THE RATIONALE FOR DIVISION OF PROPERTY AND THE LOGIC OF MARRIAGE

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Traditionally, both marital property rules and maintenance rules have been justified in broad and vague terms such as “solidarity”, “community”, “equal treatment”, “partnership” etc. As long as most families consisted of only one breadwinner and divorce rarely occurred, one could live with such broad justifications. To day it is no longer self-evident that there should be solidarity between spouses that lasts longer than the marriage. When women started to take up paid work on a larger scale, they were, in many countries, expected to be self-sufficient and to support themselves after divorce, even though they had not done so during marriage. In this situation there was a need for more explicit and precise justifications for why marriage should have economic consequences after divorce.

To day the trend in legal policy is to replace the broader terms of community, solidarity etc by more explicit justifications, such as compensation for contributions made and for losses suffered during marriage. This conception of justice is linked to retributive justice – there should be an overall balance between contributions and returns.

The idea of balance between contributions and returns is present on a general level in many European countries as well as in the US, as the majority of countries exclude the value of gifts, inheritance and premarital assets from the property subject to division. The only common feature of the assets not subject to division is that the other spouse is not presumed to have made a contribution to the acquisition of those assets. In other words: contribution appears to be the essence of the justification.

The rationale for division of property and maintenance upon divorce is significant in legal policy – e. g. whether a certain allocation of property, or granting of maintenance, should be viewed as an entitlement or a charitable transfer to a needy spouse. The rationale will - to a certain extent - determine the content of the specific regulations.

1 In Southern and Eastern Europe this has long been the case (community property), as well as in Germany (Zugewinngemeinschaft) and in Norway since 1991. One can trace such tendencies even in English law in recent cases, notably White v. White [2001] 1 A.C. p. 596. In Denmark, Sweden, Finland all assets are still subject to division, but similar limitations are discussed in these countries as well, see A. AGELL, Nordisk äktenskapsrätt, Nord 2003:2, Copenhagen 2003 p. 404-412.
Some countries explicitly link the justification to the spouses’ financial and non-financial contributions. Others reject such a justification partly because they are reluctant to putting a market price on child-care and housework. The idea that the value of non-market contributions in marriage is lower than the value of the financial contributions is shared by the American Law Institute. The Institute’s reasoning goes 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 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.”

I agree that the consumption attributable to the spouse performing domestic labour must be taken into account, when valuing the housewife’s indirect contribution. But her consumption is already taken into account in the valuation of her contribution: Let us suppose that the wife takes care of small children below compulsory school age (as well as household chores.) The husband is engaged in paid work and earns 40,000 euros per year. From his income he pays household expenses and mortgage instalments on the house (the latter constitute the “surplus” subject to division on divorce). The husband would have to reduce his working hours by one half, and consequently halve his income, if he were to take responsibility for his half share of domestic work and child care, as the children are below school age and thus need round-the-clock care. We must presuppose that the children should have just as much contact with their parents in the comparative situation. Given this premise, a wife has made half of his earnings possible, i.e. 20,000 euros per year. But the total of this sum cannot be regarded as her yearly investments in the house – of course. Part of this enabled income amounting to 20,000 euros must also be deemed to have been spent on covering consumption expenses. In our case it is reasonable to assume that the wife has contributed to half of the total consumption expenses and half of the total investment in the house. In other words: she has contributed on an equal footing to the surplus subject to division on divorce, as well as to the household expenses (consumption). The spousal contribution of domestic labour confers an equal financial benefit in this case.

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2 As regards Norway, see Innst. O. nr. 71 (1990-91) p. 14.
However, if the children had been of compulsory school age, and the wife still worked full-time at home, she would have enabled less than half his earnings, and contributed less than half. But today women normally take up paid work after a shorter period at home, and will therefore contribute directly - or indirectly through the covering of household expenses. Thus, in the great majority of marriages both spouses contribute on an equal footing to the surplus subject to division.

Co-ownership during marriage can be justified in the same way. In England in the 60s and 70s the question was raised a wife’s indirect contribution in the form of payment for household expenses or childcare should give her a beneficial interest in the family home formally owned by the husband. The broad doctrine that acknowledged indirect contribution within the framework of a remedial constructive trust has however not been adopted in English law, contrary to other common law jurisdictions, like Canada and Australia. In 1975 the Norwegian Supreme Court acknowledged indirect contribution in the form of childcare and housework as a sufficient contribution to become co-owner the house purchased by her husband with his income during the marriage. Equality exists between service and counter service at any given moment, still inequality is generated over time because one contribution is consumed and the other is invested.

The rule has now been made statutory in the new Marriage Act of 1991 with regard to housework and childcare. It is worth noting that the Supreme Court based their justification on economic reasoning. The judge who led the voting in the Supreme Court 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”. The travaux préparatoires of the new Marriage Act of 1991 state likewise that the housewife’s co-ownership is based on “economic realities” and emphasise that no transfer of property occurs by declaring that the wife is a co-owner. The same text also states that: “co-ownership is based on the contribution from each of the spouses that lies behind the acquisition.” The basic principle of the new regulations with respect to the acquisition of rights to property is that the spouses both contribute to the economic results. The fundamental thinking appears to be that if they had performed equal shares of work outside and inside the home, the husband would have had to reduce his working hours and thus earned less. On the other hand, the housewife would have had free time for a paid job and thus (normally) made a direct contribution to the acquisition.

5 Norwegian Supreme Court Reports 1975, p. 220. The house in question was acquired during the existence of marriage and formally owned (registered) in the husband’s name.
6 Marriage Act of 1999, Section 31, third paragraph.
7 Norwegian Supreme Court Reports 1975, p. 220, at p. 226.
Today, a wife can work part-time or full-time outside the home, and take care of the children part-time. It is not obvious that her housework and her care of the children enable the husband to devote his time to earning money and to a professional career. One could argue that because the husband would often have earned just as much even if he had performed “his” share of the care duties, therefore she cannot be said to have facilitated any of his earnings, and therefore has not contributed indirectly in any substantial way.

However, a chain of causation still exists during marriage: As mentioned above it must be presupposed that the children should have just as much contact with their parents in the hypothetical, comparative situation. In the same way it must be presupposed that the person working outside the home should have just as much spare time and the same living standards as a person in a hypothetical, comparative situation. Given these facts, a husband would have had to reduce his working hours if his wife had not performed some of “his” share of childcare and housework. From this point of view, the wife has made possible part of his earnings, and if these additional earnings result in investments or greater pension benefits, she has indirectly contributed thereto.

It is not surprising that the law developed in this way in the 1960s and 1970s. Partly this was of course due to the increasing number of divorces, but it was also connected with the increasing number of women going out to work: As long as it was considered to be the natural order of things for the woman to be at home looking after the children when she married, it seemed unnatural to say that she had made possible part of the husband’s income. But when there is a realistic alternative, a judicial solution by which only the one who has directly contributed achieves owner status, appears as a random and unjust manifestation of the division of labour the spouses have chosen. This makes it more plausible to consider both the full-time and part-time housewife as having made possible (or caused) parts of the husband’s income, and thus contributed indirectly to his acquisitions. Co-ownership during marriage as well as an equal division rule upon divorce can be justified in this way.

But when one window is opened, another is closed: The same realistic expectancy of paid employment for women could cut off the possibility of long-term maintenance after divorce. In Europe the frequency of the granting of maintenance varies considerably - from countries in Eastern Europe and Scandinavia where maintenance is the exception, to Germany, Austria, Switzerland etc., where it is quite common. The overall trend, however, seems to be a decline in the granting of maintenance, and a shift from permanent to short-term awards. As fault-divorce

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9 This is expressly stated in RG 1990 p. 858 (Norwegian High Court judgment): “same quality of life”.

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is no longer the rule, maintenance as a sanction is not particularly relevant; and as life-long marriage is declining, solidarity is more a justification in theory than in practice.\(^\text{10}\) Today, compensation for losses relating to marriage seems to be the most plausible justification both for long-term maintenance and for short-term maintenance: This compensation is also linked to retributive justice on a more general level.

A number of legal scholars have claimed that the principle of self-sufficiency does not take adequate account of the fact that the earning capacity of the majority of wives has been permanently reduced owing to childcare and the work patterns during marriage. They have argued for the rethinking of the “premature abandonment” of maintenance, and for the granting of maintenance as compensation for these losses.\(^\text{11}\) However, there is little to suggest that the clock can be turned back in this respect – as long as it is accepted, and often expected, that mothers work full-time outside the home, and kindergartens are available.

As lifelong maintenance becomes more infrequent, the distributive function of maintenance decreases accordingly. Pension rights are part of the assets that have been acquired during the marriage, and could in this respect be compared to other forms of savings, such as bank deposits. Against this background many are of the opinion that pension rights acquired during the existence of marriage should be divided upon divorce. To-day, pension rights are subject to division in several European countries - e.g. Germany, Switzerland, and the Netherlands and to some extent also England. Generally there seems to be an increasing tendency to split pensions in European countries. Pension-splitting is, however, a much-debated question, and it could be argued that pension rights are so closely linked to the individual that no division should take place.

Of another nature and far more controversial is the question whether spousal earning capacity (or an increment of the earning capacity during marriage) should be regarded as property subject to division on divorce. Future earning capacity, education etc ( “human capital” or “career assets”) is not treated as property in the European jurisdictions - traditionally spousal claims on future earnings are made under the rubric of maintenance, as is normally the case in United

\(^{10}\) Dieter Martiny identifies four different justifications for spousal maintenance after divorce. In addition to support during the transitional period, he mentions sanction, solidarity and compensation for losses suffered during marriage. D. MARTINY, Divorce and Maintenance between Former Spouses – Initial Results of the Commission on European Family Law, in K. BOELE-WOELKI (ed.), Perspectives for the Unification and Harmonisation of Family Law in Europe, EFL Series, Nr. 4, Intersentia, Antwerp (2003) p. 545-546.

States, as well. The crux of the argument for division of career assets seems to be that because both parents out of consideration for the children are not able to fully pursue a career, the choice of one of the spouses to partly give up a career should not be at the peril of that said spouse alone. Career assets are however regarded by many as too closely linked to the individual autonomy, and therefore not suitable for division. Moreover, division of property is final and there are great difficulties in valuing career assets. Maintenance on the other hand is more flexible because of the possibility of termination of the award, but on the other hand not in accordance with the self-sufficiency principle.

As regards gain and loss in the future, “property” and “maintenance” are two different labels for the same phenomenon: the spouses’ adjustment of work patterns to each other during marriage that have effects after marriage. One can therefore imagine a new form of benefit on the dissolution of marriage under a new name, which cannot be characterised as either “property division” or “maintenance”. Such a rehabilitative measure need not carry with it the traditional legal and political understanding that lies embedded in these two concepts. This new benefit may be tailor-made to address the particular problems that arise when future gain and loss are to be compensated.

The Ali principles substitute “loss” for “need” as a rationale for compensatory payments after divorce, and argue that such payments would be viewed as an entitlement rather than a charitable transfer. (Footnote). This is a step in the right direction, but I am not confident that this change will lead to a more frequent granting of maintenance/ compensatory payments. Loss due to marriage does not in itself constitute a satisfactory justification for transfers between spouses. Contrary to contribution, loss is not “self-explaining” as a reason for transfer upon dissolution.

However losses sustained and contributions made during marriage are often two sides of the same coin. Surpluses accumulated during marriage (as well as future income and pensions) can be regarded as fruits of the division of labour in marriage: The wife’s childcare has enabled the husband to pursue his own career and earn more money (and consequently obtain higher pension rights and earning capacity) outside the family. The “coin” is the household work and childcare, which from one side constitute an indirect contribution to the breadwinner’s acquisitions (and future earning capacity) and from the other side an obstacle for the housewife to taking up paid work, which results in a loss of income (and earning capacity).

Gain and loss are two sides of the same coin, but often one gets the impression that one has to choose between them. There is, however, no reason to conceal one side at the expense of the other. In my opinion it is important to acknowledge the economic “contribution side” of childcare and housework – as simultaneous gain and loss constitute a powerful justification for transfers between the spouses in modern marriages. In my opinion “indirect contribution” is an important rationale for the granting of compensatory payments upon divorce.

Even though loss and gain are two sides of the same coin, they do not always go equally far. In the quantification there may be differences according to whether one sees things from the gain side or the loss side. In those (few) cases in which the person who goes out to work (most often the husband) has a very high income, one can normally exclude the possibility that the wife would have earned just as much. The husband could then argue that more than half of his salary as well as his earning capacity are related to his personal abilities, and not to his wife’s childcare and the chosen division of labour. On the other hand it may be claimed that the person working at home has freed time for the person who goes out to work to earn high as well as low pay. In cases where the husband has a very high salary the spouses have chosen a more efficient division of labour during marriage, and the question of who shall be ascribed this efficiency gain cannot be solved on the basis of simple causal considerations. In such cases there is no “correct” answer to this question of causation. The contributions cannot be measured in any objective way. The question has to be reformulated.

Justifications on the basis of the spouses’ contributions - presumed or actual - are linked to retributive justice - there should be a balance between contributions and returns. This conception of justice is in accordance with one of the ideas of normative behaviour that seem to prevail in marriage. An idea of reciprocation exists which means that there should be an overall balance between service and counter-service. However the exchange of goods and services are not mutually conditioned (on the contrary, in a number of cases, a contribution would lose its value if it were conditioned upon a counter-contribution). The transfers of goods and services follow another “logic”: The spouses arrange their common economy according to the total amount of investments, expenditure and their joint earning capacity. A spouse can spend all his or her earnings on consumer goods for the family if, in that particular marriage, there is no need for investments. Spouses, especially women, also adjust their level of income to the fact that there is another person in the household with income. This adjustment of behaviour is the


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essence of living together in a unity, and I assume it is deeply rooted in many marriages - it is “the logic of marriage”.

The spouse’s adjustment of behaviour leads to inadequate results in economic settlements based on the principle that only assets acquired during marriage by means other than gifts and inheritance are subject to division. I will give some examples:

A fundamental adaptation lies solely in the fact that most spouses must be content with one dwelling; it is in the nature of family life that both parties live in one family home. If the dwelling has been paid off at the start of the marriage, this adjustment of behaviour can lead to unfortunate results, in the countries where only the assets acquired during marriage are divided. Owing to the increase both of wealth and in the frequency of remarriage, it is not uncommon for one spouse to bring a house, a cabin etc. into the marriage, whereas the other brings little property. If such basic investments are already available to the family, it is natural for the spouses to apply most of their disposable income to current expenses during marriage. The party without property will benefit from the other party’s investments during the marriage, but will be hard hit when nothing is saved for equal distribution when the spouses part company. In order that one party shall not come out of the marriage empty-handed, the said party must put aside part of his or her income during the marriage in case of a possible breach. But how many persons will do such a thing in practice? The prerequisite for property rules in the countries where only the assets acquired during marriage are divided seems to be that the spouses should model themselves on the "Economic Man" model. Spouses, however, live in a community of life one of the consequences of which is that they form a consumption unit. The parties adjust their level of consumption to the fact that basic investments, like a family home, are already available. The spouses arrange their lives according to the total amount of investments available, their total earning capacity and expenditure.

The adjustments of behaviour are a reflection of the starting position of each spouse with respect to property, education, etc: A spouse who has no pension rights or no professional degree before marriage is more likely to acquire such assets during marriage than the other spouse who has such assets. Should these assets be subject to equal division, while the other spouse’s assets remain undivided due to the fact that they were acquired before marriage?

Sometimes it is fortuitous whether a spouse consumes or invests an inheritance (separate property) during marriage - it might depend on factors that seem irrelevant when viewed ex post. (Example: The husband’s inheritance is spent on holidays, because the wife received an inheritance last year that was invested)

The contradiction that seemingly exists between the concept of reciprocation in marriage and the spouses’ adjustment of behaviour, disappears when one takes the time factor into consideration: The adjustment of behaviour that takes place in marriage is ad hoc-based, i.e. the spouses act regardless of the long-term return on individual investments. Balance might exist between any service and counter service at any given moment, still inequality is generated over time because one contribution is consumed and the other is invested. Consumptions and investments are viewed as equal contributions in an ad-hoc perspective, but in the long-term perspective it is quite different – only investments are kept.

Another question is to what extent it ought to be the task of family law to even out and correct inequalities that are due to the spouses’ adaptation during their marriage. Some will maintain that this adjustment is something spouses undertake at their own risk, so that it falls outside the area of responsibility of marital legislation to compensate for this on divorce. In my view, marital legislation should – at any rate to some degree – seek to even out the inequalities in work experience, investments, education etc. which are a consequence of living in a community of life. The problems arise from the fact that most spouses adjust their behaviour with regard to savings, investments, consumption, work and career planning. The logic of marriage differs from the rationality of individuals, and a fixed rule (with few exceptions) that divide property acquired during marriage is based on the latter. The legislators should not view marriage as if it consisted of two individuals that seek return on their own investments.

Until now one flexible remedy has been maintenance. In the future we will have to rely more on other remedies, as one would expect maintenance to become increasingly infrequent within the coming decades. The distributive function of maintenance will, of course, disappear as well. A court with discretionary power to divide property on the termination of marriage, as is the case in many common-law countries, could take all of these factors into consideration more easily. However, fixed rules for the division of assets harmonise best – for procedural economic reasons – with today’s high divorce figures in the western world. But a fixed rule with few discretionary exceptions is in conflict with the more basic features of the community of life described above. The legal solutions that come into effect when this unity is dissolved should reflect the “logic of marriage”.

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