so ist im Zweifel davon auszugehen, dass die Ehegatten Bruchteilseigentum zu 1/2 erworben haben (§ 742 BGB).

VI Nebengüterrecht

1 Ansprüche aus Dienst- und Werkvertrag

Rein theoretisch könnte der erwerbstätige Ehegatte mit dem anderen Ehegatten einen Dienst- und/oder Werkvertrag über die Haushaltsarbeit schließen und hieraus eine Vergütung fordern (§§ 611, 631 BGB). In der Praxis wird sich (soweit hierüber nicht ausnahmsweise eine ausdrückliche, am besten schriftliche Einigung ersichtlich ist) hierfür regelmäßig kein Rechtsbindungswille herleiten lassen. Denkbar, aber dennoch äußerst selten, wären solche Verträge dort, wo der wirtschaftlich schwächere Ehegatte weniger im privaten Haushalt als im Erwerbsgeschäft oder der Freiberuflerpraxis des anderen Ehegatten mitgearbeitet hat. Allein die tatsächlich erbrachte Arbeitsleistung genügt in diesen Fällen für die Annahme eines konkludenten Vertragsschluss nicht, vielmehr müssen weitere Umstände wie etwa eine erhebliche, den üblichen familiären Umfang überschreitende Arbeitsleistung, die Zahlung eines ortsüblichen oder tariflichen Lohnes oder die Abführung von Sozialabgaben hinzutreten.[57]

55. G. Brudermüller, *in* O. Palandt (Begr.), *Kommentar zum Bürgerlichen Gesetzbuch*, 76th edn, München, 2018, Einl. v. § 1297 No. 20; J. Gernhuber & D. Coester-Waltjen, *Familienrecht*, München, 2010, § 44 No. 12.
56. K.-H. Gursky, *in* J. von Staudinger (Begr.), *BGB*, Berlin, 2012, § 1006 No. 13.
57. H. Vogelsang, *in* G. Schaub, *Arbeitsrechts-Handbuch*, München, 2017, § 9 No. 23.

2 Ansprüche nach Ehegatteninnengesellschaft

Es steht den Ehegatten frei, eine Gesellschaft bürgerlichen Rechts zu gründen. Ausgleichsansprüche nach §§ 705 ff. BGB setzen den Abschluss eines Vertrages zur Gründung einer Innengesellschaft voraus. Als Zweck einer Gesellschaft kommt grundsätzlich jede erlaubte Zielsetzung in Betracht (wirtschaftlich, ideell).[58] In den typischen Fällen geht es um die gemeinsame Finanzierung oder Renovierung einer Immobilie. Bei Ehegatten, die in Zugewinngemeinschaft leben, kann nur in seltenen Fällen der Bestand einer Innengesellschaft angenommen werden, weil der im Fall der Scheidung gebotene Vermögensausgleich in der Regel bereits durch die Vorschriften über den Zugewinnausgleich gesichert ist.[59, 60] Die Vorstellung der Ehegatten, über den Zugewinnausgleich an dem gemeinsam Erarbeiteten teilzuhaben, wird vielfach dagegen sprechen, ihr Verhalten hinsichtlich ihrer gemeinsamen Arbeit oder Wertschöpfung als Abschluss eines Gesellschaftsvertrags auszulegen.[61] Selbst wenn es sich um Ehegatten in Gütertrennung handelt, wird es häufig schwierig sein, den für den Abschluss des Gesellschaftsvertrages notwendigen Rechtsbindungswillen festzustellen.

3 Zweckverfehlungskondiktion

Die Zweckverfehlungskondiktion (§ 812 Abs. 1 Satz 2 Alt. 2 BGB) erlegt dem Empfänger einer Leistung die Pflicht zur Herausgabe der Zuwendung auf, sofern der mit der Leistung nach dem Inhalt des Rechtsgeschäfts bezweckte Erfolg nicht eingetreten ist. Erforderlich ist eine Mehrung des Vermögens des einen Ehegatten durch den anderen, die auf einen Zweck gerichtet ist, der Gegenstand einer Vereinbarung zwischen den Ehegatten war. Leistung i.S.d. Kondiktionen des § 812 Abs. 1 BGB ist die bewusste zweckgerichtete Mehrung fremden Vermögens,[62] bei der Haushaltstätigkeit insbesondere die darin liegende Ersparnis von Aufwendungen. Erforderlich ist eine Zweckabrede zwischen den Ehegatten dergestalt, dass die Ehegatten zwar nicht die Schaffung eines rechtlich gemeinsamen Vermögensgegenstandes, aber eine langfristige Partizipation beider Partner an demselben bezwecken. Indes ist äußerst zweifelhaft, ob die Zweckverfehlungskondiktion zum Ausgleich von Haushaltstätigkeit herangezogen werden könnte. Ihr eigentlicher Anwendungsbereich sind Zuwendungen, die spezifisch auf den im Eigentum des anderen Ehegatten befindlichen Gegenstand bezogen sind, wie etwa Beiträge zur Kaufpreiszahlung für ein Grundstück/eine Wohnung, Tilgungsleistungen für einen Immobilienkredit, Renovierungsleistungen an der Immobilie oder Ankauf

58. S. Habermeier, *in* J. von Staudinger (Founder), *BGB*, Berlin, 2003, § 705 No. 18.
59. BGH, Urt. v. 29.1.1986 – Ivb ZR 11/85 = *BGH NJW – Neue Juristische Wochenschrift,* 1986, 1870.
60. Hilfreich könnte indes die Ehegatteninnengesellschaft bei Ehegatten in Zugewinngemeinschaft bei solchen Unternehmungen sein, die über „Tisch und Bett" hinausgehen, wie der „gemeinsame" Betrieb eines Erwerbsgeschäfts oder einer Praxis.
61. BGH, Urt. v. 28.09.2005 – XII ZR 189/02 = *NJW – Neue Juristische Wochenschrift*, 2006, 1268, No. 12.
62. A. Stadler, *in* O. Jauernig (Founder), *BGB*, München 2015, § 812, No. 2 ff., m.w.N.

von Material für Renovierungen. Bei faktischen Lebensgefährten[63] lässt die Rechtsprechung einen Ausgleich über die Zweckverfehlungskondiktion nur zu, wenn es sich um Leistungen handelt, die den Rahmen der täglichen Erhaltung der Lebensgemeinschaft überschreiten und bei einem Partner zur Bildung von die Beendigung der Lebensgemeinschaft überdauernden Vermögenswerten geführt haben.[64] Würde man – was angesichts der Option einer Zugewinngemeinschaft auch bei der Gütertrennung naheliegt – ähnliche Maßstäbe an die Gütertrennung anlegen, würde ein Anspruch aufgrund von Haushaltstätigkeit ausscheiden, weil sie den Rahmen der täglichen Erhaltung der Lebensgemeinschaft nicht überschreitet.

4 *Wegfall der Geschäftsgrundlage*

Ähnliches gilt für den Anspruch wegen Wegfalls der Geschäftsgrundlage (§ 313 BGB). Voraussetzung wäre der stillschweigende Abschluss eines sog. familienrechtlichen Kooperationsvertrages, dessen Geschäftsgrundlage der Fortbestand der ehelichen Lebensgemeinschaft bildet. Doch auch hier ist die Rechtsprechung auf solche Leistungen zugeschnitten, die sich gerade auf den Erwerb des Vermögensgegenstandes beziehen und – wenn man die Ratio bei den faktischen Lebensgefährten übertragen möchte – auf solche Leistungen, die den Rahmen des täglichen Zusammenlebens in erheblichem Maße überschreiten. Daher ist davon auszugehen, dass diese Anspruchsgrundlagen nur sehr selten zu einer Valorisierung von Haushaltstätigkeit führen werden.

VII Besonderheiten bei faktischen Lebensgefährten

Unter faktischen Lebensgefährten versteht man eine auf Dauer angelegte, nicht nur vorübergehende Verbindung zwischen zwei Personen, zwischen denen keine Ehe oder Lebenspartnerschaft besteht (die aber nicht an der Eingehung einer Ehe oder Lebenspartnerschaft gehindert wären), die sich durch enge emotionale Verbundenheit auszeichnet, eine Wirtschafts- und Verantwortungsgemeinschaft bildet und daneben keine weiteren Bindungen gleicher Art zulässt.[65] Für die faktische Lebensgemeinschaft bestehen im Zivilrecht ganz gelegentliche Sonderregelungen,[66] doch es handelt sich nicht um eine umfassende Regelung oder ein annähernd umfassendes Schutzsystem. Die analoge Anwendung von Normen des nachehelichen Unterhaltsrechts, Güterrechts und Versorgungsausgleichsrechts wird nahezu einhellig abgelehnt.[67] Den faktischen Lebensgefährten steht es

63. Zu ihnen siehe auch unten VII.
64. BGH, Urt. v. 09.07.2008 – XII ZR 179/05 = BGHZ 177, 193, No. 25 f., 33.
65. Alternativ zur faktischen Lebensgemeinschaft spricht man von einer eheähnlichen/lebenspartnerschaftsähnlichen Lebensgemeinschaft (BVerfG) oder einer nichtehelichen Lebensgemeinschaft (sonstige Rspr).
66. Z.B. im Mietrecht besteht ein Eintrittsrecht des einen Lebensgefährten in den Mietvertrag bei Tod des anderen Lebensgefährten, § 563 BGB.
67. *De lege ferenda* wird von einigen ein Härtefallunterhaltsanspruch gefordert.

in relativ weitem Umfang frei, durch vertragliche Abreden die güter- und unterhaltsrechtlichen Regelungen nachzubilden, doch wird diese Möglichkeit in der Praxis kaum genutzt. Solange ein faktischer Lebensgatte ein gemeinsames Kind betreut und deswegen nicht oder nur eingeschränkt einer Erwerbstätigkeit nachgehen kann, kann ihm ein – der entsprechenden eherechtlichen Norm des § 1570 BGB stark angenäherter – Unterhaltsanspruch zustehen, § 1615l II S. 2-5 BGB. Die sachenrechtliche Situation zwischen faktischen Lebensgefährten beurteilt sich nach allgemeinen Regeln.[68] Die Rechtsprechung greift in ähnlicher Weise wie in Gütertrennungsehen zu schuldrechtlichen Instrumenten, doch haben diese einen ähnlichen Anwendungsbereich wie oben beschrieben und sind daher im Regelfall nicht geeignet, Haushaltstätigkeit zu valorisieren.

VIII Fazit

Das Vorstehende hat gezeigt, dass für die allermeisten Ehegatten, nämlich diejenigen über 90 %, die im gesetzlichen Güterstand der *Zugewinngemeinschaft* leben, die Valorisierung der Haushaltstätigkeit nur unvollständig verwirklicht ist. Auffällig ist dabei, dass die Zugewinngemeinschaft ihrem historischen Grundgedanken nach zwar gerade auch auf eine Valorisierung der Haushaltstätigkeit abzielt, aber in ihrer Umsetzung zahlreiche Verzerrungen und Vereitelungen der Valorisierung der Haushaltstätigkeit korrekturlos hinnimmt. *Gütertrennung* und *faktische Lebensgemeinschaften* bieten in Abwesenheit besonderer vertraglicher Abreden praktisch keine Gewähr für die Valorisierung von Haushaltstätigkeit. Der Güterstand, der die Haushaltstätigkeit monetär am besten valorisiert, ist die *Gütergemeinschaft*. Doch wird sie heute kaum noch von den Ehegatten gewählt.

Letztlich bislang nicht durchgesetzt hat sich die schon in den 1950er Jahren vom Gesetzgeber den Ehegatten eröffnete Möglichkeit, durch Modifikation des Wahlgüterstandes Gütergemeinschaft eine Art *Errungenschaftsgemeinschaft* zu kreieren, indem die Ehegatten die eingebrachten Gegenstände zum Vorbehaltsgut erklären.[69] Die Erfolglosigkeit dieses Modells könnte auf die Schwerfälligkeit der Gütergemeinschaftsnormen im Übrigen zurückzuführen sein. Denn ansonsten – und abgesehen von der weithin „gefühlten Errungenschaftsgemeinschaft"[70] – ist kaum ein Grund ersichtlich, weshalb die in zahlreichen europäischen Nachbarstaaten und in den CEFL-Prinzipien erfolgreiche Errungenschaftsgemeinschaft[71] sich nicht auf diesem Wege in Deutschland durchgesetzt hat. Bis zur Schaffung des BGB galt die Errungenschaftsgemeinschaft für etwa 10 Millionen Menschen vor allem in West- und Süddeutschland. Bei den Beratungen zum BGB sprach man sich letztlich vor allem wegen der Schwierigkeiten beim Umgang mit Verbindlich-

68. Oben V.
69. BT-Drs. II/3409, S. 25, vgl. B. Thiele, *in* J. von Staudinger (Founder), *BGB*, Berlin, 2017, Einl. zu §§ 1363 ff. No. 17.
70. Siehe oben II.5.
71. Vgl. K. Boele-Woelki et al., *Principles of European Family Law Regarding Property Relations Between Spouses*, Intersentia, Antwerp, 2013, p. 219.

keiten und bei der gemeinsamen Verwaltung gegen die Errungenschaftsgemeinschaft als gesetzlichen oder Wahlgüterstand aus.[72] Doch ist die Diskussion über die Errungenschaftsgemeinschaft nie ganz verebbt.[73]

Eine stärkere Ausrichtung des Güterrechts am Ziel der Valorisierung der Erwerbstätigkeit – und hilfsweise eine Sensibilisierung der Bevölkerung für die diesbezüglichen Unwägbarkeiten des Zugewinnausgleichs – wäre durchaus wünschenswert,[74] ist aber zur Zeit rechtspolitisch nicht auf der Agenda.

72. Mot IV 143 ff.; Prot IV 118, 139, vgl. B. Thiele, *in* J. von Staudinger (Founder), *BGB*, Berlin, 2017, Einl. Zu §§ 1363 ff. No. 9.

73. Vgl. nur G. Brudermüller, B. Dauner-Lieb & S. Meder (Eds.), *Wer hat Angst vor der Errungenschaftsgemeinschaft?*, Göttingen, 2013; für eine Einführung des Güterstandes der Errungenschaftsgemeinschaft als gesetzlichen Güterstand spricht sich das Gutachten der Sachverständigenkommission an das Bundesministerium für Familie, Senioren, Frauen und Jugend für den ersten Gleichstellungsbericht der Bundesregierung aus, online abrufbar unter: <https://www.bmfsfj.de/blob/93682/516981ae0ea6450bf4cef0e8685eecda/erster-gleichstellungsbericht-neue-wege-gleiche-chancen-data.pdf>, ebenso der Zweite Gleichstellungsbericht 2017, online abrufbar unter <www.gleichstellungsbericht.de/zweiter-gleichstellungsbericht.pdf>.

74. Dies gilt insbesondere auch im Hinblick auf das im Jahre 2008 reformierte Unterhaltsrecht, das den Gedanken der nachehelichen Solidarität eingeschränkt und daher ein größeres Maß an Solidarität und fairer Vermögensbeteiligung während bestehender Ehe erforderlich gemacht hat.

3 Valorisation of household labour through relationship and property law

Challenging perspectives from England, Wales & Scotland

Anne Barlow[*]

I Introduction

Marriage has long been recognised as an economic as well as a personal and emotional relationship. However whether, and if so how, the economic consequences of the differential and gendered roles typically undertaken within marriage (and now other formal and informal couple relationships) are recognised within law is far from consistent across jurisdictions. Some feminist lines of thinking question whether special regulation of the economic consequences of personal relationships is still appropriate at all. In an age of gender equality, it is argued, each partner should be equally capable of safeguarding their own financial interests during marriage and marriage in and of itself should not be a career choice for women gold-diggers.[1] Others take the opposite view that domestic labour in the shape of child care and homemaking with consequent financial dependency on a partner should be seen as being of equal value to breadwinning within family life and remains a legitimate and important 'choice' which can be of benefit to family well-being which in turn is of value to wider society.[2] What approach we should be taking to the value of non-financial contributions to family life through family law and property law regulation is a live debate in the UK at the present time. As shall be seen, the legal approaches to these issues in both England and Wales and Scotland diverge from those of civil law jurisdictions and to some extent from each other. Let us now consider how well these address the need to value non-financial contributions to family solidarity and what the advantages and disadvantages are and for whom.

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1. See for example, R. Deech, 'What's a Woman Worth?', (2009) 39 *Family Law*, 1140-45.
2. See M. Fineman, *The Autonomy Myth: A Theory of Dependency*, The New Press, 2004.

II The Common Law Approach and the UK Social Context

The distinctive feature of the common law approach is that it does not countenance any automatic link between couple relationships and entitlement to family property. Thus in the United Kingdom, unlike the legal position for the majority of our European neighbours, there is no formal matrimonial community of property regime in any of its three family law jurisdictions.[3] Historically, community of property regimes were seen in Europe as the best way to recognise the realities of the economic relationship within most breadwinner/homemaker marriages as they offered a concrete form of solidarity through an automatic entitlement to an equal share in the community property, unless the parties agreed otherwise.[4] This is one way for the law to indirectly place a value on domestic labour and to clearly recognise in law the shared but often role-differentiated endeavour for mutual benefit involved in marriage. In contrast, in both England and Wales and in Scotland, such an approach was rejected when the 19th century feminist struggles against the doctrine of coverture, whereby a husband owned and controlled all his wife's property, resulted in a system of separate property where each spouse retained independent control of their property during marriage.[5] This separation of property is still the hallmark of the common law approach *during* marriage. However, as the 20th century progressed and divorce became more common, the hardship caused on divorce to financially dependent wives who had no property of their own - the vast majority - and whose only remedy was maintenance became a cause for concern. Reform, when it came, considered but rejected the solution of community of property and also of imposing statutory joint ownership of the matrimonial home.[6] Instead, a right to occupy the matrimonial home plus a right on divorce to apply for a discretionary redistribution of the couple's assets according to statutory criteria was preferred and was introduced in the 1970s in England and

3. There are three legal jurisdictions within the UK. These are England and Wales, Scotland and Northern Ireland. For the purpose of this discussion, the approach of the jurisdiction of Northern Ireland to valuing domestic labour within relationships equates with that of England and Wales, whereas that of Scotland is quite distinct.
4. There are of course many types of community of property regimes within Europe. For a discussion from an English standpoint of some of these and of the different feminist perspectives within the historical paths to community of property and separate property in European civil law and common law jurisdictions, see A. Barlow, 'What Does Community of Property Have to Offer English Law?' *in* A. Bottomley and S. Wong (Eds.), *Changing Contours of Domestic Life, Family and Law*, Oxford, Hart Publishing, 2009, p. 27.
5. Married Women's Property Acts 1870 and 1882 and Married Women's Property (Scotland) Acts of 1881 and 1920.
6. See Law Commission, *Financial Provision in Matrimonial Proceedings*, Law Com No 25, (London, HMSO, 1969); Law Commission, *Family Property Law Working Paper No 42* (London, HMSO, 1971); Law Commission. *First Report on Family Property: A New Approach* Law Com No 52 (London, HMSO, 1973); Law Commission, *Third Report on Family Property: The Matrimonial Home Co-ownership and Occupation Rights and Household Goods* Law Com No 86 (London, HMSO, 1978).

Wales, with a similar approach but different criteria introduced in Scotland in the 1980s.[7]

Today, in both England and Wales and in Scotland, it remains true that during a marriage, civil partnership or cohabitation relationship, each partner's property is considered their own separate property unless it has been jointly purchased. Marriage and civil partnership have no direct effect on a couple's property ownership during the relationship which is governed by property law, but these formal couple relationships in both jurisdictions do still give rise to a claim for redistribution of assets on relationship breakdown according to statutory criteria applied through the discretion of the court.[8] In Scotland (but not in England and Wales where property law alone governs the situation between cohabiting partners), this approach of discretionary redistribution on relationship breakdown now also extends (albeit in more limited circumstances prescribed by a different statutory regime) to former cohabiting couples.[9]

Thus conceptually, any valorisation of domestic labour within the family is a matter for relationship law rather than property law in both these jurisdictions and remains a matter which can only occur on relationship breakdown. However, the powers given to the family courts extend to dealing with both maintenance and family property at the same time and under the same statutes, permitting, in the married and civil partnership contexts at least, a global approach to meeting the needs and recognising the contributions of the parties. This again is a point of difference with the approach in European jurisdictions, where maintenance and family property are treated as quite distinct issues.

However, the way the law has developed in England and Wales as compared with Scotland has meant that even between these two common law jurisdictions there are differential consequences for the value which is ascribed to domestic labour within relationships. Broadly, as shall be seen, England and Wales has become more generous to the financial weaker spouse or civil partner than is the case in Scotland. On the other hand, Scotland has adopted legislation which enables cohabitants to claim financial provision on relationship breakdown, whereas England and Wales has not. Thus in practice there has been recent further divergence as case law has developed under these statutory regimes. This process of evolution of the law through legislation and case law has run in parallel with the

7. Matrimonial Proceedings and Property Act 1970, now Part II Matrimonial Causes Act 1973 and Family Law (Scotland) Act 1985.

8. The statutory criteria are set out in Part II Matrimonial Causes Act 1973 for divorce and Schedule 5 Civil Partnership Act 2004 for civil partnership dissolution in England and Wales. The Family Law (Scotland) Act 1985 as amended applies the same criteria when deciding financial claims on divorce or civil partnership dissolution in Scotland. The Family Law (Scotland) Act 2006 sets out the regime and criteria for separating cohabitants, of which there is no equivalent in England and Wales or Northern Ireland. The Marriage (Same-Sex Couples) Act 2013 and the Marriage and Civil Partnership (Scotland) Act 2014 extend marriage to same-sex couples in England and Wales and Scotland respectively, applying the same criteria to financial claims within same and different-sex marriages on divorce. Northern Ireland law permits civil partnerships but does not yet allow same-sex marriage.

9. Family Law (Scotland) Act 2006.

changing status of women in society. Whilst women's domestic labour was traditionally unpaid and confined to the private family sphere, the primary role of husbands and fathers as breadwinners was paid and located in the public sphere. Undoubtedly, we have moved away from the strictly gendered homemaker/breadwinner model within all family types and are witnessing some convergence of the perceived roles of men as fathers and women as mothers within relationships. Yet that is not to say that these breadwinning and caregiving roles are now divided equally. Nor, then, are the financial consequences of the non-financial contributory role (chiefly caregiving) experienced equally by each partner. Within heterosexual relationships, it seems that normative expectations linger and mean that caring and domestic labour within families is still primarily undertaken by women. Child care in particular continues to be viewed (by men and women) as work still ideally undertaken by mothers, according to the 2013 nationally representative British Social Attitudes Survey (BSA Survey).[10] Forty per cent of respondents selected the part-time working mother plus full-time working father as their preferred model for family life, with 13 per cent selecting the traditional male breadwinner and full-time female caregiver model. Less than one per cent supported role reversal and only four per cent supported both parents working full-time. As the editors of this BSA Survey observe in their introduction:

> '[A]ctual behaviour at home has not caught up with changing attitudes. Women still report undertaking a disproportionate amount of housework and caring activities, spending an average of 13 hours on housework and 23 hours caring for family members each week, compared with eight and 10 hours respectively for men.'[11]

Thus in the UK context, whilst most wives and mothers do now work at least part-time, the majority remain primary homemakers and primary carers of children or elderly relatives, typically reducing working hours on having children. Nationally, in 2013 women up to the age of 49 with children had lower employment rates than women without children. Whilst this in itself seems unsurprising, it is important to note that for men, the exact opposite is true. Whilst men do assist more than in previous generations with childcare and housework, in terms of employment patterns, almost all husbands and fathers work full-time, rather than part-time and typically increase rather than decrease the hours they work after having children.[12]

10. A. Park, C. Bryson, E. Clery, J. Curtice, and M. Phillips (eds.), *British Social Attitudes: the 30th Report* (NatCen Social Research, 2013), available online at: www.bsa-30.natcen.ac.uk. For a full discussion of the norms see A. Barlow, 'Solidarity, Autonomy and Equality: Mixed Messages for the Family',*CFLQ*, Vol. 27 (3), 2015, pp. 223.
11. A. Park, C. Bryson, E. Clery, J. Curtice, and M. Phillips (eds.), *British Social Attitudes: the 30th Report* (NatCen Social Research, 2013), available online at: www.bsa-30.natcen.ac.uk.
12. See further ONS, *Full report - Women in the labour market* (ONS, 2013) available at http://www.ons.gov.uk/ons/dcp171776_328352.pdf pp 8-9. In the 25-34 age range, only 63 per cent of women with children work, as compared with 89 per cent of men with children and 86 per cent of women without children in the same age group. See further discussion in Barlow above n. 10.

This situation, particularly when added to the more general gender pay gap, clearly means that the financial consequences of these roles on relationship breakdown are usually gendered and unequally experienced. Let us now examine the different legal responses that the UK has embraced and assess how fitting they are for modern society.

III England and Wales – The development of the non-discrimination approach

1 *Married and Civil Partnership Context – England and Wales*

From the 1970s until the end of the 1990s, the legislation and case law developed by the courts on redistribution of assets on divorce took a 'welfarist' approach, so-called because the *needs* of the weaker economic spouse and those of the children were interpreted to be the dominant concern of the court. There was (and remains) a right to apply for a range of financial provision on divorce in the form of periodic maintenance plus capital lump sum and property adjustment orders to meet the needs of the parties. These are awarded at the court's discretion, but there was no *entitlement*, as such, to a share of the assets.[13] The substantive statutory criteria which the court applies on exercising its discretion have themselves changed relatively little over this period.[14] However, the original guiding principle of 'minimal loss', requiring the court to place each of the parties as nearly as possible in the financial position they would have been in had the marriage not broken down, was removed in 1984.[15] Yet there was a failure to replace it with any other statutory guiding principle. Whilst the 1984 Act did also introduce the 'clean break principle', [16] which aimed to remove the concept of automatic lifelong maintenance, what any financial provision order should be aiming to achieve on divorce was in effect left to the courts' discretion, with the lacuna to be filled through case law. Section 25 Matrimonial Causes Act 1973 sets out the substantive criteria and directs the court in a very general way on the use of its discretion. First it states in s25(1) that the court has a duty to have regard to all the circumstances of the case, first consideration being given the welfare of any children under 18. It then requires the court in s25(2) to have particular regard to the following specified matters:

> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in

13. These provisions remain in ss21-24A Matrimonial Causes Act 1973. Pension sharing orders were introduced in 2000 by the Welfare and Pension Reform Act 1999 which added these provisions in ss24B-G of the 1973 Act.
14. See further s25 Matrimonial Causes Act 1973 discussed below.
15. The Matrimonial and Family Proceedings Act 1984 introduced these amendments.
16. S25A Matrimonial Causes Act 1973 imposed a duty on the court to consider whether it was appropriate to terminate the parties' financial obligations to each other and if so to do so as soon as is 'just and reasonable'.

> the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
> (d) the age of each party to the marriage and the duration of the marriage;
> (e) any physical or mental disability of either of the parties to the marriage;
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

In terms of the court's ability to value domestic labour when making financial provision orders, it is interesting that s25(2)(f) does recognise the need to take into account non-financial contributions to the welfare of the family, both past and future. This was the first time that there was explicit recognition that domestic labour was something of value to the other ex-spouse and one which may extend beyond the point of divorce. Given the wide scope of the discretion, it has been interesting to observe how the courts have used this to develop the law over time to take increasing account of the value of such non-financial contributions, alongside the financial contributions. Initially, in cases where there were sufficient assets belonging to either party, the starting point was that a wife would be awarded something in the region of one third of the parties' assets on divorce to meet her 'reasonable needs', with the husband retaining two thirds. The rationale for this starting point for asset division was explained by Lord Denning MR in the case of *Wachtel v Wachtel*.[17]

> 'The husband will have to go out to work all day and must get some woman to look after the house – either a wife, if he remarries, or a housekeeper, if he does not. The wife will not usually have so much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the housework herself, perhaps with some help. Or she may remarry, in which case her new husband will provide for her.'

This now, of course, seems shockingly gender stereotypical and clearly exposes the gendered norms prevailing around financial dependence of wives on husbands, alongside expectations around unpaid housework in the 1970s. However, the one third rule was a significant improvement of the position where only periodic maintenance paid out of a spouse's income was available. It was, though, to remain the starting point of asset redistribution for over two decades and it took a radical departure from previous case law to eventually adopt a principle of non-discrim-

17. [1973] Fam 72 (CA).

ination between the financial and non-financial contributions at the dawn of the 21st century.

During the 1980s and 1990s, there was some movement away from the one third rule. An assessment of the weaker economic spouse's 'reasonable requirements' interpreted in the context of the intact family's standard of living but with an implicit ceiling became the norm in deciding 'needs' in cases where there was significant wealth.[18] Yet what was reasonable was by definition different in each individual case.[19] In the case of *Duxbury v Duxbury*[20] a formula was developed to provide the wife with a capital sum sufficient to meet her requirements and thus also achieve a clean break. Ironically, this approach resulted in wives who were older and had had longer marriages, receiving less than those younger and in shorter marriages. It also meant that where a wife had actively assisted in building up family assets by helping to build up a business, that this was not factored into the Duxbury calculation. By the 1990s, in cases where the wife could demonstrate this, an additional payment for such a contribution was sometimes agreed, but there was no principle of equal sharing.[21] Thus in *Conran v Conran*[22] the wife who had supported the husband in developing his successful national furniture store empire (Habitat) worth £85 million, the wife's 'outstanding contribution over 30 years' in assisting her husband's business, looking after the family as well as working as a cookery writer resulted in a court award of an additional £2.1 million, over and above the £8.4 million at which her reasonable requirements had been assessed. In 1996, in the case of *Dart v Dart*,[23] it was finally acknowledged by the Court of Appeal that perhaps too much weight had been given to reasonable requirements over and above the other statutory criteria in s25. Without a legislative guiding principle, the court felt unable to change the approach and called for legislation. However, with the arrival of the 21st century, the House of Lords (at that time the highest court in the land) made a radical decision in the case of *White v White*[24] and attempted to fill the vacuum itself by interpreting s25 so as to include a new overarching guiding principle of 'fairness' and a new starting point of equal sharing. Analysis of the practical approach of the courts to before *White* indicated that the starting point for asset division was to meet the housing needs of the primary carer and the children and then the other reasonable needs of both parties if possible. Once these were met, then the view taken was that in general there was 'no justification for further adjustment by the court.'[25] In *Dart v Dart*[26] in 1996, the Court of Appeal had firmly rejected the notion that there was any princi-

18. *Preston v Preston* [1982] Fam 17 was the first case to imply there was a ceiling.
19. *Leadbeater v. Leadbeater* [1985] FLR 798 stressed that what was reasonable was affected by the other spouse's needs and ability to meet those.
20. [1992] Fam 62n (CA).
21. See *Gojkovic v. Gojkovic (No.2)* [1992] Fam 40 (CA) which established this. Here the wife was awarded £1 million in recognition of jointly building up a hotel business valued at £4 million.
22. [1997] 2FLR 615.
23. [1996] 2 FLR 286.
24. [2001] 1 AC 596.
25. R. Bird, 'Ancillary Relief Outcomes', (2000) 30 *Family Law*, pp. 831-833.
26. [1996] 2 FLR 286.

ple of equal division even of assets acquired by joint efforts. Yet in *White*, the House of Lords in considering what 'fairness' entailed took a different view. It decided it must involve a principle of non-discrimination as between breadwinners and homemakers, alongside a move towards equal sharing. The division of assets was in each case to be measured against 'a yardstick of equality', and equality should only be departed from where it could be justified. Lord Nicholls set out the radical new thinking:[27]

> If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

The Whites were farmers and had had a 33 year marriage. Mrs White had worked as an equal partner alongside Mr White in their multi-million pound farming business as well as having cared for their three children and undertaken the homemaking role. Despite this, and the new rhetoric, she received 40% of the assets which was more than her 'reasonable requirements' but less than an equal share, on the basis that some of the farmland had been inherited by Mr White alone and this constituted a reason to depart from equality. There followed a number of cases in which the grounds for departing from equality were explored. In *Cowan v Cowan*[28] equality was departed from where a 'stellar' contribution to the family assets had been made by in this case Mr Cowan, the inventor of the drawstring dustbin bag. However, the subsequent case of *Lambert v Lambert*[29] confirmed that merely being a very good businessman would not justify such a departure from equality as this would be to readmit discrimination by the backdoor. In *Lambert* the Court of Appeal found that the extensive capital assets should be divided equally between the spouses who had performed very different roles within the marriage. The Court of Appeal emphasised the importance of non-discrimination citing with approval the equality approach taken in an earlier High Court decision where:

> The husband's role was the more glamorous, interesting and exciting one. The wife's involved the more mundane daily round of the consistent carer. That was the way that the parties to this marriage chose, between themselves, to organise the overall matrimonial division of labour. How can it be said fairly, at the end of the day, that one role was more useful or valuable (let alone special or outstanding) than the other in terms of the overall benefit to the marriage partnership or to the family?[30]

As Eekelaar[31] observed, post-*White* there was a move away from the language of a welfarist dependency construction of a wife's needs towards a new entitlement

27. [2006] UKHL 24 at 605.
28. [2001] 2 FCR 332.
29. [2002] 3 FCR 673.
30. Per Thorpe LJ in *Lambert v. Lambert* [2002] EWCA Civ 1685 at para. 22 citing Coleridge J in *G v. G* at that time unreported.
31. J. Eekelaar, 'Back to basics and forward into the Unknown', (2001) 31 *Family Law*, 30-34.

basis, with entitlement having been earned through the non-financial contributions of home-making and childcare.

The next development which affected the value of domestic labour occurred in the landmark decision of the House of Lords in *Miller; McFarlane v McFarlane*[32] (*Miller; McFarlane*) in 2006. They reached the conclusion that fairness in the financial provision context is comprised of three strands, namely needs, (equal) sharing and compensation for 'relationship-generated (financial) disadvantage'.[33] It is the acknowledgment that relationships can cause financial disadvantage which was particularly novel.

However, the case made it clear that the court's first duty is to see if the parties' assets exceed their post-separation needs. If they do not, then the case proceeds on a needs-only basis aiming in particular to meet the housing needs of all members of the family and provides an important safety net in lower asset cases. Here, equal division of assets does *not* apply. An unequal division, perhaps giving the economically weaker spouse who is the primary carer a greater share of the assets, commonly occurs in order to achieve fairness. All assets, regardless of their source can be taken into account in a 'needs case' and the aim is to first provide for the housing needs of the children and each of the parties. Maintenance for a spouse will often be traded for a larger capital sum or share of the home and there is flexibility in how the needs are in fact met.

In cases where assets exceed needs, then the next consideration is whether there should be equal sharing of the assets. In *Miller; McFarlane,* two very different cases were heard together in an attempt to clarify the principles. The McFarlanes had had a long marriage with three children. By agreement, after the birth of their youngest, Mrs McFarlane gave up her successful career as a city solicitor to take on the role of the children's full time carer. Equal sharing, it was found, was not sufficient to compensate her for the relationship-generated disadvantage she had suffered and thus in order to achieve fairness, additional compensation was appropriate for the loss suffered by undertaking homemaking and childcare within marriage, which is often performed at the expense of a spouse's labour market value. Payment of compensation could, it was held, be made from capital or income and should be in addition to maintenance and/or equal division of assets. Mrs McFarlane was therefore the first beneficiary of this new approach although the courts have been reluctant to use it liberally, partly because equal sharing of high value assets will in most cases be deemed sufficient.

In *Miller; McFarlane,* the House of Lords also applied its mind to the nature of the assets that should be shared equally. For the first time in English law a distinction was drawn between matrimonial and non-matrimonial assets (although these are still not statutorily defined). However, it was agreed that unlike in relation to meeting needs, only matrimonial assets (broadly all those assets purchased jointly or acquired during the marriage otherwise than through inheritance or gift) are available for equal sharing. The matrimonial home, it was also indicated, would 'usually' be regarded as a matrimonial asset even if it was technically owned by

32. [2006] UKHL 24.

33. See judgment of Baroness Hale [2006] UKHL 24 at para. 140.

just one spouse. The business assets of just one spouse would normally be regarded as non-matrimonial. However, it was also acknowledged that some assets may become matrimonial over time, particularly if an asset has been treated as a matrimonial asset rather than kept separate.[34]

This new approach to asset sharing can be seen to be broadly favourable to the weaker economic spouse but has come to be viewed by some as unfair on their partners. Thus on the facts of the *Miller* case, the parties had had a short marriage of under three years but during this period the husband's investments had grown exponentially. Despite the short duration of the marriage which would have previously resulted in a very small award aiming broadly to meet needs or put the parties back into their pre-marriage positions, on the new principles, the increase in value of Mr Miller's investments was found to be a part of the matrimonial assets to be shared with his ex-wife. She was in fact awarded £5 million of total assets of £22 million, despite the fact that the investment choice and funds had been Mr Miller's alone and there were no children or other caring responsibilities undertaken by Mrs Miller. Clearly this fell far short of equal division, but was viewed by many as very generous given the short duration of the marriage, a specific s25 factor, and risked sending out an unwelcome positive message to gold-diggers.

In summary, the law in England and Wales has moved towards what may be described as a judicially created system of deferred community of property, whilst at the same time retaining safeguards for those with little 'community' property and acknowledging the value of non-financial contributions which affect the earning capacity of one spouse. It has preserved the safety net of a welfarist needs approach for lower asset cases which enables adequate provision to be made for the primary carer and children, whilst providing at the higher asset end specific acknowledgment of the need for compensation for relationship-generated financial disadvantage over and above the equal division of assets where this is appropriate. Both needs and compensation awards can be paid out of non-matrimonial assets where required, again showing flexibility designed to ensure that a rigid formula does not disadvantage the weaker economic spouse. Furthermore, although this has traditionally been seen as a gendered issue, with needs and compensation often arising as a result of caregiving and homemaking services primarily undertaken by women for the benefit of the whole family and leaving their partner free to continue their career, these principles have been extended to same-sex civil partners, following the case of *Lawrence v Gallagher* [35] where such a division of labour has been agreed and by analogy, now, will extend to same-sex marriages. Indeed, as Lord Nicholls indicated in *White*, the law in this area requires flexibility to move with the times and to fit with the changing standards of fairness where there is now greater appreciation of the value of non-financial contributions to the welfare of the family:

34. An illustration of this is *S v. AG (Financial Orders: Lottery Prize)* [2012] 1 FLR 651 where a lottery ticket winner bought a matrimonial home in her sole name at a time when the parties' marriage was failing. Although the other part of the winnings were non-matrimonial property, the home had become a matrimonial asset.

35. [2012] EWCA Civ 394.

> 'Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time…These wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness. Today there is greater awareness of the value of non-financial contributions to the welfare of the family.'[36]

2 *Pre-nuptial Agreements and Non-Financial Contributions*

Whilst many celebrated the non-discrimination principle, others felt that the balance has tipped too far in favour of the weaker economic spouse in an age where women were equal to men, quite capable of being financially independent and should not continue to be financially dependent on their husbands after divorce. In this context, another strand of case law has developed which has now enabled the making of enforceable pre-nuptial agreements. These essentially allow a wealthy spouse to protect their assets from their partner, should their relationship break down and can be seen as a way of side-stepping the effects of the non-discrimination principle in financial provision claims on divorce. Whilst pre-nuptial agreements were previously viewed as contrary to public policy in England and Wales, a Supreme Court decision in 2010 changed the legal status of such agreements. In *Radmacher v Granatino,*[37] Ms Radmacher, a German heiress, and Mr Granatino a French investment banker turned academic who lived in England were in dispute about the status of a pre-nuptial agreement entered into to protect Ms Radmacher's family fortune. Mr Granatino did not read the agreement, which was in German, and did not follow Ms Radmacher's lawyer's advice that he should seek independent legal advice about its implications before signing. At the time of the divorce, he was financially dependent on his wife, having given up his banking career to undertake a PhD at Oxford University and then become an academic. Although, the court found, he did not give up his job in order to care for the children, he did undertake a substantial share of the caring and homemaking work. He therefore applied for financial provision and questioned the validity of the pre-nuptial agreement. However, the majority of the Supreme Court (comprised of eight men and one woman) were unsympathetic and essentially upheld the agreement, on the basis that as a businessman from a jurisdiction where pre-nuptial agreements were common place, he understood what he was signing. They therefore took the view that that it was fair when the agreement was entered into and not unfair at the point of divorce. The burden of proving it was unfair lay on the party seeking to set it aside – typically the weaker economic spouse - and in this case Mr Granatino had failed to discharge that burden.

As Lord Wilson stated,

36. *White v. White* [2000] UKHL 54 at para. 26.
37. [2010] UKSC 42.

> 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would *not be fair* to hold the parties to their agreement.' [38]

However, the only woman member of the Supreme Court, Lady Hale, gave a dissenting judgment. She was concerned that the specific facts of this particular case would have implications for other weaker economic spouses who typically would be women as they were most likely to be the greater non-financial contributors to a marriage. She also pointed out the unhelpful gender disparity in the make-up of the Supreme Court bench:

> Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she –it is usually although by no means invariably she – would otherwise be entitled... In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.'[39]

In Lady Hale's view a better test would be to ask whether each party freely entered the agreement with full appreciation of its implications. If so, the test is whether it would be fair to hold them to the agreement in their circumstances at the point of the divorce.[40] However, the view of the majority currently prevails and whilst the jurisdiction of the court cannot be excluded, *Radmacher* was endorsed by the Law Commission for England and Wales who looked at this issue and reported in 2014.[41] They recommended that only qualifying nuptial agreements, which embodied a system of safeguards directed at the weaker economic spouse, should be directly enforceable, in essence requiring an enforceable agreement to have made provision for the needs of the parties and any children. This would, however, take such cases out of the jurisdiction of the family courts. Research in England and Wales[42] has indicated that public opinion is divided on whether or not pre-nuptial agreements are a good way forward. Some people welcome them, and they are seen as most appropriate for older couples who have children by previous relationships or the very wealthy. Others feel that this style of agreement is wholly inappropriate to what marriage is intended to be about. Some fear that it is too hard to predict the future and that they may cause hardship in longer relationships, where continued financial independence may be unrealistically assumed.

38. Above n 37 at para. 75.
39. Above n 37 at para. 137.
40. Above n 37 at para. 169.
41. *Matrimonial Property, Needs and Agreements* Law Com No 343, 2014.
42. See further A. Barlow and J. Smithson, 'Is modern marriage a bargain? Exploring perceptions of pre-nuptial agreements in England and Wales', *CFLQ,* 2012, pp. 304-309.

IV Scotland

In contrast to England and Wales, the Family Law (Scotland) Act 1985 had the effect of reducing court discretion and flexibility and increasing certainty. Periodical maintenance is restricted to a period of three years following marriage and there is a stronger use of the clean break principle. Matrimonial property is defined by the statute to include post-marital acquests and there is also a presumption that the net value of the matrimonial property will be divided 'fairly' and here, fairly means equally except where there are special circumstances. In practice, there is little scope for rewarding non-financial contributions to the marriage beyond equal sharing, which has caused the Scots' system to be likened to a deferred community of property regime. It has certainly not been interpreted to extend the generosity of scope towards the weaker economic spouse despite the explicit principles of redressing economic disadvantage within the statute. Section 9(1) sets out five principles in relation to financial provision:

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;
(b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;
(c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;
(d) a party who has been dependant to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of decree of divorce, to the loss of that support on divorce;
(e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

The interpretation of Principle 9(1)(b) which relates to balancing economic advantages and disadvantages has been restrictive. The typical use of this is to seek compensation for a wife who has followed the traditional child-rearing and housekeeping role throughout a fairly long marriage and should on the face of it be used to redress disadvantage beyond an equal share of the assets. The husband has been advantaged by her contributions to the household; the wife has been disadvantaged by her lack of career and pension at the end of the marriage. However, it is in practice difficult to make a strong case under this principle. The claimant first has to prove that there has been an imbalance, and secondly that this imbalance would not be corrected simply by a fair sharing or in other words equal division of the matrimonial property. Whilst s10 provides that the court can depart from equal sharing if this departure is justified by special circumstances, such as a matrimonial asset having been purchased with funds from an external source or prior to the marriage, this is a matter in the court's discretion. Unlike in England and Wales where needs have been generously interpreted, it will be exceptionally rare

for the weaker economic spouse to be awarded more than an equal share of the assets under Scots Law.[43]

In *Miller; McFarlane*, Lord Hope, an eminent Scots Law Lord, considered in his judgment the developing English approach to the principle of fairness from a Scots Law perspective and was critical of the 1985 Act. He thought the restriction of periodical maintenance to a three year period was unwarranted, could cause hardship and called for reform.[44] He also felt the restrictive interpretation of the economic advantage and disadvantage principles were regrettable. As he explains,

> Many more women than was foreseen in 1981 are now reaching the ranks of those who are highly paid for what they do. But many women are mothers too. The career break which results from concentrating on motherhood and the family in the middle years of their lives comes at a price which in most cases is irrecoverable.[45]

However, pre-nuptial agreements are not a new phenomenon in Scotland and have been enforceable in Scotland since the end of the 19th century in contrast to England and Wales. However, they seem to be relatively rare, in contrast to post-nuptial settlements often made on separation.[46] A pre-nuptial agreement is treated as a binding contract between the parties. Unlike in England and Wales there is a system of registration and agreements may be registered, with the consent of both parties, which both to provides evidence of the agreement and permits enforcement by means of 'summary diligence' in case of default under the agreement.[47]

Scotland has adopted an entitlement approach based on equal sharing of matrimonial assets but has not seen the need to adjust this either to protect those with lower assets or to attempt to compensate the non-financial contributor for any relationship-generated financial disadvantage. It is therefore in a more similar position to the civil law jurisdictions of Europe in this respect and prefers a more rigid but certain approach to financial provision on divorce regardless of the gendered economic disadvantage which is inherent in such an approach, where most caregiving and homemaking is undertaken by women.

It has though taken a more progressive approach to cohabitation, in contrast to England and Wales.

43. See for example Coyle v. Coyle 2004 Fam LR 2; De Winton v De Winton 1998 Fam LR 110.
44. Above n 32 at para. 121.
45. Above note 32 at para. 118.
46. See further J. Mair, 'National report on Matrimonial Property for Scotland.' *in* K. Boele-Woelki (ed.), *European Family Law in Action: Property Relations between Spouses.* Series: European Family Law, IV (24), Antwerp, Intersentia: Antwerp, 2010.
47. Above n 46.

V Cohabitation and the law in the UK

Cohabitation is the fastest growing family form in the UK and over 30 per cent of children were born to cohabitants in 2013.[48] The way such families organise their work and childcare mirrors that found within marriage, yet in England and Wales there is no redistribution of assets on cohabitation relationship breakdown. Rather, strict property law applies and joint legal or equitable ownership has to be proven of the home or any other asset for any entitlement to a share. Thus whilst the same relationship-generated disadvantage can and does occur in cohabiting families, there is no legal redress for the weaker economic partner. Whilst on cohabitation breakdown the primary carer's needs for housing and financial provision are likely to be similar to those on divorce, there is no right to claim maintenance. Child maintenance and some financial provision for the benefit of the child is available and this has been interpreted to include some element for childcare which the primary carer can use,[49] there is no value placed on domestic labour within such relationships. This situation is made worse by research which confirms that over half of people in England and Wales and some 59 per cent of cohabitants falsely believe that if you live together you have a common law marriage which gives you the same rights as if you are formally married, which is not the case.[50]

In Scotland, whilst the provision is more restricted than that which applies on divorce or civil partnership dissolution, with no possibility of periodical maintenance, the Family Law (Scotland) Act 2006 does provide a possible remedy. This is based on redressing economic disadvantage suffered by a cohabitant, rather than any principle of entitlement to relationship property and there is no time qualification period before a cohabitant is eligible to apply for redress, recognising that economic disadvantage can occur early in a relationship (s25). The key provisions are set out in s28 which states:

> '...
> (3) The court may make an order for payment of a capital sum by one cohabitant to the other, having regard to:
> a) whether (and if so to what extent) the defender[51] has derived economic advantage from contributions made by the applicant; and
> b) whether (and if so to what extent) the applicant has suffered economic disadvantage in the interests of (i) the defender or (ii) any child...
> The court must also have regard under ss 28(5) & (6) to:
> 5) the extent to which any economic advantage derived by the defender from contributions by the applicant is offset by any economic disadvantage suffered by the defender in the interests of the applicant or any child; and

48. Office for National Statistics, 2014, Childbearing by Registration Status in the UK.
49. See Schedule 1 Children Act 1989.
50. See A. Barlow, S. Duncan, G. James and A. Park (2005) *Cohabitation, marriage and the law: Social change and legal reform in the 21st century*, Hart, Oxford.
51. This is the Scots Law term for 'the respondent'.

> 6) the extent to which any economic disadvantage suffered by the applicant in the interests of the defender or any child is offset by any economic advantage the applicant has derived from contributions made by the defender.'

Exactly how generous the law should or could be in interpreting economic disadvantage in the Scottish context under s28 became an issue in 2012 before the UK Supreme Court, which is the final appellate court for all the UK jurisdictions. Thus clarification was sought in the case of *Gow v Grant*.[52] The case involved an older couple of 64 and 58 who initially both owned their own homes. Mrs Gow was persuaded by Mr Grant to sell her flat, give up her part-time job and move in with him, taking on the domestic labour role. She agreed to do this on condition they became engaged to be married. She used the proceeds of sale from her flat for some individual purposes (mainly debt repayment), and the balance she contributed to the couple's joint expenditure on items, such as holidays and living expenses. When the relationship broke down after five years, she had no monies left and sought to argue she had suffered economic disadvantage, as she was left with no home and no assets, whereas the flat she had sold had greatly increased in value. However, it was not clear that her economic disadvantage had been suffered in the interests of Mr Grant, given the joint benefit enjoyed from their joint expenditure.

In hearing the case, Lord Hope in confirming that different principles to the divorce and civil partnership context applied to cohabitants' claims under the Act, imported a 'fairness' principle into the calculation, drawing on the original Scottish Law Commission report and Ministerial statements in which it had been stated that through these provisions they sought to establish a 'fair' remedy and confirmed–

> 'the statutory purpose does no more than reflect the reality that cohabitation is a less formal, less structured and more flexible form of relationship than either marriage or civil partnership. I think therefore, contrary to the views expressed by the Second Division in para 3, that it would be wrong to approach section 28 on the basis that it was intended simply to enable the court to correct any clear and quantifiable economic imbalance that may have resulted from the cohabitation. That is too narrow an approach.'[53]

Despite the fact that the concept of relationship-generated disadvantage is not part of Scots Law, the Supreme Court seemed to be influenced by the English jurisprudence on fairness and went beyond a strict approach to assessing the economic disadvantage suffered. They accepted Mrs Gow had suffered economic disadvantage in Mr Grant's interest, notwithstanding the fact there had been a joint benefit enjoyed and that he had also contributed to the joint household. The court used its discretion to award her £39,500 which was adjudged to be the extent of her overall disadvantage and which Mr Grant was ordered to pay.

52. *Gow v. Grant (Scotland)* [2012] UKSC 29.
53. *Gow v. Grant (Scotland)* [2012] UKSC 29, para. 58.

VI Conclusion

It can be seen that the UK has a rather inconsistent approach to the way it recognises caregiving and homemaking in different relationships and across its different jurisdictions. There is a definite hierarchy in which marriage and civil partnership in England and Wales sit at the top and where equal value is accorded to non-financial contributions to the welfare of the family as to financial contributions. Marriage and civil partnership in Scotland come next in this hierarchy, with a guaranteed equal sharing of matrimonial/partnership assets between partners, where a deferred community of acquests approach has provided a less generous but certain framework for recognition of non-financial contributions.

Scottish cohabitation relationships have achieved some recognition of the fact that economic disadvantage can be suffered for the sake of a partner although this is not strictly linked to non-financial contributions to the family, but could be. This leaves cohabitation relationships in England and Wales at the very bottom of the ladder, with just some indirect compensation for caregiving costs being possible where the relationship breaks down when there are children under 18. Otherwise here, property law applies and it is clear that caregiving and homemaking cannot of themselves form a claim for a share in property, including the family home.[54]

Whilst clearly, this is an unsatisfactory state of affairs, there is a serious debate about whether and if so how caregiving and homemaking should be valued on relationship breakdown in the 21st century. As we have noted, we have not reached in the UK a situation where there is substantive gender equality in the domestic roles we perform with families. The roles in this private sphere remain gendered around caregiving and housework, although these tasks are more shared than they were in the 1970s. Added to this, is the fact that there is a significant gender pay gap in the labour market which recent analysis by Deloiite based on official salary progression data shows will not close until 2069 on current trends.[55] Salary levels in turn affect choices around which partner should give up work or work part-time when there are caring responsibilities within the family. Lack of affordable good quality childcare provision adds to the pressure to reduce paid working hours.

Whilst looking to address these structural issues and to continue to renegotiate the gender contract, we must also remember the importance and value of caregiving and homemaking in and of their own right to our families and to wider society. The work involved in family, both paid and unpaid, is a joint enterprise which is still often very difficult in the modern world to share equally. Where decisions are taken for the wider welfare of the family which result in relationship-generated disadvantage this must be recognised within family law on relationship breakdown and compensated appropriately. This should not be seen as promoting dependency but rather as appropriately valuing the family business of caring.

54. See *Lloyds Bank plc v. Rossett* [1991] 1 AC 107.

55. BBC News, 'Gender pay gap to remain until 2069 report says', 24th September 2016 available at http://www.bbc.co.uk/news/uk-37460778.

4 La valorisation du travail domestique en droit patrimonial de la famille

Une perspective Française

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I Introduction

Une étude de l'INSEE réalisée en France de septembre 2009 à décembre 2010 a révélé que chaque année, le travail domestique représentait 60 milliards d'heures, soit une à deux fois le temps de travail rémunéré selon la conception extensive ou restrictive de la notion retenue, et environ 33 % du PIB.[1]

Ce travail domestique bénévole prend essentiellement la forme de services accomplis très majoritairement par les femmes au profit des membres de leur famille, ou au bénéfice des biens affectés à la vie familiale (le logement essentiellement), dans un périmètre plus ou moins compréhensif allant d'un noyau dur incontournable incluant cuisine, vaisselle, ménage, rangement, entretien du linge, conduites et soins des enfants et des personnes dépendantes, âgées ou handicapées, aide aux devoirs scolaires, jusqu'à des frontières plus discutées (les trajets pour soi-même ou la promenade du chien..), en passant par un cercle intermédiaire comprenant les courses, le shopping, le bricolage, le jardinage, l'entretien de la voiture et les jeux avec les enfants. Ce sont ces périmètres, central et intermédiaire, qui ont été retenus par l' enquête de l'INSEE incluant ainsi tous les travaux accomplis dans le cadre familial et nécessaires au déroulement de la vie quotidienne de ses membres, même si certains d'entre eux, à l'instar du jardinage ou du bricolage, peuvent se voir reconnaitre une double fonction d'utilité et de loisir.

En toute hypothèse, trois critères permettent d'intégrer une activité dans la notion de travail domestique: elle doit être productive (de biens ou de services), non rémunérée, et pourrait être déléguée à une tierce personne susceptible de l'accomplir. C'est dire qu'une activité est prise en considération à ce titre quand il existe un substitut marchand potentiel à celle-ci: achats de plats tout préparés, recours aux services d'une blanchisserie, d'une baby-sitter, d'un chauffeur, d'une femme de ménage, d'une infirmière, d'un jardinier, d'une dame de compagnie, d'un plombier, d'un garagiste, etc..

Toutes ces activités ménagères pourraient ainsi être confiées à un tiers rémunéré, mais elles ne le sont pas, et sont de ce fait, en pratique, exclues de l'analyse économique.… Du point de vue de la comptabilité nationale, ce travail relative-

1. INSEE, Enquête Emploi du temps 2010.

ment quantifiable et évaluable, puisque l'étude le chiffre à environ 630 milliards d'euros chaque année, ne vaut donc rien.

Qu'en est-il dès lors de la « comptabilité » privée ? Le droit de la famille, et plus particulièrement son volet patrimonial, contient-il des dispositions et des mécanismes permettant de valoriser cette activité domestique indispensable au fonctionnement et à la reproduction de la cellule familiale et d'en obtenir le paiement ou à tout le moins une indemnisation? Ou bien passe-t-il aussi par pertes et profits des obligations légales, des devoirs moraux, du dévouement illimité, de l'affection sans borne et du désintéressement total?

Cette question peut paraître incongrue au sein d'un groupe où le don gratuit, de soi et de ses biens, est la norme et, fort heureusement, on peine à imaginer qu'un époux présente à son conjoint sa facture pour le temps consacré à la garde de leurs enfants ou à l'entretien de leurs véhicules.

Depuis quelques dizaines d'années néanmoins, de telles revendications à être dédommagé du temps et des soins consacrés aux activités domestiques se font jour au temps des ruptures, que ce soit celle du couple par séparation, ou celle du groupe familial élargi, au décès d'un de ses membres.

Puisque ces moments de crise s'accompagnent quasi-inévitablement d'un volet comptable et financier par la liquidation de la situation passée qu'ils impliquent, et l'organisation de la situation à venir qui s'en suit, certaines de ces réclamations à être indemnisé, et à obtenir sa part dans l'enrichissement familial résultant de ce travail bénévole, sont apparues de manière récurrentes et ont fini par être accueillies par les juges et par la pratique, au point qu'on puisse aujourd'hui en dresser la cartographie (Première partie: la revendication d'une rémunération du travail domestique).

La logique rémunératoire est même apparue en certains domaines, si légitime qu'elle est parfois spontanément adoptée par les parties ou par le juge (Deuxième partie).

II La revendication d'une rémunération du travail domestique

L'Economie n'a pas le monopole de cette découverte de la valeur patrimoniale du travail familial.

Lorsqu'il s'agit d'évaluer le dommage résultant du décès accidentel d'une mère de famille qui n'exerçait pas d'activité professionnelle mais s'occupait de son foyer, la cour de cassation contraint les juges du fond à le chiffrer pour réparer le préjudice patrimonial en résultant pour son mari et ses enfants.[2] Dans le même esprit, il a été jugé que « le surcroît de travail incombant à une femme devant assistance à son mari frappé d'invalidité à la suite d'un accident, est un préjudice dont l'auteur de cet accident doit réparation »,[3] preuve s'il en est que des services, même personnels, sont susceptibles d'évaluation et d'indemnisation.

2. Cass.com. 27 janvier 1993, *RTDCiv.* 1993 p.563, note J. Hauser.
3. Cass.civ.2e, 18 mars 1981, *Bull.civ.II*, n°70.

Dans la liquidation des rapports d'un couple, de telles demandes énoncées par celui qui s'est dévoué au service de son conjoint ou des enfants n'en paraissent que plus légitimes.

Mais sur le fondement du régime matrimonial, s'il s'agit d'un couple marié, les chances de succès sont assez minces et circonscrites à des hypothèses bien caractérisées: il est indispensable tout d'abord que l'activité fournie, ou les services rendus, ne l'aient pas été en vertu d'une obligation légale qui s'imposait à eux. Or l'article 212 du code civil leur prescrit un devoir de secours et d'assistance, tandis que l'article 213 leur impose d'assurer « ensemble la direction morale et matérielle de la famille, de pourvoir à l'éducation des enfants et de préparer leur avenir ». Quant à l'article 214 du même code, il leur fait obligation de contribuer aux charges du mariage à proportion de leurs facultés respectives, prenant en compte non seulement une exécution financière de cette obligation mais également une exécution en nature par la participation à des tâches de collaboration professionnelle ou ménagères. De manière très proche, les partenaires liés par un PACS se trouvent astreints par l'article 515-4 à « une aide matérielle et une assistance réciproque ».

Surtout, les mécanismes de rééquilibrages patrimoniaux édictés par les différents régimes supposent précisément la démonstration d'un transfert de richesse intervenu entre les patrimoines concernés, qu'il s'agisse de la technique des récompenses, qui permet de corriger les déplacements intervenus entre patrimoine commun et patrimoine propres, ou de celle des créances entre époux, entre partenaires ou entre indivisaires, pour obtenir des rétablissements entre les patrimoines personnels, indivis ou propres. Or la jurisprudence, malgré certaines critiques doctrinales, refuse, à travers la technique des récompenses notamment, de valoriser le travail en tant que tel: l'hypothèse est celle où un époux bricoleur consacre ses loisirs à améliorer un bien lui appartenant, soit en construisant de ses mains une maison sur un terrain propre, ou en restaurant, en agrandissant un immeuble propre. Certains conjoints d'époux bâtisseurs ont alors tenté de profiter de la plus-value apportée par cette activité au patrimoine propre, en revendiquant un monopole de l'industrie des époux au profit de la communauté, sur le fondement de l'article 1401 du code civil. Se fondant sur le fait que le fruit du travail des époux a vocation à alimenter la masse commune, le raisonnement tendrait alors à s'appliquer au travail lui-même, et en oeuvrant à son seul profit, l'époux bricoleur aurait en conséquence privé le patrimoine commun d'une valeur devant lui revenir. La cour de cassation s'est pour l'heure fermement refusé à adopter cette analyse en s'en tenant à une interprétation littérale des textes, en l'occurrence l'article 1437 du code civil, qui n'ouvre un droit à récompense que sur la preuve d'une « valeur empruntée » à la communauté, assimilant la notion aux seuls débours réalisés par un époux. C'est ainsi qu'une récompense sera octroyée pour le paiement par la communauté des matériaux utilisés pour la construction, mais non pour la main d'œuvre de l'époux constructeur.

Ainsi, les soins domestiques, même lorsqu'ils ne relèvent pas des services aux personnes, échappent aux mécanismes de restitution spécifiques au droit des régimes matrimoniaux et du PACS, car ils n'entrainent aucune sortie monétaire du patrimoine de celui qui les apporte.

Il n'y a guère que le droit de l'indivision qui puisse à ce titre être envisagé quand l'un des conjoints, séparé de biens ou concubin a œuvré au bénéfice d'un bien indivis, ce qui, sur le fondement de l'article 815-12 du code civil pourrait lui ouvrir le droit à une rémunération, à supposer qu'on n'y voit pas une fois encore, la simple exécution d'une obligation légale. La jurisprudence accepte le principe d'une telle demande quand le bien indivis est une entreprise et partant, l'activité de type professionnel. Il ne semble pas qu'elle l'admette volontiers dans le cas d'un travail domestique et il faut reconnaître que la lettre de l'article 815-12 qui évoque l'indivisaire « qui gère un bien indivis » renvoie davantage à la conduite d'une activité d'exploitation qu'à de simples travaux de mise en valeur ou d'entretien.

Parmi, les mécanismes correcteurs des appauvrissements conjugaux, la prestation compensatoire, « pivot des rattrapages patrimoniaux de l'après divorce »,[4] a-t-elle alors un rôle à jouer pour l'indemnisation du travail domestique?

La réponse est incertaine tant la notion elle-même est ambigüe: se substituant au devoir de secours qui existait pendant l'union, elle a pour objet de « compenser, autant qu'il est possible, la disparité que la rupture du mariage crée dans les conditions de vie respectives ».[5] Elle tend ainsi à assurer forfaitairement l'avenir du conjoint le moins aisé, tout en se fondant sur la situation passée puisqu'elle est fondée sur la disparité, donc la différence de niveau de vie que la fin du mariage va créer. Elle a donc en vérité au moins une double vocation, alimentaire et indemnitaire, qui ressort d'ailleurs des critères de son évaluation posés par l'article 271 du code civil. Elle est ainsi fixée « selon les besoins de l'époux à qui elle est versée et les ressources de l'autre.. ». A cet effet, le juge prend en considération notamment: la durée du mariage, l'âge et l'état de santé des époux, leur qualification et leur situation professionnelles mais aussi, « les conséquences des choix professionnels faits par l'un des époux pendant la vie commune pour l'éducation des enfants et du temps qu'il faudra encore y consacrer, ou pour favoriser la carrière de son conjoint au détriment de la sienne », ainsi que « leur situation respective en matière de pensions de retraite, en ayant estimé, autant qu'il est possible, la diminution des droits à la retraite qui aura pu être causée » par ces circonstances. Au regard de ces éléments, il s'avère donc que le travail domestique passé n'est pas indemnisé en tant que tel, via la prestation compensatoire, mais éventuellement pris en considération par les conséquences que cette activité familiale induit sur les ressources actuelles et à venir du demandeur. Ainsi conviendra-t-il, en pratique, de démontrer que la décision de consacrer son activité aux soins du foyer familial résulte d'un véritable choix ayant nécessité l'abandon d'une activité professionnelle préexistante, donc une diminution des ressources du demandeur, masquée par la mise en commun des revenus du fait de la vie commune, mais qui réapparaît lors de la rupture.[6] Il n'est donc finalement pas question d'indemniser le travail familial, mais de le prendre en considération « en creux » pour l'appauvrissement ultérieur qui peut en découler. La prestation compensatoire n'est donc pas conçue comme l'équivalent

4. J. Hauser, Juris.civ. Divorce, fasc.5.
5. Article 270 du code civil.
6. A titre d'exemple: Cass.civ.1ere, 31 mars 2010, n°09-13811.

du salaire différé accordé aux descendants d'un exploitant agricole qui ont travaillé bénévolement, mais professionnellement, sur l'exploitation familiale.[7] On peut en revanche rapprocher cette conception de celle qui inspirait l'ancien article 280-1 du code civil permettant d'accorder à titre exceptionnel à l'époux fautif privé de son droit de solliciter une prestation compensatoire, une indemnité, s'il apparaissait « manifeste que compte tenu de la durée de la vie commune et de la collaboration apportée à la profession de l'autre époux, il est contraire à l'équité de lui refuser toute compensation pécuniaire ». Comme cela avait été déploré à l'époque, la référence exclusive à une collaboration professionnelle interdisait toute indemnisation de l'époux aux torts duquel le divorce était prononcé lorsqu'il s'agissait « d'une femme au foyer fautive », considérant qu'elle ne s'était pas appauvrie par le seul fait de rester à la maison et d'élever ses enfants.[8] Un auteur,[9] notamment, s'inquiétait d'une telle exclusion et plaidait en faveur d'une juste contrepartie du travail ménager, dès lors que celui-ci a dépassé la contribution normale aux charges du mariage. Il n'a pour le moment pas été entendu par le législateur qui s'en est tenu à la reconnaissance très limitée du droit à un salaire différé du conjoint survivant de l'exploitant agricole,[10] ou du chef d'une entreprise commerciale ou artisanale,[11] qui a participé pendant 10 années au moins à l'activité de l'entreprise, sans être rémunéré,ni être associé aux bénéfices, ni aux pertes.

Au sein du droit des couples, aucun mécanisme légal ne vient donc permettre la valorisation et la rémunération du travail domestique.

Il en est de même au sein du droit de la famille élargie et, pas davantage, le droit des successions, dans sa forme législative, ne prend en compte les services rendus en famille, notamment l'aide et l'assistance que les enfants peuvent apporter à leurs parents âgés et éventuellement dépendants. Si le droit rural, comme on l'a évoqué, reconnait une créance aux descendants d'un exploitant agricole qui vient s'ajouter à leurs droits successoraux, c'est à la condition, strictement entendue par les juges, qu'ils aient collaboré à l'activité professionnelle, à l'exclusion de toute prise en compte du travail domestique comme l'exécution de travaux de jardinage[12] ou de tâches ménagères.[13]

Reste alors aux conjoints, aux parents et aux enfants à se tourner vers le droit commun, des obligations notamment, pour tenter d'obtenir cette reconnaissance et cette indemnisation du travail familial que le droit de la famille ne permet pas de leur accorder.

Les couples, en particulier les concubins ont ainsi parfois tenté d'utiliser la technique dite de la société de fait qui permet de donner a posteriori une existence juridique à un groupement de personnes qui se sont comportées comme des associés

7. Art. L321-13 et s. du code rural.
8. H. Sinay, 'Le travail non rémunéré au sein du couple', *Mélanges à la mémoire de Danièle Huet-Weiller: droit des personnes et de la famille*, Paris, LGDJ, 1994, p. 437.
9. J. Hauser, *RTDciv.*, 1993, p. 563.
10. Art. L321-21-1 du code rural issu de la loi du 9 juillet 1999.
11. Art. 14 de la loi du 2 août 2005.
12. Cass.civ.1ere, 10 juin 1980, *Bull.civ.*1980, I, n°180.
13. Cass.civ.1ere, 22 octobre 2002, n°00-22428.

et permet de partager son « actif » entre les « ex-associés ». Les conditions pour parvenir à cette reconnaissance d'une société de fait sont toutefois rigoureuses et la jurisprudence peu encline à en admettre la preuve. Celle-ci est en effet triple[14]: démonstration d'apports effectués par chaque concubin, intention de collaborer sur un pied d'égalité à un projet commun et volonté de participer aux bénéfices, économies et éventuellement pertes, pouvant en résulter. Or l'idée même que le travail domestique et les soins apportés à l'éducation des enfants puisse constituer les apports indispensables, en l'occurrence en industrie, a été fermement rejetée par la cour de cassation. Celle-ci a en effet cassé un arrêt de la cour d'appel de Versailles qui avait valorisé une telle activité de la concubine « sur la base d'un demi-salaire en fonction du SMIC » multiplié par le nombre d'années de vie commune ». Les juges du fond avaient ainsi, retenu que « par son travail domestique et l'éducation des enfants, elle avait permis, par de moindres dépenses, le remboursement des emprunts contractés par le couple pour faire construire le logement familial sur un terrain lui appartenant ». Dans sa motivation de la censure, la cour de cassation[15] indique que les seuls apports devant être pris en considération pour la caractérisation d'une société de fait sont ceux effectués en numéraire, excluant par là-même la prise en compte de toute activité ménagère. La solution semblait en réalité inéluctable depuis qu'une décision précédente[16] avait déjà indiqué dans le cadre d'un concubinage, mais à propos cette fois de travaux effectués par le concubin sur un immeuble de sa compagne, que « lors de la liquidation d'une société de fait, il n'y a lieu ni à la reprise, ni au remboursement des apports en industrie ».

La voie d'une rémunération du travail domestique par le recours à la technique de la société de fait semble donc définitivement fermée.

Reste alors à envisager la voie ultime du rééquilibrage des patrimoines quels qu'ils soient: la technique de l'enrichissement sans cause désormais nommé « enrichissement injustifié » depuis sa consécration dans un nouvel article 1303 du code civil par l'ordonnance du 10 février 2016.

Le code civil jusqu'en 2106 ne comportait aucune disposition fondant ce principe général selon lequel nul ne peut s'enrichir de manière injustifiée aux dépens d'autrui, mais la cour de cassation l'avait néanmoins consacré de longue date dans une décision du 15 juin 1892[17] en offrant ainsi une action (l'action de in rem verso) à celui qui a procuré à un autre, un avantage que ne justifie aucune cause légale ou contractuelle. Cette action exercée par l'appauvri contre l'enrichi lui permet d'invoquer une créance représentant la plus faible des deux sommes entre cet appauvrissement et cet enrichissement sans cause.

En l'état actuel du droit, le recours à l'enrichissement injustifié pour obtenir une indemnisation de services ou de prestations intrafamiliales, est principalement suggéré dans trois situations concrètes: Pour les couples mariés sous un régime séparatiste, l'action de in rem verso permet au conjoint qui a apporté sa collaboration professionnelle bénévole à l'entreprise de son conjoint d'obtenir une indem-

14. Cass.com. 3 novembre 2004, n°02-21637.
15. Cass.com. 24 septembre 2013, n°12-23699.
16. Cass.Civ.1ere, 19 avril 2005, n°01-17226.
17. Cass.Req. 15 juin 1892, *DP* 1892, 1, 281.

nisation lors de la rupture, en démontrant que cette activité quasi professionnelle gratuite, et qui s'est souvent poursuivie de longues années, a dépassé ce dont ce conjoint était redevable au regard de l'obligation d'aide, d'assistance et de contribution aux charges que se doivent les personnes mariées.[18] Dans la mesure de cet excès de contribution, le conjoint bénévole a ainsi droit à une rémunération égale à la plus faible des deux sommes entre l'appauvrissement qu'il subit et l'enrichissement dont bénéficie son conjoint en ayant fait l'économie d'un travailleur salarié. La doctrine considère généralement que cette solution pourrait être transposée à l'époux resté au foyer et qui s'est consacré de manière particulièrement assidue et efficace à l'accomplissement des tâches domestiques. Mais les auteurs insistent alors sur la preuve à apporter du caractère exceptionnel du travail fourni et sur l'enrichissement qui a dû en résulter pour l'autre époux et découlant d'économies réalisées (en ne payant pas de femme de ménage, de babysitter, de jardinier, etc..) ou d'acquisitions supplémentaires permises par le surplus de revenus en découlant. Ainsi, une fois de plus, ce n'est pas le travail domestique en tant que tel qui est finalement valorisable par cette voie, mais son excédent, le surinvestissement familial, qui se concrétise dans un enrichissement constatable. Par ailleurs, les exemples jurisprudentiels font certes état d'indemnisations accordées pour de collaborations professionnelles, mais non pour une activité familiale.

Des époux séparés de biens, ou des concubins bricoleurs, ont en revanche tenté d'invoquer en justice l'enrichissement sans cause pour obtenir une indemnisation des améliorations apportées aux immeubles de leurs compagnes. Ils réclament alors, pour prix de leur travail et du temps consacré, qu'une indemnité équivalente à la plus-value dont profite le bien leur soit accordée. Même s'ils ne se heurtent à aucun refus de principe, les conditions mises par les juges au succès de l'action les font succomber la plupart du temps: d'une part, l'époux bricoleur qui utilise ses compétences pour l'amélioration d'un bien appartenant à son conjoint est lui-aussi considéré a priori comme s'acquittant de son obligation légale d'assistance et de contribution aux charges, chacun devant s'en acquitter « selon ses facultés », y compris par des services matériels qui rendent agréables les lieux de vie commune ».[19] Ce n'est donc là encore que dans des situations d'exception, où les prestations fournies dépassent par leur ampleur la norme commune, qu'une telle indemnisation pourrait être envisagée. Mais à nouveau, les chances de succès sont faibles, comme en témoigne un arrêt de la cour de cassation,[20] par lequel un mari, artisan de son état, ayant effectué des travaux d'aménagement sur un appartement personnel de son épouse, travaux dont les juges du fond avaient estimé qu'ils représentaient plus d'une année de travail, se voit refuser une indemnité au motif que « la réalisation des travaux litigieux trouvaient suffisamment sa cause dans la participation que chacun doit apporter à la cohabitation dans le logement familial et n'excédait pas

18. A. Gouttenoire-Cornut, 'Collaboration familiale et enrichissement sans cause', *Rev.dr.fam.*, 1999, chron. 19; Nerson, *Le travail ménager de la femme mariée, études de droit du travail offertes à André Brun, Librairie économique et sociale*, 1994, p. 409.
19. C. Philippe, 'Couple et bricolage', *Rev.dr.fam.fév.*, 2015, étude 5.
20. Cass.civ.1ere, 19 décembre 1995, *RTDCiv.* 1997, p.497; voir aussi Cass.civ.1ere, 14 janvier 2003, n°00-16612.

la contribution normale aux charges du mariage ». D'autre part, les concubins, sur lesquels ne pèsent aucune obligation légale d'assistance et de contribution pourraient a priori avoir plus de chances de réussite. La jurisprudence toutefois semble leur transposer une obligation para-conjugale de contribuer aux charges de la vie commune,[21] y compris en nature. Par ailleurs, comme l'immeuble objet des soins du concubin industrieux est en général celui de la résidence du couple, familiale ou secondaire, la condition d'absence d'intérêt de l'appauvri fait le plus souvent défaut, puisqu'il profitait du logement sur lequel il travaillait, ou du moins, avait l'intention de s'y installer.[22] Une intention libérale pourrait également être la cause des diligences déployées et lui interdire d'invoquer un rétablissement.

Au total donc, en ce qui le travail domestique dans ces deux situations de couple, s'il est théoriquement indemnisable quand il est important, les résultats concrets seront marginaux.

Reste une troisième configuration familiale qui s'est ouverte, avec un peu plus de succès, à l'action de in rem verso: celle de l'enfant qui a assumé la charge et les soins de ses parents devenus âgés et dépendants. Le principe de l'éventualité d'une telle indemnisation mise à la charge de ses cohéritiers lors du règlement de la succession des parents a été posé par un arrêt de la cour de cassation du 12 juillet 1994.[23] Comme entre époux, la solution n'allait pas de soit, en raison de l'obligation morale et juridique de prendre soin de ses parents qui pèse sur les enfants en vertu de l'article 371 du code civil («l'enfant à tout âge doit honneur et respect à ses père et mère »). La jurisprudence l'a toutefois admis, dans des situations qui, une fois de plus, sont conçues comme révélatrices d'un dévouement et de soins hors norme et qui excèdent ce qui est normalement dû au titre de la « piété filiale ».[24] Ainsi, à ce titre encore, le travail domestique n'est pas indemnisable en lui-même; lorsqu'une créance est reconnue à l'héritier dévoué contre la succession, c'est que lui-même s'est appauvri car ses soins l'ont souvent conduit à abandonner son activité professionnelle et que, par ailleurs, il a permis à la succession de s'enrichir en faisant l'économie du salaire d'une infirmière ou d'un placement dans un établissement médicalisé. Mais en dehors de ces situations, le dévouement que l'on pourrait qualifier d'ordinaire ne permet pas l'indemnisation des soins prodigués et du temps consacré.[25] Il arrive même parfois, qu'alors que les conditions seraient remplies (soins constants ayant permis de faire l'économie d'une garde-malade), l'indemnisation soit néanmoins refusée, du fait de l'hébergement gratuit dont l'enfant a bénéficié en venant s'installer au domicile de ses parents pour accomplir sa mission. Ses cohéritiers invoquent alors en effet, en général avec succès, la compensation à opérer entre l'économie du salaire d'une infirmière ou gouvernante, et celle du loyer du logement familial.[26]

21. Cass.civ.1ere, 28 novembre 2016, *Bull.Civ*.I, n°278.
22. Cass.civ1ere, 12 novembre 1998, *Rev.Dr.fam*., 1999, n°12, note Lécuyer; Cass civ.1ere, 24 septembre 2008, *Bull.civ*.I, n°212.
23. *D*. 1995, p.6623, note M. Tchendjou; *JCP* G 1995, II, 22425.
24. Cass.civ.1ere, 6 juillet 1999 et 5 janvier 1999, *JCP* N 1999, p. 722, note JF Pillebout.
25. Pour un exemple: Civ.1ere, 19 février 2014, n°12-18592.
26. Cass.civ.1ere, 23 janvier 2001, *D*. 2001 p. 2940, note B. Vareille.

Ainsi, quelles que soient les hypothèses, les techniques du droit commun, pas plus que celles du droit de la famille, n'aboutissent à un véritable principe d'indemnisation et de valorisation du travail domestique a posteriori.

Les intéressés peuvent-ils dès lors s'organiser pour la décider en amont?

III L'aménagement d'une rémunération du travail domestique

Conscients des avantages qui résultent pour eux de la charge de travaux , de tâches ou de soins incombant à un conjoint ou à un membre de leur famille, les bénéficiaires directs ou indirects peuvent vouloir, sinon accorder une réelle rémunération, du moins exprimer leur reconnaissance par une indemnisation, une libéralité ou une association du travailleur bénévole à la prospérité familiale.

Cet aménagement d'une compensation matérielle peut être recherché délibérément par les parties par une utilisation appropriée de certains mécanismes juridiques (2). Il peut aussi être plus ou moins imposé par le juge aux intéressés, pour les empêcher de revenir sur une rémunération accordée. Dans ce cas, l'aménagement de la rémunération du travail domestique, initié spontanément par les parties, ne reçoit sa consolidation et son caractère définitif que par une certaine contrainte ultérieurement exercée par le juge (1).

1 L'aménagement contraint

Dans les rapports de couple, il arrive fréquemment que celui qui perçoit des revenus professionnels, alors que l'autre se consacre aux tâches familiales et ménagères, veuille associer ce dernier à sa prospérité en lui remettant ponctuellement des sommes d'argent, en effectuant des paiements ou des acquisitions pour son compte. Il est également de pratique courante que ces deux époux, partenaires ou concubins, achètent ensemble un bien, généralement immeuble, en indivision à parts égales, le tout étant financé dans son intégralité par celui qui a une activité rémunératrice.

Lorsque la crise survient et que l'époux financeur, devenu soudain beaucoup moins bien intentionné, souhaite récupérer sa mise de fonds, il choisit parfois d'alléguer d'un simple prêt réalisé au profit du conjoint au foyer, justifiant dès lors une obligation de remboursement de la part du travailleur domestique, et anéantissant ainsi l'indemnisation qu'il avait bien voulu, un temps, lui accorder.

Pour en conserver le bénéfice, le conjoint peut d'abord tenter de convaincre le juge qu'en effectuant ces versements, le prétendu créancier n'a fait qu'exécuter une obligation naturelle de reconnaissance et de gratitude envers celui qui s'est ainsi dévoué aux soins familiaux. La qualification d'obligation naturelle empêche en effet, celui qui s'en est spontanément acquitté, d'invoquer l'absence d'obligation juridique pour obtenir la répétition.[27] En ce sens, il est possible de citer une consécration jurisprudentielle de cette argumentation par une décision de la cour

27. Art. 1100 du code civil issu de la réforme du 10 février 2016.

d'appel de Paris,[28] dans une situation où une épouse avait dû abandonner une activité professionnelle de cadre pour se consacrer entièrement à sa famille. Cet arrêt semble toutefois isolé et l'existence d'une obligation naturelle de rémunérer les activités domestiques d'un époux semble loin d'être acquise. Si les services rendus dans le cadre familial apparaissent, eux, normaux et naturels, l'obligation de les rémunérer en revanche ne l'est donc pas, et il est vrai, du moins dans le cadre du mariage et du pacs, que l'existence des obligations légales d'assistance et de contribution paraît s'opposer, une nouvelle fois, à la reconnaissance d'une obligation, qu'elle soit juridique ou morale, de leur donner une contrepartie.

Plutôt que de recourir à la notion d'obligation naturelle, les conjoints ont eu plus fréquemment recours à la qualification de donation rémunératoire pour s'opposer à des demandes de restitution du conjoint financeur. Cette jurisprudence a fait couler beaucoup d'encre et doit être resituée dans le contexte antérieur à la réforme du 26 mai 2004. Les donations entre époux étaient alors toujours révocables et le conjoint qui avait financé l'acquisition d'un bien au nom de son conjoint au foyer pouvait dès lors invoquer la qualification de donation indirecte pour obtenir la restitution de ses versements. Les conjoints victimes de ces retournements de situation avaient alors reçu l'appui de la jurisprudence pour s'opposer à toute remise en cause, en présumant que ces actes étaient en réalité à titre onéreux, le conjoint ayant vraisemblablement ainsi voulu rémunérer l'activité ménagère du bénéficiaire. N'imaginons pas toutefois que ce renversement de la charge de la preuve, qui favorisait la qualification de dation en paiement, au détriment de celle de libéralité révocable, se fasse sans condition. Celle-ci, une fois encore, et de manière parfaitement cohérente avec ce qui a déjà été évoqué, résidait dans la démonstration, indispensable et préalable, que l'activité familiale présentait une importance et une qualité qui dépassaient la mesure de ce qui était légalement dû au titre des obligations du mariage.[29] Là encore, seul l'excès de travail domestique mérite donc indemnisation, non le travail domestique en tant que tel. De plus, on remarquera qu'elle est dès lors forfaitaire, puisque nul chiffrage ne permet de mesurer si ce qui a été versé est en adéquation avec la valeur des services rendus.

Dans les rapports familiaux élargis, l'aménagement contraint a pu également, mais de manière tout aussi rare qu'au sein du couple, emprunter la voie de l'obligation naturelle. Ainsi un père qui réclamait une indemnité à sa fille pour la construction de la maison qu'il avait lui-même effectué, s'est vu refuser toute créance pour son travail, non seulement parce qu'il n'était pas professionnel du bâtiment mais chômeur et avait travaillé clandestinement, mais surtout parce qu'il n'avait fait qu'apporter une aide à son enfant « comme un père le doit naturellement à sa fille ».[30]

28. 2e ch.A, 20 janvier 1998, *D.* 1998, p. 309, note I. Najjar.
29. Cass.civ.1ere, 2 octobre 1985, *Bull.civ.*I, n°244; Cass.civ.1ere, 24 octobre 1995 (deux arrêts), *RTDCiv.* 1997, p. 494 obs. Vareille. Voir aussi, J. Revel, L'article 214 et le régime de séparation de biens, *D.* 1983, chron. 21.
30. CA Aix en Provence, 15 septembre 2005, jurisdata n°2005-294968.

De manière plus significative, en revanche, s'est instaurée une véritable jurisprudence[31] pour admettre qu'un enfant ayant bénéficié de donations indirectes de parents auxquels il avait apporté une aide et des soins importants, soit dispensé de les rapporter lors de la liquidation de leur succession, rompant ainsi en sa faveur, l'égalité des héritiers.

Cette jurisprudence complète les décisions reconnaissant la possibilité pour l'enfant qui a pris soin de ses parents dans une mesure dépassant ce qu'il devait au titre de la « piété filiale »,[32] d'obtenir une indemnité fondée sur l'enrichissement sans cause. Lorsqu'en effet cet enfant a spontanément été gratifié par ses parents reconnaissants, les juges peuvent admettre d'y voir le versement anticipé de l'indemnisation à laquelle il aurait pu prétendre à leur décès et partant, y voir une dation en paiement, excluant là encore toute intention libérale et, en conséquence, toute qualification de donation et toute obligation de rapport. Là encore nulle comparaison à opérer entre l'appauvrissement effectivement subi par cet enfant dévoué, les économies réalisées grâce à ses soins et le montant des gratifications reçues. Le travail domestique lorsqu'il est valorisé, l'est de manière forfaitaire, comme à la dérobée. On peut y voir une volonté d'admettre une rémunération dans des situations où il y aurait en effet une injustice à ne pas reconnaître son importance et sa valeur, mais cela reste néanmoins une reconnaissance du bout des lèvres, qui se refuse à entrer dans les détails d'une liquidation peu appréciée.

2 *L'aménagement choisi*

La qualification de libéralité rémunératoire est parfois, comme on l'a vu, utilisée par les juges pour empêcher la remise en cause d'une donation entre époux (du moins une donation réalisée avant le 1er janvier 2005, donc révocable), ou le rapport successoral d'une libéralité consentie à un descendant méritant. Mais en dehors de cette utilisation opportuniste de la notion, une libéralité délibérément rémunératoire peut être consentie par le bénéficiaire de prestations domestiques à un proche aidant.[33] L'avantage est triple: outre le fait de s'acquitter de ce qu'il considère moralement comme une dette, le donateur peut espérer faciliter le règlement ultérieur de sa succession et faire bénéficier le gratifié d'une exonération des droits de mutation à titre gratuit. La jurisprudence révèle effectivement de telles utilisations[34] et accepte la qualification, dès lors du moins que les services rendus sont appréciables en argent et qu'il y a équivalence entre la valeur du bien transmis et celle des services rendus.[35] Au sein des prestations fournies au titre du travail domestique,

31. Cass.civ.1ere, 3 novembre 2004, *JCP* G 2005, II, 10024, note F. Boulanger.
32. Voir supra, II.
33. C. Goldie-Génicon, 'Les libéralités rémunératoires, Mélanges Champenois', *Mélanges en l'honneur du professeur Champenois*, Paris, Defrénois, 2012, p. 347.
34. Cass.civ.1ere, 20 janvier 2004, n°01-03799 (legs au profit du fils des disposants pour rémunérer les soins prodigués, l'état de santé des parents nécessitant l'assistance quotidienne d'une tierce personne); Cass.civ.1ere, 8 juillet 2010, n° 09-67135 (legs en faveur de la nièce de la testatrice pour récompenser les soins prodigués).
35. CA Orléans 17 janvier 1977, *RTDCiv.* 1977, 805, n°5, obs. R. Savatier.

seules celles qui sont habituellement rétribuées, sont donc indemnisables par cette voie. Par ailleurs, en cas d'excès (lorsque la valeur de la libéralité excède la valeur des services indemnisables), il est désormais acquis que la libéralité puisse avoir une double nature, rémunératoire à hauteur du montant des prestations fournies, gratuite pour l'excédent,[36] ce qui permet de donner plus de sécurité et de souplesse au procédé et devrait en encourager l'utilisation.

Dans une logique différente qui n'est pas de rémunérer des services domestiques accomplis, mais d'imposer leur accomplissement en les assortissant d'un avantage, on peut citer deux contrats utilisables en famille: la donation avec charge et le bail à nourriture.

Par la première technique, le donateur d'un bien peut imposer au gratifié de se charger de services ou prestations de toute nature, soit au profit du disposant lui-même, soit au profit d'un tiers désigné par le disposant. Pour des raisons vraisemblablement fiscales (non déductibilité de la valeur de la charge de celle du bien transmis pour le calcul des droits de mutation), la technique semble peu utilisée.

Quant à celle dite du bail à nourriture, on en trouve encore des applications, notamment dans les familles rurales. Contrairement à ce que l'appellation de bail induit, la convention est en réalité plus proche d'une vente assortie de prestations viagères consistant en l'obligation pesant sur l'acquéreur de soigner, héberger, nourrir, et plus largement fournir au vendeur, tout ce qui est nécessaire à sa subsistance, pour le restant de ses jours. Se trouve ainsi rémunéré de manière globale et forfaitaire une nouvelle fois, le travail domestique découlant de cette obligation générale d'héberger et de soigner qui est la raison d'être de l'opération.[37] Celle-ci ne peut donc être aménagée librement pour rémunérer d'autres prestations domestiques plus ponctuelles. La cour de cassation a ainsi considéré que n'était pas un bail à nourriture, mais une vente devant être résolue pour vileté du prix, l'acte qui mettait à la charge du neveu acquéreur la simple obligation « d'assurer à son oncle deux promenades hebdomadaires, de lui fournir l'habillement nécessaire et de lui assurer le suivi de sa correspondance ».[38] Dans des relations entre parents et enfants, la convention pourrait en outre être aisément remise en cause par les cohériters du débiteur des soins, invoquant l'article 918 du code civil pour obtenir sa requalification en libéralité préciputaire.

Le bail à nourriture, s'il est donc une manifestation d'une certaine valorisation de soins ménagers, ne peut être considéré comme un outil facile et souple d'utilisation.

Au final, la recherche des moyens offerts par le droit patrimonial pour permettre aux parties de reconnaitre et de valoriser les prestations domestiques est donc décevante. Parce qu'il est traditionnellement admis que ces services relèvent d'obligations, morales ou légales, conjugales ou familiales, ils ne sont pas a priori indemnisables en argent et lorsqu'ils le sont, c'est à la condition rigoureusement entendue et vérifiée par les juges, qu'ils aient revêtu une intensité telle qu'ils ont

36. Cass Civ.1ere, précit.
37. Cass.civ.1ere, 4 juillet 2007, n°06-13275; 19 septembre 2007 *Defrénois* 2008, 38782, note Dagorne-Labbe.
38. Cass.civ.1ere, 20 février 2008, n°06-19977.

dépassé la norme et qu'on puisse y déceler un excès de dévouement qui les rend quasi-professionnels. Et même dans ce cas, ils seront alors indemnisés de manière forfaitaire la plupart du temps, sans que le juge ou les parties entrent dans le détail de l'évaluation du travail fourni pour lui faire correspondre la rémunération accordée. Ce refus d'entrer dans les détails d'une liquidation véritable, qu'appellerait une réelle volonté de rémunérer un travail à sa juste valeur, paraît significative d'une réticence durable à patrimonialiser des services qui relèvent sans doute davantage de l'être que de l'avoir.

Pas d'avantage que dans les comptes publics, la valeur du travail domestique ne trouve donc une réelle reconnaissance dans les comptes familiaux.

5 Valorisation of household labour in family property law

A Dutch perspective

*Wilbert Kolkman and Leon Verstappen**

I Context, objective and research questions

In almost all countries, there is statute law regulating the property relations between spouses.[1] In most countries, the default system contains some kind of community of acquisitions or participation in acquisitions. In short: each spouse has a mostly equal share in the community of these acquisitions or in the value of these acquisitions. The default system forms a compensatory mechanism for household labour, but not the only one and probably not the best one.

This compensatory mechanism is problematic for a number of reasons. First, the amount of compensation is rather arbitrary, since the participation in assets and debts is not directly related to the actual household work conducted. For example, there is no compensation at all if there is no property, leaving the spouse working in the household or in the other one's business unpaid. Second, the default systems may not take into account that not all household labour should be compensated, as spouses are expected to contribute to the regular workload of the household. Still, most of the default systems provide for a reasonable participation in the accrued assets as a result of labour of the spouses during marriage.

The question has risen what happens when the compensatory mechanism is set aside by a marital contract.[2] Certain types of matrimonial property regimes in marital contracts, excluding compensatory mechanisms, may cause problems and unfairness between spouses. The same applies to unmarried cohabitants without a cohabitation contract containing compensatory mechanisms.[3] In the Netherlands,

1. For an extensive overview, W. Pintens, 'Matrimonial property law in Europe', *in* K. Boele-Woelki, J. Miles & J.M. Scherpe (Eds.), *The future of family property in Europe*, Antwerp, Intersentia, 2011, pp. 19-46, and K. Boele-Woelki et al., *Principles of European Family Law Regarding Property Relations Between Spouses*, Antwerp, Intersentia, 2013.
2. On the spousal autonomy: J.M. Scherpe, *Marital agreements and private autonomy in comparative perspective*, Oxford, Hart Publishing, 2012.
3. The group of unmarried cohabitants is also referred to as being in an 'informal relationship', as opposed to the ones who are married or in a registered partnership. The latter two groups are in a 'formal relationship'.

these issues were raised on the occasion of the parliamentary debate regarding the modernisation of matrimonial property law in the first decade of this century.[4]

On 11 September 2008, the Minister of Justice promised the Second Chamber of Parliament to commission research investigating the necessity to provide additional legal regulation of the separation of property regime (i.e. the contractual regime allowing spouses to exclude any community of assets). The Minister made this promise following two motions made by MP's who asked the Government to consider legislation that could mitigate the unfair effects of this potentially harsh property regime, chosen by the spouses in their marital contract. In addition, research was to be carried out into the similar effects of separation of property, resulting from the absence of legislation on property relations of partners in long-standing informal cohabitation. The Dutch call these types of marital contracts *koude uitsluiting* (literally *'cold exclusion'*) which is also the name of the report. These matrimonial property systems agreed upon in marital contracts contain the exclusion of any community of property, without any alternative system of sharing of net income or property. In short: strict separation without compensation. The objective of this research was to scrutinise this twofold problem, and to come up with possible solutions. The research covers an inquiry into the nature, extent and causes of financial problems and unfair effects resulting from separation of property that can occur through the termination of formal and informal relationships, as well as the search for possible solutions to these problems. The research was concluded in 2010.[5]

The Dutch Civil Code contains a number of provisions offering a legal basis for judges to alter a marital contract or cohabitation contract by court order. However, the analysis of case-law, especially from the Supreme Court, shows judges to be very reluctant to modify a contract. 'Pacta sunt servanda', agreements must be kept, is still the predominant rule. Judges argue that reasonableness and fairness require in the first place that parties stick to their agreement. Relying on Articles 6:248 and 258 Dutch Civil Code, which contain provisions to modify a marital contract by court order or even by operation of law, has been to no avail, at least until now.[6]

4. Kamerstukken II, 2007-2008, 28 867, nr. 20 and 21.
5. M.V. Antokolskaia, B. Breederveld, J.E. Hulst, W.D. Kolkman, F.R. Salomons & L.C.A. Verstappen, *Koude uitsluiting: Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan*, Den Haag, Boom Juridische uitgevers, 2011, p. 433 (Familie en Recht; Vol. 2); henceforth also referred to as: *Koude uitsluiting.* Also: A.G.F.M. Flos, Vergoeding voor de meewerkende echtgenoot bij koude uitsluiting: de onderbelichte, *Tijdschrift voor Familie- en Jeugdrecht*, 2018/11.
6. Antokolskaia et al., 2011, chapter 2; M.J. van Mourik & L.C.A. Verstappen, *Handboek voor het Nederlands vermogensrecht bij scheiding*, Deventer, Kluwer, 2014, chapter 8.

The research entailed a quantitative and qualitative analysis of the Dutch situation. It focused mainly on two problematic groups:
- Spouses with children who are caught in a 'poverty trap' because of the matrimonial property agreement containing separation of property without compensation.
- Spouses who worked in the household or in the business of the other, without having received adequate financial compensation for that work.

1 *Dimension of the problem I: Reasons for the choice of strict separation and numbers of such cases*

The spouses' choice for contractual separation of property without any sharing of accrued property (hereinafter also referred to as: 'cold exclusion' or 'strict separation of property') can be grounded in various reasons (e.g. a marriage at older age, owning a family fortune or a business). In the period 2004-2009, the number of marital contracts with strict separation of property lay between approximately 14 % and 18 % of all marital contracts.[7] If we added marital contracts that contain sharing mechanisms only upon death (meaning no sharing in case of divorce) the number even rises to between 24 % and 35 %.[8] Numerous interviews with practitioners, e.g. civil law notaries, gave rise to the impression that during the last couple of years the strict separation regime has become more popular, especially in cases where one party owned a low interest, capital-intensive business, for instance a farm.

2 *Dimension of the problem II: Property relations of informally cohabiting partners*

The number of married couples in the Netherlands is approximately 80 % of all couples: there are approximately 900.000 unmarried cohabitating couples on a total number of 4.2 million couples. The group of unmarried cohabitants is expected to grow the coming years. It is predicted that before the year 2050 one out of three couples are unmarried.[9] Simultaneously, the number of married couples is decreasing each year. In 2015 this number reached an all-time low.[10]

Until recently, little was known about cohabitation contracts. From the National Bureau of Statistics we know that approximately 50 % of the cohabitant couples have a cohabitation contract.[11] In 1995 approximately 85 % of all contracts were drawn up by a notary. The vast majority of cohabitants do want to conclude a contract eventually; only 15 % stated they do not want to enter into such an agreement.

7. F.W.J.M. Schols & F.M.H. Hoens, 'CNR-Huwelijksvoorwaardenonderzoek, deel I: algemeen en koude voorwaarden', *WPNR*, Vol. 6956, No. 943, 2012.
8. Schols & Hoens, 2012.
9. CBS StatLine.
10. CBS StatLine.
11. A. de Graaf, 'Steeds meer samenwoners hebben een samenlevingscontract', *CBS Webmagazine*, (February) 2010.

The Notarial Institute Groningen conducted research into the contents of the mainstream cohabitation contracts.[12] Unlike the matrimonial property contracts, in the Netherlands there is no registration possible (let alone obligatory) of cohabitant agreements. It is therefore difficult to know what the contents are of these contracts. There was just one way to find out: reach out to the practitioners who draw up these types of contracts, the civil law notaries. An internet survey among all notaries in the Netherlands was conducted. The response rate was approximately 17 % of the target group, being the notaries who regularly practice family law. The results provided a reliable indication of the content of everyday cohabitation contracts.

The results are quite remarkable. There is a huge difference between the content of matrimonial property contracts and cohabitation contracts. Whereas matrimonial property contracts usually contain provisions to share income or property in one way or another, the opposite is true for cohabitation contracts. The research shows that in less than 5 % of those contracts, there are provisions regarding sharing of income, property, pension or maintenance obligations. What we can clearly see is that the content of cohabitation contracts is induced by tax benefits or other types of benefits. Thus, the average cohabitation contract resembles the matrimonial property contract we call *koude uitsluiting*, strict separation of property without any form of sharing of net income or property. So whereas in approximately 80 % of all matrimonial property contracts there are provisions of sharing of income and/or property, these provisions lack in approximately 95 % of all cohabitation contracts.

How can this be explained? The most likely explanation is that the group of cohabitants is composed differently, more heterogeneously. The majority of the cohabitants see their relationship as a first step towards marriage and not as a full alternative to marriage. They are at the start of their relationship, often without any children; they do not want to commit themselves at such an early stage of their relation. The conclusion is that in the vast majority of cases a cohabitation contract is almost similar to a marriage contract with *koude uitsluiting*.

Given the number of couples with a potentially unfair property regime, what is the nature of the problems, the size of the problem group and the cause of the problems? These three topics are dealt with below.

II Problems and unfair effects

Socio-demographic research reveals that women, both in formal and informal relationships, and especially mothers with young children, encounter long-term financial disadvantages resulting from the unequal distribution of child care and paid employment. The problems manifest themselves mainly from the moment of the termination of the relationship. These problems are: a considerable decrease

12. This research resulted in the open access article P. Kuik, W. Schrama & L.C.A. Verstappen, 'Samenlevingsovereenkomsten in de notariële praktijk', *Familie & Recht*, (November) 2014, <www.familieenrecht.nl/tijdschrift/fenr/2014/11/FENR-D-14-00001>.

in quality of living accommodation, a decrease in income, an increase of risk of long-lasting poverty.

Hard statistical evidence shows that after the dissolution of a relationship, whether it be a formal or an informal one, the income of the female spouse who cares for children drops severely. The income of the male counterpart on the other hand increases. The average income of females is reduced by 21 % after a divorce, and that of a female partner in an informal cohabitation relation decreases with 14 % on average. The income of men rises after a divorce or after dissolution of an informal cohabitation with 33 % and 23 %, respectively. These statistics take maintenance obligations into account.[13]

It is obvious that this is caused by the man's earning capacity and the deficit in earning capacity of the woman. The female falls behind on the job market, because for a considerable amount of time she did not take part in this market. Her backlog is threefold: she has the care for the children, she has to start all over again on the labour market and if there is no compensation mechanism, she also loses on the property side of the broken relation. Her sacrifice to the family is not compensated if she only receives maintenance, since as a result of the marital agreement she does not participate in the acquisitions of the marriage. Did she realise this when entering into the marriage? Should she suffer the adverse consequences of the decision to conclude a matrimonial property contract without compensatory mechanisms as described before?

In addition to these financial problems, another unfair effect of separation of property has been identified: the cases where one of the partners has contributed substantially to the increase of the property of the other partner, without being entitled to any compensation. The size of the group of the partners confronted with this kind of unfair effect is difficult to estimate. For this reason, the researchers have limited their estimation of the size of the group encountering problems to single parent families with children living below the poverty threshold. Consequently, one has to bear in mind that the overall size of the group encountering the negative effects of separation of property is somewhat larger, although the researchers were not able to provide for any further reliable quantitative estimation.

1 *Size of the problem groups*

Using an educated guess approach, the researchers have calculated the size of the group of individuals encountering serious financial problems in the Netherlands – mainly women continuing to care for the children after the relationship breakdown – as follows:

13. For materials on the dissolution of informal relationships, see A.M. Bouman, 'Vrouwen na scheiding fors in koopkracht terug', *CBS Webmagazine*, (June) 2004. For formal relationships see A.M. Bouman, 'Financiële gevolgen van de beëindiging van ongehuwd samenwonen voor man en vrouw', *CBS Bevolkingstrends*, (3rd quarter) 2004, pp. 67-74, at p. 69.

a. Approximately 1.500 women in formal relationships with a marital agreement providing for strict separation of property;
b. Approximately 20.000 unmarried cohabiting women.[14]

2 *Causes of the problems and unfair effects*

In general, the relationship-generated reduction in earning capacity can be identified as the main cause of the problems and further unfair effects encountered by child-caring women after the relationship breakdown. In cases of strict separation of property these women commonly experienced problems and unfair results due to the lack of the compensatory mechanisms of the statutory regime of the community of property or the participation arrangements – and in case of the informal relationships – also by the absence of any statutory maintenance obligation. At the same time, informally cohabiting women on average are more highly educated, which make them less vulnerable in case of a break-up.

Problems and unfair effects can also result from an unequal property regime between the partners, mainly when one of the partners has contributed to the increase of property of the other partner without due compensation. The extent of the problems is so context-dependent that making any general statement on the matter appears to be almost impossible. The only general pattern that can be established is that serious problems and unfair effects mainly occur when one partner's child-care and work in the business of the other partner is combined with the sole ownership of the business by the latter.

III General conclusion. Justification of legal intervention

The general conclusion of this research is that separation of property leads to financial problems and unfair effects – both in cases where strict separation results from a contract between the partners in a formal relationship and from the absence of legislation regarding the property regime of partners in an informal relationship.

The number of the couples in formal relationships where contractual separation of property actually leads to problems and unfair results is likely to be limited. In practice, these problems are sometimes successfully solved by separation arrangements. However, this does not relieve the Government of its task to consider enacting legal instruments for better remedies for the problems at hand. The necessity to consider legal instruments is felt even stronger with regard to the numerous cohorts of informally cohabiting couples.

The justification for legal intervention can be found in the aspiration to provide fair and equitable regulations for the property relations governed by a marital agreement. In contrast to an ordinary civil contract, a marital agreement is characterized by such particularities as long duration. Parties to a marital contract – i.e. persons in an affective relationship – often appear to be unable to foresee and properly accommodate all possible future developments that can negatively affect

14. Antokolskaia et al., 2011, chapter 3.

their respective property situation. This consideration provides a sufficient ground for legal intervention aimed at limiting the contractual freedom and the autonomy of the parties in order to protect them from unfair results. In cases where contract-based strict separation of property negatively affects the partners caring for minor children, the protection of the interests of the children provides an additional and convincing ground for legal intervention.

Over the course of this research, a number of possible legal instruments have been identified. As to the partners in formal relationships, some of these instruments – e.g. better advice for the partners before entering into a marital contract – seek to prevent concluding an unfair marital contract. Other instruments – e.g. statutory compensation for unpaid work in a business of the other partner or the discretional power of the court to amend an unfair marital contract – seek to provide a remedy for dealing with existing unfair marital contracts. Concerning the partners in informal relationships, the remedy can be sought in the extrapolation of some rules governing the property relations of spouses, for instance the rules on spousal maintenance. The selection of the suggested instruments is largely based upon the findings of comparative research.

IV Comparative research

A number of instruments – that could be remedial for financial problems and unfair effects of the strict separation of property – have been identified as a result of a quick scan of most of the European jurisdictions and a selection of other Western countries, and an in-depth examination of a number of selected jurisdictions.[15]

1 *Comparative research: married couples*

The quick scan and the in-depth research into several jurisdictions (Australia, the Dutch Antilles, Russia and Sweden) have revealed a convergence tendency in the area of regulation of marital contracts. The conventional image of a sharp division between the flexible approach of the common law countries and the rigid approach of the countries of continental Europe is apparently no longer valid. The common law counties traditionally did not consider marital agreements as binding; they granted the court discretional power to set aside a marital agreement and to reallocate property. The countries from the continental European tradition used to adhere to a rigid approach, clinging to the adage *pacta sunt servanda*: a marital agreement is as binding and (un)alterable as any other civil contract. Both clichés are no longer reflecting the present-day situation. Since the 1970s, there is a tendency in the common law countries to allow for binding marital agreements. This culminated in the landmark case *Radmacher v. Granatino*.[16] Yet, in these jurisdictions the court continues to enjoy a larger discretionary power to amend unfair marital agreements. In continental Europe, there is a crosscurrent trend to give the

15. Antokolskaia et al., 2011, chapter 4.
16. *Radmacher v. Granatino* [2010] UKSC 42.

court a discretional power to amend extremely unfair marital agreements. This trend has started in the Scandinavian countries in the 1980s.

The comparative research resulted in examining several instruments allowing for the mitigation of the negative effects of strict separation of property ensuing from a marital contract, which could be used in the Dutch legal context. Among those were the statutory requirement that each of the parties should receive separate and independent legal advice prior to signing, secondly giving the matrimonial home and household goods a special legal status, which cannot be set apart by a marital agreement, and thirdly increasing the court's discretionary powers.

2 *Comparative research: informally cohabiting partners*

The quick scan and the in-depth research in four countries (in this case the Dutch Antilles, Sweden, Slovenia and Scotland) reveal a general feeling shared by many legislatures that property relations of the partners in informal relationships should enjoy at least some protection. This trend is reinforced by the ever-growing numbers of informal cohabitees and the fact that more and more children grow up in a non-traditional family. Another important consideration in favour of regulation is the empirical research evidence proving the fallacy of the old belief that the decision not to marry and not to make a cohabitation agreement are based on a mutual, deliberate choice of the parties.

While designing legislation for the property relations between cohabitees, the legislature in all countries is confronted with the same dilemma, namely to find a safe passage between the Scylla of paying due respect to the autonomy of the partners who – either deliberately or not – have chosen not to marry, and the Charybdis of leaving the vulnerable party without protection.

Taking this dilemma as a starting point, the legal solutions employed in various countries can be seen as a scale of instruments starting from granting only a minimal protection – as it is the case in for instance Sweden and Norway – to the complete equalisation of cohabitees with the spouses in the field of property and maintenance law. Party autonomy almost everywhere is safeguarded by giving the partners a possibility to opt out.

V Instruments considering partners in formal relationships[17]

The researchers conclude that there is a need for specific statutory regulation regarding the provision of legal advice, taking into account the special nature of a marital contract of strict separation of property. To improve the legal advice procedure, the legislature could consider introducing a statutory rule providing that each of the parties contemplating strict separation of property should receive independent legal advice separately. This legal advice must then be laid down in a certificate attached to the marriage contract, or the marriage contract itself shall contain a notification that the required advice has been provided.

17. Antokolskaia et al., 2011, chapter 5, paragraph 3.

The researchers also conclude that the law should contain provisions allowing for mitigation of the negative effects of strict separation of property. One example of a possible instrument is a *lump sum*. If the parties have chosen a contractual regime, deviating from the legal regime of community of property, the partner, who, without adequate compensation, has worked in the enterprise or business of the other partner or in the household, should have the right to claim due compensation from the other partner. The law should also provide for criteria enabling the court to determine when such compensation should be granted, and how the amount should be calculated.

Another possible instrument can be to bestow the court with the discretional power to correct a marital contract if its terms, due to a material change in circumstances, have become extremely unfair for the partner who has (primarily) been caring for the children of the couple. This instrument would allow the court to amend a marital contract in cases when, after the conclusion of the contract, children have been born into the relationship, or when one of the children or the child-caring parent has become seriously ill or handicapped. It is also possible to grant the court a more general discretionary power to adjust or set aside a marital contract providing for strict separation of property if it has been rendered unfair considering the overall circumstances of the case. It is interesting to see the Belgian legislator is considering such an introduction in the Bill of December 13, 2017.[18]

VI Instruments considering partners in informal relationships[19]

The conducted research allows the conclusion that there are sufficient grounds to consider a regulation providing for the mitigation of financial problems and unfair effects of the termination of informal relationships, especially when the interests of minor or dependent children of the couple are involved. It is up to the legislature to decide whether or not these grounds are weighty enough for enacting such provisions. The researchers confine themselves to the making up of an inventory of the legal instruments that could be employed.

One of the most obvious instruments is to extrapolate spousal maintenance to all informal marriage-like relationships. This instrument would allow the temporary mitigation of the reduction of the earning capacity of the child-rearing partner, taking into consideration both the needs of the receiving partner and the financial capacity of the paying partner. When doing so, one should allow for the difference between spouses on the one hand, who by entering into marriage have explicitly committed themselves to a certain legal status, and partners in informal relationships on the other, who did not make such commitment. Hence, unmarried partners should be given the opportunity to opt out of maintenance obligations by a contract verified by a notary.

18. Bill of December 13 2017, DOC 54 2848/001, proposing changes in the Belgian matrimonial property law.
19. Antokolskaia et al., 2011, chapter 5, paragraph 4.

Several other instruments, suggested for spouses, could equally be applied to partners in informal relationships.

VII Conclusion

Despite the solid report, the State Secretary for Safety and Justice[20] responded to this appeal for more legislation quite negatively. Although he acknowledges that there are problems in practice, he deems it unnecessary to have extra provisions for married or unmarried couples, as there are already tools in the current statute law. It is up to the lawyers, the notaries and the judiciary to use these existing instruments to their full extent. The question is whether legal practice will comply with this strong recommendation. Lawyers and judges are not overwhelmingly enthusiastic about this issue; they rather stick to the text of the contract. As mentioned before, the practice is that the parties to the contract seldom really know what the content is, let alone that they live by it.

Legal practice has to find a way of coping with this problem and the report provides sufficient tools. We think that there is also a hidden argument for the legislature not to introduce new legal measures: the fear of the courts being inundated with procedures on the fairness of the marital contract, leading to an increase of expensive legal battles. Quite often this is the untold argument to stick to the legal status quo.

20. See the letters of the Dutch Secretary of Security and Justice to the Second Chamber of the Dutch Parliament 26 September 2011 and 28 February 2012, Year 2011–2012, 28 867, nr. 23 and nr. 29.

6 Valuation of care and housework in property law

A Norwegian perspective

*Tone Sverdrup**

I Introduction

The majority of work efforts in the family are consumed. Household labour (childcare and housework) is per definition consumed, and most of the income is spent on covering consumption expenses. However, a smaller portion of the income could lead to investments – for example in a house or a car.

What we see in many families is that one party (spouse or cohabitant) undertakes more than her or his share of the "unprofitable" consumptions tasks, and as a result ends up with owning no appreciable assets even after a long relationship. The two parties' work efforts may be equal at any given moment, yet inequality is generated gradually over time because the work performance of one is consumed while that of the other is partly invested. A settlement along property lines (typically in cohabitation) would often leave one of the parties empty-handed.

One solution to this major problem in family law is to draw the property line differently. In Norway, co-ownership both in marriage and unmarried cohabitation can be established on the basis of *indirect contributions,* both in the form of childcare/housework and the covering of consumption expenses. Another solution is to divide at least some property equally between the parties upon termination – this is typically the case in marriage law in many civil-law countries.

These solutions can be justified in different ways. Traditionally, marital property regimes had their justifications in broader notions of "community,", "partnership", "need" etc. Today, the trend in legal policy is to replace these broader terms by more explicit justifications, such as compensation for contributions made during marriage and for losses suffered. In the majority of European countries property is divided equally according to fixed rules, and many of these countries exclude the value of inheritance, gifts, and premarital assets from the property subject to division.[1] The most striking common feature of the three items exempt from equal

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1. See K. Boele-Woelki, B. Braat and I. Curry-Summer (Eds.), *European Family Law in Action, Volume IV: Property relations between spouses, EFL Series No. 24,* Antwerp, Intersentia, 2009.

division is that the other spouse is not presumed to have contributed to the property's acquisition, and *contribution* appears to be the essence of the justification.

Justification is significant in determining whether a certain allocation of property should be viewed as an *entitlement* or a *charitable* transfer and in pace with increasing individualization, *entitlement* is becoming a more important justification.

Divorcees and cohabitants that have split up seldom organize in political pressure groups, and rules regarding division of property are not high on the political agenda in Western countries. Therefore, the rationale given for co-ownership and division of property upon relationship breakdown is all the more important.

The rationale that provides the greatest political support and acceptance in this perspective is the one that relates to the parties' *contributions* to capital accumulation in the relationship. A suffered *loss* may also give a strong right to claim assets, but it is not as convincing as contributions. Justifications linked to the needs of the parties are the least persuasive, and they are often marked by almsgiving, which requires appreciation from the recipient. In between entitlement and charity on the above scale, are reasons related to broader notions of community and partnership.

This paper will compare the views taken by the Norwegian courts with that of the Law Commission for England and Wales and the American Law Institute and discuss the valuation of household labour in this respect. As we shall see, the two latter bodies are of the opinion that homemakers contribute far less to the acquisitions of family assets acquired during the relationship, than do breadwinners. Lastly, the paper will discuss the key difference between these legal reasonings.[2]

II Norway: Household labour is an indirect contribution that leads to co-ownership both in marriage and cohabitation

In the so-called *Housewife* case from 1975, the Norwegian Supreme Court ruled that a wife who stayed at home and minded small children co-owned a house purchased during the marriage by her husband with his income that had been earned during marriage.[3] In 1978, the Supreme Court also ruled that creditors must respect co-ownership rights of this nature[4] and – later – that the same principle should apply to unmarried cohabitation.[5]

In Norway, ownership to land is obtained regardless of registered title. As long as the parties have not agreed upon the ownership, co-ownership is based on what the parties contributed to the acquisition. Not only direct, but also indirect contributions in the form of household labour and/or payment of the family's consump-

2. See also T. Sverdrup, 'Family solidarity and the mind-set of private law', *Child and Family Law Quarterly,* Vol. 27, No. 3, 2015.
3. Norwegian Supreme Court Reports 1975, p. 220. Indirect contribution in the form of covering the family's current expenditures was acknowledged as well, see Norwegian Supreme Court Reports 1977 p. 533 and 1979 p. 1436.
4. Norwegian Supreme Court Reports 1978, p. 871.
5. Norwegian Supreme Court Reports 1978, p. 1352 and 1984, p. 497.

tion expenses are acknowledged. In order to establish co-ownership, the acquisition must constitute a joint project. Co-ownership is determined on the basis of a discretionary assessment of these factors.

The judge who drafted the decision in the first *Housewife* case stated that it was the wife's housework and her caring for three small children "that has enabled the husband to devote so much work to building" of the house.

The principle was codified in the Marriage Act 1991. This rule covers not only the common residence, but also other items of property for mutual and personal use, e.g. a second home, a car or a boat. The legislative history states that the homemaker's co-ownership is based on "economic realities" and emphasises that no transfer of value occurs by declaring that the homemaker is a co-owner.[6] In other words: she receives only what she has created herself.

We can deduce from the case law that the homemaker caring for small children below compulsory school age has made half the breadwinner's normal earnings possible, unless the breadwinner has an extraordinarily high income, then she will enable less.[7] In a relationship where the couple have small children, the breadwinner would have to reduce his (or her) working hours by one half, and consequently halve his income, if he were to take responsibility for his half of the child care and domestic work, as the children are below school age and thus need round-the-clock care. On the other hand, the caregiver would then have had free time to take on a part-time paid job. If the children are older, of compulsory school age, and the wife still works full-time at home, she will normally enable less than half his earnings.

In Norway, the full-time housewife is a thing of the past. However, these co-ownership rules are still very relevant as about 40 percent of employed women are working part-time, and, on the other hand, take more than their share of household labour. Part-time caregiving and housework can also lead to co-ownership, and in these cases the women will normally contribute to property acquisitions directly, as well - or indirectly by covering consumption expenses. Thus, in the majority of marriages and informal relationships, the parties would be regarded as equal contributors to surplus accumulated during the relationship.

III Comparing legal reasonings

Among the Nordic countries, it is only Norway and Iceland that apply this principle of co-ownership on the basis of indirect contributions. In several common law jurisdictions, such as in Canada, Australia and New Zealand, a broad doctrine acknowledging household labour as a form of indirect contribution within the framework of a remedial constructive trust, has been adopted.

6. NOU (Official Norwegian Report) 1987: 30 p. 70-71.
7. Norwegian Supreme Court Reports 1982, p. 1269. Loss and gain are two sides of the same coin when care work is viewed as feeing time. But they do not always go equally far. It could be argued that the (part-time) caregiver has not lost as much as the breadwinner has gained, and that her compensation in any case should be limited to her loss.

If we look at more recent reports from such well-respected bodies as The American Law Institute and The Law Commission for England and Wales, we find that they are of the opinion that homemakers/domestic workers contribute far less to the acquisitions of family assets acquired during the relationship, than do breadwinners.

1 The Law Commission

In 2007, the Law Commission for England and Wales proposed new provisions regulating the financial consequences of relationship breakdown among cohabitants.[8] According to the proposal, a qualifying contribution from one of the cohabitants could give rise to relief if the contribution had resulted in a retained *benefit* or an economic *disadvantage*. The Law Commission argues that it is unlikely that the non-owning party (the applicant) would be able to show that work done in the home had been a cause of a retained benefit in the other party's hands:

> "The applicant [homemaker/caregiver] might, for example, contend that, by looking after the family, he or she had enabled the respondent to build up savings or to advance a career. However, such a contention would be very difficult to uphold because of the need to establish causation. The applicant would have to prove what the respondent [breadwinner] would have achieved had the applicant not made his or her contribution. This would be extremely difficult as there are so many variables: for example, the respondent could argue that he or she would have been able to deal with household tasks by engaging professional domestic help."[9]

Here, the Law Commission argues that the full-time breadwinner would have earned just as much even if the other party had not looked after the family, most likely, he would have paid for a help (or maybe placed the children in a childcare centre). In other words, the party who takes care of the children has only freed a relatively small amount of the wage earner's capital.

2 The American Law Institute

The American Law Institute (ALI) seems to reason along the lines of the Law Commission for England and Wales when the drafters are setting out the foundation for their principles on which they suggest financial division on divorce should be based. ALI maintains that the factual premise of an equal-contribution rationale in marriage is not plausible. The drafters reason as follows:

> "Much of the spousal earnings during marriage are consumed, and only the surplus remaining is available for division at divorce. For domestic labors to contribute to that

8. The Law Commission for England and Wales, *Cohabitation: The Financial Consequences of Relationship Breakdown* 2007 Law.Com. No 307. (Law Commission 2007). The proposal has not yet been adopted in England, but similar provisions have been enacted in Scotland.
9. Law Commission 2007, para 4. 48.

> surplus, they must not only enhance the financial capacity of the other spouse or the value of marital property but do so by an amount that exceeds the consumption attributable to the spouse performing those labors. For domestic labors to contribute equally to that surplus would require, further, that this excess enhancement equal the excess of the higher-earning spouse's income over that spouse's consumption. Neither data nor intuition support such inferences."[10]

We see that the American Law Institute is of the opinion that homemakers contribute far less to the acquisitions (i.e. family assets acquired during the marriage) than do breadwinners. The argument is that the homemaker must also contribute to her own support and, because of that there is not enough left for equal contributions to the investments.[11] The American Law Institute seems to reason along the lines of the Law Commission for England and Wales, even if the argument is less explicit.

The view of the Norwegian courts is that a homemaker caring for small children would have made half the breadwinner's earnings possible. Obviously, the total of this sum cannot be regarded as contributions to the surplus. Part of this enabled income must also be deemed to have been spent on covering consumption expenses. As aforementioned, if the children are of compulsory school age, and the wife still works full-time at home, she will normally enable less than half his earnings. However, many women assume paid work after a shorter period at home, and the two parties will therefore normally contribute to the surplus on equal footing.

IV Conclusion: The key difference

What is the key difference between the reasoning of the Law Commission and the Norwegian Supreme Court? Both are "but-for" causations (*sine qua non).*

If we look at childcare, in the Commission's causal reasoning, the care by parents and by others (a nanny) is fully substitutable. In the causal reasoning of the Norwegian Supreme Court, however, the fact that the children are taken care of by the parents, is a constant factor.

The Commission seems to reason as follows: The caregiver does not enable half of the breadwinner's income (even when attending to small children), because the breadwinner would most probably have earned just as much even if she had not performed "his" share of the child care duties. Most likely he would have paid for kindergarten or a nanny instead.

10. American Law Institute, *Principles of the Law of Family Dissolution* (2002) § 4.09 cmt. c, at 735.
11. Equal division of assets acquired during the relationship is still proposed by the American Law Institute, but the drafters are reluctant to justify these rules by the parties' contributions. The drafters maintain that it "makes far more sense to ground an equal-division presumption on the spouses' contribution to the entire marital relationship, not just to the accumulation of financial assets". One spouse may for example "have contributed more than the other in emotional stability, optimism or social skills, and thereby enriched the marital life". American Law Institute, *Principles of the Law of Family Dissolution* (2002) § 4.09 cmt. c, at 735.

However, should it be decisive whether the breadwinner most probably would have taken his share of care work in the alternative instance, or not?

The answer is yes if they were strangers to each other; two people that accidentally met, and then one of them by mistake undertook domestic work for the other.

But this is not the case. Often they have agreed upon the arrangement, where one is at home with the children full-time or part-time, and the other work more outside the home. At least we must presume – in the absence of any evidence otherwise – that they did not disagree upon the division of labour they have actually practised. The two did not meet by accident, they live together and have normally agreed upon this division of labour (or had an understanding). When the situation is like this, it is reasonable to presuppose that the children should have just as much total contact with their parents in the hypothetical posed / counterfactual situation. If not, a basic premise of the agreement or understanding is changed and the two situations – factual and counterfactual – are no longer comparable.

If the father and mother had been two disassociated stakeholders in the market, the Law Commission's causal reasoning would have been fair and reasonable. But they are not. The Law Commission ignores the fact that the parties are in a shared, committed living relationship – they constitute a *work unit* and have agreed upon a division of labour. That is, in my view, the main difference between the legal reasonings by the Commission/American Law Institute on one hand and the Norwegian legal doctrine on the other.

Different views in this respect must of course be acceptable. However, the remarkable thing is that the American Law Institute and the Law Commission do not problematize this issue at all. It is taken for granted – as self-evident – that childcare frees capital and not time, in other words that household labour is fully replaceable with market services in this causal reasoning,

Maybe this is not so surprising. Private law reasoning is developed with regard to the market, where transfers normally occur directly between the parties. This is the main legal pattern of thought regarding transfers between the parties in private law.

Reciprocity between service and counter-service is the fundamental way of thinking in contract law. In family relationships, however, the transfers of assets, goods or services are normally not mutually conditioned. And more importantly, many transfers take place indirectly; via a community and not directly between the parties.

Because these contributions occur indirectly and gradually, it is nearly impossible for a cohabitant to ensure a reciprocal service by means of a contract the way market actors would.

The two parties do not normally choose their work tasks primarily with a view to who will be the owner of the assets acquired during the relationship. This choice is usually based on other factors like gender roles, interests, wage level, commitment, etc. Indirect contributions are not intended at all; they arise as a side effect of an unequal division of labour and expenses.

A lot of private law reasoning is developed with regard to the market, where transfers normally occur directly between the parties. When couple relationships are looked upon through this private-law lens, only two persons are seen – not

the collective unit. The two parties constitute a work unit – they enable each other work efforts. Unfortunately, the division of labour that takes place in this collective unit has no legal name; it is not a legal concept, and - as we have seen - can easily become neglected in legal reasonings.

7 Valuing household work in family property regimes of separation of assets

Spanish models and experiences

*Josep Ferrer-Riba**

I Household work in the regulation of the family economy and family dissolution

Household work is an extremely common way of contributing to family welfare. When performed without remuneration by one or more members of the family unit, family law has to deal with its implications for the family finances and the personal position of whoever carries it out. It is abundantly clear that devotion to this type of work has historically shown a marked gender bias – especially when it includes bringing up children, frequently first and foremost the mother's responsibility – and brings about substantial losses in the homemaker's earning capacity leading to situations of serious financial dependency. Although correcting these negative consequences mainly requires state action and public law measures, family law can go some way towards mitigating them by adopting rules to encourage individuals to devote themselves to the home to a reasonable extent and minimize the adverse effects of doing so.

Family law accords relevance to household work mainly in three sequential stages: firstly, by setting out the duties to contribute to the family's needs (household work as a contribution to the family); secondly, by deciding how the assets or surpluses obtained by a couple during their life together should be allocated (household work as the basis of participation in these acquisitions or surpluses or in their value), and thirdly, by establishing financial claims between former spouses or cohabitants after family dissolution (household work as the basis of maintenance or redress for the needs of or detriments suffered by the homemaker).

However, it should be noted that only in highly exceptional cases in the regulation and application of these three areas of family law is there any financial valuation of household work. The laws prefer to protect personal contributions to family welfare in ways that do not entail solving such an intractable problem as setting a monetary value on them. In practice, the opportunity to set this value is only considered in the second of the stages mentioned above, if the family economy is

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governed by a property regime involving separation of assets. Spanish law is of great comparative interest for addressing this issue, not only because of the diversity of its private law systems,[1] but especially because in two of them – the Catalan and the Balearic systems – separation of property operates as a default regime and its use is very widespread.

Before turning to the property consequences, it should be stressed that performing household work is in the first place an optional means of fulfilling a family duty while living together. The treatment of household work as a contribution to family living costs is dealt with by means of *ad hoc* rules that establish the spouses or household members' duties to contribute to meeting the family's needs. Rules of this type are very common in comparative law, so much so that they have been translated into a principle of European law (Principle 4:4 of the Principles of European Family Law [hereafter, PEFL] Regarding Property Relations Between Spouses: "Contribution to the needs of the family", which states that "each spouse should contribute to the needs of the family according to his or her ability", and that this encompasses "contributions to the running of the household, the personal needs of the spouses and the maintenance, upbringing and education of the children").[2]

Spanish legal systems also have rules of this type. In some cases they appear as general rules applicable to all married couples (*régime primaire* rules), as in the law in Catalonia (Art. 231-6.1 of the Catalan Civil Code)[3] and Aragon (Art. 187 of the Code of Aragon Foral Law);[4] in others they are only part of the regulation of the separation of assets regime, as in the Spanish Civil Code (Art. 1438, *in fine*)[5] and the law in the Balearic Islands (Arts. 4.1, 65 and 67.2 of the Compilation of the Balearic Islands Civil Law)[6] and Navarre (Rule 103 b of the Compilation of

1. On the history of Spanish private law, its territorial diversity and the constitutional basis on which it currently rests, see A. Vaquer, 'Introduction', *in* S. van Erp & A. Vaquer (Eds.), *Introduction to Spanish Patrimonial Law*, Granada, Comares, 2006, pp. 1-17; T. Rodríguez de las Heras Ballell, *Introduction to Spanish Private Law: Facing the Social and Economic Challenges*, 1st ed., London/New York, Routledge-Cavendish, 2010, pp. 1-11.
2. K. Boele-Woelki et al., *Principles of European Family Law Regarding Property Relations Between Spouses*, Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 47-62.
3. The Catalan Civil Code (*Codi Civil de Catalunya*, hereafter CCCat) consists of six books, adopted separately between 2002 and 2017. Book 2, passed into law by Act 25/2010, 29 July (DOGC No. 5686, 5 August), deals with the law of persons and family. Act 25/2010 repealed and replaced several family law statutes from 1998, including Act 9/1998, 15 July, of the Family Code (*Codi de família*, hereafter CF).
4. The Code of Aragon Foral Law (*Código del Derecho Foral de Aragón*, hereafter CDFA) was enacted by Legislative Decree 1/2011, 22 March (BOA No. 63, 29 March). The Code recast various Aragon statutes on the rights of the person, family law and property law enacted between 1967 and 2010.
5. The Spanish Civil Code (*Código civil*, hereafter CC) dates back to 1889. Current regulation of matrimonial property regimes and the effects of marital crises derives from two 1981 Acts: Act 11/1981, 13 May (BOE No. 119, 19 May), and Act 30/1981, 7 July (BOE No. 172, 20 July), which have subsequently been partially modified.
6. The Compilation of the Balearic Islands Civil Law (*Compilación del Derecho Civil de las Islas Baleares*, hereafter CDCIB) was enacted as a consolidated text by Legislative Decree 79/1990, 6 Septem-

Navarre Civil Foral Law).[7] Without exception, all these rules specify that work for the household is a way of contributing to the family's living costs.

Nevertheless, although these provisions sometimes include the right to ask the judge to set the amount of the contribution to be made by a spouse who does not fulfil his or her obligation (Principle 4:4 (3) PEFL Regarding Property Relations Between Spouses;[8] in Spain, Art. 90.1 b Act 15/2015),[9] this right is seldom exercised in practice. While the couple live together the rules on the duty to contribute have only a latent force because the parties fulfil their obligations as a matter of course or in accordance with tacit or more or less explicit agreements. Once they cease to live together there is no discussion of future duties to contribute – unless this is necessary on an interim basis – but rather of the liquidation of the property regime (second stage) and the setting, if appropriate, of other financial remedies with maintenance or compensatory purposes (third stage). The problem of assessing the value of household work then shifts to these other legal frameworks. One spouse may certainly claim to have contributed more than he or she should have with household work, but any eventual excesses or shortfalls in contributions are addressed within the framework of the rules for property adjustment or distribution.

Turning to property claims, the opportunity to assess the value of household work only arises in relationships that are subject to regimes of separation of assets. If the marriage is governed by regimes of community of property or participation in acquisitions, the spouses share equally in the property consequences arising from decisions taken under the regime. In such cases, the contributions made by both spouses to the family welfare have the same economic return and the question of their market value becomes irrelevant for the purpose of determining what each spouse owns or may claim at the time of the settlement. There are certainly important differences between being subject to a community regime or to a participation in acquisitions regime (regimes which in turn allow a very wide range of variants). The extent to which investments in household work are protected and the risk of losing these investments vary highly according to whether the homemaker's participation in the other spouse's financial decisions and outcomes translates into current assets or future rights, but this is not relevant to the topic examined here.

ber (BOIB No. 120, 2 October), and was amended, in its familiy law provisions, by Act 7/2017, 3 August (BOIB No. 96, 5 August).

7. The Compilation of Navarre Foral Civil Law (*Compilación del Derecho Civil Foral de Navarra*, hereafter CDCFN) was passed into law by Act 1/1973, 1 March (BOE No. 57, 7 March).

8. See the comparative overview on this issue in Boele-Woelki et al., 2013, p. 54, above n. 2.

9. Act 15/2015, 2 July, of the Voluntary Jurisdiction (BOE No. 158, 3 July).

II Household work and separation of property regimes

1 *Separation of property regimes in the Spanish legal landscape*

On the matrimonial property regimes map of Europe, separation of assets as a property regime applicable by operation of law is extremely unusual,[10] although many legal systems regulate it as an elective regime or allow its application by private agreement. In Spain, separation of assets is the legal matrimonial property regime in Catalonia (Arts. 232-1 to 232-12 CCCat) and the Balearic Islands (Arts. 3, 4 and 67 CDCIB). It is also regulated as an elective regime in the Spanish CC (Arts. 1435 to 1444 CC), whose provisions apply in territories that do not have their own private law, and in Aragon (Art. 203 to 209 CDFA) and Navarre (Rules 103 and 104 CDCFN). In Catalan, Balearic and general Spanish law the separation of property regime explicitly includes the right to obtain financial compensation on grounds of household work. In the legal systems in Aragon and Navarre the law does not provide for any type of compensation, although, as will be seen, case law has corrected this omission in one of them.

No accurate data are available on the number of couples whose family economy is subject to separation of property. Some statistical data show that separation of property is both accepted and widely practiced in Catalonia and the Balearic Islands and that a significant number of couples subject to legal systems that have community of acquisitions as a default regime – around 30% of the total number – also opt for separation by means of marital agreements.[11] It should be added that separation of property is also the normal way of regulating property relations among unmarried couples, both when they are subject to one of the domestic partnerships statutes existing in most Spanish autonomous communities (some of

10. See, e.g., W. Pintens, 'Matrimonial Property Law in Europe', *in* K. Boele-Woelki, J. Miles & J.M. Scherpe (Eds.), *The Future of Family Property in Europe*, Cambridge/Antwerp/Portland, Intersentia, 2011, p. 32, where Catalonia and the Balearic Islands (together with Valencia, whose legislation on this issue was declared null and void by the Spanish Constitutional Court) appear in isolation as separation of property jurisdictions in the European landscape.

11. See data on pre-nuptial and post-nuptial marital agreements opting for community of acquisitions and separation of property in the different autonomous communities, in Centro de Información Estadística del Notariado, at: <www.notariado.org/liferay/web/cien/estadisticas-al-completo>. In 2014, the percentage of marital agreements in relation to the number of marriages celebrated in Spain was 26.95 %, in almost 90 % of which separation of property was agreed on. When the data are broken down by autonomous community, it can be seen that in territories that have community of acquisitions as a default regime, the percentage of couples with separation of assets marital agreements was 31.94 % of all marriages held. There is no breakdown by autonomous community of the percentage of couples agreeing on a community regime, but it can be calculated to be around 5.3 % in Catalonia and the Balearics. For the statistical series from 2011 and 2015, see M. Vila Soriano, *Configuración y cuantificación de la compensación económica por razón de trabajo: Valorar las tareas de cuidado para incentivar la igualdad de género* (End of degree project on file at UPF, Barcelona).

which expressly refer to the rules of a separation of property regime),[12] and when they are not subject to any particular law and thus lack a specific property regime.

There is no uniform legal treatment of household work, its effects and valuation in separation of property regimes as a whole in Spain. If we focus on its compensation, it is possible to distinguish between two groups of systems: (i) those that exclude it as a legal effect, leaving the spouses to self-regulate it or put it into effect of their own accord during the marriage; (ii) those that recognize it as a legal effect when the regime is dissolved, if household work was not duly compensated during the time the couple lived together.

In turn, subsystems of various types can be further distinguished within the second group, depending on the legal technique used for compensation: (i) compensation via remuneration for the work; (ii) compensation via a reimbursement claim on the basis that household work has involved an excessive contribution to family support or an unjust enrichment of the other spouse or partner; (iii) compensation via limited participation in the other spouse or partner's acquisitions. As will be seen, there is no proper consensus within these subsystems as to how the value of household work should be assessed. Finally, it is important to note that the interpretation and judicial application of the different systems have brought about amendments leading to outcomes unforeseen by the legislature and alien to the model's traits as originally conceived by the law.

2 *Non-compensatory systems*

Strict separation of property with no compensation in favour of the housekeeping spouse is rare in Spanish laws, although it is certainly admissible under any of the country's legal systems if agreed to in a pre-marital or marital agreement by future spouses, married couples or cohabitants. Until 2017, there were three territorial laws that *prima facie* regulated a separation of property system with no right to compensation in the absence of any agreement: those in the Balearic Islands (which was amended precisely in 2017), Navarre and Aragon. In the first two of them, however, case law had found ways to establish a compensatory remedy in the homemaker's favour, within the property regime framework, in situations perceived as unfair. Only Aragon retains nowadays a system of absolute separation of property, which applies as an elective regime.[13]

The three legal systems cited view performing household work as a way of fulfilling the duty to contribute to meeting the family's needs (Art. 4.1 CDCIB; Art. 187 CDFA; Rule 103 b CDCFN), but they did not explicitly provide any legal remedy to somehow compensate this work. It was up to the spouses to organize their prop-

12. E.g. Art. 5.3 of Basque Country Act 2/2003, 7 May, in the wording given by Act 5/2015, 25 June (BOE No. 176, 24 July).

13. C. Bayod López, 'La (in)aplicación en Aragón del art. 1438 CC (Reflexiones del TS en relación al trabajo doméstico)', *InDret*, Vol. 2, 2016, pp. 5-20. In many cases, however, spouses in Aragon that agree on a separation regime submit to the Spanish Civil Code regime, which recognizes the right to compensation for household work, as in the case resolved by the STSJA 26.2.2013 (RJ 2013/2892).

erty relationships according to their preferences, by means of a marital agreement or by spontaneous or planned decisions taken during their life together.

The case of the Balearic Islands is the most relevant of the three, because separation of assets governs the property relations between spouses in this territory by operation of the law, with no need for an agreement.[14] Although couples frequently acquire joint property during their marriage that is paid for by the income-earning spouse, the law did not concern itself with correcting the manifestly unfair outcomes that can come about when spouses do not of their own accord share acquisitions made with their savings. This disregard was in conspicuous contrast with the treatment that statutory law in the Balearics grants unmarried partners that agree to register their relationship and submit to the legislation on stable couples (Act 18/2001).[15] Art. 9.2 of the Act recognizes an unmarried partner's right to financial compensation when the cohabitation has entailed an economic imbalance involving unjust enrichment between the two partners and one of the following two events has occurred: a) the claimant has contributed financially or by means of work to the acquisition, maintenance or enhancement of any assets owned jointly or exclusively by the other partner; b) the claimant has exclusively or mainly devoted him- or herself to working for the family. The mismatch between the regulation of marriage and registered partnerships was so evident and so unjustified that it was corrected by the courts. In 2010 the High Court of Justice of the Balearics declared the compensatory rule in Art. 9.2 to be applicable by analogy to spouses.[16] The Court highlighted the close similarity in the regulation of property relationships between spouses and cohabitants and concluded that the situations of inequality that could occur when relationships ended were identical, and therefore decided to extend the right already granted to cohabitants to spouses living under the separation of property regime. By the highly unusual means of extending the legal benefits for unmarried partners to married couples, the Balearic system thus joined the model of compensation based on unjust enrichment (Section II.3.b below). More recently, the Balearic Act 7/2017 translated this judicial development into statutory law, by establishing that household work confers a right to compensation, whose amount will be set by the court if the spouses, at the time of dissolution of the marital regime do not reach an agreement (Art. 4.1 CDCIB).

A similar solution had previously been arrived at, albeit by a different route, by the High Court of Justice of Navarre in its interpretation of Rule 103 b) CDCFN.[17] This provision imposes on spouses the duty to contribute to the family respon-

14. On the main features of the Balearic separation of property system, see, e.g., M. N. Tur Fáundez, 'La familia en el Derecho Civil de Baleares', *in* M. Yzquierdo Tolsada & M. Cuena Casas (Eds.), *Tratado de Derecho de la Familia. Vol. VII: La familia en los distintos derechos forales*, Cizur Menor (Navarre), Aranzadi – Thomson Reuters, 2011, pp. 512-523.
15. Act 18/2001, 19 December, on Stable Couples (BOIB No. 156, 29 December).
16. STSJB 24.3.2010 (RJ 2010/4019), with commentary by Tur Fáundez, 2011, pp. 499-507, above n. 14.
17. On Navarre's optional separation of property regime, see T. Hualde Manso, 'La familia en el Derecho Civil de Navarra', *in* M. Yzquierdo Tolsada & M. Cuena Casas (Eds.), *Tratado de Derecho de la Familia. Vol. VII: La familia en los distintos derechos forales,* Cizur Menor (Navarre), Aranzadi – Thomson Reuters, 2011, pp. 711-721.

sibilities in proportion to their incomes, or, should these be insufficient, to their respective assets, as well as the duty to compute work performed in the family home as a means of fulfilling this duty. According to the Court, this rule provided a sufficient basis for justifying the existence of a right to reimbursement for excess contributions possibly made by the homemaker through his or her work.[18] In this way the Navarre legal system also aligned itself with others that follow a model of compensation based on restitutionary grounds (also Section II.3.b below).

These case law developments highlight the exceptional nature mentioned above of the absolute separation regime, in which household work merits no particular valuation and has no consequences in the settlement of the property regime (although it does not follow that it cannot have some other consequences by means of financial relief measures after separation or divorce). It is important to take into account, nonetheless, the more burdensome nature of remedies articulated by case law vis-à-vis those established by statute, considering the costs of litigation and uncertainty of outcome.

3 Compensatory systems

a Deferred remuneration systems

Under the current separation of property regime in the Spanish CC, in force since 1981 and applicable solely to couples who opt for it concluding a marital agreement, the spouses have to contribute to bearing the costs of married life in proportion to their financial resources. Household work has to be computed to this effect, and in addition, to quote Art. 1438 CC, "shall entitle [the spouse] to obtain compensation set by the judge, in the absence of an agreement, at the extinction of the separation regime".[19]

For many years the requirements to be fulfilled for claiming compensation and the manner in which it had to be calculated were the subject of controversy among authors and in the courts, where discordant judgments abounded. In 2011 the Spanish Supreme Court established a case law doctrine which has been confirmed, only with slight nuances, by several subsequent rulings.[20] This legal doctrine makes two statements:

18. STSJN 10.2.2004 (RJ 2004/2476).

19. On the main features of the Spanish separation of property regime, see C. I. Asúa González, 'El régimen de separación de bienes', *in* M. Yzquierdo Tolsada & M. Cuena Casas (Eds.), *Tratado de Derecho de la Familia. Vol. IV: Los regímenes económicos matrimoniales (II),* Cizur Menor (Navarre), Aranzadi – Thomson Reuters, 2011, pp. 31-116.

20. STS 14.7.2011 (RJ 2011/5122), with commentaries by A. Cabezuelo Arenas, 'Compensación por trabajo doméstico. Su reconocimiento no se subordina al enriquecimiento del cónyuge deudor', *CCJC*, Vol. 89, 2012, pp. 271-290 and M.L. Moreno-Torres Herrera, 'La compensación por el trabajo doméstico en el Código Civil Español', *Revista Aranzadi Doctrinal*, Vol. 8, 2011, pp. 107-130; STS 31.1.2014 (RJ 2014/813); STS 26.3.2015 (RJ 2015/1170), with commentary by P. Gutiérrez Santiago, 'Enriquecimientos injustos en la compensación económica del trabajo doméstico (Paradojas y falacias en la interpretación del artículo 1438 del Código Civil)', *CCJC*, Vol. 99, 2015, pp. 503-559; STS 14.4.2015 (RJ 2015/1528); STS 25.11.2015 (RJ 2015/5322); STS 5.5.2016 (RJ 2016/2219).

- To claim compensation it is necessary to have contributed to meeting the family's needs "solely by work carried out for the household". This requirement, which is not explicitly laid down in the provision under interpretation, was further confirmed in judgments subsequent to the first one in 2011 in the sense that the claimant's engagement in housework had to be an exclusive activity.[21] If the homemaker combines household work with another activity, albeit part-time, he or she cannot claim compensation. However, the homemaker is not required to take on all the household chores without outside help: if the family's standard of living enables the spouses to employ remunerated domestic staff, this does not exclude the stay-at-home spouse from the right to compensation, although it may reduce the amount.
- Compensation can still be claimed if the other spouse's assets have not increased during the period under consideration. The Court uses a historical argument related to the parliamentary law-making process, in the course of which this requirement was dropped.[22] To claim compensation it is therefore enough for the creditor to have devoted him- or herself exclusively to household work, even if the other spouse has devoted all his or her income to covering the family's needs and has not been enriched.

Although this case law doctrine makes no reference to how the compensation should be quantified, the Supreme Court broached the issue in several of the rulings cited and did so by giving judges a wide margin of discretion. If their judgment is reasoned and they have weighed the circumstances of every case appropriately, the decision cannot be reviewed in cassation.[23] In some cases the Supreme Court explicitly ratified the quantification carried out by the appellate court, which took the salary earned by a third person to perform the work as a reference.[24] For the Court, this is a criterion that "provides reasonable and objective valuation guidelines",[25] although it recognized that this may be insufficient insofar as the valuation fails to include other contributions made for the benefit of workers (e.g. social security benefits). Nonetheless, the same judgment also stated, courts could use other criteria to set the amount of compensation if the homemaker had sacrificed his or her work or professional capacities for the benefit of the other spouse and the family.

21. STS 26.3.2015 (RJ 2015/1170), Legal Ground No. 2; STS 14.4.2015 (RJ 2015/1528), Legal Ground No. 2; STS 28.2.2017 (RJ 2017/673), Legal Ground No. 1; STS 14.3.2017 (RJ 2017/880), Legal Ground No. 1. In a more recent judgment (STS 26.4.2017, RJ 2017/1720), the court has uneasily started to mitigate the harshness of the legal doctrine, by stating that "household work", for purposes of compensation, may include the spouse's unpaid or inadequately paid collaboration in family-run businesses, provided that he or she has been acting as a freelancer and not been hired as a salaried employee.
22. STS 14.7.2011 (RJ 2011/5122), Legal Ground No. 5.
23. STS 5.5.2016 (RJ 2016/2219), Legal Ground No. 2.
24. STS 14.7.2011 (RJ 2011/5122), Legal Ground No. 6.
25. STS 25.11.2015 (RJ 2015/5322), Legal Ground No. 4.

The legal literature has been highly critical of this approach.[26] The Supreme Court conceives of compensation as a remedy that only operates in relationships involving extreme functional specialization, on the implicit assumption that the income-earning spouse acquires the homemaker's services under a deferred payment scheme. This assumption is contrary to the very idea of marriage as a community of life in which both parties contribute to a common goal, which certainly does not include – under a system of separation of property – the right and duty to share assets or acquisitions, but to share the benefits and burdens of creating and maintaining the household and bringing up children, as the case may be. Although household work can be hypothetically valued using market criteria, the idea that one spouse is obliged to pay the other *ex post* the value of this personal work, as if the latter were an employee supported by the former, is wholly discordant with the mind-set of spouses who decide to submit to this regime. It is quite remarkable that the Court's line of reasoning derives no consequences from the legal consideration of household work as a contribution to the married couple's costs of living, and thus as an act of compliance with a legal duty.[27]

Also incomprehensible is restricting the right to compensation for the spouse who takes responsibility for the housework as an exclusive activity, penalizing those who juggle devotion to the home and part-time work, often both less skilled and less financially rewarding and resulting in longer working hours at the expense of rest and leisure.[28] The case law cited offers no grounds for discriminating against the spouse who contributes to family well-being in two ways, personal and financial. Once again, the Supreme Court's position is vitiated by wilful ignorance of the legal rules on the spouses' duty to contribute to the family's welfare, the forms that this contribution may take and its proportionality in relation to the spouses' resources.

Finally, the Court's approach to the issue of valuing household work in monetary terms is also unsatisfactory. In an environment as complex as the family, appealing to a certain discretion and weighing each case on its own merits is understandable. However, in upholding lower courts' decisions on valuation that

26. See, e.g., with an exhaustive account of all lines of criticism and further references, the commentary by Gutiérrez Santiago, 2015, above n. 20.

27. See e.g. Cabezuelo Arenas, 2012, pp. 279-281, above n. 20; M.J. Santos Morón, 'Prestación compensatoria y compensación por trabajo doméstico. ¿Dos caras de una misma moneda?', *InDret*, Vol. 1, 2015, pp. 32-33, 35-38; Gutiérrez Santiago, 2015, pp. 535-538, 555-559, above n. 20. For these authors and for most Spanish doctrine, compensation is based on an excessive contribution to family responsibilities: see also B. Ribera Blanes, *La contribución a las cargas del matrimonio en el régimen de separación de bienes*, Valencia, Tirant lo Blanch, 2004, pp. 129-136; C. de Amunátegui Rodríguez, 'La libertad de pacto en el régimen de separación de bienes', *in* J. Rams et al. (Eds.), *Autonomía de la voluntad y negocios jurídicos de familia*, Madrid, Dykinson, 2009, p. 261; Asúa González, 2011, pp. 86, 91-93 above n. 19; M. Cuena Casas, 'Artículo 1438', *in* R. Bercovitz Rodríguez-Cano (Ed.), *Comentarios al Código Civil. Tomo VII,* Valencia, Tirant lo Blanch, 2013, pp. 10121-10122; V. Moreno Velasco, *Autonomía de la voluntad y crisis matrimoniales*, Cizur Menor (Navarre), Civitas – Thomson Reuters, 2013, pp. 72-77.

28. Cabezuelo Arenas, 2012, pp. 282-286, above n. 20; Gutiérrez Santiago, 2015, pp. 543-555, above n. 20.

apply the criterion of the cost of employing domestic staff, the Court conceives of household work as a fungible activity that can be hired for negligible amounts, thereby extremely devaluing this family contribution[29] (in fact, one judgment even suggests that the value of the minimum wage could be applied).[30] An individualistic approach once more prevails in this line of reasoning, in which each spouse takes on the benefits and costs of his or her own way of contributing to household needs over a solidarity perspective that is more in line with the institution of marriage, in which the spouses jointly assume the costs of shared decisions.

Admittedly, the separation of property regime in the Spanish Civil Code is entered into by agreement and requires an attitude of self-protection in individuals adhering to it, but nobody does so under the kind of assumptions made by the Spanish Supreme Court case law. It is therefore no surprise that this compensation model has not inspired other legal systems.

b Restitution for excess contribution or unjust enrichment systems

a Rationale of restitutionary claims and translation into statutory and case law

The model of restitution of the value of household contributions is probably the closest in line with the structure of separation of property regimes, and is therefore also the most common.

In some systems – particularly in the Catalan one prior to 2010 and in most territorial laws on domestic partnerships – this compensation model is introduced by an *ad hoc* provision setting out its requirements. In other systems, however, the model applies on the basis of a simple rule which grants a right to claim compensation, with no further elaboration (as in the Balearic Islands, after the 2017 reform, according to Art. 4.1 CDCIB), or even without any specific rules laying down the features of the compensation and the requirements for claiming it. As seen above in relation to the law in Navarre, a rule establishing the duty of household members to contribute to its upkeep and regulating the way or ways of fulfilling this obligation can be sufficient. Rules of this type normally require the spouses' contributions to be proportional to available resources (at times specifying that they have to be in proportion to income and, if this is insufficient, to property, as in Rule 103 b CDCFN). Should the contributions made by the two spouses not respect this proportionality, the spouse that has contributed in excess can bring a restitution-

29. A. Aguilera Rull, 'La configuración de la compensación por trabajo para la casa (art. 1438 CC) conforme con el principio de igualdad entre mujeres y hombres', *Revista Doctrinal Aranzadi Civil-Mercantil* (BIB 2012/446), p. 10. However, Spanish doctrine mainly favours applying the salary that domestic staff would earn as a valuation criterion: e.g. V. Montés Penadés, 'Artículo 1438', *in* Ministerio de Justicia (Ed.), *Comentario del Código Civil. Tomo II*, Madrid, Ministerio de Justicia, 1991, p. 868; M.P. Álvarez Olalla, *Responsabilidad patrimonial en el régimen de separación de bienes*, Pamplona, Aranzadi, 1996, p. 103; R. Bercovitz Rodríguez-Cano, 'Comentario a la STS de 11 de febrero de 2005', *CCJC*, Vol. 70, 2006, pp. 152-153; Asúa González, 2011, p. 85, above n. 19; Gutiérrez Santiago, 2015, pp. 534-535, above n. 20.

30. STS 25.11.2015 (RJ 2015/5322), Legal Ground No. 4.

ary claim against the other for the excess value he or she has contributed. The proportional contribution rules necessarily entail the income-earning spouse, if he or she has savings capacity, giving monetary compensation to the homemaker, since the latter – assuming that he or she has no income – devotes a hundred per cent of his or her resources (that is, the value of his or her own work) to the needs of the home, while the former devotes a smaller percentage. In order for both to contribute to family needs to the same extent, the income-earning spouse has to repay the homemaker part of the surplus, thus allowing him or her to save a fraction of the value of the domestic work.[31]

Even in those fields that lack rules regulating the duty to contribute, the existence of restitutionary claims for household work can be justified by more general principles, such as the doctrine of unjust enrichment. While the Spanish Civil Code contains no general regulation for this institution, but only a few provisions for specific quasi-contracts, the Supreme Court has filled the gap with case law establishing the requirements for claiming restitution for enrichment and has applied it profusely in the framework of family relationships, specifically with regard to *de facto* partnerships whose relationships are not regulated by any territorial laws.

b The Catalan model of restitution for unjust enrichment and its adjustment in case law

The prototype of compensation for household work along these lines – at least as it was conceived by the legislature – could be found in the Catalan marital regime of separation of property before 2010. It had two versions: the first one was introduced in Art. 23 of Act 8/1993;[32] the second one, which incorporated some clarifications, was laid down in Art. 41 of Act 9/1998 of the Family Code (CF). Art. 41 CF was in turn replaced in 2010 by a different model of compensation, which will be examined in the next section (2.2.4). Despite the fact that the original model of compensation is therefore no longer in force in Catalonia, its content has remained in the legislation on domestic partnerships in several autonomous communities. The rule in Art. 41 CF was reproduced in the Catalan statutory law on stable partnerships (Arts. 13 and 31.1 of Act 10/1998),[33] and passed from this Act into other territorial statutes on domestic partnerships, which took Catalan law as a blueprint. Thus, with slight differences in expression and content, compensation on grounds of household work along the Catalan model in Art. 41 CF became and still is part

31. This is not the way in which Spanish doctrine normally interprets the proportionality rule in the spouses' contributions to family needs. Authors usually propose a comparison of the absolute values of financial and work contributions, and the housekeeping spouse is understood to have the right to compensation if the market value of his or her contribution exceeds the income contributed by the other spouse. See, e.g., Cuena Casas, 2013, p. 10121, above n. 27; Santos Morón, 2015, p. 38, above n. 27; Gutiérrez Santiago, 2015, p. 536, above n. 20.

32. Act 8/1993, of 30 September (DOGC No. 1807, 11 October).

33. Act 10/1998, of 15 July (DOGC No. 2687, 23 July). The Act, which regulated what are known as *'unions estables de parella'* (couples living in a stable union), both homo- and heterosexual, was repealed by Act 25/2010 and its provisions replaced by Arts. 234-1 to 234-14 in Book 2 CCCat.

of the laws on stable partnerships in Aragon (Art. 310.1 CDFA), the Balearic Islands (Art. 9.2 Act 18/2001)[34] and the Basque Country (Art. 6 No 2, b Law 2/2003).[35]

What follows essentially refers to the regime laid down in the Catalan Family Code, as this is the system to have been most intensively applied and from whose experience there is most to learn.[36]

Art. 41.1 CF provided that

> 'the spouse that has worked for the house or for the other spouse, without or with insufficient remuneration, has the right to receive financial compensation from the other if this has brought about a situation of inequality between the two spouses' property entailing unjust enrichment'.

As can be seen, the rule explicitly sought to base itself in unjust enrichment and therefore seemed to demand verification that the requirements thereof were fulfilled. According to the prevailing interpretation in the legal literature, the compensation aimed to refund the surplus obtained by one spouse at the other's expense for having taken advantage of services with monetary value, if these had been provided in excess of what was required by the duty to contribute to the family's maintenance needs (Art. 5.1 CF).[37] This reimbursement function seemed somewhat blurred by the language used in the rule, which ambiguously referred to "remuneration" for the work, and also by the requirement of an imbalance between the spouses' estates: in a strictly restitutionary approach, the existence or otherwise of ultimate inequality between the two estates should be irrelevant. Despite these objections, the rule's restitutionary nature seemed quite clear, though it implied that the law did put the homemaker at risk of losing his or her compensation if the benefit provided to the income-earning spouse had disappeared for whatever reason at the moment of the regime's dissolution, because if no situation of imbalance had arisen, the compensation claim vanished.

It is both relevant and instructive to note how the Catalan High Court gradually moved away from this interpretation and reconfigured compensation, modifying its rationale and requirements and conferring a wide margin of discretion on judges. This case law's most noteworthy features were as follows:

– Engagement in household work had to be conceived in accordance with prevailing social standards. Thus, in contrast to the Spanish Supreme Court's criteria in applying Art. 1438 CC, compensation could be claimed not only in relation-

34. Act 18/2001, of 19 December, on Stable Couples (BOIB No. 156, 19 December).

35. Act 2/2003, of 7 May, regulating *De Facto* Couples (BOPV No. 100, 23 May).

36. For a general description of the separation of property regime under the CF, see the report on Catalan law by M. Martín Casals & J. Ribot Igualada, 'Catalonia', *in* K. Boele-Woelki et al. (Eds.), *European Family Law in Action. Vol IV: Property Relations Between Spouses*, Antwerp/Oxford/Portland, Intersentia, 2009.

37. See references from the Catalan legal literature in J. Ferrer Riba, 'Separació de béns i compensacions en la crisi familiar', *in* Àrea de Dret Civil, Universitat de Girona (Ed.), *Nous reptes del Dret de família (Materials de les Tretzenes Jornades de Dret Català a Tossa)*, Girona, Documenta Universitaria, 2005, pp. 80-83.

ships where one spouse is the income-earner and the other has devoted him- or herself exclusively to the home, but also in those with a more limited functional specialization, according to the mainstream pattern among Catalan families.[38]
– The unfair enrichment requirement was deemed to be redundant. The Court even qualified it as "disruptive" and concluded that it was not a requirement in its own right, nor did anyone claiming compensation need to provide evidence of it. According to the Court, the fact that one spouse works without remuneration always enriches the other (*res ipsa loquitur*).[39]
– The duty to contribute to family needs was considered irrelevant as a justification for the entitlement to claim compensation.[40] According to this view, compensation did not originate in a presumed over-contribution whose value had to be reimbursed: compensation was not a corollary but a corrective of the separation regime. Its aim was to correct a property imbalance and the specific reason for the imbalance was secondary, even if it stemmed from inheriting and maintaining family property.[41]
– The amount of compensation could be set in an equitable manner. Consistent with the ideas outlined above, the *quantum* of the compensation had to be left to the judge's discretion. The Court rejected setting the amount as a fraction of the debtor's property or accrued gains as this would distort the separation regime and bring it closer to a participation in acquisitions regime, which the Catalan legislature had ruled out. It therefore stated that instead of applying a percentage, multiple factors had to be weighed, such as the length of time the couple lived together, the intensity of the domestic work, whether it involved child care, the fact of having given up opportunities of professional activity and even the couple's current incomes.[42]

With this line of argumentation, the Court jettisoned the view of compensation as a restitutionary instrument and adopted a sharing rationale that shifted the Catalan separation of assets regime towards an equitable distribution regime like the systems operating in many US states or, to put it differently, a participation in acquisitions regime in which the participation is not equal but variable, depending

38. STSJC 27.4.2000 (RJ 2000/4125), Legal Ground No. 5: "it is of little importance whether domestic work has been greater or lesser, performed full time or part time".
39. Id., Legal Ground No. 5: "whenever one spouse works with no remuneration, this generates an enrichment for the other".
40. STSJC 14.4.2003 (RJ 2003/4579), Legal Ground No. 2: "the relationship between Art. 5 and Art. 41 is artificial and can only be sustained by the wording of their terms".
41. STSJC 27.4.2000 (RJ 2000/4125), Legal Ground No. 5 : "... as assessment must be made as to whether there is inequality in favour of one of the spouses [...] and in that case a compensation must be set to restore the balance"; "nothing justifies, to say it in plain words, that one party ends up rich and the other remains poor", and STSJC 10.2.2003 (RJ 2003/4464), Legal Ground No. 2: "the preservation and increase, if so, of the husband's estate [...] would not have been possible without the wife's housework".
42. STSJC 27.4.2000 (RJ 2000/4125), Legal Ground No. 6: "the restoration of the property balance has to be left to the judge's discretion".

on circumstances that the judge has great freedom to assess.[43] The case law's allusion to the factors mentioned above that the judge can take into account to set the amount of compensation meant that the award could include opportunity costs if the homemaker had given up paid work, or even harm suffered as a result of the devaluing of his or her human capital. In this way, as in the North American equitable distribution systems, a property remedy conceived for the liquidation of the property regime could also be used to achieve indemnification goals more typical of financial remedies.[44]

The main criticism levelled at this corrective interpretation of compensation for work in the Family Code and the 1998 Act on stable partnerships – apart from other objections relating to various peculiarities of the Catalan system which are not relevant here – pointed out the increase of legal uncertainty. Appealing to the judge's discretion to set the amount of compensation obscured the criteria that should govern the spouses' participation in family wealth. The passing into law of Book 2 of the Catalan Civil Code provided the opportunity to redefine the family property regime. This was done by embracing the participation approach advanced by the case law, but at the same time by restricting the courts' discretion to apply it.

c Unjust enrichment and valuation of household work

A certain helplessness can be perceived beneath the Catalan High Court of Justice's discourse when it tries to assess the monetary value of household work by delving into the reasons for the decisions taken by spouses or cohabitants and retrospectively scrutinizing the development of their life together, especially in long-standing relationships. The judgment that first established case law on this issue alluded to some valuation criteria proposed in legal literature (e.g. the average wage of household employees, the amount of unemployment benefits) and rejected them as inappropriate, eventually opting to 'eschew generalist formulas which, although acceptable in the academic debate, would only serve to straitjacket solutions'.[45] In fact, as mentioned above, the Court ultimately gave up the very goal of valuing contributions with personal work to the family needs, even if doing it in a discretionary way. Household work ceased to be object of valuation and became: (i) a requirement for variable participation in the other partner's accumulated wealth, and (ii) an activity whose duration, intensity and quality has to be weighed to establish the amount of the participation.

Other legal systems that have adopted the restitution model have not succeeded in their attempts to value household work, nor have they achieved more satisfactory results. The law on matrimonial property regimes in the Autonomous Community of Valencia (Act 10/2007)[46] is a highly illustrative example. This Act, which

43. Ferrer Riba, 2005, pp. 85-86, above n. 37.
44. With regard to the US equitable distribution systems and the possibility to redress financial losses arising from the dissolution of marriage through the allocation of property, see e.g. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Matthew Bender & Co. (Lexis Nexis), 2002, pp. 646-662.
45. STSJC 27.4.2000 (RJ 2000/4125), Legal Ground No. 6.
46. Act 10/2007, 20 March (DOCV No. 5475, 22 March).

was declared null and void by the Spanish Constitutional Court on the grounds of the Valencian Community's lack of legislative competence to approve it,[47] adopted the system of compensation for household work based on the possible existence of an excess contribution and was the first statutory text in Spain which ventured to lay down valuation criteria. Art. 13, with somewhat contorted wording, provided that:

> 'to valuate household work account has to be taken, as a guide and as a minimum, and without prejudice to the court's weighting power or to the agreement reached by the spouses, of the following criteria: the cost of such services in the labour market, the earnings that the spouse providing these services may have forgone by not practicing his or her profession or trade as a consequence of devoting him- or herself to household work [...], or the earnings obtained by the spouse benefitting from these services insofar as the fact that they were provided by the other spouse has enabled him or her to obtain them.'

It is easy to see that this exercise was doomed to failure, as it had an open list of criteria that could produce very different outcomes and to which a purely illustrative character was given. As if this were not unsatisfactory enough, the list did not exclude the exercise of judicial discretion. It would have foreseeably been of little or no use as a legal norm.

When the Spanish Supreme Court or the autonomous communities' High Courts of Justice have had to apply restitutionary remedies without a legal basis to compensate housekeeping activities, their case law has also failed to set out clear valuation methods. No guidelines have been provided by the judgements passed by the High Courts of the Balearics and Navarre, for instance, which recognised the right to compensation for household work by analogy or on grounds of over-contribution to family living costs (Section II.2 above). In both cases the court limited itself to confirming the outcomes reached by lower courts. Likewise, the Supreme Court has contributed no useful criteria in its judgements applying the doctrine of unjust enrichment to granting compensation in long-term relationships of *de facto* cohabitation. The cases reaching the Court have been claims for compensation for housework and sometimes also for unpaid work in professional or commercial establishments owned by the other cohabitant in the framework of relationships lasting between ten and fifty three years.[48] The Court's reasoning in

47. STC 82/2016, 28 April (BOE No. 131, 31 May). The legislative competence of the Community of Valencia in private law was controversial since the adoption of the 1978 Constitution. According to this judgment (and a second one, dealing with the law on registered partnerships: STC 110/2016, 9 June) the Valencian legislative competence is limited to matters regulated by Valencian customary law still in force at the time of adoption of the 1978 Constitution. On this issue, before the delivering of the aforementioned decisions, see extensively I. Durbán Martín, *El Derecho Civil Valenciano en el Marco Estatutario y Constitucional*, Valencia, Tirant lo Blanch, 2015.

48. STS 11.12.1992 (RJ 1992/9733); STS 27.03.2001 (RJ 2001/4770); STS 17.01.2003 (RJ 2003/4); STS 17.06.2003 (RJ 2003/4605); STS 23.11.2004 (RJ 2004/7385); STS 06.10.2006 (RJ 2006/6650); STS 06.05.2011 (RJ 2011/3843); STS 16.10.2014 (RJ 2014/6131). See a thorough analysis of this case law in C. de Amunátegui Rodríguez & J. Carrascosa González, 'Las parejas no casadas', *in* M. Yzqui-

these decisions shows a redress rationale, which does not always match the claimant's allegations. In relationships of cohabitation, where there is no legal duty to contribute to household needs, it is not the excess contribution argument that is generally invoked, but unjust enrichment as such, whose requirements are verified by the court.[49] If the requirements are fulfilled, the Court grants compensation in the form of a flat rate payment or a fraction ranging between a third and a quarter of the defendant's gains, discounting inherited wealth and assets that predated the start of the relationship. This approach and the outcomes it has produced are similar to those of the Catalan model espoused by the High Court of Catalonia's case law. In both cases a restitutionary approach is taken in a formal sense, but in fact compensation is calculated using participation formulas.

c Participation of the housekeeping spouse in the income earner's gains

The version of compensation for domestic work or work for the other spouse or cohabitant in Book 2 of the 2010 Catalan Civil Code (Arts. 232-5 to 232-11 for spouses and Art. 234-9, referring to Arts. 232-5 to 232-10, for stable unmarried couples) takes up the case law doctrine created by the High Court of Catalonia and accepts its main ideas, but restricts the judge's implicit margin of discretion. Section 1 of Art. 232-5 sets out the factual situation which entitles one of the spouses to compensation and stipulates:

> 'In the separation of assets regime, if one spouse has worked for the household substantially more than the other, he or she has a right to financial compensation for this engagement providing that the other has obtained a greater increase in wealth, according to the rules laid down in this section, at the moment of the regime's dissolution by separation, divorce, marriage annulment or the death of one spouse, or effective cessation of cohabitation, as the case may be.'

The key points of the new property regime with regard to the provision of household work and its compensation are as follows:[50]

– The factual situation giving rise to compensation is redefined to become 'working for the house substantially more than the other spouse [or cohabitant]'. The requirement matches sociological reality, in which one partner frequently engages more intensely in housework than the other but only during certain

erdo & M. Cuena Casas (Eds.), *Tratado de Derecho de la Familia. Vol. IV: Los regímenes económicos matrimoniales (II)*, Cizur Menor (Navarre), Aranzadi – Thomson Reuters, 2011, pp. 762-796; M. P. García Rubio, 'Las uniones de hecho', *in* G. Díez-Picazo Giménez (Coord.), *Derecho de familia*, Cizur Menor (Navarre), Civitas Thomson Reuters, 2012, pp. 1479-1517.

49. See, e.g., STS 17.6.2003 (RJ 2003/4605), Legal Ground No. 3, in which the court requires evidence of the defendant's enrichment (including no decrease in property as a result of savings); the plaintiff's impoverishment (including losses derived from forgone expectations or cessation in previous income-earning activity), and want of cause justifying the enrichment (i.e., want of a legal provision excluding the principle's application).

50. See a detailed account in J. Ribot Igualada, 'Comentari als art. 232-5 a 232-11', *in* J. Egea Fernández & J. Ferrer Riba (Eds.), *Comentari al llibre segon del Codi civil de Catalunya (Família i relacions convivencials d'ajuda mútua)*, Barcelona, Atelier, 2014, pp. 227-295.

periods of time (e.g. in the early parenting years) or combines this with part-time jobs. As with household work, there is also provision for the right to compensation for carrying out 'work for the other spouse without remuneration or with insufficient remuneration' (Art. 232-5.2 CCCat).
– Attempts to assign a monetary value to contributions to household work are almost completely abandoned. The provision eludes references to unjust enrichment, drops the idea of excess contributions to family living expenses and is simply based on the imbalance existing between the spouses or cohabitants' estates by the fact that one has performed tasks that produced no surpluses while the other has been able to accumulate them. The objective fact that one of the two 'has obtained a greater increase in assets' is enough to be entitled to compensation.
– Rules to calculate the gains to be compared are introduced and property gratuitously transferred by the income-earning spouse to the homemaker is imputed to the compensation. One of the objections directed at previous case law was that there was no clear ring-fencing of the assets or acquisitions that could be subject to participation. Book 2 responds to this criticism with a rule laying down which assets and liabilities have to be included in the estates to be compared and how their value has to be calculated (Art. 232-6). The provision presents the typical characteristics of a rule for the determining and valuing acquisitions in a participation in acquisitions regime with a somewhat simplified formulation. The law avoids qualifying the factual situation entitling the claimant to a compensatory award as a case of 'lack of or insufficient remuneration' (where the compensation is for household work). The spouse or partner that has devoted him- or herself to homemaking activities simply has a claim to participate in the gains obtained by the other, who can anticipate this participation by acquiring joint property or putting assets in the former's name.
– A percentage ceiling is set on the amount of the award. To restrict judicial discretion, the law sets an upper limit on the amount of compensation, which is a quarter of the difference between the increases in the respective estates, calculated in accordance with the rules laid down in the same section (Art. 232-5.4). To set the specific amount within the legal cap the law grants a certain margin of discretion to the judge, who has to take into account the length and intensity of the engagement, the number of years the couple lived together and whether the work included bringing up children or personal attention to other family members (Art. 232-5.3).

In exceptional cases Art. 232-5.4 provides for compensation over the 25% ceiling if the creditor proves that his or her contribution has been significantly higher. This exception enables the law to keep a small door open to the old model of reimbursing excess contributions and therefore having to value personal work in the interest of the family, with all the problems that this involves. As noted above, it has to be borne in mind that compensation can be claimed not only on grounds of household work but also on grounds of unpaid or insufficiently paid work for the other spouse. The exception mentioned seems especially appropriate with respect to this type of work (e.g. working in a family business or a firm owned by the other

spouse), in which there are normally salary scales that make it easy to establish the market value of the unpaid work.[51] In these cases it is reasonable for the spouse or partner to be compensated with the full value of his or her unremunerated work (discounting the part that he or she would have had to contribute to supporting the family, and which the spouse that benefitted from this cooperation contributed instead, were this the case), even though the ordinary legal limit to compensation is exceeded.

The 2010 Catalan system has been perceived as a step forward on the path towards a fuller recognition of the value of personal work contributions to family welfare. Attempting to set a value on family work frequently leads to this being understood as a fungible service that can be cheaply obtained in the labour market, with its consequent devaluation. It is thus preferable to allow the homemaker to share in the surplus obtained by his or her partner and give up the attempt of setting a market value on activities with incommensurable components. An obvious question to ask is why Catalan law has set a compensation cap which results in an unequal participation in gains. This approach is unparalleled in comparative law, where the norm is to start out from a principle of equal sharing (as English law does with the equal division yardstick laid out in *White vs. White*),[52] with due regard to possible corrections if circumstances justify a different distribution. The one-quarter rule in Catalan law is explained by the desire to keep some distance from a pure participation in acquisitions regime, which the Catalan legislature rejected as a default regime, as well as by some qualms against a half and half division of big size surpluses, which could be rather attributable to individual effort or merit.[53] The restriction can of course be subject to well-founded criticisms if one evaluates it from the rationale underlying participation or community regimes; however, in the context of a separation of property regime (which allows for up and down adjustments in the participation share by agreement: Art. 232-7) the one-quarter cap, as a default rule, is perceived by legal actors in Catalonia to strike a reasonable balance.

III Household work and financial remedies at family dissolution

1 *Financial remedies in the Spanish legal systems: configuration, functions and incidence of household work on their determination*

The legal relevance of household work does not end with the reallocation of wealth acquired during marriage or cohabitation. Decisions made about the way domestic tasks are performed can create situations of dependency and loss of earning capacity whose consequences endure beyond family dissolution. When the property regime is liquidated the outcome does not always cover future needs nor provide

51. Ribot Igualada, 2014, p. 249, above n. 50.
52. [2000] UKHL 5; [2001] 1 AC 596.
53. E. Brancós Núñez, 'Separació de béns o participació: Comentari de l'article 23 de la Compilació', *RJC*, Vol. 4, 1998, p. 34.

sufficient compensation for losses arising from intensive specialization in household work, and for this reason, as is well-known, most legal systems provide other financial remedies with maintenance or compensation functions. The incidence of personal dedication to family in the recognition and quantification of such remedies is very common in comparative law. Once again, the European Principles – in this case, the PEFL Regarding Divorce and Maintenance between Former Spouses (2004) – can be brought up as an example in point.[54] Two of the several factors which have to be taken into account in determining a maintenance claim are 'the care of children' and 'the division of duties during the marriage' (Principle 2:4).[55]

In Spain, such measures are conceived as compensation and are so named. They are regulated by three legal systems: by state law, in the Spanish Civil Code (Arts. 97 to 101); by Catalan law (Arts. 233-14 to 19 CCCat), and by Aragon law (Art. 83 CDFA). In other territories having their own civil law, state law applies on this matter as a default law. In the Spanish Code this type of relief was traditionally termed 'compensatory allowance', but a 2005 reform made payment by means of a lump sum possible and it became known simply as a 'right to compensation' (Art. 97 CC). In Catalonia it is described as a 'compensatory award' (Art. 233-14 CCat) and in Aragon, as a 'compensatory allocation' (Art. 83 CDFA). In all three legal systems it has similar characteristics and presupposes the existence of an economic imbalance endured by one spouse in relation to the other's position, involving a worsening of the creditor's previous financial situation during the marriage. To distinguish it from compensation for work in separation of property regimes, without prejudging its function, it will be called 'compensation for imbalance' here. It is usually awarded in the form of a monthly allowance but can also be discharged by transfer of assets or as a lump sum. In the first case, it terminates if the creditor remarries or begins cohabiting with someone else. In the Spanish CC and the law in Aragon the allowance can be temporary or permanent, depending on the judge's discretion; in Catalan law it is temporary as a general rule and is only awarded permanently in exceptional cases, if justified by the circumstances (Art. 233-17.4 CCCat).

An open list of circumstances have to be weighed to set the amount and duration of compensations for imbalance. Among them are 'past and future dedication to the family' (Art. 97 II No. 4 CC), 'carrying out family duties and other decisions taken in the family's interest while the spouses lived together, if this reduced one of the spouse's income-earning capacity' (Art. 233-15 b CCCat) and 'family functions performed by the parents' (Art. 83.2 e CDFA).

The legal rationale and functionality of these financial claims is blurred. Comparative law shows that their purposes are intermingled in many legal systems, but that the function of spousal support usually prevails.[56] The PEFL's characterisation of them as maintenance claims is a clear example of this: 'Maintenance after divorce should be dependent upon the creditor spouse having insufficient

54. K. Boele-Woelki et al., *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, Antwerp/Oxford, Intersentia, 2004, pp. 69-72.

55. Id., pp. 85-95.

56. Id., p. 69.

resources to meet his or her needs and the debtor spouse's ability to satisfy those needs' (Principle 2:3).[57] In the Spanish legal systems, compensations for imbalance are functionally hybrids. As noted, the judge has to weigh various factors to set their amount and duration (the spouses' financial position; age; state of health; the performing of household tasks; decisions taken in the family's interests that have reduced earning capacity, etc.) (Art. 97 II CC; Art. 233-15 CCCat), some of which are needs-based and others compensation-based.[58] As can be deduced from their most salient features (temporality of the award, subsistence of the allowance dependent on the financial situation of the creditor, extinction by remarriage or start of a new partnership), the main aims of these compensations for imbalance are to mitigate the drop in living standards suffered by the claimant, help him or her to cover needs and, if possible, contribute to his or her retraining or return to the labour market.

The way the award's amount and duration are set and its vicissitudes – modification, termination – regulated is linked to these purposes, which predominantly focus on providing assistance and only indirectly redress. The law requires taking into account past involvement in housework among other factors because this is a highly relevant indicator of the existence of marriage-related losses, but redress for such losses is more of a side effect. Once the situation of property imbalance has been overcome through whatever circumstances may have arisen, the award is terminated, irrespective of whether the losses had been redressed or otherwise.

Apart from regulating the effects of marriage dissolution, several territorial laws on domestic partnerships in Spain also provide financial remedies to alleviate situations of imbalance at the end of a non-marital relationship, in addition to the unjust enrichment remedies outlined above. Their configuration is more restrictive than that of the financial relief measures in marital relationships (except in Aragon, where the compensatory allowance in Art. 83 CDFA can be claimed indiscriminately by spouses and cohabitants, although only if there are minor children). This more restrictive approach originated in the Catalan system, on which subsequent laws were based. Catalan law regulates a 'maintenance award' that can be claimed by the partner that needs it to support him- or herself if the relationship breaks down, but only in two cases: (i) if his or her earning capacity has been adversely affected by the cohabitation; (ii) if the claimant has custody of the couple's children

57. Id., pp. 79-84.

58. On the functions of the compensation for imbalance in Spanish law, see M. P. García Rubio, *Alimentos entre cónyuges y entre convivientes de hecho*, Madrid, Civitas, 1995, pp. 148-166; A. Carrasco Perera, *Derecho de familia*, Madrid, Dilex, 2006, pp. 127-132; M. Castilla Barea & A. L. Cabezuelo Arenas, 'Disposiciones comunes a la nulidad, separación y divorcio (II)', *in* M. Yzquierdo & M. Cuena Casas (Eds.), *Tratado de Derecho de la Familia. Vol. II: Las crisis matrimoniales*, Cizur Menor (Navarre), Aranzadi – Thomson Reuters, 2011, pp. 539-551. In Catalan law, see J. Ferrer Riba, 'Comentari a l'art. 233-14', *in* J. Egea Fernández & J. Ferrer Riba (Eds.), *Comentari al llibre segon del Codi civil de Catalunya (Família i relacions convivencials d'ajuda mútua)*, Barcelona, Atelier, 2014, pp. 462-465.

in circumstances that also reduce his or her earning capacity (Art. 234-10 CC).[59] The award can be made in the form of capital or recurring payments, but in the latter case – the most common – the law sets strict time limits: it has maximum duration of three years, unless the award is made on grounds of child custody, in which case it can last until the custody ends (Art. 234-11 CC). The amount paid is smaller than for married couples: its aim is to cover needs and not – as with the compensation allowance that married persons can claim – to maintain the standard of living enjoyed during the relationship up to the level that the debtor can also afford for him- or herself. Finally, the award is subject to the same modification and termination grounds as compensation for imbalance in marriage. The laws on registered partnerships in the Autonomous Communities of the Balearic Islands (Art. 9.1 Act 18/2001) and the Basque Country (Art. 6.2.a Act 2/2003)[60] regulate very similar compensation to that in Catalonia.

The function of these maintenance awards is more clearly set out than for marriages. Their purpose is to provide assistance, but only for needs generated by specific cases of loss of earning capacity resulting from the way in which the relationship has developed. Full-time or intense engagement in housekeeping and child care is undoubtedly the most typical of these cases. The award's compensatory scope is smaller, because it has a time limit and its defining purpose is only to cover maintenance needs.

2 *Complementarity between property and financial remedies to compensate for household work*

The legal design of compensation mechanisms on account of household work, both in marriage and cohabiting relationships, distinguishes between property regime measures and financial relief. The first are used in the process of allocating or redistributing assets, acquisitions and liabilities existing at the end of the regime. The second aim to provide redress for marriage-related losses and are complementary to the first, because liquidating the property regime changes the parties' financial situation and may partially correct the financial imbalance underlying the triggering of financial remedies.

If the household economy is governed by a community of property or participation in acquisitions regime, there is a sharp functional distinction between the two sets of measures. In separation of property regimes that include entitlements to compensation for household work, the delimitation is less straightforward. In particular, a question arises as to whether the long-term detriments caused by intensive specialization in household activities can be redressed within the property

59. J. M. Abril Campoy, 'Comentari als art. 234-10 a 234-14', *in* J. Egea Fernández & J. Ferrer Riba (Eds.), 2014, *Comentari al llibre segon del Codi civil de Catalunya (Família i relacions convivencials d'ajuda mútua)*, Barcelona, Atelier, pp. 569-579.

60. The Basque Country Act provides for the possibility of the partners adhering to a standard term, predefined by the law, which sets out a right to a maintenance allowance as a consequence of the dissolution of the partnership, similar to the Catalan and the Balearic allowance but with no time limitations.

measures' framework by allocating the homemaker a greater share in the other party's acquisitions. The idea that compensation for work could have indemnifying purposes has sometimes been raised by the courts in interpreting Art. 1438 CC[61] and, in Catalonia, by a sector of the legal doctrine in interpreting Art. 41 CF.[62]

If there are sufficient assets for a clean break to be made, the issue has no practical importance (aside from possible tax law implications) because compensation for imbalance, which is the natural remedy for this type of harm, can be paid with assets or a lump sum and thus operates as a supplement to the property adjustments. Otherwise, if compensation for imbalance has to be awarded in the form of recurrent allowances, as in fact happens in the vast majority of cases, the question is of more interest. Having to claim the compensation for imbalance or the maintenance award is less beneficial to the homemaker: the relevance of household work becomes more blurred among all the factors that have to be taken into account and its compensation is limited by the assistance rationale of the measure, which is needs-based, and its temporary nature. If the creditor begins living with a new partner or his or her financial situation improves by other means (e.g. through a donation or an inheritance), the allowance can be terminated and his or her previous household work is likely to remain undercompensated.

For this reason, if a legal system aspires to internalize within the family unit all the costs of the functional specialization agreed upon by the couple, it should foster compensation by means of property solutions. And should this family economy be governed by separation of property, the homemaker's participation in the gains obtained by his or her partner should be more substantial than it currently can be (a maximum of 25% of the gains differential in Catalonia), reaching half of this differential or even more, if this is justified by the negative consequences of such specialization.

IV Conclusion

The diversity of family law systems, the entrenchment of the family economy's organization around the principle of separation of assets in some territories and the increase in cohabiting relationships in Spain provide a wealth of experiences around the question of how to deal with household work in family relations. On the whole, these experiences confirm that legal recognition of household work is

61. In the context of Art. 1438 CC, see STS 14.7.2011 and STS 31.1.2014, cited above n. 20, where the Court, in granting the compensation, emphasizes the fact that dedication to the family has prevented the homemaker's personal development with the consequent loss of employment or professional expectations. This approach has been however severely criticized by the majority doctrine: see, with further references, Gutiérrez Santiago, 2015, pp. 538-543, above n. 20.

62. See, e.g., P. Ortuño Muñoz, 'Comentari a l'art. 41 del Codi de família', *in* J. Egea Fernández & J. Ferrer Riba (Eds.), *Comentaris al Codi de família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid, Tecnos, 2000, pp. 236-237; E. Roca Trias & L. Puig Ferriol, *Institucions del Dret civil de Catalunya. Vol.II: Dret de la persona i dret de família*, 6th ed., Valencia, Tirant lo blanch, 2005, p. 423. The same authors insist in this position, with much less consistency, interpreting Art. 232-5 CCCat: see id., *Vol. II-2*, 7th ed., Valencia, Tirant lo blanch, 2014, p. 186.

almost unanimously favoured, not only for its contribution to enhancing family welfare and wealth, but also because of the consequences it may have on the housekeeping spouse. In those systems and institutional areas (e.g. domestic partnerships subject to Spanish state law) where the law still neglects to provide this recognition, case law has filled the gap.

Spanish legal systems have tackled the recognition of household production with lines of reasoning and legal techniques deriving from contract law (remuneration), unjust enrichment law (restitution), partnership law (participation in the results of pursuing a common goal) and tort law (compensation for damages) adapted to the circumstances of formalized or informal family relations. Although they have not been covered here, inheritance law techniques should be added to this list, inasmuch as they play an essential role in marital and cohabiting relationships that are dissolved by death.

On the whole, the attempts to value home production by considering it a fungible activity which can be hired in the domestic services market have been unsatisfactory, although the courts have occasionally accepted this approach as a valuation criterion. This form of valuation fails to grasp the dynamics of family life and the bonds of interdependence and support created by living together, and does not take account of the singularity of parents' dedication to children. This objection proves particularly appropriate with respect to compensation techniques that are meant to lead to a precise monetary valuation: the remunerative approach, which requires setting the price to be paid, and the restitutionary, which entails determining the monetary value of in-kind contributions to family needs so that excesses can be calculated and reimbursed. Apart from valuation issues, the remuneration approach does not match the presumed will of the parties by getting married: the application of this compensation criterion *ex post* with no regard for whether the other party's property has increased or not, as proposed by the Spanish Supreme Court on applying Art. 1438 CC, distorts the bases on which marriage is concluded.

The uneasiness with these approaches explains the shift of Catalan law, in which separation of property is practised on a large scale, towards a participatory model which does not require monetary valuations of family work. This model presupposes a conception of a couple's relationship as a partnership in which members share not only the benefits of setting up a household and enjoy a certain standard of living together, but also any surpluses accumulated by either of them. The Catalan model's singularity lies in the fact that this participation in the other's gains is not a consequence of marriage – as it is with a legal regime of participation in acquisitions – but is associated with carrying out work for the home or for the other member of the couple: in a way, marriage is conceived of as a partnership where the housekeeping spouse becomes a work partner. This concept also raises valuation issues for setting the participation quota. Catalan law settles them somewhat artificially by establishing a maximum share of a quarter of the other spouse or partner's excess surpluses and attributing powers to the judge to specify the amount to be paid, through the weighing of several factors that may show greater or lesser intensity and quality of the work.

The different models of valuing household production studied here do not incorporate the costs of personal dependence and loss of earning capacity that

intensive specialization in domestic work involves. When such losses exist, they are alleviated with financial relief measures, outside the scope of the property regime. However, the prevalent maintenance function of these measures entails the risk of undercompensating such detriments. This is a good reason to recommend opting for a regime of community or participation in acquisitions, or for concluding a marital agreement that ensures a fair distribution of these costs, but, in the framework of a legal regime of separation of property with limited participation in gains, it is also a strong argument for eliminating or relaxing the limits.

8 Valorisation of household labour in family property law

A comparative overview

*Charlotte Declerck and Leon Verstappen**

I Introduction

In an ideal, equal world, we all contribute equally, everything is shared equally and everybody enjoys wealth equally. Husband and wife each work, have the same earning capacity and consequently earn the same amount of money. They contribute equally to the household: each of them prepares dinner, changes diapers, does the dishes and takes out the garbage alternately. They are married in a matrimonial property system with no sharing of income or assets at all and without any maintenance provisions. Each partner has his or her equal share in the financial burdens and benefits of the relation and that's it. Is there any household that works accordingly? Do we really want to shape our relationships like this? How calculative!

At the other end of the spectrum, we find the old, stereotype family: the man is the hunter, he brings home the bacon, the woman takes care of the household and the children. She does the cooking, washes the dishes, cleans the house and does everything to make him feel at ease in his house. They are married in a matrimonial property system in which they share all income and all property and with maintenance obligations until death. Do we want to live such a life? How old fashioned!

If we may assume that reality is more diverse, that this is not the way average couples arrange their life, and that there is a division between the tasks and roles within the family, how should we deal with the financial consequences of these arrangements? More specifically: how should we deal with property arrangements on the basis of which one partner profits at the expense of the other?

The topic at hand has at least four dimensions:

a. Why should there be compensation for household labour? What is the justification? Is it the contribution argument? Or because of solidarity between partners? Or equal treatment of household labour?
b. When should there be compensation for household labour? Should it be only upon divorce, or death or right away?

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c. In what form should the compensation be made available? Is in the form of maintenance or shared property? In money or in assets?
d. How can couples, judges and the legislator use property law to compensate for household labour? What is the yardstick to be used? How much compensation do we need?

This is to describe the problem and the questions that go with it. Next will be how the law deals with it. How do the legislator, judges and literature approach these questions and can we see a development in the past decades?

There are a few remarkable developments regarding household labour that seem to appear from the contributions to this volume. It is interesting to determine whether there is a causal relationship between developments in society and in households in particular, compared to the development in property law positions of spouses through the years. The law and judges seem to follow only slowly these developments in society. Society is moving with bigger leaps than the judiciary and judiciary is following faster than the legislator.

The classical marriage, in which the man is supposed to be the earning partner and the woman is the caring partner, seems to be quite dated. Sverdrup states in her contribution that the full-time housewife is a thing of the past. Household work is increasingly shared or outsourced, rather than a burden of just one spouse. Part time work is popular, so the burden of care taking and household labour is shared. Yet that is not to say that these breadwinning and caregiving roles are now equally divided (Barlow; Declerck/Boone). The effect is that more and more, every spouse contributes to the acquisition of assets and develops earning capacity. Sverdrup states that in the majority of marriages and informal relationships, the parties would be regarded as equal contributors to the surplus accumulated during the relationship.

As Sverdrop states rightfully, the two parties' work efforts may be equal at any given moment, yet inequality is generated gradually over time because the work performance of one is consumed while that of the other is partly invested. A settlement along property lines (typically in cohabitation) would often leave one of the parties empty-handed. But the benefits of a relationship come not only from a property perspective. Creating opportunities on the job markets through earning capacity is maybe equally relevant. One also has to take into account that the efforts to create earning capacity aren't that successful and that joblessness can easily have a negative impact on property. Who has to bear the burden of debts?

II Just matrimonial property systems

Arriving at this point, we would like to put the research questions into a broader perspective and refer to Verbeke's dissertation on Property distribution upon divorce and his later publications, in which he also focuses on unmarried couples.[1]

1. *WPNR*, Vol. 6568, 2004; A.L.P.G. Verbeke, 'Weg met de koude uitsluiting!', *WPNR*, Vol. 6464, 2001, p. 947. Also: A.L.P.G. Verbeke, 'Naar een billijk relatievermogensrecht', *TvPr*, 2001, p. 391 and A.L.P.G. Verbeke, 'Wettelijk verbod van koude uitsluiting', *NJB*, Vol. 45/46, 2001, p. 2185.

According to Verbeke, we must take as a point of departure of a just matrimonial property system between spouses that there is a balance between two components of every marital relationship: *autonomy* and *solidarity*. A fair default system provides a share in the matrimonial property, that is justified by three principles: (1) contributions to the marriage as a partnership, whether it is pursuing a career, household work or children's care, is considered to be equivalent; (2) a spouse should be compensated properly for his or her sacrifice devoting his or her time to the household and to children's care instead of study or work; (3) finally, sharing of income and property can also be justified by the fact that there is a duty of care between spouses. One conclusion might be, that looking at compensation for household labour might not be sufficient, since there are other considerations to be taken into account. This calls for a comprehensive and global approach.

Taking these principles as point of departure, we first have to look at the best starting point in the matrimonial property default system. Taking into account the aforementioned three principles, a form of equal participation in income and property gained during the relationship as a result of either partner's contributions towards the partnership, seems to be the most logical point of departure.

III Default compensation mechanisms

In 2013, the Commission on European Family Law concluded a participation in acquisitions and a community of acquisitions to be the two most preferable default systems.[2] In short: each spouse has an equal share in all acquisitions during marriage, as a share in the community of these acquisitions or as a participation in the value of these acquisitions. In both cases, pre-matrimonial property as well as inheritances and gifts are excluded.

One can argue that an equal share is not necessarily always a just compensation, because contributions to the partnership aren't necessarily equal. Especially when we also have to compensate for the deficit in earning capacity. But as a point of departure in the default matrimonial property system, this will suffice. Moreover, it can also serve as a criterion for compensation when a compensatory mechanism is not in place.

As said before, we don't live in an ideal world and since there is a division of tasks and roles between partners, we have to cope with the unfair differences in property positions current systems allow for at the end of the relationship. In a fair matrimonial property system, there should for instance be a balance between the contribution to the relationship at the one side and the share in property at the other. The matrimonial property default systems of many countries already contain compensation mechanisms when it comes to household labour. Most default matrimonial property systems indeed have a built-in compensatory mechanism, through community of acquisitions or participation in the value of acquisitions. In most systems, property that spouses obtain during their relationship is shared

2. K. Boele-Woelki, Fr. Ferrand, C. González-Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny & W. Pintens, *Principles of European Family Law Regarding Property Relations between Spouses*, Antwerp, Intersentia, 2013.

equally. The nature, duration or intensity of the household labour supplied by the spouse is irrelevant in this perspective.

In countries such as Belgium, France and the Netherlands the default regime of community of acquisitions forms the compensatory mechanism for household labour. Verstappen/Kolkman state correctly that this is not the best of solutions due to a possible imbalance between the contribution to the relationship and the division in property. The amount of compensation is rather arbitrary, since the participation in assets and debts is not directly related to the actual household labour conducted. Also in Belgian doctrine this solution is being criticised. The division in two halves could be unfair towards the spouse who has generated an extraordinary income (e.g. a football player in the Premier League). Some Belgian authors insist for this reason on the introduction of a maximum cap in order to avoid exaggerations of the role of solidarity within the framework of the partnership.

In Germany, the so called *Zugewinngemeinschaft* is the compensatory tool in the vast majority of marriages to compensate household labour. The German legislator chose this regime as the default regime in order to emphasize and voice the legal equality between all types of labour. However, Lugani thinks that the valorisation of household labour is insufficiently expressed in the legal formulations of this default regime. For example, the financial weaker spouse has a claim at the time of the dissolution of the marriage, regardless of the fact whether he or she has actually performed household labour. In addition, the spouse can only make a claim in money when the marriage is dissolved. He or she can never claim the goods themselves. Furthermore, the spouse in question can never be allowed to manage the goods during the marriage, as only the spouse who legally owns the goods could manage them. There are only few exceptions to this rule. Even more, it is possible that the *Zugewinn* cannot be applied due to a lack of accumulated capital, e.g. in cases of bankruptcy. Of course, in such cases the household labour cannot be valorized. Also, if the *Zugewinn* has a negative balance, the household labour will not be valorized. She favours *Gütergemeinschaft* or the *Errungenschaftsgemeinschaft* as the systems that realise valorisation of household labour the best. Though there is a lot of criticism on the current default system of *Zugewinngemeinschaft*, it is not likely that it will appear on the political agenda.

Barlow describes the absence of matrimonial property law in England and Wales, and Scotland. Marriage and civil partnership have no direct effect on a couple's property ownership during the relationship which is governed by property law. However, these formal couple relationships in both jurisdictions do still give rise to a claim for redistribution of assets on relationship breakdown according to statutory criteria applied through the discretion of the court. In England and Wales equal value is accorded to non-financial contributions to the welfare of the family as to financial contributions under the judicially developed non-discrimination principle. Scotland provides a guaranteed equal sharing of matrimonial/partnership assets between partners; a deferred community of acquests approach has provided a less generous but certain framework for recognition of non-financial contributions.

In almost all countries, there is statute law regulating the default property relations between *spouses*. But this is not the case when it comes to *unmarried couples*.

Although some countries have specific provisions as regards to property relations between unmarried cohabitants, in many cases, those provisions are not comprehensive in a way that they regulate the property relationship as such, like in a marriage. In all countries, there is freedom for all couples to shape their property relations by drawing up a contract, be it a marital contract or a cohabitation contract. Apart from dealing with the property of either partner, these contracts may of course also contain maintenance provisions to support the financially weaker partner after a breakup.

Sometimes there are more instruments for compensation of household labour between cohabitants compared to spouses, like in the Balearics. However, one must consider the more burdensome nature of remedies articulated by case law vis-à-vis those established by statute, considering the costs of litigation and uncertainty of outcome (Ferrer). In those systems and institutional areas (e.g. domestic partnerships subject to state law) where the law still neglects to provide this recognition, case law has filled the gap (Ferrer). Spouses and cohabitants that have split up seldom organize in political pressure groups, and rules regarding division of property are not high on the political agenda in most Western countries (Sverdrup).

IV Deviation from the default compensation mechanisms

Compensation for household labour is not in place for married couples with marital property contracts that deviate from the default system, excluding this compensatory mechanism. It is neither the case for unmarried couples without a cohabitation contract containing compensatory mechanisms. Contrary to the default system for married couples, there are no compensatory mechanisms in property law for unmarried cohabitees. These compensatory mechanisms have to be agreed upon in cohabitation contracts.

Empirical research in The Netherlands reveals that there are a considerable amount of cases of unfair consequences of matrimonial property regime 'cold exclusion'. In this type of matrimonial property regime, there is no sharing of income or property, consequently no compensatory mechanism for household labour. Research shows very clearly that the Dutch systems hasn't got sufficient legal instruments that are effective as a remedy in these cases. The judiciary is very reticence. Proposals to improve the system weren't successful. The very concrete recommendations to the government were not followed by legislation and the judiciary remains reluctant (Verstappen/Kolkman).

More or less the same counts for Belgium and France. As Declerck/Boone and Bouchard-Barabé state in their respective contributions, the Belgian and French perspectives are currently not much better. An analysis of Belgian and French case law shows that the courts only have a limited number of options available to valorise household labour under a regime of pure separation of property. Several legal instruments are merely defences against claims for compensation from funding partners. Moreover, the question of whether or not compensation for household labour can be based on unjust enrichment is ambiguous. Moreover, Bouchard-Barabé states correctly that this is not a compensation for the household labour

as such, but only for the amount of uncompensated contribution to the household exceeding the limits of the duty to contribute to the needs of the family.

Also in Belgium a number of solutions have been proposed, such as (1) the abolition of the pure separation of property regime and the introduction of a mandatory right of participation in any gains and (2) the introduction of stricter information obligations for the notary. Until now none of them were successful. Nonetheless the overall reform of the existing relationship and property laws is high on the Belgian political agenda. The minister of Justice even set up a working group of academic experts to formulate a set of priorities. One of the priorities is a better legal framework of the regime of separation of property and of the clauses that spouses may add, such as the clause of participation in acquisitions. One of the other priorities is to give the judge a more general discretionary power to grant a compensation if the marital contract providing for strict separation of property has been rendered unfair considering the overall circumstances of the case. Finally, the introduction of a stricter information obligation for the notary is proposed.

V Non-default compensation mechanisms; intervention by the judge

If these compensatory mechanisms are not in place, the question is whether judges can issue a compensation or reallocation order, and under what conditions they would do so. Assuming that not all inequality has to be taken away in terms of compensation for household labour and that compensation is only due when the amount of uncompensated contribution to the household is exceeding a certain level, as it is a normal contribution to the family, questions remain as to what kind of compensation is due and to what extent.

Compensation household work can be realised through three mechanisms that have to be distinguished:

a. compensation via remuneration for the work;
b. compensation via a reimbursement claim on the basis that household work has involved an excessive contribution to family support or an unjust enrichment of the other spouse or partner;
c. compensation via limited participation in the other spouse or partner's acquisitions (Ferrer).

The attempts of valuing household labour by considering it a fungible activity which can be hired in the market for domestic services have been unsatisfactory, although the courts have occasionally accepted this approach as a valuation criterion. This form of valuation fails to grasp the dynamics of family life and the bonds of interdependence and support created by living together, and does not take account of the singularity of parents' dedication to children (Ferrer). This seems to be unsatisfactory, because apart from valuation issues, the remuneration approach does not match the presumed will of the parties in the framework of a marriage contract: the application of this compensation criterion *ex post* with no regard for whether the other party's property has increased or not, as proposed by the Span-

ish Supreme Court on applying art. 1438 CC, distorts the bases on which the marriage agreement was concluded (Ferrer). The uneasiness with these approaches explains the shift of Catalan law, where separation of property is practised on a large scale, towards a participatory model which does not require monetary valuations of family work (Ferrer).

Judges can apply already vested legal tools such as: contract law (remuneration), unjust enrichment law (restitution), partnerships' law (participation in the results of pursuing a common goal) and tort law (compensation for damages) adapted to the circumstances of formalized or informal family relations, but also inheritance law (Ferrer). But they all are not made specifically for remuneration of household labour, so it takes innovative judges to use these tools in practice (Verstappen/Kolkman; Declerck/Boone; Bouchard-Barabé).

In Norway, co-ownership both in marriage and unmarried cohabitation can be established on the basis of *indirect contributions,* both in the form of childcare/housework and the covering of consumption expenses (Sverdrup). Traditionally, marital property regimes had their justifications in broader notions of "community,", "partnership", "need" etc. Today, the trend in legal policy is to replace these broader terms by more explicit justifications, such as compensation for contributions made during marriage and for losses suffered (Sverdrup).

Declerck/Boone advocate the introduction of a legal right to economic compensation following the Catalan example. The court may award compensation for household labour at the expense of the other partner upon termination of the relationship. Not only the nature, duration and intensity of the work done, but also the duration of the relationship and the number of children are criteria to be taken into consideration by the court when estimating the amount of the compensation. Also, this amount may not be more than half of the gains accumulated during the relationship.

The solution could also be based on the conception of a couple's relationship as a partnership in which members share not only the benefits of setting up a household and enjoy a certain standard of living together, but also any surpluses accumulated by either of them (Ferrer). One might add that the partnership should be for better and for worse, so also negative financial developments should be included.

Division of assets was wealth based and now towards a new entitlement basis, with entitlement having been earned through the non-financial contributions of homemaking and childcare. Now: of three strands, namely

– needs
– (equal) sharing
– compensation for 'relationship-generated (financial) disadvantage'

Both common law and civil law countries favour recognition of household labour. The common law choose not to have any kind of community of property between spouses, instead discretionary redistribution of the couples' assets according to statutory criteria has been introduced. There is a judiciary power to readjust property ownership according to certain criteria. By this, tailor made solutions were made possible as 'the judges think fit'. This also extends to civil partnerships and,

in Scotland, also to former cohabiting couples. The approach must be seen in relation to the division between common law countries when it comes to settling maintenance claims. Common law countries favour clean break and civil law countries still distinguish between property division and maintenance (Barlow).

The Law Commission for England and Wales and the American Law Institute are of the opinion that homemakers contribute far less to the acquisitions of family assets acquired during the relationship, than do breadwinners (Sverdrup). But as Sverdrup states, this is a view taken from a rather commercially oriented point of departure which ignores the fact that the parties are in a shared, committed living relationship – they constitute a *work unit* and have agreed upon a division of labour.

The aforementioned approach, being tailor made, has been refined further during recent years through case law in which specific criteria and guidelines are developed for concrete decisions in terms of reallocation of property upon divorce. The common law judgements come from total review by the judiciary to a more flexible approach giving significance to matrimonial contracts. This reached its high point in the landmark case *Radmacher v. Granatino.*

It is immediately apparent that there is no longer a sharp division between common law countries and civil law countries. While in common law countries there is a tendency to allow for binding marital agreements, there is the crosscurrent trend in Continental Europe to give the judge a discretional power to amend extremely unfair marital agreements and this despite the adagium *pacta sunt servanda* (Verstappen/Kolkman, Barlow).

VI Conclusion

The overview shows that all the examined legal systems have some form of compensation mechanism for household labour. The proposed mechanisms are unfortunately always inadequate and still too often a distinction is made depending on the marital status of the partners. This is regrettable as household labour should be appropriately valorised within our family and society. Formulating an all comprehensive solution is very difficult. The contributions and the conclusions of this book could be a first step and a source of inspiration for law reform.

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