Bridging Cultures and Traditions in the Reconceptualisation of the Value of Non-financial Contributions to the Marriage Relationship

Submitted by Chung-Yang Chen to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law

In February 2011

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In the first part of this century, the traditional common law jurisdiction of England and Wales and the civil law jurisdiction of Taiwan simultaneously gave increased legal recognition of the homemaker’s non-financial contributions to the marriage relationship, albeit using quite different mechanisms to achieve this.

Family law in both jurisdictions has faced the issue of whether it should adapt to changed social norms by better reflecting the equal partnership discourse of marriage in the value that should be given to non-financial contributions typically made by women, such as housework and childcare, both during the marriage and on divorce. Yet, whether and how to do this has been the subject of much debate in both jurisdictions.

This thesis therefore considers how the laws in these jurisdictions assess the value of non-financial contributions, before, during and after marriage (i.e. on divorce). It explores the extent to which they meet the aim of achieving substantive gender equality by weighing their achievements against the principles of gender mainstreaming. In order to evaluate this in the context of Taiwan where a gender mainstreaming approach was employed to frame the recent legislative reforms, a qualitative empirical research study was undertaken.

The study also considers how social and cultural norms operate alongside or in opposition to the intended effects of legal developments in this field and argues that at the very least, stronger legal provisions going beyond gender neutral laws are needed to remove the traditional gendered assumptions about the low value of non-financial contributions.

Therefore, this study intends to explore the problems which result from these socio-legal phenomena and, drawing on the strengths and weaknesses identified in the comparative study of Taiwan and England and Wales, put forward possible legal solutions. These, it is argued, involve a reconceptualisation of the value of non-financial contributions to marriage.
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CHAPTER 1 INTRODUCTION AND BACKGROUND

1.1 Introduction
In this introductory chapter, the background to the present research will be provided along with an outline of the principal theoretical propositions. This chapter will also set out the research problem and the associated research questions that this thesis seeks to address. Finally, a brief overview of the structure of this thesis will be included at the end of the chapter.

1.2 Background to the Study
In the first part of this century, the traditional common law jurisdiction of England and Wales and the civil law jurisdiction of Taiwan simultaneously gave increased legal recognition of the homemaker’s non-financial contribution to the marriage relationship, albeit using quite different mechanisms to achieve this.1 In Taiwan, the Civil Code 2002 was introduced and made it clear that marriage was to be regarded as a partnership of equals: with each party’s contribution to the family, financial or non-financial, to be valued equally. At the same time, the Code established the ‘deferred community of surplus’, as its default matrimonial property regime.2 Under this, each spouse remains free during the marriage to acquire and dispose of his or her own property, but at the end of the marriage, any net increase or surplus of the financial gains is divided equally between the spouses, under the deferred community3. The Code presumes that the non-financial (homemaking/ child-caring) contributions are valuable, and their accumulated value entitles either spouse to have a half share of the net gain or surplus derived from the matrimonial assets.

1 The Family chapter in Taiwan’s Civil Code, originally promulgated over half a century ago in 1930, recognised the homemaker’s non-financial contribution in the 2002 amendment. In England and Wales, this recognition of non-financial contributions can be found in 1970 legislation now contained in s25(2)(f) Matrimonial Causes Act 1973, although these were not seen to be of equal value to financial contributions to the marriage. However, their value was greatly enhanced following, judicial decision in White v White [2001] 1 AC 596, according to which financial and non-financial contributions were to be given equal weight as discussed below.
3 For the operation of the default matrimonial property regime, see section 4.3.3.1.
In addition, one of the provisions in reference to the affirmation of the value of homemaker’s/ child-carer’s domestic contributions is that it exempts the homemaking/ child-caring spouse from the duty to pay the living costs of the household. It also permits for the first time a special allowance to be agreed to be paid by the breadwinner to the homemaker/ child-carer spouse. The legal norms embedded in the 2002 Code therefore seem to treat wage earner and homemaker equally. However, it will be argued that the homemaker/ child-carer still suffers economic disadvantage during marriage as the provisions in reference to the protection of homemaker’s/ child-carer’s economic status are nothing but contingent rights. In addition, it will be argued that Confucian thinking not only has profound influences on legal developments, but reinforces male domination (patriarchy) within social norms. Taken as a whole, it is suggested that the current legislation only achieves the goal of formal rather than substantive gender equality.

In the common law system in England and Wales, the most important legislative starting point in regarding marriage as a partnership of equals in property terms was the amendment to the Married Women’s Property Act 1882 which abolished the doctrine of unity, under which a wife’s property automatically became the husband’s on marriage. It was then that the system of separate property during marriage was established, where marriage has no effect on property ownership and each spouse retains ownership of their individual property throughout. This system of formal equality between men and women continues as the foundation of family property law today. This initially meant that each party left a marriage with only the property vested in their name. However, in 1970, the Matrimonial Property and Proceeding Act introduced a discretionary system of property redistribution on divorce and this is now contained in Part II of the Matrimonial Cause Act 1973 (hereafter MCA 1973).

Yet, in recent cases, judicial decisions have attempted to use the great discretion afforded to the courts under MCA 1973 to establish clearer principles as to which assets should and should not normally be redistributed on divorce (described respectively as matrimonial and non-matrimonial assets) and also to indicate

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4 See the concepts of the duty to pay the living costs of the household and the special allowance for the homemaker/ child-carer in section 4.3.3.4 and 4.3.3.5.
that there should be a principle of equal sharing of assets, subject in both cases to the needs of each party being met. To some commentators, this implies that in substance, English law has moved towards a judicially created matrimonial regime of deferred community of property limited to acquisitions.\(^5\) On dissolution, arguably the court’s identification of a pool of matrimonial assets creates a deferred community of matrimonial property which in most cases, it was held, the courts should share equally between the parties, unless there are good reasons for departing from equality.\(^6\) Furthermore, in *White v White*\(^7\), the Law Lords strongly rejected the notion of gender discrimination whereby the husband’s contribution as a breadwinner was special and should in some way entitle him to a greater share of the wealth. In *Lambert v Lambert*\(^8\), the case stressed the fact that marriage is a partnership, that both parties bring their own different gifts or interests into the marriage and that the role of the bread-winner should not be seen as being intrinsically more valuable than that of the homemaker/ child-carer.

Even though the conceptual approach to the deferred community of property in Taiwan is quite different to that employed in the English law context (despite the recent move towards a presumption of equal division of matrimonial assets which are not specifically defined), these two jurisdictions still share a common trend. On the one hand, they both emphasise that marriage is a partnership of equals and they underline the importance of equal valuation to financial and non-financial contributions. Yet, on the other, they both struggle to give full effect to an equal economic status for homemakers/ child-carers. It is suggested here that this is in part because they both still rely on formal equality as the foundation for their family laws, which risks missing the more difficult target of achieving substantive equality. Consequently, it is appropriate and interesting to analyse

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6 For the development of the case law on this point see *White v White* [2001] 1 AC 596; *Lambert v Lambert* [2002] 3 FCR 673, *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24. For further analysis on the earlier of these cases, see: Cretney (2003) ‘The Family and The Law: Status or Contract’, 15 Child and Family Law Quarterly p.411-412. However, this view was not accepted by subsequent judicial decisions. See *Sorrel v Sorrel* [2005] EWHC 1717 (Fam), per Bennett J, at para 96; *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, per Baroness Hale, at para 151.

7 *White v White*[2001]1 AC 596

8 *Lambert v Lambert*[2002] 3 FCR 673
the similarities and differences between these two jurisdictions concerning the issue of the valuation of non-financial (homemaking/child-caring) contributions. Family law being limited in terms of what it can achieve in regards to changing the wider culture, it is also necessary to consider the impact of any traditional and cultural obstacles to gender equality in this field within these two very contrasting jurisdictions.

For a homemaker/child-carer, there is no doubt that legal recognition of value for their work within the home not only signifies the promotion of the homemaker’s/child-carer’s economic status within the family, but also means that housework/child care may be considered to have financial value, therefore enabling homemakers/child-carers to be entitled to a share of marital property. Valuing non-financial (homemaker/child-carer) contributions appropriately, it is argued, means going beyond just a nominal recognition; it needs to be further considered in the context of what equality might mean here and how and why the law values this type of contribution in comparison with financial contributions. The gender dimension of this equation will also be considered and it is worthy of note at the outset that research into the gender division of housework labour has generally shown that in Britain as well as Taiwan, wives take on the majority of household responsibilities regardless of employment status.9

Even though both societies appear to have become more egalitarian in the public domain, where women have equal opportunities to be engaged in the public sphere, such as politics and employment, within the private domain, in contrast, many women still suffer an unequal burden of non-financial contributions. Because of the heavy pressure suffered by housewives, several studies show that men should be encouraged to help their wives with the housework/child-caring.10 However, it is not a statutory obligation to ask men to do housework/child caring in either jurisdiction and even if it became one, one basic obstacle would still arise: many men still perceive child-caring tasks to be

‘women’s work’ and are not willing to share the burdens of housework.\textsuperscript{11} It is clear that under the traditional gender pattern of division of domestic contributions, the ‘labour of reproduction’ produced by women is that they play the unpaid yet critical role of daughter, mother, daughter-in-law and wife within the home, ensuring that the caring and homemaking work is undertaken within the household at no cost.

Currently, in both England and Wales and Taiwan, more married women are forced to work outside the family in a full or part-time job due to financial pressures, yet they are expected in addition to continue to organise and perform the homemaking and caring tasks. This social phenomenon reinforces the urgent need to examine the extent to which the law values non-financial contributions and to ascertain whether homemakers/child-carers receive adequate protection by law.

This study will therefore analyse how these jurisdictions give value to homemaker’s/child-carer’s contributions within the marriage relationship. In general, this contribution only falls to be valued in law when the court redistributes the marital assets in the event of divorce. This means that the homemaker/child-carer risks being unable to enjoy the fruits which are produced from the breadwinner’s contribution to the welfare of family until the marriage come to an end; this can be seen to be a particular concern in the Taiwanese context. During the marriage, the homemaker/child-carer is not only dependent on the breadwinner’s generosity, but has no entitlement if the earning spouse chooses to be miserly towards the other spouse by limiting the money available to them. Moreover, earnings traditionally are thought of as belonging to the breadwinner. Therefore, he or she has all the rights to manage and dispose of this money during marriage, subject only to the legal obligation to financially support one’s dependants.

Consequently, in order to keep a marriage subsisting for the sake of the children, a homemaker/child-carer could live a life in an economically weak position without access to 'community' or independent financial resources and continue to suffer from relationship-generated disadvantage throughout the marriage. On the other hand, the legislation specifies in both jurisdictions being studied that the spouses have a duty to maintain each other. In practice, however, research reveals that although there are statutory mechanisms for ordering one spouse to pay maintenance to the other during marriage, there are still some difficulties in enforcing this obligation in a way which is appropriate to the wealth of the family. In England and Wales, it has become rare to see a court order the husband to maintain his wife (or indeed the reverse) without divorce or judicial separation proceedings having been instituted. Where a housekeeping allowance is paid by a husband to a wife, in the absence of any alternative agreement this will belong to them in equal shares (s1 Married Women's Property Act 1964), which again is a provision on which there has been little or no litigation in recent times.

Therefore, it is strongly argued that in order to promote the homemaker’s/child-carer’s economic position within the family, a move away is needed from sole dependency on the breadwinner’s maintenance to a formal recognition of the value of non-financial contributions to family life. To do otherwise would be equivalent to reinforcing women’s dependence on men, yet caring work still needs to be undertaken. Unsurprisingly, under these circumstances, the homemaker/child-carer has two options to choose from if no or little financial support is available to them within the marriage: either to end the marriage or continue to maintain the marriage while the homemaker/child-carer continues to

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12 In England and Wales, three procedures are available:
Application may be made under S.2 of the Domestic Proceedings and Magistrates’ Courts Act 1978, or under Sch.6 of the Civil Partnership Act 2004; under S.27 of the Matrimonial Causes Act 1973, or Sch.5 of the Civil Partnership Act 2004; under S.22 of the Matrimonial Causes Act 1973, a spouse or a civil partner may seek a separation order, and the court may make orders for financial provision and property adjustment, see G v G [2003] Family Law 393, and Harb v Fahd [2005] EWCA Civ 1324.
Similarly the same legislation is available in Taiwan, see Taiwan Civil Code :§1116-1 and §1117, at note.2
face the same problem. After all, the law in action is far from the law in books.\textsuperscript{14} Therefore, this study intends to explore the problems which result from these social phenomena and put forward possible solutions to these problems.

1.2.1 Social norms perspective

In order to achieve this, it is vital to consider in this context how social norms affect the view of non-financial (homemaking/child-caring) contributions. From an historical perspective, both in the East and the West, there is a gendered assumption that men are the breadwinners and contribute financially to the family by working outside the home; women are traditionally seen to look after the home by working unpaid within the family. This gendered arrangement in a nuclear family was universally accepted by society in the 19th century both in England and Wales and in Taiwan\textsuperscript{15}. However, at the end of the 20th century, it was estimated that women’s unpaid work accounted for at least 50 per cent of a country’s GNP. The unwaged work was included in food production, reproduction, agriculture and household activities\textsuperscript{16}. Yet, according to the traditional breadwinner/homemaker model, only work that men did outside the home for pay was thought of as real and valuable, while the work that women did, such as homemaking/child-caring, was not.

With respect to roles within the division of the household labour, today legal norms neither require men to play the role as family breadwinner, nor assume only women should act as the homemaker/child-carer. How a married couple chooses to arrange their working lives is definitely a private decision. However, in reality, an asymmetric difference of wages for men and women in the labour market reinforces the traditional division of labour in heterosexual households. Significantly more women than men are classified in the category of homemaker/child-carer: unlike the work that men do for remuneration, women are engaged in knitting, baking, sewing, or childminding, which are not considered as real

work\textsuperscript{17}. Once again, these unrecorded or under-recorded occupations are less likely to be accounted for as formal employment statistics, undermining their acknowledged value within and outside the home.\textsuperscript{18}

Also, the ideology of taking homemaking/ child-caring as nothing but a labour of love will devalue the homemaker’s/ child-carer’s devotion to the family. As long as looking after the home and children is simply described as virtuous behaviour, this domestic work is irrelevant to the so-called real work. In addition, in the sense of social norms, attempting to value the homemaker’s/ child-carer’s contribution may be thought as an intrusion on family harmony, even a taboo, and this is particularly strong in the Taiwanese context\textsuperscript{19}. As an old Chinese proverb states: ‘the law deals with any issue other than the field of domestic affairs’. As far as the legal development of the equality of sexes within marriage is concerned, it will be argued that the lawmakers’ negative attitude to law reforms (in terms of its preoccupation with formal equality) arguably continues as an obstacle to reaching substantive equality in both jurisdictions being considered and reinforces the inequality of sexes in the name of maintaining family harmony.

\subsection*{1.2.2 Legal norms perspective}

Like social norms, legal norms are another foundation of contemporary society. These two norms interact with each other to ensure a harmonious societal life. The main goal of this socio-legal study is also to examine the effectiveness of law, but also to explore the inequality in the social phenomena, and further, to put forward suggested solutions to the problems identified in their interaction as concerns non-financial contributions to family life.

As in the past, the idea of paying women for unwaged work as homemakers/ child-carers remains a highly controversial issue. This study will use a social-legal perspective to reconceptualise the value of the homemaker’s/ child-carer’s contribution and intends to argue in favour of promoting their

\begin{itemize}
\item\textsuperscript{17} Morris, A and Nott, S. (1995) \textit{All my Worldly Goods: A Feminist perspective on the Legal Regulation of Wealth} (Aldershot: Dartmouth,) p.56.
\end{itemize}
economic status within the family.

In summary, groundbreaking changes in family law have been carried out from the 1970s in England and Wales in relation to legal development of the protection of the homemaker’s/child-carer’s economic status. In Taiwan from the 1980s onwards, legal changes also have brought both a direct and indirect impact in terms of the matrimonial property regimes, with radical reform being achieved in 2002. On one hand, there is a view that these changes represented remarkable advances; but on the other they have arguably produced much confusion about the role that law should play in family life and have led to further legal developments in this sphere in both jurisdictions at the beginning of the 21st century.

Therefore, it is essential to consider whether these law reforms are in line with the rapid social changes taking place in these jurisdictions. In order to address the issues that are arising, this study intends to review the regulation of the marriage relationship in these two jurisdictions in three stages: before marriage, during marriage and after divorce.

1.2.2.1 Before marriage

Before marriage in some jurisdictions it is possible to regulate the financial position of parties on divorce by a pre-nuptial agreement. A pre-nuptial agreement is an agreement entered into by a couple before their marriage which seeks to prescribe what should happen in the event that their relationship breaks down. However, in all jurisdictions, the contents of a pre-nuptial agreement determine its enforceability. In practice, it is often unclear whether a couple can prescribe the terms regarding the division of labour, financial arrangements or the redistribution of property on divorce. Yet, the enforceability of such agreements receives various degrees of recognition within different jurisdictions. Taiwan and England and Wales can be seen to have started out at different ends of the spectrum, both with regard to enforceability of such agreements and their role in ascribing value to non-financial contributions to a marriage. In England and Wales, where pre-nuptial agreements have traditionally been viewed as contrary to public policy, the landscape is shifting as regards their appropriateness and enforceability, with the position having been actively
developed through case law whilst legislative reform is awaited.

Unlike in continental European jurisdictions, pre-nuptial agreements have not generally been considered as binding in England and Wales: one of the reasons is that England and Wales do not have a matrimonial property regime as such, but allow for the wider discretion of the court with regard to the division of property on divorce which it has been contrary to public policy to oust. Recent decisions, particularly in Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 1 FLR 1186, Charman v Charman [2007] EWCA 503, which taken together have at the same time increased the value ascribed to non-financial contributions to a marriage whilst fuelling uncertainty as to the likely division of assets on divorce, have prompted a number of cases where the significance of pre-nuptial agreements has been considered. As a consequence, it can be seen that the time for introducing enforceable agreements has come in the latest Supreme Court decision delivered in Radmacher v Granatino [2010] EWCA 503, after which such agreements must be given ‘decisive weight’. Ironically, though, the principal function of pre-nuptial agreements might well be to give people the autonomy to limit the value ascribed to non-financial contributions as compared with financial contributions in any given marriage. Indeed the Law Commission for England and Wales is now considering how the law relating to marital agreements might be reformed.

Under the Taiwan Civil Code, in contrast, a couple may make an agreement with respect to the decisions of prefixing the surname to husband or wife, domicile, special allowance for homemaker/ child-carer (payable during marriage), division of household labour and the duty to pay the living costs of household. In practice, some of the terms are not strictly enforceable by the court, namely the division of household labour and the duty to pay the living costs of the household.

20 MCA 1973, s25.
22 This well-designed example of pre-nuptial agreement provide by Modern Women’ Foundation is available at: <http://www.38.org.tw/Page_Show.asp?Page_ID=314> 03/01/11 accessed.
However, a breach might be deemed to be legal grounds for divorce if either party has not performed this contractual obligation. The ability to agree the relative value of financial and non-financial contributions to a marriage in this way is arguably significant. In addition, the practicability and statistics of the agreement regarding special allowance for the homemaker/child-carer made by a couple is an important point to be explored in this study. If in reality, very few couples decide to make this term, it will be necessary to consider what the factors are deterring couples from prescribing their financial arrangements before marriage and to explore whether there are any cultural or traditional obstacles to a couple’s decision. These issues will be addressed and discussed and further explored in the empirical research conducted for this study to consider how this aspect of the law in Taiwan is working in practice and whether further reform is needed.

Before marriage in Taiwan, a couple may choose a matrimonial property regime. With regard to the scope of deferred community of property, the Taiwan Civil Code introduces separation of property during marriage and establishes that not all the property acquired before marriage is taken into account when the court redistributes it on divorce. The Taiwan Civil Code provides that each party’s property shall be divided into the property acquired before marriage and acquired during marriage, and they shall be owned respectively. If the property could not be proven to be the property acquired before marriage or during marriage, it shall be presumed as the property acquired during marriage. The legal grounds for not taking the property acquired before marriage into account for redistribution is because that particular property is not the result of joint efforts.23

Unlike Taiwanese couples, it is apparent that, under English law, a couple is not currently allowed to prescribe the scope of marital property and shield it from the scrutiny of the court. In order to evaluate the function and effect of pre-nuptial agreements, which can be used to meet the people’s needs, this study will compare the degree of enforceability between different jurisdictions, and explore why pre-nuptial agreements are not currently strictly binding for English courts and whether were this to change, it might assist in agreeing a value for

23 Further discussion, see diagram 4.1 at chapter 4.
non-financial contributions to marriage.

1.2.2.2 During marriage

In English law both income and capital assets remain with the owner during marriage subject to quite limited duties. Thus whoever earns income has all the rights to it and has no obligation to share the income in any particular way, provided that a ‘reasonable maintenance’ is given to a spouse. In other words, financial orders can be given by the court in case of neglect by one party to a marriage to maintain the other party (or child of the family) and these orders are available without the need to apply for divorce or judicial separation. When making this order, the court shall have regard to all the circumstances of the case including the contributions which each party has made or will make to the welfare of the family, e.g. any contribution to homemaking and family care.24

However, the term ‘reasonable’ has a vague meaning and this leaves the court to make its decision on a case by case basis. Such litigation almost invariably leads to the relationship breaking down. As mentioned earlier, a homemaker/child-carer only has two options to choose from if the breadwinner is financially ‘mean’ towards the other spouse: end the marriage or keep it subsisting by putting up with the situation. Furthermore, maintenance in some way is a barrier to a homemaker/child-carer’s economic independence. It can be argued that the very nature of maintenance makes it an ineffective mechanism to ensure the homemaker’s/child-carer’s contribution during marriage shall be valued and protected. It is a welfare solution rather than an earned entitlement.

In comparison, under the Taiwan Civil Code 2002, its recognition of the homemaker’s/child-carer’s contribution can be reflected in the following aspects: the entitlement to the deferred community of surplus through default matrimonial property regimes on divorce, spousal duty to maintain, the duty to pay the living costs of the household, the special allowance for homemaker/child-carer, all during the subsistence of the marriage.

*The matrimonial property regimes in Taiwan*

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As will be discussed in detail in chapter 4, the husband and the wife may choose from one of the contractual property regimes, namely the community of property and separation of property regime provided by the Taiwan Civil Code, as their agreed matrimonial property regime. Where the husband and the wife have not made an agreement to the matrimonial property regime, the statutory regime, namely the default one, shall be applied automatically.\(^{25}\)

According to the statutory regime, the surplus of the property acquired by the husband or the wife during marriage, after subtracting the debts incurred during marriage, if any, shall be equally divided, with one half being paid to each spouse when the marriage ends. Property acquired from succession or as a gift is excluded from the distribution, but Taiwan’s system is based on entitlement not need in this regard.

**Spousal duty to maintain in Taiwan**

Need can be met in other ways, however. The content of the obligation here is for each spouse to meet the basic and reasonable needs for the other spouse’s life. This may be fulfilled, for example, by one party supporting the other financially and the other providing homemaking/child-caring services. However, another issue arises that this provision gives very limited practical recognition to the exchange value of the homemaker/child-carer’s contribution. Where the other party to the marriage has failed to provide reasonable maintenance, the homemaker/child-carer still may not apply to any court order for maintenance because of strict requirements.\(^{26}\)

**The duty to pay the living costs of the household in Taiwan**

With regard to the duty to pay the living costs of the household, the Code provides that it shall be shared equally by the spouses. However, in deciding how this will be shared, each party’s economic ability, household labour or other conditions need to be taken into account unless otherwise provided for by law or mutual agreement\(^{27}\). In other words, in weighing up the relative contributions to family life, it is significant that the non-financial (homemaking/child-caring)

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25 See Taiwan Civil Code, §1004, §1005, at note.2.
26 As for the difficulty in maintenance application, see later discussion in section 4.3.3.3.
27 See note.2, Taiwan Civil Code, §1003-1.
contribution is for the first time recognised as important as the financial contribution in Taiwan Civil Code. But does this go far enough?

**Special allowance for the homemaker/ child-carer**

Significantly, a provision newly introduced in 2002 declares that the couple may reach an agreement to give the homemaker/ child-carer a certain amount of special money paid by the breadwinner over and above the payment for living costs for the household.\(^{28}\) This is designed to protect the economically weaker party, typically the homemaker/ child-carer, from suffering the inequality due to undertaking the homemaking or child-caring rather than a paid job.

Ironically, this might be understood as a mere symbolic slogan because of its unenforceability. However, in order to explore the effectiveness of this new law, this study has undertaken qualitative interviews with legal professionals and academics specialising in the family law field in Taiwan\(^{29}\).

1.2.2.3 In the event of divorce- developments in England and Wales and Taiwan

In practice, it is on divorce that the value of non-financial contributions is considered. In English law, on the dissolution of marriage, how to value the homemaker’s/ child-carer’s contribution is important not only to the court’s decision but also to principles behind the role of family law itself.

With regard to the contribution to the welfare of the family, there are many ways to support a family, such as homemaking and child-caring, although they are intangible contributions to the welfare of family as compared with those made by a financial contributor. Until the decision in *White v White*\(^{30}\), non-financial contributions were accepted as being less valuable than financial contributions, but at the turn of the millennium this view was challenged and resulted in a radical reinterpretation of their value within the case law. As Lord Nicholls significantly explained in *White*\(^{31}\)

\(^{28}\) *ibid.*, § 1018-1.

\(^{29}\) The operation of new Code 2002, see Chapter 5.

\(^{30}\) *White v White* [2001] 1 A.C.596.

\(^{31}\) *ibid.*, at p.605.
'In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whether the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering para (f), relating to the parties’ contributions… 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 child-carer.'

After White, subsequently in the cases (heard together) of Miller and McFarlane, he continued to repeat this principle again and confirmed it should be universally applicable to all marriages\(^{32}\).

Given rapid social change has taken place, in most families the division of labour has been shifting from a gender-based division to a role-based division. Neither men nor women are legally assumed to follow what society traditionally expects a man or a woman to be like in terms of the roles they perform within marriage. Therefore, in particular, while assessing the value of non-financial contributions to the family, it is essential to suggest that firstly the court has to remove the traditional stereotyped images of both sexes which have long been carved into the judicial mind, and also they are required by law to deal with this matter from a gender-neutral perspective. This key approach is to address the inequality which results from ‘relationship-generated disadvantage’ as Baroness Hale noted in Miller and McFarlane\(^{33}\):  

‘Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs. McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties’ needs, the a premium above needs can reflect that relationship-generated disadvantage.’  

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\(^{32}\) Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, at para.1.  
\(^{33}\) ibid., at para. 140.
In viewing the House of Lords’ decisions, on one hand financial contributions and non-financial contributions should now be valued equally. However, on the other hand Lady Hale also identified the reality that the homemaker/child-carer always suffers the relationship-related disadvantage in financial terms and this needs to be compensated for. Thus, the study intends to consider how a theory of partnership might be used to reduce the relationship-generated disadvantage and achieve sexual equality within marriage.

In Taiwan, the Civil Code has legally presumed that the value of the homemaker’s/child-carer’s contributions to the family entitles the weaker financial party, typically homemaker/child-carer, to have a share of marriage assets. What property can be shared and the financial consequences of divorce depend on which type of property regime has been agreed by the spouses. The courts are not allowed arbitrarily to change the parties’ choice and judge the case with powers which are not conferred from Taiwan civil code.

Besides the property matter, the other issue which needs to be dealt with after divorce is the grant of alimony, namely the maintenance after divorce. But the homemaker’s/child-carer’s contribution is normally not to be taken into account when the court decides the grant of alimony. There are also strict requirements for alimony applications. Therefore, in Taiwan, the deferred community of property regime may in practice be the only useful means to protect the homemaker’s/child-carer’s non-financial contributions and entitles them to the half of the deferred community of surplus.

1.3 The overview of the study
The justification for the research and a statement of the contribution that this thesis intends to make to the field is to achieve a better understanding of the difficulties law has in valuing financial and non-financial contributions to a marriage during and after the relationship. In particular, it will consider how important are cultures and traditions to this legal valuation and pose some crucial questions. Has the value of non-financial contributions been assessed culturally and traditionally throughout the society in England and Taiwan? If so, how does the law reflect the value made by homemakers’ contributions today and does their value deserve to be reflected in a more equal way in comparison
with financial contributions?

It is clear that recently in these two jurisdictions the legislation has put emphasis on the non-financial (homemaking/child-caring) contributions to marriage relationship when the court redistributes the marital property\(^\text{34}\). However, does the position of women, (who as wives are typically the main non-financial contributors to marriage), in a society affect the way these contributions are valued in law? If so, what effect does it bring to bear? How important is it to allow parties to the marriage to use their autonomy to decide their own legal valuations of contributions through pre-nuptial agreements?\(^\text{35}\) Or should the law instead set down clear principles? Might the introduction of same-sex partnerships, in which the roles within and contributions to marriage are clearly gender neutral, throw any light on how to value non-financial contributions?\(^\text{36}\)

1.4 Aims and Objectives of the Study

The aims and objectives of the study can be summarised as follows:

1.4.1 Affirmation of the value of non-financial contributions

The first aim of this study is to consider why it is important to weigh up the relative value of non-financial and financial contributions to the marriage relationship and this question is inextricably linked to the changing role of women in society. In Taiwan and England and Wales the position of women in society has changed greatly in the last part of 20\(^{\text{th}}\) century. Family law has been faced with the issues of whether it should adapt itself to changing social norms to better reflect the value that should be given to non-financial contributions typically made by women - such as housework and childcare – both during the marriage and on divorce. Women now have a far greater choice as to whether to

\(^{34}\) Please see, the Matrimonial Cause Act 1973, s.25 (2)(f) and the Civil Partnership Act 2004 Sch.5 para.21(2)(f). See also Taiwan Civil Code, at note.2, §1030-1.

\(^{35}\) For example, in Taiwan, before or during marriage, a couple may contract a certain amount of money, namely special allowance for the homemaker/child-carer, paid by the other party. See Taiwan Civil Code, §1018-1, at note 2.

\(^{36}\) Only the heterosexual marriage is recognised by Taiwan Civil Code, therefore, this question is of limited relevance to issues in the Taiwanese context at the present time.
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contribute financially or non-financially, and it is only tradition and culture that holds them to the non-financial role. An increasingly important question for both societies is therefore how might this role either be more equally shared with men or alternatively more equally valued as compared with financial contributions.

It is interesting to consider, from an economic theory view, how much are housewives worth? A calculation following a poll of 4,000 British housewives (used to establish the amount of time spent on key household chores) reveals that a housewife would earn almost £30,000 a year (more than the average national wage) if she was employed to spend the same gruelling hours to do all the same chores such as cooking, cleaning, looking after children, as a paid worker rather than a wife. In addition, the majority of those polled (71%) agreed that keeping a family running is of itself a full-time job. This survey, whilst not claiming to be nationally representative, arguably demonstrates that housewives could easily command a wage for their efforts in the household labour and this should not be ignored in the family law sphere.37

In viewing the position of the housewife in Taiwan, national statistics also show that over 80 per cent of married women are acting as the main homemakers, and further, over one half of husbands do not share or help to do the housework. Normally, married women do more housework than single women.38 Obviously, wives and mothers are paid nothing for daily errands such as child care, cooking and dealing with family finances. Is it justifiable to say that women do the daily errands out of love and thereby classify this as a non-contribution to a family in financial terms? This thesis will argue that there is a need to look to achieve a substantive equality for these with financial contributions to a marriage. In so doing, it is necessary not only to look at the workings of the law itself, but also at the effects of social norms and feminist proposals for equality.

1.4.2 Reconceptualisation of the value of non-financial contributions

This study secondly aims to present and analyse the very different ways in which

37 This survey was conducted by www.alljoinon.com, a networking site for housewives, see BBC news, available at <http://news.bbc.co.uk/1/hi/business/7252504.stm>, 11/01/11 accessed.
the value of non-financial contributions is traditionally, culturally and legally, assessed in England and Wales and Taiwan. Why and how the law values the non-financial (homemaking/ child-caring) contributions during marriage and on divorce, and to give its legitimacy are the central ideas to this study.

Historically, in both societies, under consideration, family law adopted a patriarchal vision of the roles within marriage.

In a truly patriarchal system, fathers have primary responsibility for the welfare of their families, and hence authority over them. The concept of patriarchy is often used to refer to the expectation that men take primary responsibility for engaging with the world of work, acting as representatives via public office. Women, on the other hand, work unpaid in the private sphere of the family.

As a matter of course, such a dichotomous arrangement of roles into the public/private or breadwinner/homemaker spheres is still common in the ordering of family life. It is a particularly common Taiwanese tradition that men take care of bread and butter; women take care of housework/ child-caring. This has made the homemakers’/ child-carers’ contributions to the family, typically women’s domestic labour, to be seen as their unquestioned vocations or duty and not attracting any specific value during marriage. In England/Wales and Taiwan, with the development of women’s liberation movement and changed employment patterns, the distinct roles for men and women in very separate spheres has been greatly weakened, particularly where there are no children of the family. However, the home carer role is still played by great majority of women; they often quit the job and then look after the children and home, perhaps returning to part time work later. Men act as the breadwinner and are mainly in charge of earning money to support their families. Women, in contrast to men, whether willingly or through lack of choice most often take the role of homemakers/ child-carers. This lasting phenomenon has led homemakers to remain within an economically weaker position within their families. One main factor is that their non-financial child-caring contributions are automatically categorised in the private sphere and are consequently perceived as having no financial value.
However, over the past few decades, the calls for gender equality within family have challenged the gendered roles in the division of household labour. This traditional rigid concept that categorises non-financial contributions as a concern for the private sphere alone is greatly changing. A few important issues need to be posed again. Have legislation and judicial decisions made proper responses to the calls for reform in this sphere? Has the pernicious influence of patriarchy still remained in terms of social institutions and culture in England and Taiwan? If so, is there a possibility or even a necessity to reconceptualise the value of non-financial (homemaking/child-caring) contributions and transfer this value into public sphere from private sphere to avoid their continued undervaluation? How do the social norms and legal norms interact with each other upon these issues?

In order to discard the old beliefs of patriarchy remaining in the modern society, this study intends to reconceptualise the value of non-financial contributions which it is argued are not valued adequately by cultures, traditions, laws and social policies in both jurisdictions. Thereupon, it will be suggested that homemakers/child-carers should be given more positive legal protection to enable them to choose freely to devote themselves to be a homecarer, where this is in the interests of the family as a whole without fear of relationship-generated financial disadvantage, which is often gendered.

**1.4.3 Marriage should be seen as a partnership relationship**

In addition, a third aim of this study is to explore the nature of the marriage bargain in the 21st century. It argues that marriage itself should be regarded as analogous to a partnership and both parties constitute a joint economic enterprise and work for common benefits. Consequently, it follows that on divorce, the concept of partnership enables each party to be entitled to their equal share of the matrimonial assets. In Taiwan arguably this is the case under the statutory marital property regime, whereas in England and Wales, equality, although a starting point, is not certain.

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At the point of divorce, in Taiwan, the court not only distributes the partnership assets, but also has completely discretionary powers to decide the amount of alimony (maintenance after divorce). Normally the value of the non-financial child-caring contribution will not be considered as a factor to decide the amount of the alimony. It seems clear that the provisions under the Code are very weak with regard to the alimony claim as the partnership approach is limited to the relationship in the continuance of marriage. How this may be addressed will also be considered.

In English law, on the other hand, Lord Nicholls in *Miller v Miller* accepted this concept that marriage is a partnership of equals. As he put it:\(^40\):

\[\text{‘The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less.’}\]

It is self evident that on marriage the parties will each contribute different assets, skills, personalities to the relationship. They could be financial or non-financial whatever. Each party will enjoy and share all of the above things throughout the marriage. If the relationship includes the mutual sharing of all aspects of their lives, this should include the sharing of marital assets. At least, each party’s contribution, whether financial or non-financial, to the relationship can be reflected by the sharing of marital assets. This study will consider whether the time is right to put this on a statutory basis.

1.4.4 Balancing the family financial autonomy and state’s interests

In discussing the value of homemaker’s/ child-carer’s non-financial contribution, one important question regarding to the state’s interests arises. On the face of it, there is a little direct legal regulation of how the members of families manage their financial affairs or value the contributions that are made to their family. However, law and social policy have been playing a great part in influencing indirectly a family’s financial arrangements and economic ordering. One aspect of family regulation which must be considered is whether the state’s intrusions on family financial autonomy and freedoms to choose its own means of internal

\(^40\) [2006] UKHL 24, at para16.
financial managements are appropriate. A clear example of this is the law relating to the enforceability of pre-nuptial agreements and this will also be considered.

Another line of argument to be considered is whether valuing the homemaker’s/child-carer’s domestic contributions could be seen as undermining family harmony. To a certain extent, an objection to the pursuit of individual autonomy in the name of public policy, such as family harmony, is to perpetuate the family injustice. Thus, how to reach an appropriate balance between individual’s autonomy in household financial affairs and the state’s interests is another focus on this study.

1.4.5 Promotion of homemaker's/child-carer's economic status

Further, the study seeks to a justification for homemakers/child-carers to claim a proportional amount of allowance from breadwinners to promote child-carer their dignity and economic status, according to the breadwinners’ earning capacity during marriage. However, the concept of this allowance has not been made legally enforceable during marriage in either of the jurisdictions. In addition, this study will present the findings of a small scale of qualitative interview survey of expert legal professionals and academics and will come back to this issue in further, analysing these findings to see if such an allowance to be claimed by the homemakers/child-carers and made enforceable can be justified, particularly in the Taiwanese context.

1.4.6 Mainstreaming gender perspective into family law

It will be suggested in this thesis that a process of gender mainstreaming should be further pursued in Taiwan and could provide a useful benchmark for whether substantive equality has been achieved in the English context. Gender mainstreaming is defined as mainstreaming a gender perspective in the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate
goal is to achieve substantive gender equality.

Family law is the most multi-faceted of all areas and it includes every aspect of state’s legal intervention to the private lives of those who are related by blood or affinity. Surely, it will be argued, the area of family law should be reviewed from a gender mainstreaming perspective? This is particularly true, it is suggested here, in the case of the economic relationship between husband and wife within a family, where, it is argued, there is a need for readjustment from a gender perspective.

1.4.7 Further suggestions for law reforms
Finally, this study considers the existing legal framework that governs non-financial contribution to marriage relationship in England and Wales and contrasts it with the Taiwanese position. The study also points out the lacunae and anomalies in the current legislation and puts forth some suggestions and proposals for reform in this area. Particularly in Taiwan, where we have the benefit of having undertaken an empirical study, suggestions for reform will be put forward.

1.5 The organisation of the study
This chapter has provided the background to this study and the study’s aims, objectives and scope, and confirmed its discussion within the context of social and legal norms within England and Wales/ Taiwan. There are seven additional chapters following this Introduction.

Chapter Two: Gender mainstreaming and feminism critique
This chapter provides a background, definition, version and objectives of gender mainstreaming alongside the feminist critique which can be applied to reach the goal of gender equality.

Chapter Three: Methodology
It explains the methodology and the research design of this study. This chapter also describes the operational procedures used for this study, including the instruments for data collection, the selection of data for analysis, and the
schedule for this study. Interviews were employed to permit an in-depth examination of the Taiwanese context and are original data collected for this study.

Chapter Four: The conception of the value of non-financial contributions to the marriage relationship in Taiwan
This chapter presents the overview of how the law values the homemaker’s / child-carer’s contributions to marriage relationship in the Taiwan law context. This chapter also intends to examine the effectiveness of new Family Law Chapter under the Code 2002.

Chapter Five: Findings from the interviews
This discusses the findings from the interviews set out in chapter three and together with the discussion from chapter four to develop a map of how the values the homemaker’s / child-carer’s contributions to marriage relationship in the Taiwan law context, both from literature and practice perspectives. This chapter also set out the themes to be further explored in the comparison chapter.

Chapter Six: The concept of the value of non-financial contributions to the marriage relationship in English law context
This chapter deals with how the non-financial contributions to the marriage relationship are valued in English Family Law context, which guidelines are created to rule the cases in the divorce cases.

Chapter Seven: The valuation of non-financial contributions to the marriage relationship in comparative context: England and Wales/ Taiwan
Chapter Seven uses a mixed method of micro-comparison and macro-comparison based on a selection of themes to provide a wider discussion of these themes and the issues are raised by comparison.

Chapter Eight: Conclusion
To conclude this study, in this final chapter, the main research questions in chapter Three are used to structure the chapter. In addition, it also concluded common principles in both jurisdictions, provides a reflection on the limitations of the research and suggests some areas for further investigation.
CHAPTER TWO
GENDER MAINSTREAMING AND FEMINISM - A CRITIQUE OF ITS INFLUENCE ON FAMILY LAW IN TAIWAN

2.1 Introduction
In order to consider the extent to which gender equality is embodied in family law in Taiwan, it is necessary to look at the influence of gender mainstreaming and its operation in the Taiwan legal context. As shall be seen, it was the acceptance of the need for a gender mainstreaming process that led to the 2002 reforms to the Taiwan Civil Code and thus the principles of gender mainstreaming which embody a clear feminist critique will provide the benchmark against which these reforms should ultimately be judged.

2.2 Background of this chapter
Gender equality has been one of the key themes in the international history of fundamental human rights. However, it could be argued that there is still no agreement on how to pursue it effectively. Since it was formally featured in 1995 at the Fourth Conference on Women in Beijing, gender mainstreaming has become the strategy of achieving gender equality worldwide. In order to help further understanding of gender mainstreaming which has been used in Taiwan to develop family law policy, this chapter intends to explain its definition, vision and objectives and further see how it can be manipulated effectively in all areas to protect different genders and provide them with more freedom and choice and in particular, to reach the ultimate goal of substantive or de facto gender equality.

However, substantive gender equality cannot be achieved only by changing legal norms alone, and this has been particularly argued to be the case in the private sphere. Although the legislature and the Justices of the Constitutional Court in Taiwan have made positive responses to the call for gender equality within family law, how to make gender equality a reality within family life still

41 The concept of gender mainstreaming was first proposed at the Third World Conference on Women in 1985 in Nairobi. The idea has been developed in the United Nations development community.
remains difficult as the traditionally patriarchal family norms prevail and are still socially dominant and respected.

This chapter also aims to explain what predicament Taiwan society faces on the issue of how to mainstream gender perspectives into family law. Finally, the illegality of ostensibly neutral laws will be reviewed from the angle of feminist jurisprudence.

2.3 Background of gender mainstreaming

With the development of economy, science technology, and the change of social norms, women’s position in society is gradually changing worldwide. It is beyond dispute that the current female generation has more rights and freedoms than the last generation that is than their mothers and grandmothers experienced. However, it could be argued that the overall position of women is still inferior to that of men both in the public sphere, i.e. politics, labour market, economy and social welfare, and in the private sphere, such as the position within the family.

In response to an acknowledgment at international level that women still suffered disadvantage in terms of gender equality rights, 1975 was declared International Women’s Year by the United Nations, and the First World Conference on Women was held in Mexico City. More than 1800 representatives from 133 countries attended the conference which aimed to promote the advancement of women worldwide. In addition, there were 5,000 participants in the NGO Forum on Women held during the conference. Since then, the networking of women organisations began to be built up and has continued to develop\(^\text{42}\).

In 1979, the Convention of Elimination of All Forms of Discrimination against Women was approved by the UN General Assembly. It defines what constitutes discrimination against women and sets up an agenda for national action to eliminate such discrimination. The Convention is often seen as an international

\(^{42}\) Available at :<http://www.womenofchina.cn/womens_day/milestones/216038.jsp>, 02/01/11 accessed.
Since the 1995 Beijing Declaration, the concept of gender mainstreaming is seen as a global strategy for the promotion of gender equality. The ECOSOC (The U.N. Economic and Social Council) agreed conclusions (1997/2) provide a brief definition of gender mainstreaming as the ‘process of assessing the implications for men and women of any planned action, including legislation, policies and programmes in all areas and at all levels…’. The concept of gender mainstreaming not only became a milestone in the history of international women’s development, but is a guiding principle for further advancement for the women worldwide which could be used by law and policymakers.

2.4 The definition of gender mainstreaming

Gender equality is an integral part of human rights that aims to promote the full dignity of women and men in all areas. However, various definitions of gender equality shows that the goal of gender equality cannot be achieved only by stating that women and men should be treated the same. Moreover, it was accepted that equal legal treatment will not necessarily lead to de facto equality while the living conditions of women and men in society differ. It could be argued that equal legal treatment of women and men can only reach de jure equality at the most and risks ignoring the more difficult issue of whether substantive equality is being achieved within society:

‘The main point is not the mere existence of such differences, but the fact that these differences should not have a negative impact on the living conditions of both women and men, should not discriminate against them and should contribute to an equal sharing of power in economy, society and policy-making processes.’

To address the gulf between de jure and de facto equality, the major principles of gender mainstreaming were established as a device in the ECOSOC’s Agreed Conclusions:

‘Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.’

In other words, mainstreaming is the mechanism to emphasise that gender equality is a fundamental value and that it is pursued from the centre rather than the margins of decision-making in all areas. Gender equality should play a key role in every policy making process. The lack of women’s participation in policy making has been the barrier to gender equality, therefore, Mainstreaming also aims for the increased involvement of women in decision-making processes, resource allocations, development of policy directions, implementation and monitoring practices.

Thus, Gender Mainstreaming is not just about promoting women’s legal rights, which can be rendered meaningless if social and cultural norms operate against their realisation in practice. Importantly, it also refers to the integration of gender equality considerations in all social policy development, legislation, process and decision making, planning and monitoring of programmes towards the realisation of de jure and de facto gender equality between women and men.

2.5 The vision of gender mainstreaming
From the historical context above, it is clear that the proposal of gender mainstreaming plays an important role in achieving gender equality. In short, gender mainstreaming could be seen as the means to achieve the goal of gender equality in all areas.

2.5.1 Welfare for every individual
It is a wonderful vision for all women to create a society where gender equality is achievable. However, pursuing the vision is not just for the happiness and welfare of women and girls themselves, but for that of men and boys too. It could be understood to be just as much about improving the welfare of women’s and girls’ husbands, fathers and brothers. Therefore, ‘empowering women is not only a goal in itself. It is a condition for building better lives for everyone on the planet.’ Moreover, pursuing gender equality through gender mainstreaming not only can deconstruct the gendered roles of women and men in traditional patriarchy but also mainstream gender equality perspectives into all policies, laws and systems.

2.5.2 The dual function of gender mainstreaming
It involves a dual aspect. On the one hand, the gender mainstreaming reviews whether the existing laws and social policies are compatible with the requirements of gender equality, on the other, it becomes the strategy of any planned action, including future legislation, policies or programmes, in all areas and at all levels. From the introduction above, it is clear that gender mainstreaming not only requires that the government shall have regard to any impact on women and men in government actions, such as legislation, policy-making, which are relevant to politics, the economy, society, culture and other areas, but also mainstreams gender perspective into all areas and levels in any government actions.

2.5.3 Instilling a gender perspective into all areas
It is so important to instil a gender perspective into all areas. The most used example to explain the gender mainstreaming is the number of toilets provided in public areas, such as railway stations, schools and any other public facilities. As far as most people are concerned, they have a similar life experience that the queue for the females is always long while the queue for the males is short. With

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regard to the time usage of toilet, the ratio of men to women is 1:3. However, currently in Taiwan the ratio of the number of male’s toilet to female’s toilet is still 1:1.\textsuperscript{49} That is the main reason why the queue for the female toilet is always longer than the queue for the male toilet. Such an inconvenience for women absolutely results from not mainstreaming the gender perspective into the architectural design. If the gender perspective can be taken into account by the person in charge or architect in the architectural blueprint, the number of female toilets can triple, thus, it would reduce inconvenience of the female users in using toilets. Therefore, if the public facilities are only designed to meet male needs they would cause great inconvenience for women and wider society. What gender mainstreaming requires is substantive equality, not just formal equality, namely the equality of numbers. Following gender mainstreaming, the government should instil a gender perspective into the planned action and make properly different treatment between women and men.

Another example is that the current government’s population policy is to boost the birth rate by means of offering the parents a birth allowance as Taiwan nowadays is the country with lowest birth rate in the entire world\textsuperscript{50}. However, inadequate social welfare policy and the high costs of child care centres for working women are the major causes leading to the inevitable outcome of the lowest birth rate. In other words, in order to reverse the trend of low birth rate, the government should strengthen the public child care system to help reduce the child care costs. It might be an efficient way to boost the birth rate if married couples’ financial pressures which arise from the difficulties of child care can be addressed more satisfactorily. It is clear that the outcome of the lowest birth rate stems from policies of a women-unfriendly state and is exacerbated by norms relating to who should undertake childcare within society. This example also explains that a different field of view might be seen if the government was to plan their population policy taking account of gender sensitive opinion.


\textsuperscript{50} Along with Germany, Taiwan now has the world’s lowest birth rate, see <http://taiwantoday.tw/ct.asp?xitem=103114&ctnode=413&mp=9>, 02/01/11 accessed.
Therefore, gender mainstreaming aims to create the living surroundings where all genders feel comfortable, free and not oppressed. Moreover, it is expected that the goal of gender equality can be achieved progressively by means of policy and laws which have gender perspectives. In short, a highly developed society shall be a gender equality society where different genders are seen to be equals. Such a vision of substantive gender equality, can, it is believed, be achieved by means of gender mainstreaming.\textsuperscript{51}

2.5.4 Gender equality is not just for a specific group.

The ultimate goal of gender mainstreaming is to reach gender equality. Most people, sub-consciously if not consciously, usually perceived gender equality as nothing but a women’s issue and regard it as a matter irrelevant to the men. However, it is necessary to clarify that gender equality is an essential human right for all genders and does not imply that women and men are the same and should have the same treatment, but that they have equal value and should be accorded equal treatment. Gender equality is the value aiming for the well-being of the whole society and the entire human race, not just for the specific group; moreover, it is not for women’s exclusive well being. Over the past several decades, the strategies of women’s organisations to promote gender equality have overemphasised women’s oppression and patriarchy and they have used the promotion of women’s rights as the starting point.\textsuperscript{52} However, it could be argued that the traditionally patriarchal ideology has also established a rigid image of men’s gendered role either in family or society. Accordingly this image of men to a certain extent has impacted on men’s life process. Thus the target for promoting gender equality changes from a women’s issue into a gender issue and such a target becomes essential to social and human development.\textsuperscript{53}

The oppression of a patriarchal system, rigid gender roles and gendered division of labour has placed the restrictions on the choice and freedom of a person and they reinforce the difficulty of social and human’s development. Therefore, the


process of achieving gender equality through gender mainstreaming not only provides effective measures to overcome the disadvantage women face but helps liberate men from the social pressure of gender role stereotypes, thus creating a society which is better for women and also better for men. Therefore, women’s autonomy and stronger legal personality can be affirmed and promoted by the concept of gender mainstreaming. Women are not the problem; the social structure is the problem. In order to achieve gender equality and let every individual have more freedom of choice, it is essential to change the social structure and system, moreover to change law and policy maker’s attitudes towards gender issues, thus every individual is not limited by gender.

2.6 The objectives of gender mainstreaming
The objectives of gender mainstreaming can be summarised as follows: the different genders should have equal rights; both genders can act as the actors and beneficiaries; to provide each of the genders with more freedom of choice; and to reach de facto gender equality.

2.6.1 The different genders have equal rights
One of the objectives of gender mainstreaming is to treat the different genders with equal rights. Every individual shall be entitled to have the rights of being respected equally.

2.6.2 Both genders can act as the actors and beneficiaries
Both women and men shall comprehensively participate in the process of creating a society with gender equality. Men in particular should not be absent from this process and they shall cooperate with women to break the pattern of the traditional gendered division of labour; thus both men and women become the actors and beneficiaries on the path to gender equality.

56 Different genders not only refer to physical genders, such as male and female, but also include transgender. The term of transgender refers to the people who may feel, act, think or look different from the gender that they were born with.
2.6.3 To provide the different genders with more freedom of choice

Gender mainstreaming also aims to provide every individual with more freedom of choice of life style and life management according to the needs and expectations of each gender. These choices include enabling men to be eligible for childcare leave and allowances, and for men to act as the homemaker/child-carer and for women to be the breadwinner instead. Therefore, the inequality in different genders can be removed through the so-called role reversal.

2.6.4 To reach de facto gender equality

There are two levels of understanding gender equality: de jure and de facto gender equality. Sometimes this distinction is described as formal and substantive equality. De jure gender equality means the equality decided by the law. De facto gender equality refers to the equality reflected in real life. Every individual is entitled to equal rights under the law and this is the prerequisite of achieving gender equality. Therefore, the first step in pursuit of gender equality is to eliminate the laws which discriminate on gender grounds. At a constitutional level, all citizens of the Republic of China (Taiwan),

‘Irrespective of sex, religion, ethnic origin, class, or party affiliation, shall be equal before the law’ and the State ‘shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality’.57

It is quite clear that Taiwan has provided women, on the face of it, with de jure gender equality. However, de jure equality only refers to formal equality and does not completely imply that women are eligible for entitlement to equal rights and freedom in reality. De jure gender equality still cannot guarantee equal treatment for women as the law on gender equality fails to automatically make gender equality a reality. In short, the ideal of de facto gender equality can only be achieved by successfully mainstreaming gender perspective into every corner of the society.

2.7 Feminism: A critique of mainstreaming gender perspectives into family law

It has been a difficult mission to carry through the goal of gender mainstreaming, namely the substantive gender equality, within family area under a society greatly influenced by the patriarchal norm. Although formal gender equality has been set up by degendering the male dominated provision in law, women still find themselves in a lower economic position both in the public and private domain. Family harmony whereby roles are equally valued is unachievable by only using gender neutral law, as the patriarchal social norm does not automatically change. In the following section, the reflections on legal norms, namely gender neutral law and the Justices’ views on the move of gender equality issue, is made from the feminist perspective.

2.7.1 Formal gender equality in family law

The objectives and vision of gender mainstreaming and its strategy of achieving de facto gender equality are described above. From the view of the history of Taiwan women’s development, it is certainly clear that Taiwan has achieved the goal of de jure gender equality in its family law legislation by adopting the stream of thought of gender mainstreaming. In general, there are no longer laws that discriminate against women existing in the current Taiwan legislation. The gender neutral laws have replaced the male dominated laws in family law area. It was men’s inherent domination which dominated the property relationship in the matrimonial property regime under the Code from 1930s to 1980s. However, nowadays the default matrimonial property regime under the 2002 Code has adopted the principle of separation of property during marriage and redistributes property on divorce.

As noted above, the 2002 Code has decided the property relationship for the parties by means of matrimonial property regime in the event of divorce. However, this right to property redistribution is only realisable on marriage breakdown. Therefore, the current Code allows for the parties’ agreement in terms of financial duties and rights during marriage as the Code presumes each party should be provided with equal legal capacity and the parties can decide

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58 As discussed in Chapter 4 below, see section 4.3.3.2.1 and 4.3.3.2.2.
59 See section 4.3.3.2.3.
their own income management. With regard to the financial duties and rights of spouses during marriage, such as the duty to pay the living costs of the household, the duty to maintain each other and the agreement of provision of a special allowance for the homemaker/child-carer in the marriage relationship, current family law leaves room for a mutual agreement in reference to the above matters between husband and wife to be reached. However, in reality there is still a difficult and gendered position in existence as it is questionable whether these gender neutral laws can make gender equality a reality in the family life, particularly on the issue of promoting women’s economic status within the marriage relationship. This is the subject of the empirical research in Chapter 5. For women, economic independence and security are the hugely important links in the pursuit of gender equality as these values bring women self-respect and confidence and help women be respected by the others.

2.7.2 Women’s lower economic position

In general, women have more equal employment opportunities than before in the public arena. However, the rate of women’s employment in the labour market is still lower than men’s in Taiwan. Furthermore, women have lesser chance to have employment promotion than men.

In addition, women are still playing and expected to play the role of main homemaker and child-carer in the society even though they also work outside the family. Thus, the role of acting as the unpaid homemaker and child-carer reinforces the women’s poverty in private arena. Moreover, the difference in wage between females and males demonstrates that women’s economic position is still inferior to men’s in work place.


In 2010, Female Employment Survey conducted by Council of Labour Affairs has shown that the most prevalent unequal treatment that female employees facing in workplace was ‘pay rise’, followed by ‘promotion’, see the website of Council of Labour Affairs, Executive Yuan, available at: <http://eng.stat.gov.tw/public/data/dgbas03/bs2/gender/2010%20GenderImages(Eng).pdf> 20/01/11 accessed.

ibid., The same survey above also revealed that the monthly earning ratio of female/ male was 80.08%.
2.7.3 Economic independence within family

With regard to real economic independence, this should indicate circumstances where individual women and men have their own access to the full range of resources and economic opportunities so that they can shape their lives and can meet their own needs and those of their dependants. It recognises that women are economic players who contribute to economic activity and should be able to benefit from it on an equal basis with men. Women need to be valued and recognised for the contributions which they make to their family, children, community and economy. Women need economic resources to make choices for themselves and their children.

Gender equality is the vital value of human rights stipulated at the constitutional level; the value is not only applicable to workplace and other public domains but also applies to the private sphere, such as marriage relationships and family. However, in reality the gender hierarchy built into traditional patriarchy has rooted in Taiwan families and male domination lurks in every corner of the society. It is a very difficult challenge to complete the constitutional mission where ‘the State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality’ in a patriarchal family culture.

2.7.4 Rule shift and culture shift

The fulfilment of gender equality has two different levels of significance: rule shift and culture shift. The rule shift refers to the change of legal norm and the

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63 See Justices of the Constitutional Court, Judicial Yuan Interpretation No.365 ‘Article 7 of the Constitution states: "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Article 9, Paragraph 5, to the Amendment provides: "The State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality." The union of man and woman through marriage, the family and children created from that union are subject to the above constitutional obligations. In an exceptional situation, where discrimination based on sex is to be allowed by the Constitution, the exceptional situations must be grounded on biological differences or the differences in societal functions as the consequence of the biological differences in order for the exception to be held valid.’ available at <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> , 11/01/11 accessed.
64 See the Additional Articles of the Constitution of Taiwan, Art. 10, s. 6, at note.57.
culture shift indicates that the change of individual’s behaviour and mindset. In general, the rule shift is not necessarily equivalent to the social norm or culture shift, or the shift of attitude and behaviour of an individual. How effective the imposition of legal norms can be for societal change not only depends on the individual’s perception, the intensiveness, consequences, enforcement and procedure of the legal norms, but more importantly on whether the social norms and system matches up with the new legal norms. The establishment of new legal norms would make sense only in the circumstance that the implementation of laws can be ensured and reinforced through social norms.

However, Taiwan is tackling the predicament of mainstreaming gender perspectives into family law by changing legal norms in the face of strong prevailing traditional social norms which pull people in the opposite direction. It is undeniable that there is still a gap between the legal and social norms as can be seen by means of reviewing the process of these two norms interacting with each other.

2.7.5 The law has limits
As noted already, the rule shift is not necessarily equivalent to the social norm or culture shift, or the shift of attitude and behaviour of an individual. Particularly in the family law area, the law has its limits as this area has been seen to be a forbidden area by the lawmaker. There has been a tug of war between maintaining the family harmony and promoting gender equality in previous family law reforms. The importance of family harmony still prevails over gender equality within the family, thus only formal gender equality is set up and the gap between legal norms and social norms exists. The reality of this tension is considered in the following discussion.

2.7.5.1 Reflections on the law of private/public distinction
In general, human activity in modern society can be divided into two spheres: the public sphere, e.g., work, commerce, industry and politics, and the private sphere which revolves around domesticity, child-caring and home. Law traditionally reinforces the view of males as free, independent, irresponsible, and autonomous actors in the public sphere, and of women as dependent, mainly responsible for the role of rearing children and in charge of the private sphere of
the home. Fundamental human rights and duties are protected at the legal norm level in the public sphere, such as the right to education and work. In the private sphere, instead of looking to law and legal norms to establish individual rights, duties and behavioural standards, the individual is expected to conduct himself or herself in accordance with the moral principles which guide behaviour within the family, such as San Gang or Wu Chuang66 in Confucian thinking. These deeply rooted social norms make it difficult for new legal norms to penetrate and change behaviour in this sphere.

Such a public/private distinction imperceptibly reinforces the view that the private sphere should not be interfered with by legal norms67. The law’s intervention in family issues will only be undertaken in extreme cases, such as injustice, e.g. domestic violence or male dominated law. Moreover, legal norms have usually been playing a subsidiary role and should not legitimately interfere with family issues, as seen from in legal history. Consequently, the standards that guide domesticity and family relationships are morals and ethics, not the law. Traditional legal theory only concerns itself with the rights and duties of the individual in relation to the state. As a result, the tie between the political relationship in the public arena and the gender relationship in the private sphere is totally ignored. Thus, feminists strongly criticise the public/private division in approach between the implementation of new legal norms and holds the position that the individual rights and duties cannot be completely protected by family ethics68.

66 See Chapter 4.
67 Wang has observed that the public/private distinction was challenged by some feminists as an obstacle to achieving justice within the family, through changing the property relationship between the husband and wife; consequently, they proposed the entitlement to the special allowance for the homemaker/child-carer. Finally, this proposal was denied by the lawmaker. See Wang, H.T., (2006) ‘Feminism and Family Law in Taiwan- the Change of Matrimonial Property Law as Example’, National Chung-Chen University Law Journal, pp.50-62. For an alternative feminist view that Confucian thinking does not adopt the same distinction between the public/private sphere as in Western tradition, see Yin, J., ‘Toward Confucian Feminism: Critique of Eurocentric Feminist Doscourse’, China Media Research 2(3), 2006, pp. 9-18.
Furthermore, in the context of public/private distinction, it is very hard to implement the fundamental human values embodied in the public sphere, such as equality and justice, within the family if family autonomy is the guiding principle. In order to challenge men’s power in the private sphere, feminism began to preach the slogan ‘the personal is political’, trying to review the traditional gender relationship in the private sphere using an equality perspective. At the same time, feminists expect to resolve the problem of structural gender inequality by reviewing the law from a gender perspective.

2.7.5.2 The gloss of family harmony

The Taiwan Civil Code 2002 provides that, with the exception of the costs of the household, the husband and the wife may contract a certain amount of money, namely the special allowance for the homemaker/child-carer, paid by one for the other’s free disposition. Such an idea of special allowance for the homemaker/child-carer was strongly attacked by the male dominated Parliament. The opponents questioned its legal justification and asserted that domestic labour is a matter that should only be discussed within the private sphere and that the law should not intervene for any reason. They also argued that domestic labour is relevant to how the husband and wife manage the division of household labour in their family. In addition, domestic labour is done out of love and affection and it is not necessary or appropriate to make it a legal right or duty for which payment is made.

Moreover, if the domestic labour becomes a legal right or duty with a paid value, it would affect the division of household labour of a couple and cause damage to the harmony of the family.

However, from the angle of the feminist, the current Code provides that this right of claim for the special allowance for the homemaker/child-carer comes from the couple’s mutual agreement, rather than a legal right conferred on the claimant. Therefore it would not damage family harmony. Furthermore, the ability of the homemaker/child-carer to participate in employment is restricted due to time

and effort needed for domestic work and accordingly it results in a low economic wage, even when they are in paid employment. In order to improve the structural economic inequality in the family relationship, the law should give the homemaker/child-carer the according right of payment for their child-caring contributions and to share either in the matrimonial property or family income. However, the current Code did not recognise it as a legal right unless the other party’s consent to the agreement was obtained.

2.7.5.3 Law’s passive role in family affairs
With regard to the realisation of gender equality in the family, Lee indicates that the law has limited impact on the individual’s behaviour and the attitude toward to the family issue. Although the public/private distinction has been strongly attacked by feminists who assert that family issues and women’s family experience should not be kept outside the public sphere, in practice, how the state intervenes in family issues, particularly in the balance between the state’s intervention and the protection of family privacy, still has remained controversial. In addition, nowadays, whilst the trend of family law is towards state intervention, it has little real effect on gender relations in wider society. To date, the court’s intervention by law is mainly applicable to the protection of minors; with regard to gender issues in family, disappointingly the court is still passive.

2.7.5.4 Reflections on the Interpretation of the Justices of Constitutional Court
Apart from the Civil Code, the interpretation of the Justices of the Constitutional Court is one of the sources of law in Taiwan’s legal system. The Justices of the Constitutional Court in Judicial Yuan have the power to interpret the Constitution and ensure the uniform interpretation of statutes and regulations in line with the Constitution. The Constitutional Court is the highest authority to interpret the written law and its interpretation is binding on all lower courts as the Constitution of Republic of China (Taiwan) article § 78 provides:

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Chapter Two

The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of statutes and ordinances.74

With regard to the application of gender equality in family law at a constitutional level, the Justices have made several milestone interpretations to show the move of the border between the public/private sphere:

Case 1: The rights to and the duties of parenthood

Issues: Article §1089 of the Civil Code provides that in the case of parental disagreement in exercising parental rights over a minor, the father shall have the right of making the final decision. Is the provision of the said Article compatible with the Constitution?

Judgment: Gender equality is applicable to the family union, therefore, the husband and the wife shall equally share the parental rights as the Justices indicated:

‘Article 7 of the Constitution states: "All citizens of the Republic of China (Taiwan), irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Article 9, Paragraph 5, to the Amendment provides: "The State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality." The union of man and woman through marriage, and the children created from that union are subject to the above constitutional obligations. In an exceptional situation, where discrimination based on sex is to be allowed by the Constitution, the exceptional situations must be grounded on biological differences or the differences in societal functions as the consequence of the biological differences in order for the exception to be held valid.

Article 1089 of the Civil Code stipulates that "parental rights and duties concerning minors, unless specified by other statutes, shall be borne by both parents. Should there be disagreement in the exercise of parental rights and duties, the father shall be accorded the right of final decision. In cases where one of the parents becomes incapable of exercising these rights, the spouse shall assume the duties. Should it be the case that both parents are incapable of exercising parental rights, the next capable person shall assume those duties." This particular Article was enacted during the nineteenth year of the Republic, the product of cultural traditions and social mores of a bygone era. With widespread education, and equal access to education granted to both sexes, favorable changes in employment conditions, and women having greater career opportunities, conditions are virtually indistinguishable for both men and women; this Article stipulates that in the event of disagreement, the father shall have the final say; the recommended action should be a

compromise between the two parents in the interest of preserving gender equality in exercising parental rights, or else, in the event of such a disagreement, the position of the mother will be subordinated to that of the father, which constitutes a gross violation of gender equality, and creates a glaring discrepancy with the actual status of women in today's family.

Based on the above, Article 1089 of the Civil Code, which stipulates that in situations with regard to parental disagreement in exercising parental rights over that of a minor, the father shall have the right of final decision, is therefore incompatible with Article 7 of the Constitution, which states that both sexes are equal under the law, and also with Article 9, Paragraph 5, to the Amendment which prohibits sexual discrimination.

This Article should be amended and shall be void within two years from the day of this Interpretation.

This problem should be resolved based on the premises of the principle of gender equality and the best interest of minors; in the event that such a disagreement arises, the nearest relative or a conference of relatives, or the family court decision shall have the right of final decision, unless there are extraordinary circumstances in which steps other than the normal course of action should be considered.  \[75\]

Finally, the male dominated provision in Article 1089 has been removed and its current provision is based on a gender neutral principle where the parents shall jointly exercise their parental rights and assume the duties of the parenthood, unless otherwise provided by law. If one of them is unable to exercise such rights, the other party is eligible to exercise such rights alone. If there is inconsistency between the parents in the exercise of the rights, they may apply to the court for the decision in accordance with the best interests of the child\[76\].

**Case 2: The making of domicile**

**Issues:** Does Article 1002 of the Civil Code which provides that a husband’s place of residence shall be that of the wife, violate the principle of equality and proportionality as specified in Articles 7 and 23 of the Constitution, thus being null and void?

**Judgment:** the domicile shall be decided by mutual agreement of the husband and wife, rather than being decided by the husband’s domicile. The Justices interpreted that:


\[76\] See note.2, Taiwan Civil Code, §1089.
'It stipulates in Article 1002 of the Civil Code that the residence of the wife shall be that of the husband and the residence of the taken-in husband shall be that of the wife; nevertheless, in case there is an agreement that the residence of the husband shall be that of the wife or the residence of the wife shall be that of the taken-in husband, the agreement shall be upheld. Though the proviso renders the opportunity for the husband or the wife to make an agreement on the residence, one shall accept the residence of another as his/her residence in the case where the husband or the wife of the taken-in husband refuses to make such an agreement or in the case where no agreement can be made. The above law does not take into consideration that the other party of the marriage also has the right to choose the residence and does not cover specific circumstances, which is in violation of the principle of equality and proportionality of the Constitution. The above law shall become void within one year from the date of this Interpretation.

In addition, the designation of the residence of the couple is different from the marital obligation to cohabitation. The residence stipulation is made to determine the effect of legal matters related to the couple, which shall not be viewed as the only place designated by the Civil Code where the couple may perform their marital obligation to cohabitation. Both parties to the marriage have the obligation to live together as long as the marriage shall last, regardless of whether or not a residence may have been designated.\(^78\)

Finally, the current version of the Article 1002 provides that the husband and the wife can agree their domicile by mutual agreement; if it has not been agreed or cannot be agreed, they may apply to the court for the decision\(^79\). Again, the Code used a gender neutral law to regulate the designation of the home.

**Case3: The married daughter's inheritance rights**

**Issues:** Are the provisions of the regulations for the handling of the government owned housing and farlands vacated by married veterans after their hospitalisation, retirement or death, which deprive a veteran’s married daughter of a veteran of her inheritance in respect of the distributed farmland and its subsequent cultivation upon the veteran's death, in violation of the Constitution?

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\(^77\) The term of ‘taken-in husband’ refers to the custom by which a wealthy family that lacks an heir might take in a boy child. The boy would take on the last name of his new family, and traditionally would marry to the family's daughter. The boy is called ‘taken-in husband’.


\(^79\) See note.2, Taiwan Civil Code, §1002.
Judgment: The said regulations were held to be unconstitutional as it denied the married daughter’s right to inheritance, the Justices explained that:

‘All citizens of the Republic of China (Taiwan), irrespective of sex, shall be equal before the law; the state shall further substantive gender equality.’ The foregoing provisions are unambiguously set forth in Article 7 of the Constitution and Article 10-VI of the Amendments to the Constitution, respectively. The state organ, in carrying out public administration missions, shall also comply with the aforesaid constitutional provisions while formulating rules and engaging in private acts that are subject to private law. The Regulations for the Handling of the Government Owned Housing and Farmlands Vacated by Married Veterans after Their Hospitalization, Retirement or Death as proclaimed by the Veterans Affairs Commission, Executive Yuan, on July 11, 1980, are designed by the state to deal with the circumstances in the wake of the government’s retreat to Taiwan by helping veterans to settle down and earn a living.

Under the said regulations, numerous parcels of state farmland administered by the Veterans Affairs Commission are distributed to veterans as special and preferential treatment by the state. As such, the rights and legal benefits so conferred are different from those acquired by the ordinary citizens. A legal relationship of loan for use is formed between a veteran and the state as far as the distributed farmland is concerned. A loan for use is a contract without compensation that forms a specific relationship between the loaner and loanee.

Upon the death of the veteran or the fulfilment of the loan for use, the competent authority should terminate the contract to reclaim the farmland so as to use the national resources in a reasonable manner. If, instead, the competent authority allows the veteran’s surviving dependents to continue using and cultivating the originally distributed housing and farmland for the specific purpose of ensuring their livelihood, it should then consider whether the scope of the term “dependents” should extend to the veteran’s children, and weigh their abilities to earn a living and cultivate the farmland to determine whether it is necessary to continue with the assistance to enable those with equal legal status and standing to enjoy the same benefits before making appropriate plans based on the principle of gender equality. Section 4-III of the aforesaid Regulations for the Handling of the Housing and Lands provides, “If the surviving spouse of the deceased veteran remarries but is without issue or only has daughter(s), the land and housing shall be reclaimed unconditionally upon the marriage of the daughter(s); and the rights of the veteran may be inherited by his son, if any.”

The relevant provisions, which state to the effect that the right of inheritance in respect of a deceased veteran is limited to his son regardless of whether the son is capable of making a living, whether it is necessary to render assistance, and whether the son is married, are inconsistent with the principle of gender equality without having to consider whether the distributed farmland may be the subject matter of inheritance because they have gone so far as to give discriminatory treatment to a specific class of women based on sex and marital status. Therefore, the competent authority shall, within six months from the date of this Interpretation, carefully review and revise the relevant provisions based on the aforesaid essence of this Interpretation. 80

80 See Interpretations of Justices of Constitutional Court No.457, 1998, available
It is definitely clear that the Justices repeatedly confirmed that gender equality shall be applied in family life and they could not accept any law against women. However, could it still be argued that the Justices have revised the traditional patriarchal values with an active mindset from the interpretations? The inference is that they have not exactly achieved this as the Justices changed their position remaining neutral and being ‘judicially passive’ rather than ‘judicially active’ in the situation where the words used in law are not obviously unfair to women. This is illustrated in the following case involving domestic violence.

Case 4: Women’s difficult position in domestic violence

Issues: The Supreme Court’s Precedent holds that “although a spouse who has suffered unbearable mistreatment in cohabitation is entitled to sue for divorce, it does not include cases where the other party temporarily loses control and overreacts to the spouse’s misconduct”. Is the said Precedent compatible with the Constitution?

Judgment: Where there is unbearable mistreatment the court shall have regard to one’s education levels, social status and other relevant factors, the Justices indicated that:

‘The maintenance of personal dignity and the protection of personal safety are contained in the Universal Declaration of Human Rights, and are also two of the fundamental concepts underlying our constitutional protection of the people’s freedoms and rights. Article 9, Paragraph 5, of the Amendments to the Constitution, which provides that: “The State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality,” enshrines the above ideas. In Interpretation No. 365, this Council has held that this constitutional protection shall also be applicable to marital relations and domestic life. The objective of marriage is for a husband and wife to live together. The spouses should strive and cooperate to maintain their mutual satisfaction, security and happiness.

Therefore, it is not only a necessity for a stable marriage but also generally expected that a husband and wife should respect each other to improve mutual harmony and to prevent domestic violence. Article 1052, Paragraph 1, Subparagraph 3, of the Civil Code, which provides that a spouse who suffers unbearable mistreatment inflicted by the other party in cohabitation is entitled...

to resort to the courts for a divorce, is aimed at protecting the personal dignity and safety of both spouses. If the mistreatment becomes so severe that the continuity of the marital relationship seems unlikely, a request for divorce should be approved. To determine so-called “unbearable mistreatment in cohabitation,” the courts should, case by case, take into account the degree of the mistreatment suffered by the injured party, the levels of education of both parties, their social status, and so on, and determine whether the continuity of marriage is threatened. If the degree of mistreatment suffered by the injured party goes beyond the encroachments on personal dignity and security that would be tolerated by most spouses, this should be seen as unbearable mistreatment in cohabitation.

The Supreme Court’s Precedent S.T. 4554 (Supreme Court, 1934) held that: “although a spouse who has suffered unbearable mistreatment in cohabitation is entitled to ask for a divorce, this does not include cases where the other party temporarily loses control and overreacts to the spouse’s misconduct.” The holding said only that the other party temporarily losing control and overreacting to the spouse’s misconduct should not necessarily be seen as inflicting unbearable mistreatment in cohabitation. Accordingly, once education levels, social status and other relevant factors have been taken into account, if the overreactions do not threaten the continuity of the marriage, the request for a divorce based on unbearable mistreatment in cohabitation should not be approved.

This precedent does not intend to confer upon the other party powers to punish the party who commits the misconduct. If the degree of mistreatment suffered by the injured party goes beyond the encroachments on personal dignity and security that would be tolerated by most spouses, this should be seen as unbearable mistreatment in cohabitation. Therefore, the Supreme Court’s Precedent S.T. 4554 (Supreme Court, 1934), which does not exclude the application of Article 1052, Paragraph 1, Subparagraph 3, of the Civil Code if the other party’s overreactions become detrimental to the continuity of marriage, is not in violation of the Constitution.82

In the above interpretation, it could be argued that the Justices’ position on this issue remained questionable as they indicated that the protection of personal dignity and safety within the family may vary according to the injured party’s education or social status. Moreover, they also implied that what conduct constitutes the so-called unbearable mistreatment may differ in each case.

However, the role that the court should play is to judge whether the injured party’s request should be approved, but not to decide whether the injured party is eligible to the request. Thus, it can be inferred that those who have a lower social and economic status, traditionally women, might need to endure more mistreatments. Therefore, on one hand, seemingly the Justices rebutted the

gender inequality within a family only in the circumstance that the words used in law definitely discriminate against women. On the other hand, the Justices showed their deference to the law where there are no words used in law clearly discriminating against women even though the unequal treatment to women results from the traditional family values\(^{83}\).

2.7.5.5 Reflections on the trend of gender neutral law

In the past, the poor position of women in the private sphere of family was not seen as a public policy issue. For women, society only has sympathy with their poor situation if they really have had or regards the women's experience as an individualised case, such as the unequal division of household labour has been seen to be out of the women's own willingness. Nowadays, the male dominated law is no longer seen in legislation, which has been replaced by gender neutral law. However, in fact, one survey results indicate that 53.5 percent of those surveyed held that Taiwan is still a male dominated society. However, 35.3 percent of those surveyed still agreed that the male breadwinner and female homemaker family is the best choice for the couple\(^{84}\).

Moreover, the wage difference between men and women is normally seen as a result of naturally physical differences. These prejudices against women's position normally come from the lack of gender awareness\(^{85}\). In order to respond to the calls for the gender equality in family law, there have been significant changes in family law reform in past two decades. These changes can be generalised into two main strands of approach in the amendments to the family law. The first strand is to degender the law and the second one is to settle the major family issue by mutual agreement.


\(^{84}\) This survey was based on 1091 respondents who are aged over 20. Survey dates: July 2010, available at: <\texttt{www.rdec.gov.tw/public/Data/08129323971.pdf}> 11/01/11 accessed.

\(^{85}\) Under certain circumstance, women are generally being considered as causing themselves problems, e.g. a woman will suffer from the sexual harassment if she is sexually attractive or a wife who is suffering from the domestic violence will be presumed to be lack of communication with her husband. See Wang, H.T., (2007) \textit{op.cit.}
The trend of degendering family law could be seen as one of the processes of achieving the goal of gender equality and it has been the leading guideline in previous reforms in family law since the 1980s. The common practice of the lawmaker was to replace the husband-dominated exclusive rights and duties by enabling the husband and wife to jointly share them, e.g. currently the rights to parenthood are jointly shared by the husband and wife.

In order to adjust the property relationship between the husband and wife, the lawmaker has also removed the husband-dominated provisions from the previous version of property regime which was embodied with patriarchal thinking. Nowadays the entire separation of property has been set up in the current default property regime where the husband and wife retain their own property respectively from the commencement of the marriage until divorce. As a consequence of degendering the property regime, the party’s rights and duties of the property would not differ between the husband and wife.

However, further discussions on the illegality of ostensibly neutral laws are needed as long as there is a gap existing between gender neutral legal norms and inherently gendered social norms. Moreover, an illusion that there is no difference of rights and duties between the husband and wife may have been created through the trend of degendering the law. That is to say, such an unrealistic illusion confuses the reality and the ideal of legal norm and may put off further reform of gender equality within family as social norms would not be automatically altered because of the change of wording used in law.

Although the patriarchal system has lost its justification in law due to the previous family law reforms, it is uncertain how substantive gender equality can be realised within the family. In the past, in addition to the support of legal norms, the patriarchal system has greatly relied on deep rooted social norms and institutions. Disappointingly, the family law reforms did not seem to have adequate capacity to shake out the ingrained patriarchal values and institutional

power within the structure of marriage and the family more generally. Although
degendering the law has given a new standpoint of gender equality and provided
the husband and wife with a chance to negotiate with each other over family
issues, gender as factor which affects the rights and duties between the husband
and wife which has not yet been removed.

The lawmakers tried to value different genders equally by offering each the same
treatment in terms of new legal norms and expected to reach the goal of
substantive gender equality by degendering the law. In addition, they also
believed that the masses would automatically absorb and abide by the spirit of
new legal norms which are ostensibly gender neutral. By this route, it was
thought that the gender issues which exist within the family, and particularly in
the division of household labour, would be successfully resolved.

With regard to the division of household labour, the “Census of Taiwanese
Housewives’ Sense of Happiness” indicated that nearly 65 per cent of those
surveyed said that they became housewives in order to take care of children or
elderly parents. In addition, 53.1 per cent of those surveyed are housewives with
part time jobs either at home or outside of home. Therefore, it is clear that
women are still playing the main role of child-carer and domestic contributor
while they have to go out to work88, and further many retired women living with
their children are offering their domestic services89. Therefore, traditional
customs and institutions are not being as strictly abided by as in the past; the
restraints through social norms in industrial society are not as influential as they
were in the agricultural society, but in reality the rigidly gender images shaped
from patriarchal system are still playing a powerful role.

Accordingly, the lawmaker’s optimism for gender equality has never been
fulfilled and it could be argued that there are two mindsets that the lawmakers
might have adopted behind the ostensibly gender neutral legal norm. One is that

88 See The census of Taiwanese Housewives’ sense of happiness 2006 ,in Taiwan, there were about 4.86 million housewives, including 2.28 million full time
housewives, 750,000 housewives with part time jobs at home, and 1.83 million
the lawmaker’s attitude towards the seemingly gender neutral legal norm is overconfident and the other one is that they just wanted to perform their duties in a perfunctory manner\textsuperscript{90}. Either way, such mindsets have proven to be a barrier to the promotion of substantive gender equality.

To what extent can the influence of patriarchal family norms also be found in the development of family law reforms? In order to follow the goal of gender equality, the second strand of guidelines for law reforms was to degender the wording used in legislation and require the husband and wife to share rights and to reach a mutual agreement on certain family issues\textsuperscript{91}.

This aims to get rid of the domination of men over the women so that the goal of substantive gender equality required in the Constitution can be carried through. However, the wife and husband still have to proceed with negotiations under the shadow of patriarchal family norms, as long as these norms have potential and factual influence over family issues. In practice therefore, sharing the rights in family issues would exist in name only. The goodwill of pursuing gender equality within the family does nothing but pay lip service to those who have less negotiating power, typically women.

Negotiating or bargaining power is perceived as real power which influences the outcome of negotiations. It also refers to the ability of the negotiator to influence the behaviour of another. As people negotiate, power can shift from one side to the other in response to changing circumstances. Ideally, it should be extremely rare for the power in negotiations to be one sided. In theory, each party should press for the terms beneficial to him or her and finally an acceptable outcome of mutual benefit would be reached. However, this is not the reality in couple negotiation as each party only have very limited power to negotiate given the strong influence of patriarchal family norms. This makes it far less likely to alter

\textsuperscript{91} Under the Code, the parties may reach a agreement on the domicile; the child’s surname name(article 1059); the duty to pay the costs of the household(article 1003-1); the special allowance for the homemaker/ child-carer(article 1018-1), see Taiwan Civil Code, at note.2.
the respective rights and duties and the gender roles will not shift mutually through negotiation.\textsuperscript{92}

Under these circumstances where each party’s bargaining power is limited and unequal, the outcome of any negotiations is unlikely to go beyond the scope of patriarchal family norms. In the traditional patriarchal family, the father/husband is the main decision maker, therefore, mother/wife shall obey their father/husband or have their father’s/husband’s tacit consent over major family issues. Since the father/husband had the legal privilege to make decision, they did not have to share the decision making rights with their mother/wife unless the father/husband were willing to share.

Currently the father/husband no longer has the legal privilege of deciding family issues in law, but the unequal bargaining position between the husband and wife arising from social norms is still critical in this situation, particularly on the issue of how law values the non-financial (homemaking/child-caring) contributions to the marriage relationship. Under the Code, if either the husband or wife seeks to achieve economic independence during the marriage relationship, he or she may reach agreement for this with the other party in terms of how to perform the duty to pay the costs of the household, the duty to maintain each other and the special allowance for the homemaker/child-carer. By leaving this as a matter of private negotiation, rather than public duty, it is clear that if no such agreement is reached, the Code, the Constitution and the judges who interpret these decisions hold the position of not intervening in the above issues as they strictly adhere to the maintenance of the public/private distinction despite the unequal and gendered effect of social norms on the negotiating process.\textsuperscript{93}

Moreover, the contents of patriarchal family norms refer to the expectations of the husband or wife, other family members and the public. For those whose behaviour is incompatible with the family members’ expectations and with social norms, they would not only have been seen as lacking justification but would also lose the support of the public and definitely would receive negative

\textsuperscript{92} See Lee, L.J., (2007), \textit{op.cit.}, p.41

feedback and be stigmatized within the wider community. The reason why wives are unwilling to challenge tradition is because any wife herself also realises where the boundary of patriarchal family norms lies and the social danger inherent in crossing it. In order to avoid the negative outcome of challenging social norms and institutions, women tend to not to request the opportunity to make an agreement, despite their legal right to do so.\textsuperscript{94}

2.8 Summary

The ultimate goal of gender mainstreaming is to reach gender equality in both the public and private sphere. In addition, what the gender mainstreaming requires is to reach de facto equality, not just de jure equality. Gender mainstreaming also has the function to sift out the gender inequalities hidden in every corner of the society by examining the government’s planned action and policy.

Moreover, the lawmaker’s response to the call for gender equality on the law reform where appears in the form of gender neutral laws is called in question. The reality is that the de facto gender equality within the family is hard to realise under the influence of patriarchal family norm, let alone by just relying on gender neutral law. Therefore, in order to make gender equality a reality within the family it is absolutely necessary to question the illegality of ostensibly neutral laws. This remains to be observed in the future by the Justices. At least the law shall do something more effective and bring its expressive function into full play to bridge the gap between the social norm and legal norm.\textsuperscript{95} Thus the goal of substantive gender equality may be reached, such as the entitlement to the special allowance for the homemaker/child-carer remains to be considered to remedy the drawbacks of gender neutral law.

\textsuperscript{94} With regard to women’s self restrained behaviour of not to make agreements of special allowance for the homemaker/child-carer, the duty to pay the costs of the household, please see the findings of the interviews in empirical research in Chapter 5.

\textsuperscript{95} See Lee, L.J., (2007) \textit{op.cit.}, pp. 46-54
2.9 Conclusion

Under the influence of Confucian thinking, the patriarchal family has been rooted in Taiwan society for a very long time. The mode of gender division of labour where women are expected to play the role of the main family carer not only affects family life but also influences the working environment and social policy. Therefore employers may expect their male employees to be the ideal staff as they do not have the distraction of also having to perform homemaking and childcare. Women face the dilemma between the invisible disadvantage of promotion in employment and the unpaid homemaking/ caring within family in Taiwan.

Moreover, the state plays a subsidiary role of caring for the vulnerable such as the disabled, the aged and children, as women are always presumed to undertake the responsibility of caring in an individual family. Thus it can be seen that there is still a close tie between patriarchal family and other social structures.\footnote{Jhang, C.L., (2008) ‘A Study on Women’s Policy in Taiwan: From the angle of feminism’, \textit{Police Science Bimonthly}, Vol.39, No.2, pp.75-104.}

In order to reshape the family structure and standards to make gender equality a reality within family, further positive cooperation from social systems and sectors is needed. More importantly, the mindset and behaviour of the majority of people in Taiwan is greatly dominated by patriarchal family norms supporting the operation of the patriarchal family. Many rigid gender images surrounding the patriarchal family, such as ‘men as the breadwinner, women as the homemaker/ child-carer’, ‘male has the exclusive right of succession’ and ‘parents are taken care of by the son and daughter-in-law’ have been traditionally handed down and abided by. Furthermore, these images also have been circulated generation to generation and became one of the perfectly justified social norms. In addition, such social norms do not merely sustain the continuation of the patriarchal family but are the obvious barriers to achieving gender equality within the family.\footnote{Chen, L.W., (2002) ‘Gender Equality in Family: The Reflection of Marriage and Family Involvement’, \textit{Journal of Women’s and Gender Studies}, No.14, pp.173-274.}
Given these conclusions, the next step is to see how far the revisions to the Taiwan Civil Code which used a gender mainstreaming approach has fulfilled the expectations of those who hoped they could address these issues in aspects of Family Law. To do this, a small qualitative study was undertaken, as shall be seen in chapters 3-5. The next, chapter 3, will start with the consideration of the methodology for this study.
CHAPTER THREE: METHODOLOGY

3.1 Introduction
This chapter explains the rationale for the methodological approach taken to explore the research questions, and describes the design for its implementation. The chapter begins by briefly reviewing the purpose of the study and the research questions. This is followed by an outline of the research design, including the overall research materials used and the research stages, together with the information of methods in each stage employed. Particularly, the empirical work in Taiwan is highlighted regarding the details concerning sampling, data collection procedures and analysis. Finally, the issue of ethical considerations is addressed.

3.2 Purpose of the Research
Although a number of studies have been carried out into non-financial (homemaking/child-caring) contributions to the marriage relationship in many countries, there is little research into the assumptions underpinning the operation of the law from a cultural perspective. Hence, the purpose of this study, as Chapter One established, is to explore how the laws in England/Wales and Taiwan assess the value of non-financial child-caring contributions to the marriage relationship, and to examine the effectiveness of current laws in reference to the economic protection of the homemakers/child-carers in these two countries against their very different cultural backgrounds. Through discussing the above issues, this comparative study also aims to point out the lacunae and anomalies in the current legislations in both countries, and puts forward some suggestions and proposals for the future development or reform to the recognition of the value of non-financial (homemaking/child-caring) contributions to the marriage relationship.

In order to carry out the aims proposed above, this study tackled the following principal research questions within the English and Taiwan law contexts, which are shown below:
Question 1:
How do the laws, from a comparative perspective, assess the value of the non-financial child-caring contributions to the marriage relationship?
1.1 How do the laws consider the validity of prenuptial agreements?
1.2 How do the laws provide financial support for homemaker/child-carer during marriage?
1.3 How do the laws distribute the matrimonial property in the event of divorce?
1.4 How do the laws provide financial support for the ex spouse after divorce?

Question 2:
How do the gender neutral laws conceptualise the value of non-financial child-caring contributions to the marriage relationship?
2.1 How do the laws realise the value of non-financial child-caring contributions to the marriage relationship?
2.2 How do the laws compensate the homemaker/child-carer for his/her financial loss?

Question 3:
How can the value of non-financial contributions to the marriage relationship be reconceptualised in law through gender mainstreaming to achieve substantive equality for homemakers/child-carers?

3.3 Research design
3.3.1 Materials and resources
In order to thoroughly understand and provide a well-represented map to describe how non-financial child-caring contributions to the marriage relationship are valued in both legal systems, documentary materials have first been gathered and reviewed. As reminded by Silverman, the analysis of such materials ‘must (also) incorporate a clear understanding of how documents are produced, circulated, read, stored and used for a wide variety of purposes’ 98. Hence, the resources in this study tended to focus on official documents and research literatures, which involved a wide range of relevant documentary

sources, such as parliamentary debates, legislation, reported court cases, law reports, law journal articles, law textbooks, research papers, statistics, newspapers, online databases and websites in the jurisdictions.

A documentary analysis was conducted to achieve a contextual understanding of the legal environment and practices within these two countries from relevant documents. As from 2002, the amendment to the Taiwan Civil Code has formally recognised the value of non-financial contributions to the marriage relationship and gave effect to assessing these values within marriage by various means. However, few debates in the research-based literature can be found that focus on the effectiveness of the new law relating to the recognition of the value of non-financial child-caring contributions. Thus, after a deliberate consideration, it was thought necessary to conduct an empirical study to explore the effectiveness of the new law due to the shortage of relevant documentary materials on this in Taiwan law context. Thus the effectiveness of the 2002 reforms will be assessed both through an analysis of the existing literature, but supplemented with insights given by the data gained from the empirical research. In adopting this approach, this study provides a better integrated and original overall viewpoint to reflect on the value of non-financial contributions in Taiwan.

In contrast to the lack of materials to reveal the working of the civil law system in Taiwan, a wealth of relevant materials in England and Wales have been obtained from a wide range of literature, and further detailed principles underpinning the law were also available from the legislation and the ruling of recent judicial decisions within the English legal system. Additionally, due to the consideration of time, and monetary resources, empirical work in England and Wales was not practicable. However in order to clarify some specific aspects of how English law operated in practice on which no literature could be found, one meeting with the Senior District Judge of the Principal Registry of the Family Division of the High Court in London was facilitated in February 2011.

3.3.2 Three stages of research design
For the reasons outlined above, a mixed method approach has considered to be best suited to examine the relevance for phenomena from several perspectives. The design of this study, therefore, has been carried out using as the following
three stages, and the method in each stage is also shown below:

**Stage 1**
A literature review involving analysis of relevant materials England/Wales and Taiwan was used in this study. This involved reading, describing, analysing and interpreting the documents. Furthermore, it has been suggested that the researchers should pay careful attention to both the 'literal (or surface) and deeper meanings'\(^{99}\) when interpreting materials, in which the knowledge may involve the specific context by using certain language terms. Thus, it was important in this comparative study to be aware that the issue of the definitions and meanings in the different legal and cultural backgrounds was likely to emerge. Finally, the inductive method was used to build up the main research questions from the results of the literature analysis.

**Stage 2**
Given the lack of literature on the workings of the amendments to the Taiwan Civil Code, a qualitative interview study with the legal practioners and academics was undertaken. As Creswell stated, *'the intent of qualitative research is to understand a particular social situation, event, role, group, or interaction'\(^{100}\).* Silverman further explains that qualitative methods can provide *'a deeper understanding of social phenomena'\(^{101}\).* In this stage, the qualitative approach in empirical research has been employed along with the findings in stage one to seek an overview of how the value of non-financial contributions in Taiwan were being assessed, either in theory or practice. More details of this empirical work, including the selection of sampling and the methods of data collection and analysis will be discussed in next section (2.4).

**Stage 3**
The combined method of macro-comparison and micro-comparison\(^{102}\) was employed and the findings from the comparison between England/Wales and

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Taiwan were analysed in order to consider appropriate suggestions for further law reforms.

3.4 Empirical research in Taiwan

In order to explore whether the law, in practice, was being used to assess the value of non-financial child-caring contributions to the marriage relationship as foreseen by the amendments to the Code in Taiwan, a detailed exploration through semi-structured individual interviews with six female participants each with high reputation and professional knowledge in the field of family law were carried out between June and August 2009 in Taiwan.

The following section briefly explains the qualitative interview study conducted in Taiwan. It includes how the sample was being selected, the data collection instrument chosen and the method used to analyse the data.

3.4.1 Selection of sample

The participants chosen for this study came from a population of legal specialists in family law area, particularly family law lawyers, judges and academics. The reason to select the participants from these background was to obtain the professional knowledge from their experiences, either in practice or in theory, to review how the new Family Law Chapter under the 2002 Code assesses the value of the non-financial child-caring contributions in marriage. The aim was to gather expertise from those who advised on the provisions of the Code and so knew its aims as well as those who were operating these provisions in practice, as lawyers and judges in the family field, and were able to judge what extent its aims were being fulfilled in practice.

3.4.1.1 The requirements for selecting sample

In order to ensure the information gathered from participants touched the perspectives of both theory and practice, the participants in this study have been selected from both academic and practice fields. In the academic field, it was decided to select only target participants who had been specialised in the family law area for at least ten years. With regards to the basic qualification for sample selection in the field of legal practice, namely family law lawyers and judges,
target participants were required to have practical experience of dealing with family law cases before and after 2002 when the amendments of the Code were introduced. In this way, the study aimed to capture the knowledge and expertise of those who had experience of family law before and after the radical amendments were introduced and advise on how the value of the non-financial child-caring contributions had progressed over this time.

3.4.1.2 Participants in this study
The original plan was to choose twelve target participants for this study, six males and six females, including four judges, four lawyers and four academics. The invitation to participants was sent to them individually in May 2009 by recorded mail, setting out the research purposes, interview plan and ethical consent form. Eventually, only six female participants were willing to participate in this project and accepted the interview request, including three judges, three lawyers and one academic. However, one of the judges only agreed to carry out a telephone interview and preferred to answer the questionnaire questions in turn, without being interviewed face to face. Therefore, the data gained from this judge was not directly comparable with that from the other participants and was ultimately not used.

Table 3.1 below provides a summary of the case study participants, with their background and specialist information. The rights of using their names and background information have been given from participants’ research ethical informed consent forms. (For more details please see the ethics section (3.5)).
### Table 3.1 Background information of participants

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<thead>
<tr>
<th>Name</th>
<th>Gender</th>
<th>Occupation</th>
<th>Working experience</th>
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<td>Family law lawyer</td>
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<td>Civil Law Judge, family division of Taiwan Taipei District Court.</td>
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<td>You</td>
<td>Female</td>
<td>Family law lawyer</td>
<td>Senior Family Law Lawyer, Mei-Nyu You Law Firm.</td>
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Participant lawyers and judges selected were all from Taipei City and Taipei County, where the populations are about 5,200,000 and contain approximately 25 per cent of total population of Taiwan\(^{103}\). It is important to recognise that a

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potential limitation of the research is that the experiences or information provided by the participants may be shaped by the culture of the region, containing unique characteristics or phenomena which influence the way and the value of non-financial (homemaking/child-caring) contributions to the marriage relationship are assessed and might not be representative of experiences in other areas of Taiwan. However, Taipei courts deal with a large number of family law cases from variety of urban and rural areas by the district courts of Taipei City and Taipei County, giving a good perspective on the law. The viewpoints from participants, therefore, are identified to provide a useful contribution to conduct this study.

3.4.2 The data collection instrument
The data collection instrument employed in this study is a conversational style semi-structured interview where the participants were asked open-ended questions. A list of issues or questions to be addressed had also been prepared for interviewer and participants before the interviews to act as an aid-memoir. However, there still was a degree of flexibility to the structure/content of the interviews to allow for greater insights into and enable participants to speak more freely about the topic. The interviews were mostly held at the participants’ office or a place they preferred which would make them feel the most comfortable and accessible in accordance with good practice. Each of the interviews was structured around six main questions (see Appendix A Interview Questions, p270) in a 90 minute recorded voice file. Notes were made in case of any appliance fault. The reasons for choosing interviews as the data collecting approach in this study are described below.

Firstly, interviews are mostly used when the research requires detailed and personal opinions and ideas particularly in relation to benefits, attitudes, values and feelings. People who participate in an interview are usually asked to describe in depth issues such as how they do their work, or something relevant to their life experience. Grix identifies four broad types of interview, including the

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semi-structured interview. This type of interview, also called in-depth interviews, is much more flexible to enable the interviewer to explore a specific topic more openly, and also allows interviewees to express their opinions in their own words and for the pursuit of unexpected lines of enquiry. The researchers may not obtain everything they want to know through the prepared interview questions, probing questions, therefore, provide a ‘much freer exchange of opinions between interviewer and interviewee’ when it is felt that clarification or more details are required. Consequently, it is also a good way to ‘strengthen research findings as it provides rigor, breadth, and depth to the phenomenon being investigated’.

Secondly, due to the time and monetary resources, the quantitative methods for data collection, such as a structured questionnaire survey, which sought a nationally representative sample, were considered unachievable. Furthermore, this work aims to gain deeper viewpoints on the law is approach to the value of non-financial (homemaking/child-caring) contributions to the marriage relationship. It is argued that the quantitative methods, which may only get either simple yes or no answers or certain chosen items from the prepared answers, would be unable to offer a detailed and actual insight into this subject area.

3.4.3 Data analysis

Once the data had been collected, the next step was the analysis of the materials. Data analysis of interviews often relies on a process of coding or scoring recurrences of similar patterns, searching for agreement and disagreement between each of interviewees, interpreting the responses to questions, and then finding out the themes relevant to the research topic. Hence, the approach of data analysis in this study was reading of the transcripts and a thematic coding and analysis of the data, using grounded theory to make theory from the data.

106 See Grix, J., op.cit, p.127.
107 See G. Esterberg, K., op.cit, p.87.
3.4.3.1 Transcription

The interview data was in the first instance fully transcribed verbatim incorporating hesitations. Due to the fact that the interviews in this study were carried out in Taiwan, the participants were not sufficiently familiar with English. Hence, the transcriptions were firstly written in Chinese and returned to the interviewees for respondent validation. Afterward, the Chinese transcripts were translated into English. In this process, considering the difference of language and cultural background, the meanings and the English words/terms used in the transcriptions were double checked by a colleague examination to ensure the internal validity.

Coding the data

‘Coding involves attaching one or more keywords to a text segment in order to permit later identification of a statement’ \(^{110}\). This method was applied to interview data collected in this study. The analysis of the interview data was manually carried out. Although there was some computer software available for analysing qualitative data, the computer packages were not used given the small sample size. Some meanings are expressed in a roundabout way and did not fall into one particular pattern. Therefore, in order to avoid that, the basis for initial categories was formed by the wording of questions under which the data were collected, then ‘meaning condensation’ followed by ‘meaning categorisation’ was carried out\(^{111}\). This stage of the analysis involved reading and re-reading the transcripts, as is important for researchers to familiarise themselves with the data. As Radnor suggests, it is going through this process that ‘helps [a researcher] to stay close to the data’ \(^{112}\) before any attempt at systematic analysis is made and researchers then reduce the possibility of misinterpretation.

Furthermore, another important step of developing an analysis was to look for

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\(^{111}\) Meaning condensation is referred to the abridgement of the meanings expressed by the interviewees into shorter formulations. See Kvale, S., (1996) *Interviews: An Introduction to Qualitative Research Interviewing* (London: SAGE) p.192.

patterns (similarities and differences) in the data. Usually, different interviewees might handle the same kinds of issues or deal with different issues in similar ways. The same kinds of events might occur repeatedly, or similar patterns might occur over and over among different events\textsuperscript{113}. In addition, colour coding was used, giving each category a colour and indicating on the transcript the relevant response. Therefore, a systematic approach was used in order to recognise patterns and build up relationships between categories. Cross referencing between the categories which resulted from the coding of interviews was also carried out to see where there was consistency or inconsistency of responses.

### 3.5 Ethical considerations

As Wellington indicated, ethical issues encompass ‘\textit{the moral principles governing research practice}’\textsuperscript{114}. The consideration of ethics is widely recognised as necessary to any research design at each stage of the research sequence. Basically, the researcher is obligated to respect the rights, needs and uses of the information collected, as well as the rights of the participants. Given the personal nature of the data collected it was essential to ensure that this study complied with the School of Law’s Statement on ethical practice.

#### 3.5.1 Informed consent

Aside from this obligation to respect the information, the researcher also has an obligation to respect the rights of the participants. In this study, firstly, all participants were asked to give informed consent on a voluntary basis before they agreed to participate in this empirical study. In order to ensure they were fully aware of their rights and have some understanding of the context and purpose of this study, each participant was given a written information sheet including interview questions, together with a Consent Form (see Appendix B Consent Form including an example in Chinese version, p272-273). The information included details, purpose and procedures of the study, as well as addressing the participants’ right to withdraw at any time, and advice regarding confidentiality issues associated with participants. The participants were asked to sign this form and return it to researcher. Moreover, a verbal overview was

\textsuperscript{113} See G. Esterberg, K., \textit{op.cit.}, p.168.

also offered again to obtain the permission to record the interview process from participants before interviews took place.

### 3.5.2 Right to Withdraw

This interview study was conducted on a fully voluntary basis, therefore, the participants were informed that they had a right to withdraw from the interviews at any time without giving any reason. The right to withdraw was stipulated on the consent forms for participants to sign.

### 3.5.3 Anonymity and Confidentiality

“Collecting, using and sharing data in research with people requires that suitable ethical and legal procedures are in place. Laws also govern the use of some kinds of data, such as the Data Protection Act”\(^{115}\). As this study deals with issues of a potentially sensitive nature regarding the participants’ private opinions on legal affairs drawn from their professional experience, the data with their full personal information was not released to or accessed by any unauthorised third person and is completely confidential to the researcher only. An offer of confidentiality was given in the consent form by their masking names on the interview transcripts as they provide a level of anonymity to everyone. However, in fact they all actually agreed to be named on the interview transcripts and thus they were not anonymised. The data with personal information shall be kept for as long as necessary up until the completion of the PhD process. It was made clear to the participant that the written report shall be only for academic use and their full personal details would only be made available for those who involved in the making procedure. It was explained the thesis containing views they expressed would be retained in the University library for further use.

### 3.6 Limitations of the Research

Firstly, wide ranges of literature used in the subject arguments addressed in this thesis were written before and after 2002. However, the literature in the subject of this thesis since the amendment to Taiwanese Civil Code 2002 has been very limited and proved insufficient.

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\(^{115}\) See UK Data Archive, available at: <http://www.data-archive.ac.uk/create-manage/consent-ethics/legal> 02/01/11 accessed.
Secondly, the interviews were conducted in Taiwan to seek to the legal specialists’ experience in the arguments addressed this thesis to fill the gap in the post-2002 literature by seeking views on how the reforms were working in practice from experts in the field. However, the sample was only from Taipei City and Taipei County which are the two biggest cities in Taiwan. The main purpose of the interview schedule was to suggest recommendations for further law reform through their experiences. However, the findings of interviews were not intended to be nationally representative, although the interviewees are specialists in this area. In order to get deeper and broader insight into the arguments addressed in this thesis, consideration of a large scale sample could be considered to be undertaken in a future study.

Thirdly, the sex of the all the interviewees selected in this study was by coincidence female. It could be argued that the experiences of different sexes of interviewees may differ. The experiences of male and female interviewees might affect the reliability of the research because of different treatments they have received, yet they are all legal professionals dealing with male and female clients and so it is hoped that they have put forward a balanced perspective.

Fourthly, the decision not to undertake an interview study in England and Wales was due to time and money limitations. It is evident that an insight into English law can be gained through the far larger literature on the working of the law since the judicial activism which led to the new approach from 2000 onwards. However, it is hard to know how satisfactory the law is. Further consideration might be given to this area in ongoing research.
CHAPTER FOUR:
THE CONCEPTION OF THE VALUE OF NON-FINANCIAL CONTRIBUTIONS TO THE MARRIAGE RELATIONSHIP IN TAIWAN

As discussed in chapter 2, the goal of gender mainstreaming is to achieve the substantive gender equality in all areas and at all levels, including family area. This chapter examines whether Taiwan legislation in terms of the protection of homemaker/ child-carer has achieved the goal required by gender mainstreaming.

4.1 Introduction
Valuing non-financial contributions to the marriage relationship has traditionally been seen as a taboo in Taiwan society although specific laws which recognise the value of non-financial (homemaking/ child-caring) contributions have been passed in the Family Law Chapter of the Taiwan Civil Code in 2002. The written law, namely the Taiwan Civil Code 2002, seemingly has on the face of it achieved the goal of promoting the economic status of the homemaker/ child-carer by attaching a value to these contributions. However, when examining the law in action, a large number of people still hold the position that giving a financial value to the homemaking/ child-caring contributions is incompatible with the traditional virtues that presume women should be in charge of housework or child-caring.

Moreover, in reality most women still mainly play the role of the sole homemaker/ child-carer in a breadwinner/ homemaker family, even though they have to work outside the home. In addition, they are expected to have an unshirkable duty to, without any wages, undertake the important tasks of managing the household and raising the children according to prevailing social and cultural norms. Thus it is clear that the law in action is greatly influenced by the social norms enmeshed in the culture over many years. A distinct gulf has existed between the written law and the law in action regarding the issue of how to promote the homemaker’s/ child-carer’s economic status and dignity within the family. It could be argued that the spirit of recognising the value of non-financial contributions to
the marriage relationship can be achieved in practice relies on inserting the symbolic provisions of the written law which will in practice induce change though the power of the law.

Therefore, a good way of exploring the effectiveness of such symbolic legislation is to examine the law in action. In so doing, it is necessary to observe the interaction between the social norms and legal norms to see whether changing the law changes cultural practice or whether the relationship is more complex. This chapter proposes to analyse the obstacles faced by a homemaker/child-carer in attempting to rely on Civil Code provisions in practice, and attempt to assess the effectiveness of the current law in Taiwan.

Firstly, in order to gain understanding of the social norms operating in Taiwan on married couples, this chapter is intended to give a brief introduction to Confucian literatures, such as Li-Ji and Nyejie, to explore how the Confucian thinking gradually sets a rigid role of husband and wife in terms of social and cultural norms, locking women into the family and ignoring the value of homemaking/child-caring contributions in the name of traditional virtues.

Secondly, at the legal norm level, in the first half century after the Taiwan Civil Code was first promulgated in 1930s, there were many changes in family structures, social structure, economical environment and people’s attitude toward life, rendering the Code’s assumption outdated in the family law sphere. During that 50-year period, the traditional thinking of Confucianism coexisted with the new thinking of civil law system in the Taiwan Civil Code. This can be seen particularly in the contents of the Family Law Chapter under the Code where the compromise between the Eastern culture and Western culture was apparent, and where there were a large number of provisions explicitly embodied male domination and a patriarchal system in that Chapter. In 2002, the discriminatory provisions against women under the Code were repealed. The

116 In the developments of a society, the social norms and legal norms interact with one another in everyone’s actual life. The law should not just be discussed in the books, and further, the solution to a problem found in the theory on paper is not good enough to examine the effectiveness of law. Therefore, from a perspective of pragmatism, how to make the maximum effectiveness of a system of law by means of exploring the relevant social life and experiential facts is hugely important. See Liou, H.E., (2003) op.cit.
current Family Law under the Code is entirely constructed on a gender neutral basis. However, it could be argued that the goal of gender equality can be achieved by means of gender neutral laws in the face of prevailing gendered social norms is the most difficult question to answer. This still remains to be seen and is the subject of this thesis\textsuperscript{117}.

Therefore, this chapter also looks to review the effectiveness of the provisions related to the recognition of the value of non-financial contributions from both the constitutional level are the Civil Code level. In general, under the Taiwan Code, the provisions that could be seen as giving recognition to the value of non-financial contributions through the marriage are:

1. Matrimonial property regimes: in dealing with the property relationship between the parties the Code adopts the concept of matrimonial property to enable the homemaker/child-carer to have the right to claim half of the deferred community of surplus;

2. In the field of financial support: the Code exempts the homemaker/child-carer from the duty of contributing to pay the costs of household by carrying out the household management;

3. The Code enables the couple to agree that the homemaker/child-carer will be paid a special allowance by the wage earning spouse which is placed at the homemaker's/child-carer's own disposal and is in addition to their living expenses;

4. The spousal duty to maintain the other spouse by meeting their basic needs.

4.2 The Confucianism’s impact on the social norms
Over the past thousands of years Confucian thinking has made significant contributions, both politically and economically, to the social stability in ancient

feudal society. However, with the rapid social changes experienced at the end of the twentieth century, the position of women in society has shifted towards equality with men and gender awareness has gradually arisen to the extent that challenges have been made to those social norms greatly influenced by Confucian thinking; the so called “traditional virtues”. Although some Confucian thinking is probably out of keeping with the times and incompatible with the affirmation of the value of being or human dignity which involve acceptance of gender equality, it still could be argued that such thinking in some cases has more influential impact on social norms’ progression than the legal norms have on family practices. The traditional way of understanding gender relations continues to influence social norms in Taiwan, although legal developments from 1985 onwards have sought to challenge this.

Taiwan has inherited a Confucian culture which now operates within a more capitalist economy. In order to understand the Confucian views on the value of non-financial (homemaking/ child-caring) contributions to the marriage relationship, it is necessary to trace back to the Confucian views on the social etiquette between man and woman which are embodied in Taiwan culture.

4.2.1 The position of Confucian thinking in Taiwan culture
In the ancient periods, the Confucian creeds had a similar position to that of the law. The emperor usually ruled the country with Confucian creeds. Up until now, Taiwanese thinking has been greatly influenced by the Confucian thoughts about the role of great divide between men and women. Confucianism does not merely puts great emphasis on the etiquettes and rites upon which family relations are founded, but has greatly influenced the patriarchal clan system as much as national laws. Every person in society ought to comply with these rites and etiquettes in order to become a socially acceptable unit as required by Li Ji.

118 Taiwan (Republic of China) which was built up in 1911 and China (People’s Republic of China) which was established in 1949 are different countries. Although there has been a hugely political issue between these countries, however, culturally they belong to the same source and have been greatly influenced by Confucianism. The culture of Taiwan is a hybrid blend of Confucian Han Chinese, Japanese, European, such as Netherlands, Spain and Portugal, American, global, local and Taiwanese aborigines’ cultures, which are often explored in both traditional and modern understanding. See Huang, C.C., (1995) Introduction in Cultural Change in Postwar Taiwan, (Taipei: West-view Press), pp.1-5.
The principles in the *Book of Rites* contain rules about social norms and are very powerful, and they have similar force of law in western terms. Although Confucius himself rarely directly refers to what the position of women should be, it is still clear to be understood how the Confucian thinking provides rules for women’s behaviour by examining the moral creed for females in the *Book of Rites*. As explained in the following section, the Confucian thinking not only intended to cultivate women’s inner thoughts of moral characters, such as *San-Tsung* and *Sz-De*, but use *San-Gang* and *Wu-Chang* to reinforce the subordination of woman to man.

In addition, a man/breadwinner and woman/homemaker model in family has been set up by Confucianism thousands years ago. Thus, the strict rites are rooted in daily life and Chinese people shape the standardised model of an ideal woman under the influence of Confucian thinking, and further, such a model not only becomes a man’s way of judging a woman, but is the ultimate goal that women seek to achieve, although the Confucian thinking on women’s position would be seen as entirely having the ideas of male domination and feudal patriarchy from a modern gender equality perspective.

### 4.2.2 Self-cultivation (*San-Tsung* and *Sz-De*)

*San-Tsung* outlines the three duties of obedience women must possess, and *Sz-De* outlines the four virtues of women in ancient China, both of which are spiritual fetters of wifely submission and virtue imposed on women in feudal society. What is the notion of *San-Tsung* about? The *Book of Rites* interpreted this as follows:

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119 Li Ji, the Book of Rites, was one of the Chinese Five Classics of Confucian Canon, has had a significant influence on Chinese history. It mainly described the social norms, governmental system, and the ancient/ ceremonial rites of the Zhou Dynasty (c. 1050-256BCE). The original text is believed to have been completed by Confucius himself, and the book has been edited and re-worked by various different scholars of the Han Dynasty (202BCE- 220CE). See Luo, L.T., (2007) *Introduction to Sinology*, (Taipei: Yun-Liou Publisher).

Women shall have the three duties of obedience: to father before marriage, to husband after marriage and to son after the death of husband. The broad meaning may refer to taking heed of the male’s advice or warnings, to accompany the male, and to submit her to the male. On one hand, Confucian thinking instilled the San-Tsung in women in the name of virtues. However, on the other hand, it built up a male dominated world. Women were deprived of rights of self determination.

Therefore, women were imprisoned within the private sphere, particularly within family. The notion of the ‘home’ is the only place for women to move around in. They were seen as second-class persons and should be entirely subordinate to men. In addition, in Confucian thinking, the term of ‘sky’ may refer to the God with sovereign power, and women were required to treat their father, husband and son as their ‘sky’. In other words, the male’s position is the highest equivalent to a god. Relatively, women’s role in Confucian society is nothing but a tool to help men achieve fame and success.

With regard to Sz-De, the Nyujie\(^{122}\) details what virtues an ideal woman should possess. The four virtues are: morality, proper speech, modest manner and diligent work of women in ancient China. As the Book of Rites requires:

‘教以婦德，婦言，婦容，婦功’\(^{123}\)

they also can be found in Nyujie, the Lessens for Women:

‘婦行第四；女有四行，一曰婦德，二曰婦言，三曰婦容，四曰婦功。夫云婦德，不必才明絕異也；婦言，不必辯口利辭也；婦容，不必顏色美麗也；婦功，不必功過人也。’\(^{124}\)


\(^{122}\) Nyujie which was also known as lessons for women. It was written by the Han Dynasty female scholar Ban Zaho(45-116CE). This book was one of the essential readings for educated women which rule the women’s behaviour and conduct in the first part of 20th century.

\(^{123}\) Shie, D. Y., op.cit. p.42.

It interprets that an ideal woman ought to possess wifely virtue, wifely speech, wifely appearance and wifely work. Now what is called wifely virtue need not be brilliant ability or exceptionally different from others. Wifely speech needs to be neither clever in debate nor keen in conversation. Wifely appearance requires neither a pretty nor a perfect face. Wifely work need not be work done more skilfully than that of others. These qualifications are one-sided and only apply to the wife and are not necessary to the husband.

4.2.3 The man/outside and woman/inside home model

In general, the Confucian views about women have significant influences on the female role models in Chinese culture. Furthermore, interpretations of the rites which endorsed and reemphasised these values by the later followers of the Confucianism produce many inequalities of treatment between the male and female which are acceptable without question in Taiwan society. The Book of Rites not merely set up the rigid roles between men and women, but created an inside/ outside home model; it stipulates:

eva> 男不言內，女不言外。非祭非喪，不相授器。其相授，其無篚，則皆坐奠之而後取之。外內不共井，不共福浴，不通乞假，男女不通衣裳，內言不出，外言不入。’

The above statement strictly requires that the husband is in charge of matters outside the home and, on the contrary, the wife should be responsible for the household matters. Such a statements set up a strict gender divide of the roles between the homemaker and breadwinner, and it resulted in the husband’s supreme power over the family finance as he is the sole wage earner outside the home. In the Confucian family structure, the husband needs to earn wages outside the home and look after the whole family with his income. In legal terminology, the husband has the duty to maintain every person in the family. Therefore, it is not necessary to value homemaking in an economic view as it is the work any woman who possesses the virtues is willing to do.

The Confucian thinking has put a high emphasis on the importance of the

so-called “inside/ outside model”. For example, in order to convince women of the importance of acting the role inside the home, Confucian thinking also stressed the greatness of motherhood. One case which was used to illustrate this is as follows: the emperor’s mother is allowed to affect the emperor’s decision on national business with the status of being a mother, so that in this way women could possess the power over men. However, on the other hand, the above statement was contradictory to the San-Tsung as the Book of Rites still required that:


The wife must show obedience to her husband in regard to the household as her husband is the head, the sole decision maker in the family. In addition, the wife shall serve her husband like the junior generation serves the elders. In short, the Confucianism intended to set up a system and social organisation characterised by male dominance, but disguised in flowery language. Such a system requires that the wife must abide by the belief in male domination throughout her life. To date, the rigid man/outside and woman/inside still had a profound effect on the gender role and division of household in the modern culture even though the Taiwan Family Law is on a gender neutral basis. Women’s role is still principally seen as being within the private field than the public sphere.

4.2.4 Taking over the mother-in-law’s role of being a homemaker/child-carer

The rites of Confucian thinking not merely taught women how to become an ideal wife, but required them to be a qualified daughter-in-law. Particularly according to the wedding custom, the wife must be well dressed and pay a formal visit to parents-in-law in the early morning on the first day after the wedding. This visit is customarily seen as the handing-over ceremony of the role of homemaker/child-carer. Afterward the wife takes over the mother-in-law’s role
of being a homemaker/child-carer and the mother-in-law retired from the role homemaker/child-carer\textsuperscript{128}. As a rule, a single woman becomes a married woman after going through six important rites of ceremony\textsuperscript{129}. It is undeniable that the Confucian thinking also stressed the importance of the role of homemaker/child-carer through holding serious rites of ceremony in this regard.

4.2.5 Social structure (San-Gang and Wu-Chang)

In addition to the role of women within family, Confucian thinking also set up guidelines for women’s interpersonal relationship outside the home. In order to maintain social stability, Confucian thinking simplified the social structure to three human relations which are called San-Gang. The relations include: a king must be the role-model for his minister, a father must be a role-model for his son and a husband must be a role-model for his wife. Among these relationships, the human relation between the husband and wife is seen as playing the most important role in social development. The husband and wife must strictly abide by their role under the doctrine of San-Gang. Otherwise, it would undermine the foundation of society and the public will also show strong social disapproval of those who have not complied with the specific role. Each person in the society between the relative relationships must play their proper own role according to San-Gang. Only when the three human relations interact with each other properly, a stable and strong society can be built.

In addition to San-Gang, Confucian thinking also emphasises the five humanities which are called Wu-Chang referring to benevolence, honour, courtesy, wisdom and trust need to be borne in mind at any time in the case that the wife gets along with her husband. As a result, either San-Gang or Wu-Chang are used to deepen the inner thoughts of male domination in terms of public relations.

Once again a husband’s role-model for his wife directly reinforces the subordination of women to men. This model also incorporated the wife’s personality into the husband’s and became one. Thus, women had no rights to participate in the society and politics, no entitlement to the matrimonial property.


\textsuperscript{129} \textit{ibid.} pp.11-13.
Women became the husband’s property.

4.2.6 The wifely duty in current society

As mentioned above, Confucian thinking was mainly grounded on male domination, and it was functional in the period of patriarchy. However, it also brought the modern society the negative effects on the gender division of social roles. The Confucian thinking intended to anchor the role of woman to the family and regards the non-financial (homemaking/child-caring) contributions as a wifely virtue with no value or worth. In addition, Confucianism does not allow women to participate in the public affairs. There were strict restrictions against women’s participation in the public domain by means of rigid man/outside and woman/inside home model. Even though some women do so, their contributions to the public sphere were still being seen as minimal and therefore of less value. The rigid image of women’s role in the private family sphere causes a strong link to the low value placed upon women’s labour either in the public sphere or private sphere. In other words, the moral goodness, such as San-Tsung and Sz De, does not need to be assessed by market value, as the virtue is of a priceless worth and, as a result, valuing non-financial contributions would be seen as undermining the nature of traditional virtues of Confucian thinking.

In modern Taiwan society, women’s participation either in the public domain or private sphere has been improved by the legislature\(^{130}\). However, it could be argued that to a certain extent Confucian thinking still influences the view of women within cultural and social norms. In some cases, San-Tsung and Sz-De are still even the potential standards used to judge whether a woman is an obedient wife or loving mother. For example, in deciding where to reside, the Code adapts gender neutral basis allowing the husband and wife to decide the domicile by mutual agreement. However, one social phenomenon exists where the wife would customarily be seen as a virtuous daughter-in-law if she is willing to live with parents-in-law and look after them, although she does not have any legal obligation to do so. This phenomenon indicates that the more sacrifices

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\(^{130}\) In terms of the women’s political rights, Taiwan has the reserved-seats system for women, e.g., the number of female members of Legislative Yuan on each political party’s list is reserved by the Constitution of Taiwan and the number shall not be less than one-half of the total numbers. See Additional Articles of the Constitution of Taiwan, Article 4, s1, see note 57.
she makes to her husband’s family, the more virtues she would possess in the eyes of public society. In comparison, men are not required to act in this way.

Over the past thousands of years in Chinese culture, Confucian thinking is not only the foundation of social structure, but plays the most influential role in the social norms of the feudal society. Specifically in the view of women, the Confucian thinking requires that women are subordinate to men, and men are presumed to act the role of patriarch, or the head of family. In order to stabilise the patriarchal system, Confucian thinking reinforces the dichotomy that the man is responsible for matters outside the home and the woman for household matters. Although the current legal framework does not require that the breadwinner and homemaker model should be followed within the family, however, traditional Confucian thinking has been embodied this model in most Taiwan families over the past hundreds of years. Furthermore, women have been educated to believe that it would be a great glory if a wife could make sacrifices for her husband and family to fulfil her duties faithfully and uncomplainingly. In most cases, it would probably be seen as unconventional if the women prefer to work outside, rather than stay at home.

Moreover, this wifely duty is considered as a necessity to found the husband’s family honour. Thus, such rigid thinking greatly instils the breadwinner / homemaker model in the family. In order to help the husband develop and keep his mind on the business, as a matter of course, women have been supposed to stay at home to act the role of homemaker/ child-carer. The general belief is that it would certainly bring honour to their previous generations if their daughter can be socially recognised as a dutiful wife and loving mother. The saying of ‘behind every successful man there is a great woman’ seemed to perfectly justify the gendered division of household matters in Taiwan society. It also inculcates women with a sense of family duty whilst at the same time denying giving the recognition of the woman’s independent personality and economic status in the family. Some probably fear that women will be unwilling to do housework if they are no longer economically dependent on men.

4.2.7 The impacts of Confucian thinking on current society
The influences that the traditional virtues bring into Taiwanese society can be
reflected in the following aspects from the views of the husband and wife.

4.2.7.1 Different attitudes towards homemaking/child-caring between husband and wife

Research indicates that during the period between 1970s and 1990s, in the dual-income families, wives were still undertaking the heavier burden of homemaking than husbands despite the fact that the wives’ socioeconomic status, gender awareness and social gender class norm has greatly changed. It also shows that although husband’s participation in housework has increased, they mostly did the housework together with their wife, rather than being willing to do it alone\footnote{Liu, Y.S. and Yi, C.C., (2005) ‘Conjugal Resources and the Household Division of Labour under Taiwanese Social Change: A Comparison between the 1970s and 1990s Social-Cultural Contexts’, Taiwanese Sociology, No.10, pp.41-94.}. Moreover, the effects of a husband’s socio-economic status in the two contexts between the 1970s and the 1990s suggests the influence of gender ideologies associated with particular classes and persistence of class-gender norms\footnote{Ibid.}.

The research demonstrated that the ideology of man/outside and woman/inside home model still influences the husbands’ view on gender division of household labour, although they have gradually participated in housework and accept the change of gender awareness\footnote{Wang, S. and Mo,L.L.(1996) ‘Family Values of Married Male in the Chinese Family’, The Soochow Journal of Social Work, No.2, pp.57-114.}. This rigid model makes an obvious distinction between ‘men’s housework’ and ‘women’s housework’, men are more unwilling to be engaged in women’s housework, such as laundering and cooking, as Taiwanese husbands take women’s housework as an unmanly business. The husbands are more willing to do manly business such as household maintenance\footnote{Tang, S.M.,(2001) ‘A Study of How Household Chores Are Allocated and What They Are Affected by- For Only Dual-earner Couples’, Journal of Living Science, No.7, pp.105-131; see also Chuan, C.F., and Lee, E.W.,(2007) ‘Women’s Housework and Men’s housework’, Journal of Social Sciences and Philosophy, V.19, Issue.2, pp.203-229.}.

4.2.7.2 Unequal division of household labour between husband and wife

Recently, the latest studies show over the past 30 years in Taiwan, the traditional
gender division of household labour is little changed and wives still act the main homemaker despite working full time\textsuperscript{135}. With regard to the participation in the household, the ratio of wife to husband remains 2:1\textsuperscript{136}. In some cases, married women have to consider leaving their job if no one is able to share the child-caring with her. In 2006 the average scale of leaving job due to give child birth is 15.39\%, and up to 21.42\% for the first child birth. In addition, the scale of leaving job due to marriage is 34.31\%\textsuperscript{137}. The numbers prove that marriage and child birth are the two main reasons for modern Taiwanese women’s leaving job. They undertake the unreasonable pressure of not only acting a sole homemaker/child-carer in family, but risking losing her job outside the home. However, the law does not ask them to do so; other pressures are at work here.

Moreover, national statistics indicate that over 80\% of Taiwanese married women act the main role of homemaker and over 25\% of the housewives did homemaking alone and more than half of wives had husbands who were unwilling to help them with the homemaking. These statistics also show that 54\% of married women, aged from 20 to 29, are the main homemaker in their family. This number increases up to 90\% over the age of 40\textsuperscript{138}. Thus, social norms regarding the division of labour are shifting and slowly becoming less gendered.


\textsuperscript{138} See: The census of knowledge, attitude and practice of contraception in Taiwan, was released in 2007 by the Bureau of Health Promotion, department of health Taiwan, there were 4500 samples of married women aged from 20 to 49, available at: $<$http://www.bhp.doh.gov.tw/BHPnet/Portal/file/ThemeDocFile/200712271155527713/%e8%aa%bf%e6%9f%a5%e7%b0%a1%e4%bb%8b%e2%80%94%e5%8f%b0%e7%b0%9c%b0%e5%8d%80%e5%ae%b6%e5%ba%ad%e8%88%87%e7%94%9f%e8%82%b2%e5%8a%9b%e8%aa%bf%e6%9f%a5.ppt#1$>$, 10/01/11 accessed.
4.2.7.3 The sense of happiness of Taiwanese housewives

One survey was launched in 2006 which was called the census of Taiwan housewives’ sense of happiness that showed that around 40 percent of those housewives surveyed were willing to adopt the role of homemaker if they were starting married life again, and 64 percent of those housewives surveyed agreed that their main purpose in life was to look after the members of their family. Meanwhile, the survey also indicated that most housewives surveyed have little discretionary income at their own disposal. Over one half of those housewives surveyed had less than 350 U.S. dollars to spend per month. About 25 percent of those housewives surveyed, or estimated 1.21 million housewives had less than 160 U.S. dollars and 12 percent, or estimated 580,000 housewives, had no allowance at their disposal. Compared with the GNP in 2006 which indicated that it was about 16.491 U.S dollars per person, the monthly amount of money housewives can manage is relatively disproportionately small. Yet despite this huge disparity the housewives surveyed reached 78.4 in a scale of 100 in the sense of happiness. It is probably a kind of self-enforced sense of happiness that arises out of the belief that it is virtuous for a wife not to complain, which is another embodied social norm under the influence of Confucian upbringing.

4.3 The evolution of legislation

Nonetheless, with rapid changes in politics and economics in the modern Taiwanese society, Confucian thinking is gradually losing its force to regulate the relationship between men and women either in public or private sphere. The namely traditional virtues are no longer able to resist the society’s urgent call for law reform on gender issues in family law area.

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139 See: The census of Taiwanese Housewives’ sense of happiness 2006 which was conducted by the Institute for Public Opinion of Shih Hsin University. Organisers of the survey released the results and called on Taiwanese men ‘to be thoughtful’ to their wives and mothers. There were 800 samples of housewives aged from 20 to 59 in the census. Available at: <http://www.tsu.org.tw/index.php?option=com_content&task=view&id=44&Itemid=59>, 10/01/11 accessed.

140 The current exchange rate between New Taiwan dollars to U.S. dollars is about 1:30, available at: <http://rate.bot.com.tw/Pages/Static/UIP003 zh-TW.htm>, 02/01/11 accessed.

4.3.1 Three waves of women’s movement- Gender awakening in Taiwan

As aforementioned, in the past feudal society, the wife’s non-financial (homemaking/child-caring) contributions were deemed as an esteemed sacrifice for her family. Therefore, some argued that assessing the value of the non-financial contributions within marriage would cause serious destruction to social order and family harmony. The idea of wages for women’s housework may be seen to undermine the moral principles on which Confucian society was built. Furthermore, it would also violate the essential principles of social relationships as required by Confucianism\textsuperscript{142}.

Over the past two decades, due to the spread of the Western influences to the East, Taiwan society has gradually absorbed the thinking of gender equality. The notion of gender equality challenges the traditional Confucian thinking about the position of women in family.

More recently, the urgent need for gender equality has gained recognition and influence within Taiwan society and politics. In the development of thinking on gender issues, the women’s movement has been playing a key role and became a powerful force to achieve the goal of gender equality. There were three waves of women’s movement in the Taiwanese’s feminism history\textsuperscript{143}. In the 1970s, the first wave of Taiwanese feminism, known as ‘New Feminism’ was launched by Shiou Lian Liu, the former Vice President of Taiwan, which was the birth of the native feminist movement at that time. Liu published books on gender issues to introduce the western feminist thinking into Taiwan and used publications to challenge traditional gendered roles in Taiwanese society. However, the women’s movement did not go further due to an insufficient amount of support within society at that time, although gender awareness has been slowly growing throughout Taiwanese society.

\textsuperscript{142} There was a fierce debate on the wages for the housewife in the process of law reforms. See: (2002) ‘The Legislative Yuan Gazette’, V.91, I.48, pp.29-137; V.91, I.42, pp.123-146. Available at: <http://gaz.ncl.edu.tw/browse.jsp?jid=79001516&year=091_f>, 09/01/11 accessed.
In the early 1980s, the second wave of Taiwanese feminism continued. In 1987 the Awakening Foundation was founded by a group of Taiwanese feminists and became a significant foundation of the women’s movement in Taiwan. The main aim of the foundation was to establish an equal and harmonious society for men and women in Taiwan. Some significant Bills on gender issues during the 1980s were drafted by Awakening Foundation and these were introduced to parliament. During the debates surrounding family law reforms, they also brought up the ideas of wages for the women’s housework and tried to implement these ideas in the amendments to the Taiwan Civil Code. The successful amendments to the Code in reference to the protection of homemaker included the revision of marital property regimes in 1985. This could be seen as first time to give recognition of non-financial (homemaking/ child-caring) contributions.

The third wave of feminism began in the 1990s, Taiwanese feminists still worked for the promotion of gender equality on many perspectives. Apart from creating a gender neutral education and improving women’s political participation and employment, they also kept campaigning for the family law provisions in Civil Code to be updated and amended. The fundamental elements involved in the proposed amendments to the Code were to remove husbands/fathers favouritism over wives/ children on surnames, child-caring and custody, marital residence and marital property ownership issues. More recently the concept of the special allowance for the homemaker/Child-carer in 2002 was introduced. Whether the idea of wages for the women’s housework has been successfully incorporated in the legal norms will be discussed in the following sections.

4.3.2 The constitutional level

In the context of the constitution of Taiwan, one of the state’s primary policies is that the state shall *protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality*. All law and policy must be compatible with this aim or they could be held invalid on the grounds of unconstitutionality. It is clear that what gender equality in the constitution of Taiwan requires is not just to achieve the goal of same treatment between men and women. On the contrary in fact, in certain cases the same

144 The Additional Articles of the Constitution of Taiwan was passed in 1991, see note.57, Art. §10.
treatment might result in real inequality. Therefore, the gender equality that the constitution of Taiwan refers to is substantive gender equality and not just formal equality and this should be applied in both the private and public sphere as has been legally recognised by the Justices of Constitutional Court. Any legal treatment which is incompatible with the policy of substantive gender equality would be interpreted as unconstitutional and void. Thus, the next section looks at whether the current Taiwan family law is compatible with the constitutional requirement with regard to the recognition of the value of non-financial contributions to the marriage relationship.

4.3.3 At Code level
Overall, the weakness and strength of the Code on how it assesses the value of non-financial contributions to the marriage relationship can be reviewed from the aspects of the property relationship and financial support provisions in the Code. The Code deals with the parties’ property relationship by setting out different types of matrimonial property regime (including the default statutory regime). In addition, a further aspect of recognition of the value of non-financial contributions can be examined through the different types of financial support provided by the Code, including the duty to maintain, the obligation to pay the living costs of the household and the special allowance for the homemaker/child-carer.

4.3.3.1 The evolution of the Code on the recognition of the value of non-financial (homemaking/child-caring) contributions
How to promote gender equality within the family has been one of the leading principles guiding each proposed family law reform. However, under the shadow

145 Please see the Interpretations of the Justices of the Constitutional Court: No.365; No.452; No.485; No.620, available at: <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp>, 03/01/11 accessed.
146 In Taiwan, the Constitutional Court is organised by the Justices and its position is similar to the House of Lords in UK. It’s constitutional duty is to be above partisanship and maintain the judicial independence, trying cases free from any interference.

The power of the Justices consists of providing rulings on the following four categories of cases:
(1). Interpretation of the Constitution;
(2). Uniform Interpretation of Statutes and Regulations; and
(3). Impeachment of President and Vice President of Taiwan.
(4). Declaring the dissolution of political parties in violation of the Constitution.
of Confucian thinking, what values should modern Taiwan family law embody and attempt to promote? The tension between new gender equality thinking and Confucian thinking becomes very clear in the subject of how to value non-financial contributions within marriage.

Historically, with regard to the legal evolution of how the law values non-financial (homemaking/child-caring) contributions to the marriage relationship, there have been three important amendments to Taiwanese family law. In general, the amendments were mainly based on the gender equality principle and they include: the introduction of the matrimonial property regime in the 1930s, enabling the husband or wife to be entitled to the share of matrimonial property in the event of divorce; the legal duty to maintain each other was confirmed by the Code in the 1980s\textsuperscript{147}; the amendment to matrimonial property regime, the exemption of the homemaker’s/child-carer’s obligation to pay the living costs for the household and special allowance for the homemaker/child-carer in 2002. However, disappointingly there has been no amendment made to the maintenance after divorce.

On the whole, the Code attempted to introduce the recognition of the value of homemaking/child-caring contributions by safeguarding the homemaker’s/child-carer’s property rights over matrimonial property. However, the value is only realisable on divorce and property rights are therefore nothing more than contingent rights during the marriage. Nevertheless, the Code has at least achieved the gender neutral level in law.

The most common type of the marriage in Taiwan is still the male breadwinner-female homemaker/child-carer marriage in a single-income household which represents two thirds of married households\textsuperscript{148}. Within that type of family whether the gender neutral provisions in the Family Law Chapter can on their own change or help change the social phenomenon that

\textsuperscript{147} Prior to 1980s, whether the duty to maintain each other was a moral or legal obligation was disputable. To avoid disputes on this issue the Code has made it clearer that maintain to each other shall be a legal obligation.\textsuperscript{148} The national statistics shows that the rate of married women in dual-income household is 34.3% in 2003, 37% in 2006, available at: <http://www.dgbas.gov.tw/public/Attachment/88111331271.doc>, 05/01/11 accessed.
homemakers/child-carers are always the economically weaker party still remains to be seen.

4.3.3.2 Matrimonial property regime

In the development of the property regime, there has been a trend away from a male-dominated regime to a separation-based regime. The wife does not have full legal capacity over the property unless the separation of property is being adopted, as will be seen below.

The traditional thinking that a wife must treat her husband as her sky has its roots in early Taiwan society has been reflected in legal thinking. In the 1910s, the wife’s right to own her property was recognised by judicial decisions and she could retain the ownership of dowry given by her family even if she divorced. However, it could be argued that the wife was not given the complete capacity for the transactions due to law’s traditional patriarchy. In that period of transition, the wife had to return any gifts to her husband given by him if she remarried; if either the wife or the husband cannot prove that she or he owns the property, the husband was assumed to have the ownership of this property.

With the spread of the influences of the Western thinking, there has been a gradual shift from coverture the scheme whereby the husband alone could own the family property ownership to separate scheme for marriage relationships in the 1930s. In that period, the legislation intended to promote the married women’s economic status within the family by regulating the property relationship between husband and wife on divorce as explained below.

The married woman’s marital property rights were legislatively recognised for the first time in the Family Law Chapter of the Taiwan Civil Code, which was promulgated in 1931. The Code was modelled on the civil law system of the

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150 See Kuo, W. op.cit, no.886, 1915; no.147, 1918.
151 ibid, no.228, 1918.
Continental Europe and first introduced the matrimonial property regime\textsuperscript{153}. In that period, the default regime was the matrimonial property regime under which all property belonged separately to the parties at the point of their marriage and their after-acquired property constitutes the matrimonial property.

In particular, that part of the matrimonial property which belonged to the wife at the point of the marriage or which comes to her during marriage by succession or other gratuitous gift constituted her unreserved property\textsuperscript{154} and she retained the ownership. The husband was the owner of his unreserved property and of all the other matrimonial property which does not constitute part of the wife’s unreserved property. The burden of proving that any property was the unreserved property of the wife was on the wife who asserts this. In addition, the wife’s income and the natural fruits, for example the rental of her own house, of her property acquired during marriage fell into the ownership of the husband, subject to the provisions in regard to her separate estate.

Under that matrimonial property regime, the husband administered all the matrimonial property and bore the cost of administration. The wife could administer it only within the limits of her power to act as the agent of the conjugal union\textsuperscript{155}. The husband was the sole administrator of the matrimonial property and is presumed to have entitlement to all property which the wife cannot prove belong exclusively to her. The husband undertook the duty to maintain the family and was responsible for the living costs of the household. However the husband has the entitlement to the natural fruit that was produced from the wife’s unreserved property to compensate his loss for the administration costs\textsuperscript{156}. In this period, the concept of valuing non-financial contributions had not been incorporated into the Code and had showed the legal norms to be clearly patriarchal.

\textsuperscript{153} The family law chapter of the Taiwan Civil Code 1931 based on the Swiss matrimonial property system, \textit{ibid}, p.205.
\textsuperscript{154} The term of ‘unreserved property’ refers to the property that does not form any part of the matrimonial property. The owner of the unreserved property can use, manage and dispose of it.
There was no express provision in relation to the recognition of the value of non-financial contributions until the amendment to Code in 1985. Society was still surrounded by unchallenged male dominance before that time, and gender inequality still remained deeply embedded in the matrimonial property regimes of 1931. Half a century later, the public demands for gender equality urged the legislature that the law was out of date and should be revised. The urgent calls for law reform on the grounds of gender equality accelerated the amendment to the matrimonial property regime. Finally in 1985 the legislature readjusted the financial arrangements in the matrimonial property regime under the Code and broadened the scope of wife’s unreserved property.

In order to reach the constitutional aims of gender equality, the 1985 amendments to the Code first gave formal legal recognition to non-financial contributions by providing that where on the distribution of the matrimonial property of the husband and the wife on divorce there is found to be a surplus due to profits made on the property, after deducting the debts incurred during marriage, each party has entitlement to half the surplus. In other words, at that time, the value of non-financial contributions to the marriage relationships was seen as being an entitlement to one half of the deferred community of surplus. The legislature assumed that the value of non-financial contributions have been gradually accumulated during marriage and thus entitled the party who is in charge of the homemaking/child-caring to a half share of the deferred community of surplus on divorce.

However, whereas on one hand, it was a heartening provision that gave legal recognition of non-financial contributions to the marriage relationship; on the other hand, the Code had not, unfortunately, provided any safeguarding provision for the entitlement to the deferred community of surplus on divorce to prevent one party from intentionally misusing or disposing of the matrimonial property before the marriage comes to an end. In practice the wife was therefore unable to take any legally protective action to preserve her entitlement to the matrimonial property if her husband’s act intentionally endangers or infringes her right to claim the deferred community of surplus before divorce.
Furthermore, the right to make a claim for the deferred community of surplus on
divorce was nothing more than a contingent right. Again, the value of
non-financial contributions to the marriage relationship was only realisable in the
event of divorce and had no realisable value during marriage. Although the Code
in 1985 gave symbolic recognition of these contributions, it had not yet provided
the economically weaker party child-carer with any substantial preventative
measures to safeguard the share of matrimonial property or to provide financial
support during marriage. In order to more effectively support the financially
weaker party, the voice for further law reform was heard by the legislature in
2002.

Under the 2002 amendments to the Code, one of the legal consequences of
marriage is to ensure financial arrangements between the spouses are placed
under a regulation regime. Thus there is the automatic application of the default
property regime unless otherwise agreed (§1004, §1005)\textsuperscript{157}. The husband and
the wife may, though, choose from one of the contractual property regimes,
namely “community of property” and “separation of estates” provided by the
Code, as their agreed matrimonial property regime (§1007)\textsuperscript{158}. The agreement to
the regime is allowed to be concluded by the parties before marriage and they
can opt out of the agreed regime with mutual consent at any time during
marriage.

In order to ensure the business security and the rights of the spouses, the
conclusion, modification or termination of the agreement must be done in a
written document (§1007)\textsuperscript{159}. The husband and the wife are not allowed to
amend any contents of the property regime, and further, may not conclude any
property regime not listed under the Code. The types of matrimonial property
regime listed in the Code are as follows:

\textbf{A. Default regime}

The default regime is defined and is based on formal equality between spouses
on divorce and separation of property during marriage. Those who are not

\textsuperscript{157} See Taiwan Civil Code, at note.2.
\textsuperscript{158} ibid.
\textsuperscript{159} ibid.
agreed to any regime are legally presumed to opt in this default regime.

- **The advantages of default regime**
  In contrast to the contractual property regimes, such as community of property and separation of estates, provided by the Code, the default regime plays a “subsidiary and constructive”\(^{160}\) role in the system of property regime. The Code assumes that laypersons generally do not have a good understanding of their financial affairs during marriage and what would affect their property distribution in the event of divorce. Even though the couples have a good understanding of the types of regime before entering into marriage, they have not had any real opportunity to observe and learn from married life. In order to avoid the future disputes over the property relationship during marriage and distribution of property on divorce, the Code thus aims to provide a pre-emptive solution through its default regime.

  Furthermore, prior to marriage it is unimaginable to require the couples to precisely predict their financial situation during marriage. For couples who want to get married, but without having any legal advice, it is quite difficult for them to make a decision on what property regime should be chosen or to make a pre-nuptial agreement to deal with the financial arrangements either during marriage or on divorce. Inevitably the adoption of the default property regime can reduce the unnecessary time-consuming negotiations between the parties. As a matter a course, currently the default property regime is widely accepted as appropriate and adopted by the majority in Taiwan\(^{161}\).

- **The contents of default regime**
  **What property to be distributed**
  In contrast to the earlier property regime in the 1980s, the core of the current default regime provides a very clear framework and divides the property of each spouse into two distinct categories, namely the property owned before marriage and the property acquired as from the date of marriage. Only the property acquired during marriage shall be taken into account when the court redistributes the assets in the event of divorce. If any property could not be

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161 See Appendix C (2), at p. 281; Appendix C (6), at p. 301.
proven to be acquired before or during marriage, it shall be presumed and classified as the property acquired during marriage; if it could not be proven which party owns the property, the property shall be presumed as being owned by the spouses jointly. Although the property owned before marriage is not the object of redistribution, the natural fruits produced from that property forms part of the property acquired during marriage. Furthermore, if the spouses have adopted a contractual regime previously, but then they change it into the default one, any property acquired before the point of change fall into the category of the property owned before the marriage (§1017). This, it can be seen, has clearly removed the gendered, patriarchal presumptions which had been embedded in the 1930s Code, discussed above.

**Separation of property during marriage**

During the continuance of the marriage relationship, the husband or the wife is the owner of property in his or her own right, he or she would manage, use, collect natural fruits, and dispose of his or her own property acquired before and during marriage respectively. Similarly, the husband and the wife are respectively liable for his or her own debts accrued during marriage, when the debts are paid off by the other party’s property, he or she may claim for reimbursement(§1018, §1023).

**How to distribute the matrimonial property?**

Under the default regime, in the event of divorce, all the property acquired by the husband or the wife during marriage, after deducting any debts, if any surplus left, shall be equally divided, between the spouses. Normally, the spouse with the larger increase in property or income gives half of the difference to the other party, that is to say, the party who has earned or accrued more assets, income or property during the marriage has to hand over half the value of the surplus to the other party who has less property or income. But the property acquired from succession or as a gift and solatium is excluded from the distribution. The Code assumes that the acquisition of that kind of property does not result from the parties’ common efforts to the marriage relationship and the beneficiary or

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162 See Taiwan Civil Code, at note 2.  
163 ibid.  
164 The solatium is a form of compensation for emotional rather than physical or financial harm.
donee owns it respectively. Thus, it has been decided as a matter of the law and policy that the distribution of that property is not justified and this is the position endorsed in the Code.

The example see Diagram 4.1 below may assist the understanding of property distribution in the default regime. Although in general, the spouse with the larger increase in property or income normally gives half of the difference to the other party, the Code does provide that each spouse may apply to the court for readjustment or nullification of the equal distribution of the difference in case of “obvious unfairness” (§1030-1)165. An example of this would be that one party may assert that the other party does not deserve an equal share of the difference due to inadequate contributions to the family, either financial or non-financial. However, the readjustment has only been seen in the big money cases. It is very hard for the homemaker/child-carer to assert that non-financial contributions are more important and that they deserve a greater share of deferred community of surplus than the other party166.

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165 See Taiwan Civil Code, at note 2.
166 See section 5.5.1.1.4
Table 4.1 below shows what sort of property shall be taken into account when the court distributes the marriage assets.

<table>
<thead>
<tr>
<th>Pre-Marriage</th>
<th>During Marriage</th>
<th>Dissolution of Marriage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Not to be redistributed:</strong></td>
<td><strong>To be redistributed:</strong></td>
<td>Claim for half of the difference of revised property after deduction.</td>
</tr>
<tr>
<td>■ The property acquired before marriage</td>
<td>■ The property acquired during marriage</td>
<td></td>
</tr>
<tr>
<td>■ The gift or inheritance</td>
<td>■ The gift or inheritance</td>
<td></td>
</tr>
<tr>
<td></td>
<td>■ Solatium</td>
<td></td>
</tr>
</tbody>
</table>

Table 4.1 Property taken into account on marriage breakdown

Firstly, any property acquired before marriage is not to be taken into account. Any property acquired as a gratuitous gift or by succession throughout the marriage falls into the category of non-matrimonial assets which are not to be distributed.

Secondly, the property acquired during marriage falls into the category of matrimonial property and such property is the object of distribution in the event of divorce. The Taiwan Civil Code has legally presumed that the accumulated value of non-financial contributions to the marriage relationship or family entitles the homemaker/child-carer to claim for half of the difference of the revised property. Again, the gift, property by succession, and the solatium will not be taken into account.

Thirdly, in the event of divorce, the party who has earned or accrued more assets, income or property during the marriage has to hand over half the value of surplus to the other party who has less property or income as shown in the above example.

As previously indicated, although the Taiwan Civil Code 1985 first recognised the value of non-financial contributions and provided that each party had rights
to claim for the deferred community of surplus, the Code did not provide the claimant with any preservative measures of the matrimonial property during marriage. This was accepted as a defect in the Code and in order to preserve the contingent rights of the weaker economic spouse, the preventative measures have been provided by the Taiwan Civil Code 2002. These are discussed in the section below.

- The preventative measures of matrimonial property

**Disclosure of matrimonial property**

The husband and the wife are now under a mutual obligation to inform each other of and to disclose his or her property acquired during marriage (§1022).\(^{167}\)

**The relationship between the party's gratuitous or non-gratuitous acts and third party**

In deciding whether a party is acting in a way to avoid a claim by their spouse, the measures differ from whether the act done by one party is gratuitous or not. Firstly, where the husband or the wife's gratuitous act on his or her property acquired during the marriage endangers the other party's right to claim for the deferred community of surplus in the event of divorce under the default regime, the party whose property right is endangered or infringed may apply to the court for annulment of the act unless it was a proper gift performing a moral obligation, e.g., donations to charity. Secondly, the other may apply to the court for its annulment only if it was done with knowledge of the endangerment and the beneficiary knew this upon the receipt of the benefit as well (§1020-1)\(^{168}\) e.g., the property conveyance to the beneficiary is void.

**Liability for personal debts**

Another aspect of the 2002 reforms is that each spouse is respectively liable for his or her debts. When the husband or the wife discharges the other's debts with his or her own property, even if it is during the continuance of the marriage relationship, he or she may claim for reimbursement (§1023) \(^{169}\).

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167 See Taiwan Civil Code, at note 2.
168 ibid.
169 ibid.
If the husband or the wife discharged his or her own debts incurred before marriage with his or her property acquired during marriage, or if they discharged his or her debts incurred during the marriage relationship with his or her own property acquired before marriage, unless this property has been made up, it shall be counted into the category of the matrimonial property acquired during marriage, or as debts incurred during the continuance of the marriage relationship upon the point of divorce under the statutory regime. If the husband or the wife discharged his or her debts with his or her property acquired from succession or as a gift or solatium, the provisions above shall be applied (§1030-2). Thus another aspect of gender equality is equal obligation to pay personal debts. Either party cannot discharge his or her own debts with the other party’s property without reimbursement.

**Restitution order to third parties**

If the husband or the wife, in order to reduce the other’s entitlement to the deferred community of surplus, disposed of his or her property acquired during marriage within five years before the dissolution of the marriage relationship under the default regime, the property disposed of shall be counted into, and deemed as the category of the matrimonial property acquired during marriage, except where the disposition was a proper gift performing a moral obligation. If the party who is obligated to give half of the difference to the other party fails to give it, the one who is entitled to receive it may claim against the third party for restituting the shortfall of the share to the extent that the third party has benefited from it. However, if the third party has not gratuitously benefited from the claim for restituting the shortfall of the share, it may be made only if the third party has benefited from an obviously uneven payment. The claim to the third party shall be extinguished if it is not exercised within two years from the time when the claimant has known of the infringement of the right to distribution of the matrimonial property, or if five years has elapsed from the dissolution of the relationship under the default regime (§1030-3).

**The calculation for point the net value of matrimonial property**

The net value of property acquired by the husband or the wife during marriage
shall be counted at the termination of the marriage relationship under the default regime. However if the relationship is terminated by a judicial decree of divorce, it shall be counted at the commencement of the action (§1030-4)\textsuperscript{172}.

**B. Contractual regimes\textsuperscript{173}**

If the spouses opt out of the default regime to another, they must choose one from the contractual regime listed in the Taiwan Civil Code. There are two types of regime, namely community of property and the separation of estates.

- **Community of property**

  **What property constitutes community property?**

  Under the general system of community of property, with the exception of separate estates, (e.g. articles which are exclusively intended for the personal use of one spouse) all the property and income of the husband and the wife are brought into the common property of the two parties, in which both parties have undivided shares of ownership. Neither party can dispose of his/ her share in it. The separate estates contain the articles which:

  (1) are exclusively intended for the personal use of the husband or the wife;
  (2) are essential to the occupation of the husband or the wife and
  (3) gifts acquired by the husband or the wife which the donor has designated in writing to be part of the separate estate. This is governed by the provisions concerning the separation of estates regime (§1031; §1030-1)\textsuperscript{174}.

**Administration of community property**

The husband and the wife administer the common property jointly unless there is contrary agreement between the parties. The cost of administration is borne out

\textsuperscript{172} ibid.

\textsuperscript{173} The statistics of the Ministry of Justice shows that only 0.2\% of the married couples opted in the contractual regimes from 1966 to 1987. The judicial statistics indicates that over the past 4 years the numbers of couple opted in contractual regime increased very slowly. It has 987 couples in 2004, 1178 couples in 2005, 1183 couples in 2006, 1105 couples in 2007 and 1365 couples in 2008. The number shows that all of the couples opted in the separation of estates. Available at <http://www.judicial.gov.tw/juds/index1.htm>, 01/01/11 accessed.

\textsuperscript{174} See Taiwan Civil Code, at note 2.
of the common property (§1032)\textsuperscript{175}. Either the husband or the wife can dispose of the common property with the other’s consent otherwise it cannot be set up against a third party unless the third party knew or is likely to know of its absence, or unless the property in question could have, under the circumstances, only been regarded as part of the common property (§1033)\textsuperscript{176}.

\textbf{Paying off the debts}

Debts incurred by the husband or the wife before or during the marriage relationship should be chargeable to the common property and should be respectively liable to the extent of the separate property (§1034)\textsuperscript{177}.

Where debts payable out of the common property have been paid out of the common property, there will be no claim for compensation. Where debts payable out of the common property have been paid out of the separate property, or debts payable out of the separate property have been paid out of the common property, the claim for compensation shall arise and can be made even during the marriage relationship( §1038)\textsuperscript{178}.

\textbf{Distribution of community property}

On the dissolution of the community of property regime, each party gets back the property which was excluded from the matrimonial property by contract, unless otherwise provided for by law. With regard to the common property acquired during the marriage, each of the husband and the wife acquires a half of the property, unless otherwise provided for by contract (§1040)\textsuperscript{179}.

\textbf{The scope of community}

The parties may limit the scope of community property. Therefore, the husband and the wife may agree by contract that only labour income forms the community property. Labour income comprises earnings from salary, wage, shares, bonus

\begin{itemize}
\item \textsuperscript{175} \textit{ibid.}
\item \textsuperscript{176} \textit{ibid.}
\item \textsuperscript{177} \textit{ibid.}
\item \textsuperscript{178} \textit{ibid.}
\item \textsuperscript{179} \textit{ibid.}
\end{itemize}
and the other related income acquired by the husband and the wife during the continuance of marriage relationship, as well as the interests and substitute profits of the labour income. If the property could not be proven to be the labour income or other property rather than labour income, it will be presumed as labour income. The property rather than the earnings of the husband or the wife is governed by the provisions concerning the separation of estates (§1041)\textsuperscript{180}.

Under this regime, what property shall be distributed on divorce depends on the scope of community agreed by the parties. However, the number of couples who opt in this regime is relatively low in Taiwan, although to a certain extent the regime places the recognition of the value of non-financial contributions to the marriage relationship. The reason why was this regime not adopted as the default regime was perhaps because the legislators has foreseen the unpopularity of pre-nuptial agreement in Taiwan as the couple need to limit the scope of community by agreement if they want to do so.

\textbf{Separation of estates}\textsuperscript{181}

The second option for spouses who do not choose the default regime is the separation of estates. With regard to this regime, the husband and the wife retain the ownership of their own separate property from the point of getting marriage to that of divorce, and each administers, uses and collects the natural fruits from his or her own property respectively (§1044)\textsuperscript{182}. Under the separation of estates, the husband and wife each have a right to all income or earnings derived from their respective property or labour. The liability of debts incurred by the husband or the wife in the separation of estates shall apply the provisions in the Article 1023 (§1046)\textsuperscript{183}.

Under this type of regime, the goal of assessing the value of the non-financial

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{180} \textit{ibid.}
\item \textsuperscript{181} The wealthy couples would mostly prefer this regime to prevent the property acquired before marriage from being distributed in the dissolution of marriage. One recent well known case is the richest businessman in Taiwan, fortune estimated over 500 billion U.S. dollars, made an agreement to adopt the separation of estates in his second remarriage. The news is available at: <http://space.atmovies.com.tw/space/space.cfm?action=data&sid=199462&type=clist&cid=GE&page=73&oc=3>, 09/01/11 accessed.
\item \textsuperscript{182} See Taiwan Civil Code, at note.2.
\item \textsuperscript{183} \textit{ibid.}
\end{itemize}
\end{footnotesize}
child-caring) contributions is unachievable through the distribution of matrimonial property. In general, this regime is only found in big money case where the wealthy party uses it to prevent his/ her assets from being shared by the other party. Therefore, it should only be used where the parties are equal in terms of their assets and income; it is not suitable where the homemaker/ child-carer has no assets.

Reflections on the property regime in Taiwan

As noted above, lay persons may not have a good understanding of how the law deals with their property relationship during marriage and property distribution on divorce. Therefore, the default regime will be automatically applied to them otherwise stated.

Currently the default regime, compared with the contractual regime, has been considered as the most useful regime regarding the recognition of non-financial contributions. The advantages are that under that regime on one hand the separation of property during marriage represents an independent property relationship between parties, on the other the right to claim the deferred community to the surplus on divorce shows that the value of non-financial contributions has been calculated in advance into the entitlement to that surplus.

However, the main problem in practice is the type of property which is to be categorised as matrimonial property and needs to be distributed on divorce. It might be easier to calculate the proceeds of the tangible assets and distribute them, mainly including house and car. However, in most cases the intangible assets, such as earning capacity and pensions, are hard to calculate and not redistributed in practice. Moreover, the so called fair distribution of property in some cases results in an unfair outcome for the non working spouse, namely the homemaker/child-carer\(^{184}\). More specifically, under the strict requirement of maintenance application after divorce (alimony in Taiwan), it is hard to compensate the homemaker’s/child-carer’s financial loss where they also face the unfair outcome of property distribution.

\(^{184}\) For more practical problems faced by Taiwan, such as dishonest disclosure of assets and the lack of actuary, please see Chapter 5, the empirical research conducted in Taiwan.
In addition, it could be argued that the complete separation of property during marriage is currently the main theme in the default regime, but overemphasis on the separate existence scheme would cause substantive gender inequality within family in the case that the non working party is not provided with sufficient financial support.

4.3.3.3 The duty to maintain each other
As seen already, the way that the Code deals with the relationship property by property regime gives varying recognition to the value of non-financial contributions. However, any value of the non-financial contributions is not realisable during marriage. Therefore, the financial support that the Code provides for the non working party plays a decisive role in judging whether the Code has placed adequate recognition of the value of non-financial child-carer contributions during the marriage. One key type of the financial support provided by the Code is the spousal duty to maintain each other.

4.3.3.3.1 Maintenance during marriage
Prior to the 1980s, it was not a legal obligation to maintain the spouse at the Code level as it was thought that the non-financial child-caring contributions should be performed in exchange for the male patriarch’s financial support in Confucian thinking. In order to make it clearer, finally, the lawmaker placed the mutual legal obligation to maintain one’s spouse in the Code in 1985. Thus, the husband and the wife are now under a mutual legal and moral obligation to maintain each other. The order in which they are to perform such an obligation is at the same level as the obligation to maintain in the hierarchy of younger lineal relatives by blood, that is children; and the order in which they are entitled to receive maintenance is the same as the elder lineal relatives by blood such as parents (§1116-1). That is to say, homemaker/child-carer does not prevail against the children in terms of the order of being maintained.

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186 See Taiwan Civil Code, at note 2.
In addition, at the Code level, the contents of the duty to maintain the spouse is different from the duty to maintain the lineal relative by blood as the Code has put restrictions on those spouses who are entitled to claim for maintenance. In general, the claimants shall be limited to those who ‘cannot maintain their own living’ and are ‘unable to earn the living’, but the limitation above in respect of an inability to earn a living shall not apply to the case of the elder lineal relatives by blood (§1117)\textsuperscript{187}, In other words, the younger lineal relatives have the complete obligation to maintain their elder lineal relatives’ living in any event, regardless of inability to earn a living. An issue arose over the requirement of being ‘unable to earn the living’. One commentator argued that the two strict requirements shall both apply to the claim for spousal maintenance\textsuperscript{188}.

In practice, the Supreme Court in deciding this issue was inconsistent in its decisions. The previous precedent interpreted that the two strict requirements should apply to the claim for spousal maintenance. Thus the claimant can only be granted maintenance in this case where he/ she not only cannot maintain the living, but he/ she is also unable to earn their living\textsuperscript{189}. However, this decision was overruled by a later one\textsuperscript{190} which decided that the inability to earn was not necessary. Finally, the claimant is now eligible for the spousal maintenance as long as he/ she prove that he/ she cannot maintain the living.

It is presumed, at Code level, that the non-financial contributions are not being viewed as the exchange value for the claim of maintenance. The quality of non-financial contributions does not affect the amount of maintenance granted. However, at the Code level, acting in the role of a homemaker/ child-carer is not good enough of itself to justify the right to claim for the spousal maintenance. Doing the homemaking/ child-caring has never being taken by the court as a specific consideration for the claim of awarding maintenance. It is suggested that it was a wrong hypothesis to presume that the aim for the equal economic position between spouses can be reached simply by relying on the inclusion in

\textsuperscript{187} ibid.
the Code of a reciprocal duty to maintain each other. Some have argued that, under the requirement of the duty to maintain each other, the order of the spouse’s right to claim for maintenance is the same as the lineal relatives by blood, such as children. To a homemaker/child-carer without any income, there is no difference in the economic position as between him/her and the children within the same family. Yet the non-working spouse is required to reach the level of ‘cannot maintain the living’ before a maintenance claim can succeed\textsuperscript{191}.

As the Taiwan Civil Code has inherited fundamental principles from German law, it is useful to trace back to the German law to seek to solution to the problem faced by Taiwan. In German law, the non working party can perform his/her duty of contributing to maintenance through work by carrying out the homemaking/child-caring. The scope of the obligation to maintain in German law is also broader than that in Taiwan, it includes everything that is necessary to pay the living costs for the household and to satisfy the personal need of the spouse\textsuperscript{192}.

In contrast to German law and indeed to English law, the reality is that under the Taiwan Civil Code, little recognition of one party’s non-financial contributions is given under the maintenance provisions and they are far from being valued as equal to performing the other party’s duty of contributing to maintenance on the household through work.

4.3.3.3.2 Maintenance after divorce/Alimony

In the Taiwan family law context, the term ‘maintenance’ only refers to the financial support provided by the earning party during marriage and the financial support to an ex spouse after divorce is called ‘alimony’. In an alimony claim, the


\textsuperscript{192} See German Civil Code Section 1360: ‘The spouses have a duty to each other to appropriately maintain the family through their work and with their assets. If the household management is entrusted to one spouse, he normally performs his duty of contributing to family maintenance through work by carrying out the household management.’; and Section 1360a(1): ‘The reasonable maintenance of the family includes everything that is necessary, depending on the circumstances of the spouses, to pay the costs of the household and to satisfy the personal needs of the spouses and the necessities of life of the children of the family entitled to maintenance.’, available at: <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_00P1360> 08/01/11 accessed.
no fault party may claim for alimony as long as he/she has difficulty in earning a living on account of a judicial decree of divorce.\textsuperscript{193}

In addition, if the claimant party has suffered damage due to a judicial decree of divorce, then he/she may claim compensation from the other party at fault. Furthermore, the claimant party may still claim an equitable compensation in money for a non-pecuniary loss, provided that he/she is not at fault.\textsuperscript{194}

However, the non-financial contributions are not to be considered by the court in deciding the size of alimony or damage compensation.\textsuperscript{195} Furthermore, another factor omitted is the standard of living enjoyed before divorce. Again, the Code also shows its weakness in maintaining the financial weaker spouse after divorce and this contrasts potentially with the recent developments in England and Wales.

4.3.3.4 The duty to pay the costs of the household
Under the Code, each party has a duty to pay the costs of the household with his/her income and assets. In practice, the duty to pay the living costs of the household is not the same as the duty to maintain due to their different requirements.\textsuperscript{196} Unlike the requirement of being entitled to maintenance, there is no specific condition to be fulfilled before applying for the money to pay the living costs of the household. The court has discretionary power to grant the money and its amount.

How to perform the duty?
The Code provides that the husband and the wife act as agents for each other in daily household matters (§1003).\textsuperscript{197} In order to place recognition of the value of non-financial contributions, the Code 2002 also provides that the costs of the household shall be shared jointly by the spouses according to each spouse’s economical ability, the performance of household labour or other conditions.

\textsuperscript{193} See Taiwan Civil Code, §1057, at note 2.
\textsuperscript{194} ibid., §1056.
\textsuperscript{195} See Chapter 5, the interviews conducted in Taiwan.
\textsuperscript{196} Some argue that the duty to pay the living costs the household overlaps the duty to maintain. See Dai, D., (2002) op. cit, p.535.
\textsuperscript{197} See Taiwan Civil Code, at note 2.
unless otherwise provided for by law or mutual agreement(§1003-1)\(^{198}\). That is to say, if the household management is entrusted to one spouse, such as homemaking/child-caring, he/she may perform his/her duty to pay the costs of household in the exchange of carrying out the household management.

This provision can be seen as the milestone of recognising that the homemaker’s/child-carer’s non-financial and the breadwinner’s financial contributions to the marriage relationship shall be valued equally. Thus, the non-financial contributions are no longer of little or with no value, although it could be argued over how to bring it into the symbolic recognition action.

For example, some argue that carrying out household management has been recognised by the Code meets the duty to pay the cost of household. However, it is not helpful to promote the homemaker’s/child-carer’s substantive economic position during marriage as the breadwinner is still the owner of the whole income, he/she may freely manage the remaining income after paying the costs of the household. As a matter of course the breadwinner’s economic status is always higher that the homemaker/child-carer\(^{199}\).

\textbf{The contents of the costs of household}

The concept of the duty to pay household costs is very unclear as the Code does not elaborate on what expenditures can be included. Criteria were illustrated by the court to explain the contents of that duty\(^{200}\). The relevant judgements are summarised as follows:\(^{201}\)

1. The duty to pay household costs does not vary according to the type of property regime that the couples have opted into. This duty is one of the essential methods used to maintain a satisfactory marriage life. The husband and wife, with equal dignity and personality, should be responsible for

\(^{198}\) ibid.
maintaining the marital union. In order to carry out the gender equality required by the constitution of Taiwan, the Code requires that such a duty to pay the costs of household shall be shared jointly by the spouses according to each spouse’s economical ability such as earning capacity, the performance of household labour or other conditions unless otherwise provided for by law or mutual agreement.

2. The costs of the household include the costs of living for the husband and wife, the education fees for children and any other household expenditure. Furthermore, the husband still has the duty to pay off the wife’s living costs when they live apart as long as she has legal ground to make a claim.

3. Any other household expenses include everything that it is necessary; the bills of water, power, gas, eating, clothing, residence and travelling and so on. In deciding the amount of living costs for the household, the parties’ social position and economic status shall be taken into account by the court. The courts are directed to have regard to all circumstance of the case.

Even though the court has made criteria for the duty to pay the costs of the household, the concept is still confusing in the Taiwanese law context. As noted above, some argue that the duty to pay household costs overlaps with the duty to maintain. According to the principle that specific law prevails over general laws, the duty to pay household costs shall prevail over that to maintain. More importantly in practice, a claim for money to pay household costs is more likely to be successful than to claim maintenance, as the requirement for maintenance claim is so rigid. However, another issue that arises here is that normally the court would not grant the maintenance claim to the claimant as long as the respondent has provided money to pay the costs of household.

Furthermore, the money given by the earning party to pay household costs can only be used for the purpose of managing the household, not for personal use. Thus the non-working spouse is not allowed to use the money to pay for his/ her own personal business. It is still far away from the goal to achieve economical

203 See section 5.4.2.1
equality between the breadwinner and homemaker/child-carer a reality within family.

4.3.3.5 Special allowance for the homemaker/child-carer

As discussed above, the Code has placed symbolic recognition on the value of non-financial contributions through its matrimonial property regimes but the value is only realisable in the event of divorce. The homemaker/child-carer will still therefore suffer financial disadvantage during marriage in cases where the earning party refuses to provide the money for the costs of household or maintenance. This is reported to be a common situation and therefore a matter of practical concern as well as of principle.

The issue of how to achieve better financial independence for homemakers/child-carers was addressed in the 2002 reforms. In order to promote the homemaker’s/child-carer’s substantial economic independence, one possibility is to allow child-carer them to manage their own financial arrangement. This fits with the idea of promoting their autonomy. Under the Code, the idea of special allowance for the homemaker/child-carer was seen as the most effective way to promote the homemaker’s/child-carer’s economic status during marriage.

In the progress of the proposed law reform, the drafter of the amendment to Civil Code 2002 adopted the idea of ‘allowance for personal use’ from the Swiss Civil Code:

‘A spouse who looks after the household, cares for the children or supports the career or business of the other spouse is entitled to receive from the latter a reasonable allowance for his or her own personal use.

When determining said allowance, account must be taken of the personal resources of the receiving spouse and the need to provide conscientiously for the family, career and business.”

This was intended to promote the idea of “wages” for the homemaker/child-carer,

advocating that the homemaker/child-carer shall have a certain amount of money provided by the breadwinner at their free disposal. This was an extremely radical proposal that would never give a clear indication of the value of homemakers and child care. It can be seen that at that time this proposal directly challenged the traditional virtues of Confucian thinking where the homemaking and child-caring is seen as virtuous and its value is not required to be assessed.

In the end, however, this radical solution was rejected. Instead, a compromise was made between the drafter\(^\text{205}\) and the counterforce of the special allowance for the homemaker/child-carer. The provision passed by the Legislative Yuan\(^\text{206}\) was that the breadwinner and homemaker or child-carer may agree on certain amount of money provided by the breadwinner at the homemaker’s/child-carer’s free disposal. However, the breadwinner is not legally obligated to provide the homemaker/child-carer with any allowance.

The Legislative Yuan not only denied the proposal but also again insisted that placing the duty to provide a special allowance for the homemaker/child-carer on the breadwinner was very problematic to the marriage relationship and could be seen as an obstacle to the harmony of family relationship\(^\text{207}\). The grounds for not passing the bill are as follows:\(^\text{208}\)

Firstly, the idea of the wages for women’s housework undermines the sanctity of marriage, and furthermore taking the right to claim for special allowance as a consideration of the non-financial contributions is unacceptable in Taiwan society because homemaking/child-caring is not a type of business service.

\(^{205}\) The idea of the wages for the women’s housework is proposed by the Awakening Foundation. See <http://www.ws0.taiwane.com/awakening> 11/01/11 accessed.

\(^{206}\) The position of Legislative Yuan is equivalent to the Law Commission in England and Wales. See <http://www.ly.gov.tw/?GXHC_gx_session_id_=dd38610eff228020>, 09/01/11 accessed.

\(^{207}\) Some argue that this article is not grounded on the ideas of the wages for the women’s housework as offering the allowance is not a compulsory legal duty. See Chen, H.S., (2008), op.cit., p.223.

Secondly, it is extremely hard to calculate the value of non-financial contributions to the marriage relationship. It is also questionable that what criterion shall be applied to assess this value? If the homemaking/child-caring are unsatisfactory, is the breadwinner allowed to hire a housekeeper for less to substitute the homemaker/child-carer?

Thirdly, multi-assessing has to be avoided as the value of non-financial contributions has been assessed in the following ways: the claim for half of the deferred community to surplus and the duty to pay the costs of household. It would over value non-financial contributions for allowing the special allowance for the homemaker/child-carer on top of this.

Consequently it is clear that the aim to seek homemaker’s/child-carer’s economic promotion during marriage is denied again by the Code in the name of the traditional virtues. The compromised amendment on its own could do little to achieve substantive gender equality where the bargaining power between the spouses in most cases is likely to be impeded by prevailing cultural and social norms.

With relation to the allowance, the current Code allows it and will enforce it where the parties’ agreement provides for it. The Code provides that with the exception of the money for household costs, the husband and the wife may contract a certain amount of money paid by one party for the other party’s free disposal (§1018-1)\(^{209}\).

The idea of the special allowance is used to protect the economically weaker party, typically the homemaker/child-carer, from suffering financial disadvantage for acting in this role of child-carer. Ironically, it might be entirely understood as a symbolic slogan as in practice there is no case found to date where this agreement has been concluded. A fierce debate on the nature of the special allowance for the homemaker/child-carer has been going on in academia. The nature of the special allowance can be summarised as follows, it could be:

\[^{209}\text{See Taiwan Civil Code, at note 2.}\]

123
The remuneration for homemaking/ child-caring services

Such an allowance represented that the allowance is the remuneration for non-financial contributions to the marriage relationship. This position held that there is no difference between homemaking/ child-caring services and the housekeeping hire services.

In order to avoid undermining the social morals and the affections between husband and wife, it is not a good idea to assess the value of the non-financial contributions by this way\textsuperscript{210}. However, if regarding the homemaker as the same as the employee and valuing non-financial contributions according to market value, it would disobey the rationale of that marriage as a partnership and the living expenses of the household matters should be performed equally by the both parties. Furthermore, it is more important is to value the non-financial contributions, not to price them\textsuperscript{211}.

The living costs of household

Some argued that the special allowance for the homemaker/ child-carer could be covered by the scope of the costs of household. There is no need to distinguish the two as the nature of the special allowance could be seen as part of the costs of household broadly\textsuperscript{212};

However, as the Article §1030-1 stipulates, “\textit{the costs of the household are jointly shared by the husband and the wife according to each party’s economical ability, household labour or other conditions unless otherwise provided for by law or mutual agreement.”} The breadwinner’s financial contributions and the non-financial contributions shall be equally valued and the homemaker/ child-carer is allowed to perform their duty of contributing to the payment of household costs by carrying out household management.

Therefore, in this case it would allow for the double-counting of the homemaking/  

\textsuperscript{210} Wan, C.W., Damage to Family Harmony, \textit{The China Times}, 2002, p.15.  
child-caring contributions as the breadwinner would undertake a heavier economic burden than the homemaker/child-carer while he/she has performed personal duty to pay the costs of household.

Moreover, as the Article §1018-1 provides that the husband and the wife may contract a certain amount of money paid by one for the other's free disposal, with the exception of the costs of the household matters. It is clear that the special allowance cannot be covered by the duty to pay the costs of household.

**Maintenance**

Some hold the view that the nature of special allowance can be seen as part of the maintenance, as the Article §1116-1 stipulates that the husband and the wife are under a reciprocal obligation to maintain each other. The homemaker's/child-carer's need of special allowance can be met by the breadwinner's maintenance if the homemaker/child-carer really needs it\(^{213}\).

However, in practice as established by the precedent of the Supreme Court, the claimant can apply for maintenance only where they cannot maintain their own living\(^{214}\). It is clear that such an unreasonable restriction to maintenance claim is contradictory to the view that the allowance could be seen as part of the maintenance. The special allowance is not the same as the maintenance in its nature as it goes beyond the provision of basic needs and is specific recognition that a financial value should be placed on non-financial contributions being undertaken within the marriage\(^{215}\).

**An advance entitlement to the deferred community of surplus**

Some argue that Article §1030-1 provides that each of the spouses has the entitlement to half of the deferred community of surplus in the event of divorce. The entitlement has been accumulated from the value of non-financial contributions through time. The Code has highly assessed its value during marriage, thus it is proper to deem the allowance as the advance entitlement to


the deferred community of surplus\textsuperscript{216}.

\section*{Substantive claim for allowance}
Some consider that the allowance for the homemaker/child-carer is neither the advance entitlement to half of the deferred community of surplus nor a part of the maintenance, moreover, it is neither covered by household costs nor a contingent right. The allowance is the substantive right of claim for the consideration of non-financial contributions to the marriage relationship. The homemaker/ child-carer is entitled to claim for the special allowance from the breadwinner\textsuperscript{217}.

\section*{4.4 Conclusion}
Over the past two decades, the significant legal development concerning gender equality issues has been made in Taiwan. However studies shows that Taiwan society still has not entirely escaped from Confucian views about the women’s inequality. The social norms in Taiwan are greatly influenced by the rites of traditional Confucian thinking on the gender division of household labour.

It is clear that there is a gulf between the law in books and the law in action and the effectiveness of laws still remains in question. So, it is questionable whether the goal of substantive gender equality has been achieved in this area as required by the constitution.

As a whole, the current Family Law Chapter under the Code is drafted in gender neutral terms and makes an attempt to value financial and non-financial contributions to the marriage relationship equally, at least in terms of community property. Under the Code, the homemaker/ child-carer can make a claim to half of the deferred community of surplus, but even here as has been shown the rights are only realisable in the event of divorce. Furthermore, some other issues need to be addressed in the current property regime as set out below. It is always hard to realise the rights to the distribution of property where there is

\textsuperscript{217} Le, W. M.,(2002) \textit{op. cit.}, pp.127; see also Kuo, L.H.,(2003) \textit{op. cit.}, p29.
dishonest disclosure. Defining matrimonial property is not as clear as it could be argued and thus divided. In particular the categorisation of pensions and earning capacity remain unsettled in this regard, yet they are highly significant asserts which can be distributed in other jurisdiction, including England and Wales.

During marriage, the Code does try to provide for financial support for the homemaker/ child-carer by maintenance. However maintenance claims are not always being made successfully because of the strict requirements under the Code which is seen unduly restrictive and fail to recognise either the needs of the homemaker, nor attach clear value to non-financial contributions. The same difficulty occurs again when they claim for the maintenance after divorce, namely alimony again in contrast to England and Wales.

In addition, the Code also tries to assess the value of non-financial contributions by means of exempting the homemaker/ child-carer from the duty of contributing to household costs by carrying out household management during marriage. However, it could be argued that this symbolic recognition of the value of non-financial contributions, whist welcome, does little in practice to promote the substantive economic position of homemaker/ child-carer.

As noted, the entitlement to the special allowance for the homemaker/ child-carer, is probably the most substantive way to promote the economic status of homemaker/ child-carer during marriage, yet this was denied by the Legislative Yuan.

Overall, all the provisions relating to recognising the value of non-financial contributions under the Code, in the event, can be seen as nothing more than contingent rights given that the value of non-financial contributions can only be realised until the marriage comes to an end, and symbolic rights, where maintenance, alimony and special allowance are very difficult to achieve.

The Code always holds the position that there is no need to intervene in financial management during marriage and leaves it for the parties’ mutual agreement, but the reality is that unequal bargaining power between breadwinner and homemaker/ child-carer is not being taken into account by the Code. Normally,
the earning party has a stronger bargaining power than the non working party, thus it is submitted that an equal bargain outcome is unachievable if the law does not play a more protective role. Moreover, the outcome of an unsuccessful bargain usually leads to the end of the marriage and this makes the financially weaker party unwilling to bargain with the other party although an unequal financial arrangement during marriage is faced by him/ her. It seems in general, the financially weaker party would prefer to endure the financial difficulty, rather than strive for their economic independence. In the meantime, gender neutral law also creates an illusion that there is no inequality within family as either party has been treated as economic equals by separation of property. However, the truth might be that the bearing of inequality perhaps exactly results in the gloss of the so called traditional virtues, namely San-Tsung and Sz-De.

It is clear that the goal of substantive gender equality has not been achieved yet. In fact, these provisions are incompatible with the requirement of substantive gender equality at the constitutional level and may remain so until gender inequality in social norms has been removed or at least begins to break down.

Last but not least, the Code also shows its weakness regarding maintenance claims after divorce as the strict requirements make it hard to be awarded.

Taken together, this all shows, it is submitted, that there is a need for further law reform to help bridge the gulf between social norms and legal norms. In order to substantially promote the homemaker’s/ child-carer’s economic status during marriage, it deserves further consideration that the homemaker/ child-carer is legally entitled to the special allowance as was originally proposed in 2002.
CHAPTER FIVE: FINDINGS TO INTERVIEWS

5.1 Introduction

As from 2002, the amendment to the Taiwan Civil Code has formally given recognition to the value of non-financial contributions to the marriage relationship and gave effect to assessing these values within marriage by various means. However, few debates in the research-based literature can be found that focus on the effectiveness and working of this new law child-caring. Therefore, it was thought necessary to conduct an empirical study to explore the effectiveness of the new law due to the shortage of relevant documentary materials on this in Taiwan law context. The effectiveness of reforms will be assessed through an analysis of the existing literature, but supplemented with insights given by the data gained from the empirical research. In adopting this approach, this study provides a better integrated and original overall viewpoint to reflect on the value of non-financial contributions in Taiwan.

This chapter sets out an analysis of qualitative interviews, which were undertaken in order to discover how the Taiwan Civil Code 2002 values non-financial (homemaking/ child-caring) contributions to the marriage relationship viewed from the potentially contrasting perspectives of practitioners and academics. In Taiwan, there has been a shortage of literature on the above issue. Thus, the results can be used to help answer the following research questions: How does the Code value the non-financial contributions to the marriage relationship in theory and in practice through its matrimonial property regime and financial support for the homemaker/ child-carer during marriage and after divorce? Have the provisions under the Code met the requirements of substantive gender equality either at the constitutional level or using gender mainstreaming? In this analysis, the aims of the 2002 revisions to the Taiwan Code are used to assess the practical outcomes.

The interview schedule was designed to explore the above questions and to examine what financial protection the Code provides for the homemaker/ child-carer in the eyes of legal experts. In particular the provisions governing the following aspects of the Code were identified as significant: pre-nuptial
agreements; the obligation to pay the living costs of the household\textsuperscript{218}; the duty to maintain\textsuperscript{219}; the special allowance for the homemaker/ child-carer\textsuperscript{220} and maintenance after divorce (alimony)\textsuperscript{221}. In addition, the understandings of the legal experts as to what activity can be seen as non-financial contributions in practice also affects the assessment of the value of non-financial contributions and this was also investigated.

Additionally, the interview schedule was designed to reflect this and therefore contains three sections which review what financial resources the Code provides for the homemaker/ child-carer pre-marriage, during marriage and after divorce.

Given the importance of practical experiences to any assessment of the effectiveness of the reforms, this empirical study not only supplements the lack of literature on these issues from 2002 to date but also gives insight into possible suggestions for further law reform based on the legal experts’ responses to the current working of the 2002 Code.

Finally, as discussed below, the findings are used to consider not only whether there is still a gap between the law in the statute books (embodying legal norms) and the law in action (embodying social norms) on the issue of how to properly value non-financial contributions to the marriage relationship, but also to consider whether the Code, in its gender neutral provisions, only gives symbolic rather than meaningful protection to the homemaker/ child-carer. Where the interviewees held such views on the Code, their suggestions for further law reform were also sought.

\textbf{5.2 Definition of ‘domestic labour’}

The term of ‘domestic labour’ was first used in the 2002 Code to represent the non-financial contributions. However, the Code did not specify what activity could be included. Therefore, as legal experts’ understandings of ‘domestic labour’ definitely helped shape the details of the Code, their views will also affect how the concept of ‘domestic labour’ is being implemented in practice. As

\textsuperscript{218} See Taiwan Civil Code, §1003-1, at note 2.
\textsuperscript{219} \textit{ibid}, §1116-1.
\textsuperscript{220} \textit{ibid}, §1018-1.
\textsuperscript{221} \textit{ibid}, §1056; §1057.
Taiwan has adopted a codified, civil law system, judge-made law has little or no role outside the constitutional court and case law is not a formal source of law. Judicial construction of statutes must be compatible with the original legislative intent. Thus, following the implementation of the 2002 amendments to the Code, judges and lawyers have had to address the issue of what the original legislative intent was when they were dealing with ‘domestic labour’ cases, otherwise the decisions would be held unconstitutional.

Taiwan is therefore in the difficult position of having already affirmed the spirit of ‘domestic labour’, but having left open the question of how to implement the spirit of the law in practice. Thus, the qualitative study aimed to discover how the absence of a definition of ‘domestic labour’ was being addressed in practice, as unlike financial contributions to the marriage relationship, domestic contributions have no clear economic value and are less easily measured by monetary value.

5.2.1 Describing it, but not giving a definition

As set out in chapter three, there were six participants in this study – two judges, three practitioners and one academic. All of the interviewees indicated that it is too complicated to give a clear definition of ‘domestic labour’. Therefore, they tried to describe what characteristics ‘domestic labour’ has rather than to give a clear definition of it. As indicated below, there was a consensus within the sample that ‘domestic labour’ should not only include the visible physical efforts, such as looking after home and child-caring, but also the invisible yet critical mental efforts, such as spiritual and emotional support.

As Shiu, a family law judge, explained:

“It is too difficult to define this concept as it has various ranges of things in our daily life. It could broadly include food, clothing, housing, transportation, education and entertainment - whatever. Moreover, spiritual and emotional support, such as the inner life and belief, are included. In a traditional dichotomy men are breadwinners/ women are housewives. I believe that the role of homemaker/ child-carer does not only stand for an actual provider of living essentials, but she is also the heart of family. Therefore, my brief definition of ‘domestic labour’ is that it includes all the mental and physical efforts made by a housewife/househusband to maintain and develop the family life. These contributions include all spiritual and material support in daily life, for example, food, clothing, housing, transportation, education and entertainment’ (Shiu, family law judge).”

222 See Appendix C (6), p. 303.
To be meaningful, the scope and character of any definition of ‘domestic labour’ should not be limited to the capacity for physical labour; it must also encompass the invisible support.

Although no one, clear, legal definition of ‘domestic labour’ emerged from the interviews, they helped describe the concept and shape the spirit of valuing domestic contributions from which a definition could emerge:

“In general, ‘domestic labour’ includes the activity that offers the family members food, clothing, accommodation and transportation, and also caring and the division of household tasks. In daily activities, caring includes child and elderly care. The household tasks refer to food and clothes preparation and maintenance of the house…Therefore, what kinds of activities are counted as ‘domestic labour’? I roughly divided them into two sections. The first section is about the caring for the child, elderly and the spouse. The second section is about the maintenance of the state of family life” (Lee, lawyer).

“The concept of ‘domestic labour’ is quite broad, and it includes both material and spiritual support. The material support includes child-caring, doing the laundry and cooking, etc. The spiritual support is about encouraging the other party to share the joy and sorrows of married life. In short, all the non-financial contributions made to maintain the married life, either material or spiritual contributions, can be counted as the domestic contributions” (You, lawyer).

“You know… a housewife’s ‘domestic labour’ is a kind of mental and physical effort to the family. The ‘home’ is different from another group as the home provides the members of the family with a sense of belonging” (Gi, lawyer).

Overall, the participants hold the opinion that the concept of ‘domestic labour’ is very wide and it include all the activities that are not being seen as the money making activities. Moreover, the ‘domestic labour’ also includes the elder care, particularly the care of husband’s parents in Taiwan society.

5.2.2 The ‘labour within the family’ and ‘domestic labour’
Taiwan has adopted family law system similar to that of Germany and of Switzerland. Under German law, there is a distinction between ‘domestic labour’ and ‘the labour within family’, where only the latter is thought to have real...
economic value, as one participant explained:

“In Germany, “domestic labour” is a concept that differs from “labour within the family”. In Japan, they hold the same position. “Labour within the family” refers to the labour that makes profits economically, e.g. you are a helper on the farm your husband’s family owns, then you are entitled to the wages” (Kuo, law professor).

In reality, many married women in Taiwan perform multi-functional roles. They are not only acting the role of homemaker/ child-carer but the helper of her husband’s family business without pay:

“I know many couples, they keep multi-status relations with each other, and they not only have the couple relationship, but have an employer-employee relationship. As a result of multi-status relationships in various occasions, the wife acts as either the spouse or the helper of her husband’s business without wages. If she essentially contributes to her husband’s business, then, we could technically calculate how many contributions she has made to her husband’s business although I realise that to calculate how much value ‘domestic labour’ has is an extremely controversial issue” (Lee, lawyer).

Under the amendment of Taiwan’s Civil Code 2002, both types of labour in the domestic sphere could be regarded as the ‘domestic labour’, and are being acknowledged by the Code. However, interestingly though, it seems that the ordinary people in Taiwan might not agree, revealing cultural differences and a gap between legal and cultural norms. One survey shows that Taiwanese people think it is not necessary to distinguish the different concepts between ‘domestic labour’ and ‘the labour within family’, because in sum, both of them hold only a non-economic value:

‘However, from the surveys I have done throughout Taiwan a couple of years ago, the interesting result was that most Taiwanese regarded “domestic labour” and the “labour within the family” as the same, e.g. you help in your family business but are not being paid. In Taiwan, such labour is still covered within the concept of “domestic labour”.

Both in Germany and Japan, these two types of labour are different concepts, but in Taiwan people think they are the same and that they have no market value. In practice, we have difficulty on how to distinguish “domestic labour” from “labour within the family”. I guessed this was because of cultural difference when I was engaged in this survey’ (Kuo, law professor).

226 See Appendix C (1), p. 274.
227 See Appendix C (2), p. 279.
228 See Appendix C (1), p. 274.
229 See also : Kuo, L.H., (2000) ‘The Value of the Labour within the Family’,
In addition, the cultural focus on the importance of the breadwinner's financial contributions to the marriage relationship has been identified as the key factor resulting in a phenomenon where domestic contributions are being undervalued:

“There are many ways to maintain a family life, but most people over-emphasise the importance of financial contributions to the marriage relationship. They ignore the non-financial contributions which are also necessary to maintain a family” (You, lawyer).

“...the household tasks are relevant to the activity that no one would appreciate after you have finished it. However, someone will be aware of it as soon as you have not done it. In other words, the activity does not look like requiring too much time and strenuous efforts. However, it would seriously affect the family life if no one gets it done” (Lee, lawyer).

Given that difficulty in deciding what efforts can be seen as the ‘domestic labour’ and thus assessed by the Code, the best solution to this problem is to regard the marriage relationship as a quasi partnership and there is no need to define what activities can be included in the ‘domestic labour’. The equal partnership is being created by one of the effects of marriage. Thus, any efforts made to the marriage for acting the role of homemaker/ child-carer should be seen as the ‘domestic labour’ and shall be protected by the Code:

“Therefore, we held the position that the marriage relationship should be regarded as a partnership, and there was no need to decide what type of labour should be regarded as “domestic labour”, and what should not. Therefore, currently in Taiwan, as long as the homemaker's/ child-carer's labour is emotionally supportive and benefits the wage earner's business, e.g. the husband can have a comfortable break when he comes from work, the emotional contributions made by the wife do play an important role for the development of his business. In this case, the labour she does should be classified as being in the category of “domestic labour”, although in reality it is without market value and does not bring any monetary value to the marriage relationship” (Kuo, law professor).

This approach, if adopted, would have resonance with the equal partnership:

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231 See Appendix C (2), p. 279.
232 See Appendix C (1), p. 274.
approach to ‘domestic labour’ developed by the courts in England and Wales (see below chapter six)

5.2.3 An attempt to assess the value of domestic contributions in tort suits
Unlike financial contributions, it is less easy to calculate the value of domestic contributions by monetary value. An idea was suggested that the value of domestic contributions might be indirectly calculated in a way similar to tort suits:

“I remember a German case where there was a wealthy married woman. She directed the servants to do the housework, rather than do the housework herself. She was once injured in an accident, and she was unable to direct the servants for a few months. Legal action was taken by her against the injuring party and the court held the position that the plaintiff’s efforts of conducting housework could be seen as part of ‘domestic labour’, although she was not engaged in the housework in person, such as laundry and dish washing. Finally her claim for the pecuniarily loss during the period of injury was granted” (Kuo, law professor).

5.3 Pre marriage
The legal effect of the marriage relationship commences at the outset of entering marriage and ends on death or when the marriage is dissolved. During the marriage, the Code has set up the property relationship for the parties through the property regime.

Therefore, within Taiwan’s system of matrimonial property, the parties are not allowed to alter the terms provided in the property regime by pre-nuptial agreements. However, the parties still can negotiate a pre-nuptial agreement in terms of the financial support during marriage, namely the obligation to pay the living costs of the household or special allowance for the homemaker/child-carer. Thus, it would be seen as the first chance for parties to decide how to value the non-financial contributions to the marriage relationship before they enter into marriage. But how does this opportunity now work in practice?

5.3.1 Pre-nuptial agreement
Kuo observed that the Code has interpreted the nature of the marriage relationship as a quasi-partnership. This interpretation indicates that each party should be treated as equal with legal capacity, and it allows the parties to

233 See Appendix C (1), p. 274.
manage their own financial support during marriage in mutual agreements, except for the specified property regime.

“We have been thinking about the nature of a marriage agreement…Perhaps we could regard it as a quasi-partnership agreement. In a partnership agreement, one partner definitely could bargain the terms with the other partner for their rights and obligations. They may decide how to run the business and share the profits made from the partnership. Similarly the couple in the marriage relationship could also agree to the same terms. Therefore, the Civil Code leaves room for negotiation by the couple. Generally, the Code already told you that the value of the non-financial (homemaking/child-caring) contributions to the marriage relationship should be equally valued. And it encouraged you to make agreements with each other in terms of the special allowance for the homemaker/child-carer and the obligation to pay the costs of the household” (Kuo, law professor)²³⁴.

However, in practice, Jeng, a family law judge, argued that ordinary people do not make a pre-nuptial agreement due to emotional reasons and the lack of legal information:

“The new provision was passed in 2002. However, only legal practitioners were familiar with it. The ordinary people had no idea of the concept of domestic contributions. Furthermore, they did not have a good understanding that the value of ‘domestic labour’ can be transferred into the way of performing the obligation to pay the costs of the household. They received very little legal information and education. With regard to pre-nuptial agreements I never heard of any case of it. It is probably that we do not have any pre-marriage education so that most people even do not know how to start to make an agreement. In addition, in our culture most people do not want to mention the financial arrangement when their relationship is going well…They do not agree on any agreement, but I heard some of them making agreement during marriage, particularly in a lawyer’s family. It rarely happens in an ordinary person’s family” (Jeng, family law judge)²³⁵.

Thus, very few couples seem to make written pre-nuptial agreements probably because it is thought to be not only unconventional but a taboo at a moment when their relationship is filled with trust, love and affection. As some lawyer participants explained, when asked about how often people were entering into pre-nuptial agreements:

“Very rarely….You are not permitted to do this in traditional Chinese culture, namely Confucian thinking” (Gi, lawyer)²³⁶.

²³⁴ See Appendix C (1), pp. 274-275.
²³⁵ See Appendix C (4), p. 293.
“In Taiwan, pre-nuptial agreements are not very popular. Couples are unwilling to talk about this topic before entering into marriage. The Awakening Women Foundation has been advocating a draft of a pre-nuptial agreement which contains the child’s family name, domicile, and the obligation to pay the costs of the household and the special allowance for the homemaker/child-carer. Some couples came for legal advice about the pre-nuptial agreement because they were not sure of what legal effect the agreement would result in and how it affects their life. The parties mostly were unwilling to negotiate the terms with each other due to the emotional factors” (You, lawyer)\(^{237}\).

In most cases the parties usually only seek verbal agreements, but these verbal agreements are not enforceable under Taiwan law:

“In my career experience, very few couples chose the pre-nuptial agreement as a written document. However, many couples came to seek verbal legal advice on this issue. Most of them show many concerns on what agreement they may agree on in terms of the obligation to pay the costs of the household and special allowance for the homemaker/child-carer. In addition, the awakening foundation has provided couples with a draft of a pre-nuptial agreement in which the division of household tasks and the amount of special allowance for the homemaker/child-carer are written down. The couples are suggested to consider this draft in terms of the above issues before entering into marriage” (Lee, lawyer)\(^{238}\).

“In fact, so far I have never seen any case of pre-nuptial agreements. I doubt that the pre-nuptial agreements can take any action if the marrying parties do not have a common belief about how to manage their future life. You know…lives are probably changeable every minute and every moment. The pre-nuptial agreement is not necessarily so binding on the parties. It is unconvincing that proper protection is given to the housewife/househusband only by means of a pre-nuptial agreement. All I know from being a judge is that the parties give a verbal agreement at most rather than a written agreement, if any. However, the verbal agreement has no legitimacy and it is unenforceable. Ironically, the solemn pledge of love, affection and support between the couples probably become a fleeting illusion when the love story ends in a divorce” (Shiu, family law judge)\(^{239}\).

“I think some couples probably already take care about the financial support before entering into marriage, particularly in the circumstance where a loss of income occurs before and after marriage. One party might probably have promised another party not to worry about this matter but this promise was not being done in written document. You know… it is quite hard to get it done in written agreement when one falls in love. Somehow it is a taboo subject if one party continues to push another party to sign the pre-nuptial agreement. Most of the couples are ashamed of focusing on the subject in our culture. If one of them insists on a written agreement, unavoidably the other would doubt the sincerity of love” (Lee, lawyer)\(^{240}\).

\(^{237}\) See Appendix C (3), p. 286.

\(^{238}\) See Appendix C (2), pp. 279-280.

\(^{239}\) See Appendix C (6), p. 303.

\(^{240}\) See Appendix C (2), p. 280.
5.4 The financial support during marriage

The legal experts have observed that, apart from dealing with the property relationship between parties though property regime in the event of divorce, the Code also set up financial support which is based on gender neutral principle for the parties during marriage. Some of them reflect the recognition of the value of non-financial contributions to the marriage relationship. The provisions include the duty to pay the living costs of the household, the duty to maintain each other and the special allowance for the homemaker/child-carer. However, in practice some questions remain over how much effect the gender neutral provisions have on promoting the economic status of homemaker/child-carer; and furthermore, whether the provisions perpetuate gender inequality.

5.4.1 The duty to pay the living costs of the household

Unlike maintenance claim, there is no specific requirement to meet in order to claim the money for the costs of the household and it is in that sense a preferable and more available remedy. However, how to implement the true spirit of valuing the homemaking/child-caring contributions remains questionable in Taiwan society.

5.4.1.1 Symbolic recognition of the domestic contributions

Under the Code, each party has the duty to pay the living costs of the household. In the amendment to the Code 2002, it has provided that such a duty to pay the living costs of the household can be performed by carrying out the household management. As it provides:

‘The payment for living expenses of the household will be shared by the husband and the wife according to each party’s economical ability, household labour or other conditions unless otherwise provided for by law or mutual agreement’\(^{241}\).

In general, the living costs of the household range over the parties’ costs of living, education fees and any other living essentials. However, the Code does not detail how to carry out this exemption from the duty to pay the living costs of the household if either party carries out homemaking/child-caring. More questionably, such a provision has been criticised as achieving only symbolic

\(^{241}\) See note.2, Taiwan Civil Code, §1003-1.
recognition of the value of non-financial (homemaking/child-caring) contributions as it does not take any action in daily life in the absence of a mutual agreement. As Jeng argued:

“In fact, the majority of lawmakers thought it was an unnecessary provision because it was seemingly like calculating the wage for doing housework. Finally, they just intended to propagandise this concept to ordinary people rather than to seriously implement this provision. As a result, the provision becomes nothing but a slogan that the domestic contributions needed to be valued. In practice, this provision does not take any action” (Jeng, family law judge)²⁴².

5.4.1.2 Unpopularity of the agreement

On one hand the Code does not provide the proportion of the duty to pay household costs for the parties, on the other the Code leaves it for the parties’ agreement. However, Lee found that the couples are more unwilling to consider agreeing on the terms of the duty to pay the living costs of the household before marriage:

“In order to avoid the disputes over the proportion of obligation to pay the costs of the household by making non-financial contributions, I often suggest the couple to consider the pre-nuptial agreement of the obligation to pay the costs of the household either before or during marriage. In contrast to the cases before marriage, more clients come for legal advice of bearing the obligation to pay the costs of household after they got married, particularly in the early years” (Lee, lawyer)²⁴³.

5.4.1.3 The court’s discretionary power to decide the proportion of the duty

In general, the requirement for the claim of the money for the living costs of the household under the Code is vague and general. Thus, the court has complete discretionary power to decide the proportion of the duty to pay the costs of the household. However, the guideline for this has not been clearly set up by the court so far:

“My advice is to tell them that although the Code has given legal recognition to the non-financial contributions, the court will decide the proportion of duty each party should bear according to the contributions he or she has made on a case by case basis when they have a dispute over this matter. We do hope the courts can unify the decisions as soon as possible” (Lee, lawyer)²⁴⁴.

²⁴³ See Appendix C (2), p. 281.
²⁴⁴ See Appendix C (2), p. 281.
5.4.1.4 The acceptability in the society

Society’s attitudes to the recognition of value of non financial contributions still play the key role of the implementation of the new provision, although the Code has placed the formal recognition of the homemaking/child-caring contributions:

“The Code has provided that the non-financial contribution can be seen as the way to bear the obligation to pay the costs of the household. It is a great idea of the current Code to value the non-financial contributions to the marriage relationship. But the social norm still has certain impact on how to implement this idea. To be honest, it is less likely to change people’s thinking in a short period. Probably the public just needs more time to accept it” (Lee, lawyer)245.

The above provision under the Code has been seen as moral standards at most and it has not played its protective role well in the society:

“…but to solely rely on the Code is not enough to implement the idea. All we need to do is to popularise this new idea to the public, either to wives or husbands, to affect the social norm. We do not intend to provoke a conflict between husbands and wives. We try to convince husbands and wives of accepting that domestic contributions can exempt the homemaker/child-carer from the obligation to pay the costs of the household instead….You know…gender equality is also important in a family. You could find that the central idea of gender equality is of the human dignity on the constitutional level. You should see your partner as an equal and keep him/her in the state of being worthy of esteem and respect. I always think that the ideal family should be like a forum for negotiation and mutual communication and it should be based on mutual help, trust and respect which are behind the family law. But you know…we still need more education on this matter” (Lee, lawyer)246.

“It is quite difficult to implement the provisions in real life only by means of legal language under the Code. The key point is whether people are willing to do what the provisions prescribe. I believe that the marrying parties ought to have a common belief of living together and be ready to share a future life before they decide to give life to each other. For example, agreeing on the division of households. We do not necessarily need the law’s intervention in every minute and moment. But, at least, I think the current law also functions as an educational means to instil respect for the dignity of the homemaker/child-carer and making homemaking/child-caring valuable for married couples”(Shiu, family law judge)247.

5.4.2 The duty to maintain during marriage248

Apart from the duty to pay the living costs of the household, the duty to maintain

245 See Appendix C (2), p. 281.
246 See Appendix C (2), p. 281.
247 See Appendix C (6), p. 304.
248 The maintenance after divorce is called alimony in Taiwan. The requirements for the maintenance claim during marriage and the alimony claim after divorce are different. However, both of them have strict requirements.
is seen as another one of the financial resources the party can have during marriage. However, not only does the Code give strict requirements before the maintenance claim can be made, but the courts also place certain restrictions on the claim in practice. Both of them have increased the difficulty in successfully applying for maintenance claims.

5.4.2.1 Strict requirement of maintenance claim

Under the Code, the spouses are obligated to maintain each other during marriage and this duty emerges at the outset of the marriage relationship and ends in the dissolution of marriage. However, maintenance is not easily granted due to its strict requirements, the lawyer participants showed that:

“There are very strict requirements of applying for spouse maintenance…Normally the housewives only live on a limited financial resource if the wage earner is very mean about the money. If you do not want to divorce you could go to court and claim the money for the costs of the household from the wage earner in the absence of an agreement of special allowance for the homemaker/child-carer... it is more easily than to claim maintenance. Such a method is applicable to any matrimonial property regime under the Code” (Lee, lawyer)\\(^{249}\).

“I feel it is still a bit late although you have made the agreement and want to enforce it. Your claim does not necessarily come true as the other party has already hidden the property. Therefore, the maintenance claim might be the only financial resource for the economically weaker party to apply for in the absence of an agreement of the money for the costs of the household and special allowance for the homemaker/child-carer” (You, lawyer)\\(^{250}\).

Therefore, sometimes it would be easier to claim the money for the living costs of the household instead of claiming maintenance during marriage, as Shiu, the judge, pointed out the maintenance claim is:

“Very rare...because the requirements of applying for a spouse’s maintenance are very strict so that they prefer to apply for the money for the costs of the household rather than spouse maintenance” (Shiu, family law judge)\\(^{251}\).

5.4.2.2 The degree of duty to maintain

The Code does not provide the extent of a duty to maintain each other. Normally the courts only require the earning party to provide the other party with a

\\(^{249}\) See Appendix C (2), p. 284.
\\(^{250}\) See Appendix C (3), p. 290.
\\(^{251}\) See Appendix C (6), p. 304.
minimum standard of living, rather than to provide reasonable maintenance which satisfies personal needs of the other party. Therefore, the claimant is less likely to have same quality of living that the respondent has, as Gi indicated:

"Under the Code, the wage earning husband still has the power of money over their wife. The quality of the housewife’s life simply depends on her husband’s generosity. The court would not order the wage earning husband to pay maintenance during marriage as long as he provides his wife with a minimum standard of living, although this living is close to the poverty line" (Gi, family law lawyer)\(^{252}\).

In addition, the courts usually hold the position that the claimant has not reached the level to be maintained as long as she/he has an income:

"In practice, there are very harsh requirements of spouse maintenance application. It is impossible for anyone who has an income, even the income is quite low, to be granted maintenance. You could say the only solution to an awful marriage is to divorce if your husband is unwilling to take the mutual duty to maintain you" (Jeng, family law judge)\(^{253}\).

### 5.4.2.3 Maintenance is probably awarded in the extreme case

Although the Code provides that the parties are obligated to maintain each other, the level of maintenance entirely depends on whether the wage earning party is generous. Moreover, only in an extreme situation, e.g. malicious abandonment during marriage, the spousal maintenance would be awarded by the courts:

"Well…It is unlikely to enforce the duty to maintain under the Code. Only in the case of malicious abandonment, could you claim for the spouse’s maintenance…On one hand it is less likely for a full time homemaker/child-carer to have any financial income during marriage, on the other hand it is impossible to have any acquisition of property during marriage. The court would not grant you any maintenance unless in the case of malicious abandonment. Imagine that if you were a homemaker/child-carer and intend to buy a piece of cloth, but your husband refuses to buy it for you. Will you not feel quite helpless?" (Kuo, law professor)\(^{254}\).

### 5.4.3 The special allowance for homemaker/child-carer

One new provision passed in the Code 2002 was to manifest the economic independence for the homemaker/child-carer.

\(^{252}\) See Appendix C (5), p. 299.
\(^{253}\) See Appendix C (4), p. 294.
\(^{254}\) See Appendix C (1), pp. 275-276.
“With the exception of the living expenses of the household, the husband and the wife may contract a certain amount of money paid by one for the other’s free disposition.”

This provision on one hand has declared that the spirit of equally valuing financial and non-financial contributions to the marriage relationship should be affirmed, on the other, however, it has caused more confusion in practice as it has just placed symbolic recognition of the non-financial contributions.

5.4.3.1 The objectives of the allowance
This is a provision aiming to promote the homemaker’s/child-carer’s economic status during marriage:

“As far as I know, the central idea of the special allowance for the homemaker/child-carer was to promote the housewives’ economic status and dignity, enabling them to have small money at their free disposal as in Taiwan many housewives secretly hid money for personal savings” (Jeng, family law judge).

“We proposed the special allowance for the homemaker/child-carer when we were engaged in the law reform in 2002. Quite a few women indicated that they deeply appreciated that introduction. Such an allowance helped them to maintain personal dignity and gain economic independence from their husbands. They gained lots of self confidence they never had before. At least, they felt that homemaker/child-carer was no longer a humble position” (You, family law lawyer).

In addition, the introduction of the allowance for the homemaker/child-carer is based on the approach which regards marriage as a quasi-partnership.

“The idea of special allowance for the homemaker/child-carer was entirely based on profit sharing between the couple. The allowance could be seen as the advance bonus to the quasi partnership, namely marriage. And this allowance is only for individual use, at one’s own disposal. The purpose of such an allowance is totally different from the money for the costs of the household shall be used for family expenditure. You could use the special allowance to buy any thing as you wish without the other party’s consent. It was the key index of the promotion of housewives’ dignity” (Kuo, law professor).

The concept of profit sharing should apply to the marriage relationship as the

255 See Taiwan Civil Code, §1018-1, at note 2.
256 See Appendix C (4), pp. 294-295.
258 See Appendix C (1), p. 276.
marriage relationship is similar to the business partnership:

“We advocated that parties can share the net earnings, after deducting the costs of the household from the total incomes every month. A certain proportion of spending money for individual free disposal may be agreed on out of these net earnings. Once again, a marriage relationship is like a partnership, the partners see each other as equals of personality and dignity. That was the origin of why we strongly advocated that the homemaker/child-carer should be given a right under the Code to claim for the special allowance for the homemaker/child-carer. The couple should agree on how to distribute the net earnings, to manage and use the share that he or she is entitled to.” (You, lawyer)

Overcoming the difficult problem that the value of non-financial contributions is only realisable in the event of divorce if the special allowance for the homemaker/child-carer can implement the spirit of placing value on homemaking/child-caring contributions during marriage:

“As to the issue of special allowance for the homemaker/child-carer, the parties are not allowed to distribute assets acquired during the subsistence of the marriage. So, the right to claim half of the deferred community to surplus is only a contingent right, it does not necessary come true during marriage. Therefore, we proposed giving the housewife a sum of money for free disposal, which is called special allowance for the homemaker/child-carer” (You, lawyer).

Normally the special allowance for the homemaker/child-carer is required less in the dual income family as both parties are economically independent from each other. This demonstrates that the special allowance for the homemaker/child-carer is of great importance for the homemaker/child-carer in a single income family, as Lee argued that:

“I think the agreement of a special allowance for the homemaker/child-carer usually happens in the single income families. I never heard of the same situation occurring in dual income families. I guess that is partly because the parties are both wage earners and have an independent economic status. How to bear the obligation to pay the costs of the household normally is a big concern of dual income families. I never heard of any agreements of special allowance for the homemaker/child-carer made in dual income families. However, I think in single income families, the housewives desire to have periodical money at their disposal from their husbands as they do not have any income” (Lee, lawyer).

261 See Appendix C (2), pp. 282-283.
5.4.3.2 A gloss of economic independence

The current provision was a political compromise between the legislation and drafter. The main reason to reject the proposal of special allowance was, as the lawmaker insisted, that sufficient protection for the homemaker/child-carer was provided under the Code. Moreover, the lawmaker still had the mindset that the income solely belongs to the breadwinner, instead of jointly sharing, as one of the drafters stated that:

“The current version under the Code is different from the idea we suggested in 2002. The Ministry of Justice was strongly opposed to this idea at that time. One official representative argued that the Code already provided the housewife with enough protection, such as the right to claim half of the deferred community to surplus and the exemption from obligation to pay the costs of the household by domestic contributions. If not so, the housewife should request additional pocket money from her husband or the couple could talk over broadening the range of the costs of the household. There was no need to entitle the housewife to claim the special allowance for the homemaker/child-carer. We were opposed to using the name of ‘pocket money’, because this term probably referred to the wife’s subordinate status to her husband” (You, lawyer).

She continued to argue that the idea of special allowance for the homemaker/child-carer can enforce the notion of promoting their economic status. But finally the proposal was rejected by the lawmaker; the homemaker/child-carer is not entitled to claim the special allowance:

“We contended that to a certain extent the parties in the marriage relationship are similar to a commercial partnership, they should see each other as equals, treat each other with respect, and they share jointly what they have earned in the subsistence of the marriage. Either partner has the vested right to share the profits, this origin of right does not derive from the other partner’s generosity at all. However, the Ministry of Justice completely denied the original idea of the special allowance for the homemaker/child-carer. The current language of the special allowance under the Code is the compromise between the administration and legislation. The final language under the Code is that the parties “may agree on” the special allowance. One controversial issue still remains whether the court has the power to interfere with the individuals in the absence of a mutual agreement” (You, lawyer).

Another drafter also argues that the lawmaker just wanted to propagate the formal recognition of the value of non-financial contributions:

\[\text{262 See Appendix C (3), p. 288.}\]
\[\text{263 See Appendix C (3), p. 288.}\]
“Unfortunately, it is a shame that either party is not entitled to have right of claim for the allowance under the current Code. The Code just leaves room for mutual agreement…In addition, the article 1018-1 under the Code provides that, with the exception of living costs of the household, the husband and the wife may contract a certain amount of money paid by one for the other’s free disposition. The term ‘may’ was used in that article, not ‘shall’ or another stronger word instead. Therefore, either party is not obligated to sign an agreement of special allowance for the homemaker/child-carer. Neither party needs to make a similar agreement by any law. If the allowance is not being stipulated in a written agreement, either party has no right of claim for it. My personal understanding of the main idea of the article 1018-1 is that it just intends to propagate the importance of the non-financial (homemaking/child-caring) contributions. In fact such propagation does not take action very well in real family life. If you want to promote the homemaker’s/child-carer’s economic status, you still need a written agreement and then it can be enforced by the court” (Lee, lawyer)\textsuperscript{264}.

5.4.3.3 The importance of the legitimacy of the allowance

The lawyer participant, You, pointed out that some thought there is no need to entitle homemaker/child-carer to have a special allowance as they can ask more money for the living costs of the household:

“In Germany, the concept of living costs of the household is broader than that in Taiwan, it covers not only the actual expenditures for the whole family, but includes the expense for offering a quality life for every family member which conforms to human dignity. Furthermore, the expense of offering equal quality life between spouses is needed. In Taiwan, someone considers expanding the scope of the costs of the household, and then the housewives can claim more money for her own use” (You, lawyer)\textsuperscript{265}.

However, she continued to argue that, unless otherwise explicitly indicated, the homemaker/child-carer is at the risk of being accused of embezzlement as the money for the living costs of the household is only allowed to be used for the purpose of the household, not for personal use, as she stated:

“It is questionable whether the wife can use this money for different purposes. It could be argued that the housewife would probably be accused of embezzlement if she misspends the money which only should be used in the costs of the household. Furthermore, the housewife would face the same dilemma if there is no distinction between the special allowance for the homemaker/child-carer and the money for living costs of the household”(You, lawyer)\textsuperscript{266}.

Another lawyer also mentioned that normally the wife only has the right to

\textsuperscript{264} See Appendix C (2), p. 282.
\textsuperscript{265} See Appendix C (3), p. 287.
\textsuperscript{266} See Appendix C (3), p. 289.
manage the money for household purpose, but does not own it:

“In most cases, if a husband does not specify the purpose of the money, normally the wife would use it to pay the costs of the household but does not dare to spend the money for herself” (Lee, lawyer)\(^{267}\).

### 5.4.3.4 Symbolic entitlement to the allowance

The lawmakers always held the position that they do not want to intervene with the parties’ financial arrangements during marriage. Therefore, they wanted to respond to the call for reforms in a perfunctory way. As a consequence, the gaps between the law in books and the law in action make the special allowance for the homemaker/child-carer exist in name only:

“The lawmakers intended not to get the clause of special allowance for the homemaker/child-carer passed as they thought there was no need to interfere with family matters. The current provision is just a compromise and it has never even taken action. In addition, under the current matrimonial property regime, the wage earning husband still has the power of money over his wife. The quality of the housewife’s life simply depends on her husband’s generosity” (Gi, lawyer)\(^{268}\).

“The Code just leaves room for mutual agreement. Many issues arise: What is the cause of action for the claimant? Can the allowance be legally enforced in the absence of a mutual agreement? We have been keeping our eyes on the ongoing debates…. the article 1018-1 under the Code provides that, with the exception of the costs of the household, the husband and the wife may contract a certain amount of money paid by one for the other’s free disposition. The term ‘may’ was used in that article, not ‘shall’ or another stronger word instead. Therefore, either party is not obligated to sign an agreement of special allowance for the homemaker/child-carer…. If the allowance is not being stipulated in a written agreement, either party has no right of claim for it…. My personal understanding of the main idea of the article 1018-1 is that it just intends to propagate the importance of the non-financial (homemaking/child-caring) contributions. In fact such propagation does not take action very well in real family life. If you want to promote the homemaker’s/child-carer’s economic status, you still need a written agreement and then it can be enforced by the court.” (Lee, lawyer)\(^{269}\)

“I think the special allowance for the homemaker/child-carer should be enforced by the court. I do really hope some cases can be found in the future. I have discussed this issue with few family law division judges. Their unanimous opinion on this matter was that the power to interfere was not conferred on the judges under the Non Contentious Proceedings Act in the absence of a mutual agreement. Therefore, the judges currently still have no power to grant the claim of the special allowance for the homemaker/

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\(^{267}\) See Appendix C (2), p. 283.
\(^{268}\) See Appendix C (5), p. 299.
\(^{269}\) See Appendix C (2), p. 282.
child-carer." (Kuo, law professor)\(^{270}\)

### 5.4.3.5 Unpopularity in the society

Cultural thinking makes the provision of special allowance for the homemaker/child-carer unpopular in Taiwan society, and the judges rarely deal with this type of case. As Jeng stated:

“At present I have never heard of any case of the special allowance for homemaker/child-carer. It is because the couples’ conservative attitudes toward the marriage in Taiwan cause them not to apply for the allowance. Therefore, I would like to suggest that a special allowance for homemaker/child-carer may be settled by mediation rather than in court” (Jeng, family law judge)\(^{271}\).

Shiu also held similar position:

“So far nobody has come to court and applied for it. I never heard of a case from my other colleagues. Maybe it is because the cultural reason for not doing so. The provision is probably nothing else but the lawmaker’s kindness” (Shiu, family law judge)\(^{272}\).

She continued to argue that there is no entitlement to the allowance under the current Code:

“Personally, I still advocate that the homemaker/child-carer deserves a right of claim for the special allowance for the homemaker/child-carer. Although the Code already has left room for the parties’ negotiations, but what further action can the parties take in the absence of a mutual agreement on special allowance for the homemaker/child-carer? The court decisions were very clear that the parties were not entitled to have rights of claim unless the agreement has been made” (Shiu, family law judge)\(^{273}\).

So far, there are only a small number of cases where the special allowance from mutual agreement could probably be made by the lawyer’s indirect encouragement, as Lee observed:

“A very small number of couples make the agreement after years of marriage. But I never heard about anyone who made the agreement before marriage. Although they do not mention the legal jargon ‘special allowance for the homemaker/child-carer’, I entirely realise what they really intend to have is

\(^{270}\) See Appendix C (1), p. 275.
\(^{271}\) See Appendix C (4), p. 295.
\(^{272}\) See Appendix C (6), p. 305.
\(^{273}\) See Appendix C (3), p. 289.
the special allowance for the homemaker/ child-carer. They already have a verbal agreement but they hope me to make terms in written agreement which stipulate that one party is eligible to claim for a certain amount of monthly money for free disposal from the other party. Finally, in order to avoid further disputes I would use the legal jargon in that agreement” (Lee, lawyer)274.

In those cases, she suggested the amount of allowance should vary from each family’s economic situation and should be a reasonable number after deducting the living costs from the income:

“It all depended on the wage earner’s economic situation and social status. However the prerequisite was that you must have a written agreement between you and your partner. In general, the money they agreed on was small after deducting the costs of living, such as mortgage, bills and the education fees for a child, from the wage earner’s income… I would consider this point when I suggested the amount to them. On the whole, the amount that I suggested was from 15,000 to 20,000 NT dollars which is acceptable in a middle class family. There is a referable index which shows that in Taipei city the monthly expenditure for an adult is between 24,000 to 25,000 NT dollars. I think it is reasonable to stipulate the amount less than the monthly expenditure if you could live in an acceptable way” (Lee, lawyer)275.

5.4.3.6 The illusion of the special allowance for the homemaker/ child-carer

Some couples stated that they could agreed on the special allowance for the homemaker/ child-carer by any other way, e.g. treats his housewife to a free trip or gives a valuable gift to her. The allowance can be given in any other form and it does not have to be the cash. This generosity does not mean that the wife has the complete entitlement to the special allowance, as Kuo observed:

“It is clear that most couples looked on the proposal of the special allowance from the sidelines. However, I guessed some couples have got used to it gradually. They might say they already agree on the special allowance in other forms, such as offering the housewife a free trip as a reward for her hard-working homemaking, instead of giving money to her. Moreover, in New Year, some husbands give cash gifts to their wives. Moreover, the wealthy husbands are keener to flaunt their generosity towards their wives by giving them a valuable gift. I found the same results in my survey throughout Taiwan. However, this still completely depends on the husband’s generosity” (Kuo, law professor)276.

5.5 Property distribution and financial support after divorce

There are two financial consequences for the parties in the event of divorce.

274 See Appendix C (2), p. 282.
275 See Appendix C (2), p. 282.
276 See Appendix C (1), p. 276.
Firstly, the Courts need to divide the property according to the content of the matrimonial property regime. Secondly, the court deals with the maintenance after divorce, namely the alimony.

Under the Code the default property regime applies automatically to married couples who have not expressly arranged another type of regime. To date, this regime still has been adopted by the majority of married couple. During the marriage the spouses have separate estates. They each retain the ownership of their own estate during the marriage; they manage, use and dispose of their own estates separately. This regime entitles either party to half of the deferred community to surplus so as to affirm the value of the non-financial (homemaking/child-caring) contributions. In the meantime, the courts need to consider the alimony claim under the requirements of the Code.

5.5.1 The right to claim half of the deferred community to surplus

The current default property regime is based on separation of property and entitles either party to claim the deferred community to surplus in the event of divorce, as You stated:

"We designed a regime of sharing the assets acquired during the marriage on dissolution of the marriage. The system is that either party is entitled to take out the asset value that he or she brought into the marriage, such as inheritance and solatium. Afterward they share what they have built together. On dissolution of the marriage, either by death or divorce, the accrual or growth to each party’s estate is worked out. This is done by calculating the net value at dissolution minus the net value at commencement of the marriage. If one of the estates has grown more than the other during the marriage, the party with the smaller growth has a claim against the party with the greater growth, for half the difference" (You, lawyer).

She further argued that it might be the easy way to reach fairness although the value of non-financial contributions that is only realisable on property distribution:

"It is unimaginable to divide all the assets into two parts on a 50-50 basis during marriage. Whereas the marriage relationship is a long-lasting relationship, the value of the homemaker’s non-financial contributions to the family would not have a chance to be assessed until the marriage breaks down and in the absence of a mutual agreement by the parties. I think the right

277 See Appendix C (3), p. 290.
to claim for half of the deferred community to surplus is probably the fairest way to distribute the assets when the marriage breaks down, although it is unrealistic and unimaginable to divide all assets into parts that belong to each party. But I still doubt that the value of the homemaker’s contributions can be entirely reflected in such a way during marriage” (Kuo, law professor).278

5.5.1.1 The difficulties in implementing this right of claim in practice

It is clear that the 2002 Code provided the chance for the financial and non-financial contributions to be equally valued though property distribution on divorce. However, there are some difficulties that have to be overcome for the right to claim half of the deferred community of surplus in terms of hiding property; the making of property list; the high deposit threshold for the non working party; the lack of actuary and the readjustment in property distribution. More importantly, whether the retirement pensions can be seen as a property to be divided remains question mark.

Firstly, the most serious problem is that the respondents receive no punishment in the case that they hide the property. As You stated:

“In practice, it is quite hard to obtain the full disclosure of the other party’s assets. The court may require that the respondent has to make a full and honest disclosure. But the respondent mostly does not obey the order to make an honest disclosure as the court demands. The tax authority is also of little help with this matter if the respondent has hidden the property or intentionally conveyed the property to a third party prior to the commencement of the proceedings. In some jurisdictions, the respondent is probably being accused by the court of contempt because of dishonest disclosure” (You, lawyer).279.

In the meantime, Lee pointed out that the courts have difficulties in sorting out the property list:

“Of course the Code has given the legal recognition to the domestic contribution and quantified its value as the right to claim half of the deferred community to surplus. However, not so many couples have a good understanding of how to carry out this right. In practice, it is quite difficult even for the judge to make a property list and correctly redistribute the marital assets. To decide which property is in the category of assets acquired before or after marriage has always been the controversial issue in a divorce. You need to prove that you own the property. In that case many issues may arise, such as the depreciation of the assets and stock assessment. It really takes time and money” (Lee, lawyer).280.

278 See Appendix C (1), p. 275.
280 See Appendix C (2), p. 284.
Secondly, You stated that the lack of actuary makes it difficult to carry out the claim of rights, thus, the urgent introduction of actuary is needed and it can help make the property list:

“An actuary report is necessary while divorce action is filed. Actuaries act as the expert witnesses in court cases requiring specialist experience, for example in calculating the worth of the parties’ assets. The introduction of the actuary also avoids dishonest disclosure of the property. The lack of actuary greatly caused uneven distribution of matrimonial property in Taiwan” (You, lawyer)281.

Thirdly, reducing the deposit threshold of the preservative measures of property can make the right to claim half of the deferred community to surplus more practicable:

“With regard to the right to claim half of the deferred community to surplus it is the problem related to the preservative measures of property. If the respondent is hiding the property, the court only requires one tenth of the cash deposit, it was one third before, if the claimant applies for the order of attachment of property. To some extent it can prevent the respondent from hiding the property” (You, lawyer)282.

However, the homemaker/ child-carer normally is the financially weaker parties and he/she is probably unable to afford the deposit although the threshold was reduced from one third to one tenth of the total value, as Lee argues that:

“Perhaps the right to claim half of the deferred community to surplus would take years to be carried out. Although the Code has given legal recognition to the domestic contributions, for me it is just a slogan. Furthermore, the applicant needs to prepay the divorce court fees before filing for legal action. Can you imagine that housewives with no income could afford the court fees? In practice it is a hollow slogan although the housewife is entitled to the right to claim half of the deferred community to surplus I suggest further law reform is needed, so as to provide the economically weaker parties with more substantial protections” (Lee, lawyer)283.

Fourthly, in order to avoid obvious unfairness, the Code provides that:

“The court shall adjust or waive the share of distribution provided that equal

283 See Appendix C (2), p. 283.
distribution is obviously unfair\textsuperscript{284}.

Therefore, the equal sharing of the assets under the Code is not a fixed rule. The homemaker/ child-carer may use this provision to claim for more share of the property distribution. The judge, Shiu stated that:

\begin{quote}
"I distribute the property according to the provisions in reference to the right to claim half of the deferred community to surplus under the default property regime. Further, I will take the value of domestic contributions into account in a judicial divorce. I once dealt with a case where the wife acted as the sole role of wage earner due to her injured husband's inability to work. Also, she has been looking after the children until they had grown up. The husband tried to claim half of the deferred community to surplus when they divorced. She argued that her husband had not made any contributions to the family, either financial or non-financial. I rejected the husband's claim and made the decision in favour of the wife" \textsuperscript{285}
\end{quote}

However, the adjustment is more common in the so called big money cases, particular in a judicial divorce. Yet, homemaking/ child-caring contributions are never taken into account by the court as a factor to readjust the property distribution:

\begin{quote}
"The court would not adopt this adjustment as long as divorce settlement has been made between parties. It probably happens in an extreme case, for example, where one party is a housewife while the other one is a sluggard who did not contribute anything to family. However, homemaking/ child-caring contribution cannot be justified to deserve a greater share when the court exercises the readjustment of the property. Anyway, it is very rarely to see one. Mostly it happens in a big money case" \textsuperscript{286}.
\end{quote}

\begin{quote}
"Most couples rarely apply to the court for this adjustment. In general, it usually happens in a big money case and homemaking/ child-caring contribution in never taken into account by the court. I am dealing with a case at present where the wife demands of the husband to give full disclosure of the assets, but he tries to find an excuse and hide the assets. Mostly the real property is much easier to be found as we have a registration system. However, it is hard to find any other intangible assets. I used to deal with a case where a wealthy business not only had hid all of his assets, but still asserted his half share of the wife's assets. I think that the lawmakers are always largely inactive on social problems. They will not make any reforms until the problem causes widespread discontents again. They always think the current Code is satisfactory" \textsuperscript{287}.
\end{quote}

\textsuperscript{284} See Taiwan Civil Code, §1030-1, at note 2
\textsuperscript{285} See Appendix C (6), p. 305.
\textsuperscript{286} See Appendix C (5), p. 401, see also Appendix C (2), p.283.
\textsuperscript{287} See Appendix C (3), p. 291.
“However, claiming for readjustment only occurs in a judicial divorce, particularly in a big money case. It is common to see the parties claim for readjustment of the share. However, homemaking/child-caring contribution is never a factor considered by the court to exercise the readjustment of the property redistribution. With regard to the divorces by mutual consent, we are unable to know the fact of divorce settlements by mutual consent as they are not open to public” (Jeng, family law judge)288.

Fifthly, the primary criterion for the courts to distribute the matrimonial property is determining when the assets are acquired. Only the property acquired during marriage is to be divided. Therefore, any real property, chattels and goods acquired during marriage are divided by the courts, but the future earning capacity is not being seen as a property to be divided although sometimes it is valuable, as the judge Shiu stated:

“In practice, any tangible or intangible assets acquired are to be divided. It includes the real property, e.g., the land and house. Chattels and valuable goods are also to be divided, such as car and shares. The courts will assess the value of the assets and divide them afterward. But I do not think the future earning capacity can be seen as any type of property and needs to be divided” (Shiu, family law judge)289.

However, the lawyers argued that the court shall have regard to the future earning capacity:

“Theoretically I would say yes, but it is less likely to be carried out unless you have any formal position in your husband’s company. If you were just a helper with no wages...that is impossible” (Lee, lawyer)290.

“I have not thought of it. As I understood, in the U.S the earning capacity is one of the factors that should be taken into account by the court on divorce. However, it is quite difficult to follow suit here” (You, lawyer)291.

In addition, one valuable asset that needs to be considered is retirement pensions; lawyers argued that the pensions should be seen as a potential property and to be divided:

“The wage earning husband is entitled to have a retirement pension when he retires. I think the housewives have done contributions to their husband’s retirement pension scheme. Ironically, the housewives devote themselves to

289 See Appendix C (6), p. 305.
290 See Appendix C (2), p. 284.
their families but own nothing in the end. The worst thing is that they even need to spend time on striving for economic independence on their husband. What a big sacrifice they have to make” (Gi, lawyer)\textsuperscript{292}

“Any potential assets acquired after the date of divorce are not taken into account by court. If the wage earning husband retires in two years after divorce, he earns the retirement pensions alone. However, I hold that the law should entitle the wife to share the retirement pension because of her domestic contributions prior to divorce” (Gi, lawyer)\textsuperscript{293}

“We designed a regime of sharing the assets acquired during the marriage on dissolution of the marriage. The system is that either party is entitled to take out the asset value that he or she brought into the marriage, such as inheritance and solatium. Afterward they share what they have built together, including the investment insurance and retirement pensions”(You, family law lawyer)\textsuperscript{294}

However, the judges have opposite views on this issue:

“We have already taken the savings insurance investment into account when we distribute the matrimonial property. But I do not think the retirement pensions should be included” (Shiu, family law judge)\textsuperscript{295}

“I know some have argued that retirement pensions could be seen as part of income and should be distributed on divorce. I am personally opposed to this idea as it is against its purpose of the employer to provide the employee with the minimum safeguard of living” (Jeng, family law judge)\textsuperscript{296}

5.5.2 Alimony claims\textsuperscript{297}

In general, the Code deals with property relationship and alimony separately. The courts only deals with alimony claims in a judicial divorce, and they do not intervene in a divorce by mutual agreement. Currently in practice it is harder to be awarded the alimony by the courts as they need to comply with the strict requirements of the alimony claim, and furthermore, the courts never consider non-financial contributions as a factor in alimony claim, and consequently the Taiwan Civil Code has shown its weakness in this regard, as the participants stated:

\textsuperscript{292} See Appendix C (5), p. 300.  
\textsuperscript{293} See Appendix C (5), p. 300.  
\textsuperscript{294} See Appendix C (3), p. 290.  
\textsuperscript{295} See Appendix C (6), p. 305.  
\textsuperscript{296} See Appendix C (4), p. 295.  
\textsuperscript{297} Under the Code, the divorcing couples who are in divorce by mutual agreement are not eligible to claim alimony.
“There are very strict requirements to apply for alimony under the Code. Normally the alimony would only be granted under the circumstance that the claiming applicant has difficulties in earning a living. We have been pushing the legislation to loosen the requirements of applying for the alimony. However, there has been a debate on the nature of alimony. My understanding of its nature under the Code is that the alimony is seen as the compensation for loss, not the extension of duty to maintain each other. Thus, the homemaker’s domestic contributions would not be taken into account by court in an alimony application” (Lee, lawyer).  

“In Taiwan, there are strict requirements for the alimony claim in divorce proceedings. In practice the court only ordered the alimony to those who are unable to earn the living on account of the divorce decree. The definition of ‘unable to earn the living’ is that the claimant must have no ability to work and pay for his life. We have been proposing to adopt American law. The wife who acts as child-carer is entitled to be maintained by her husband with the same living standard as they had before the divorce. This is the provision contrast to Taiwan where the claimant is only eligible to claim for compensation of mental loss, not alimony. We still need further reform on this point” (You, lawyer).  

“There are strict requirements of applying for alimony in a judicial divorce. The court has a discretionary power to decide the amount of alimony on a case to case basis. Unfortunately, the domestic contribution is never being taken into account in an alimony application. With regard to divorce by mutual consent, the court has nothing to do with alimony as the couples do not need the court’s intervention in the divorce settlements” (Shiu, family law judge).  

“To be honest, it is quite difficult to be granted alimony by using this reason. The applicant must meet two requirements: he/she must be the innocent party for the divorce and has difficulties in livelihood due to the decree of divorce. A large amount of alimony nearly occurs in divorce with mutual consent. It rarely happens in the judicial decree of divorce as the courts have to comply with the strict requirements. The courts are only concerned about how you start your future life, but do not take into account what previous domestic contributions you have made” (Jeng, family law judge).  

“That is impossible...under the current Code. The Code provides that the purpose of alimony is unrelated to the value of domestic contributions to the marriage relationship. In addition, the requirements of claiming for alimony are very strict as the claimant must be unable to earn a living because of the consequence of divorce. Perhaps only two kinds of persons are qualified claimants, the elderly and the disabled people. Therefore, no housewife would claim for alimony at the risk of losing the war of custody of child as the court assumes that you do not have the ability to raise children. Further, more in-depth, the court holds the view that the Code already enables you to claim half of the deferred community of surplus, why more? You already have enough financial resource to restart your life. Thus you will not have any difficulty in earning a living” (Gi, lawyer).  

298 See Appendix C (2), p. 284.  
300 See Appendix C (6), p. 305.  
301 See Appendix C (4), p. 296.  
302 See Appendix C (5), pp. 300-301.
5.6 Gender Mainstreaming

Overall, the goal of Gender mainstreaming has not been achieved as the current Code still has a far way to reach the substantive gender equality although it is based on gender neutral basis, as Kuo pointed out that:

“We have made the first step in this area, but we have not completely carried out the ideas. Compared with Japan, in Taiwan the protection of the homemaker/child-carer is not from the woman’s angle, but from the angle of gender. Therefore, the Code of 2002 is based on gender neutral basis and we have made more progress than Japan. The term ‘homemaker’ becomes a gender neutral and it refers to either housewife or househusband” (Kuo, law professor)\textsuperscript{303}.

You, a lawyer, also observed that the reduction of cash deposit of property attachment could be seen as being compatible with the policy of gender mainstreaming, but more reforms remain to be carried out:

“…there are additional protective provisions for a homemaker/child-carer which have not been passed under the Code as we mentioned earlier. Although the Code was amended in 2002, I don’t think that so many people have a good understanding of what it is about. However, it is gratifying for us that the Code has declared that the ‘domestic labour’ is no longer of little value. In addition, the reduction of the cash deposit of property attachment is compatible with gender mainstreaming as in most cases normally wives are the claimants and in an economically weaker position. It is one of the examples of the treatment by gender differences as required by the substantive gender equality. However, overall we need further reform to give more substantial economic protection to homemaker/child-carer” (You, lawyer)\textsuperscript{304}.

Other participants held that there is a long way to go to achieve the goal of gender mainstreaming:

“No, absolutely not, not yet… As you do not see any value of ‘domestic labour’ is realisable until divorce. In addition, the Code does little to compensate the housewife for her loss. The goal of gender equality has not been achieved yet in this regard” (Gi, lawyer)\textsuperscript{305}.

Therefore, more legal education on gender issues is needed to change people’s mindset:

\textsuperscript{303} See Appendix C (1), p. 277.
\textsuperscript{304} See Appendix C (3), p. 291.
\textsuperscript{305} See Appendix C (5), p. 301, see also Appendix C (2), p. 285; Appendix C (4), p. 296.
“It is too hard to achieve this goal and it might be achieved in fifty years. It is not so easy to implement the idea within a family, and we still need more education on gender issues.” (Jeng, family law judge)\textsuperscript{306}

“Well…still long way to go. We need to strengthen the education of gender equality in family. It would be great to make law reforms from a gender mainstreaming perspective so that men and women benefit equally.” (Shui, family law judge)\textsuperscript{307}

“I think Taiwan was already in the lead in this area among the South East Asian countries…but still have a far way to go…first of all, we need more education of gender equality to overcome the cultural issue.” (Lee, lawyer)\textsuperscript{308}

5.7 The calls for further law reform

Over the past decades, some issues remain unresolved although the Code has eliminated discriminatory law against women and set up the gender neutral basis in family law area. The weakness of the current Code is indicated and further law reform is suggested by the participants.

5.7.1 To avoid hiding property

The effectiveness of the claim to half of the deferred community to the surplus is largely affected by the dishonest disclosure of property. The system of registering estate property by joint names is suggested to avoid hiding property:

“It is fairer to the parties after the Code amendment 2002. The Code was modelled on the matrimonial property under the Swiss Civil Code, which implements the gender equality. However in practice, many wealthy parties are hiding the assets to avoid the distribution of matrimonial property. The consequences of law enforcement are not going very well. Therefore, I suggest the parties to register their house in joint names which can safeguard their property” (Jeng, family law judge)\textsuperscript{309}.

In addition, the introduction of an actuary in the courts might also help to avoid the practice of hiding matrimonial property, as You suggested already:

“In some jurisdictions, the respondent is probably being accused by the court of contempt because of dishonest disclosure. An actuary report is necessary while divorce action is filed. Actuaries act as the expert witnesses in court

\textsuperscript{306} See Appendix C (4), p. 296.
\textsuperscript{307} See Appendix C (6), p. 306.
\textsuperscript{308} See Appendix C (2), p. 285.
\textsuperscript{309} See Appendix C (4), p. 296.
cases requiring specialist experience, for example in calculating the worth of the parties’ assets. The introduction of the actuary also avoids dishonest disclosure of the property” (You, family law lawyer)\textsuperscript{310}.

5.7.2 Entitlement to the special allowance for the homemaker/child-carer

In Taiwan society, the homemakers/child-carer suffers economic disadvantages during marriage as long as the breadwinner is unwilling to support them. Thus, in order to provide the homemaker/child-carer during marriage with financially substantive support, it is hugely important to entitle the homemaker/child-carer to the special allowance for the homemaker/child-carer:

“Once again, we should legislate the special allowance to a homemaker/child-carer and then the wage earning husband is obligated to offer the housewife this allowance in the absence of a mutual agreement. Moreover, the court should take homemaking/child-caring into account when deciding to share the obligation to pay the costs of the household between parties, rather than invariably emphasise the monetary contributions. The party who contributes more non-financially to the family should be reduced comparatively obligation to pay the costs of the household.” (Gi, lawyer)\textsuperscript{311}

“The special allowance for the homemaker/child-carer was grounded on the standpoint that the domestic contribution to the family is of great value. The initial idea of the allowance was misunderstood as calculating the value of doing the household affair with a market price… The ‘domestic labour’ within the household greatly differs from the market labour in a paid employment. The value of domestic contributions to the marriage relationship is less likely to be calculated with the market price. The special allowance for the homemaker/child-carer is based on the concept of the advance bonus of the accrual accumulated during the marriage. In the spirit of the special allowance for the homemaker/child-carer, either domestic or non-financial contributions to the marriage relationship are equally valued…I think the Code should provide that the parties shall agree on the amount of a special allowance if they have any adequate income” (You, lawyer)\textsuperscript{312}.

“Currently the difficulty in this issue is that the court does not have the power conferred under the Code to intervene in the special allowance for the homemaker/child-carer in the absence of a mutual agreement. Therefore, the procedural statutes need further reform to give the court power to award the special allowance for the homemaker/child-carer. In addition, we have been encouraging more housewives can apply to courts for the allowance. On one hand people would take the allowance for more granted if more cases could be made. On the other it is the educational aim of the Code to make people to get used to it” (Kuo, law professor)\textsuperscript{313}. 

\textsuperscript{310} See Appendix C (3), p. 290.
\textsuperscript{311} See Appendix C (5), p. 301.
\textsuperscript{312} See Appendix C (3), p. 289.
\textsuperscript{313} See Appendix C (1), p. 278.
5.7.3 Another way to assess the value of homemaking/ child-caring contributions to the marriage relationship

No matter what criteria are used, it is extremely difficult to assess the value of non-financial contributions. However, it is worthy to consider discovering the value of domestic contributions in tort suits:

“First of all, we need to reform the procedural statutes. Besides, we need more accumulations of homemaker's/ child-carer's domestic contribution-related cases. We hope more cases can be made from the angle of the compensation of damages. In the event of a torts case, an injured homemaker/ child-carer should claim for the compensation of damages. The amount of compensation for the homemaker's/ child-carer's loss should be seen as equivalent to the value of domestic contributions. In practice, the next step is to turn the abstract concept of the value of the domestic contributions into the concrete loss which a homemaker/ child-carer has. We can try to measure the value of the domestic contributions step by step” (Kuo, law professor)

Moreover, in order to gradually change people’s mindset, the Pen-Wan Ru foundation\textsuperscript{315} has launched a campaign to give a wage to those who are engaged in household services. It also can prove that homemaking/ child-caring contributions have great value:

“As I know, the Pen-Wan Ru Foundation organises a campaign where women are trained as domestic workers by specialists on household tasks. Then, the well trained domestic workers offer the household services to another family and they earn wages by hourly rate. Thus, the domestic workers help themselves and each other. Today I help you with the child-caring, then, tomorrow you help me with the laundry in return. It is interesting that the housewives do the same household tasks without any wages in their own family. But the value of the domestic contributions is obviously shown when they do the same services for another family. The housewives become more self-confident as long as they are economically independent from their husbands. This campaign not only helps promote the woman's economic status, but changes the household tasks into an activity with values” (Lee, lawyer)

5.7.4 Enhancement to gender issues in education

As noted above, the gulf between the legal norms and social norms is clear. Apart from further law reform, it is also important to enhance the gender issues in

\textsuperscript{314} See Appendix C (1), p. 277.
\textsuperscript{315} The foundation was founded in 1996 in memory of a feminist, Pen-Wan Ru, who was raped and died. The aim of this foundation is to promote gender equality and secure women’s safety. The foundation also provides community care for those who need it in a way of mutual help system. The website is available at: \texttt{<http://www.pwr.org.tw/index.aspx> 02/05/11 accessed}\n\textsuperscript{316} See Appendix C (2), p. 281.
legal education, the judges indicated that:

“You cannot just rely on the law as law has its limits. The core of this matter is education, particularly family upbringing. In Taiwan mammonism has spread and people are pursuing material wealth and possessions. Parents are only concerned about children’s school results rather than their moral education. Therefore, I would suggest parents not only to instil the idea of domestic contributions being as important as financial contributions to their child, but also to teach them about gender equality in domestic upbringing” (Jeng, family law judge)\(^317\).

“The provisions under the current Code are meaningful to gender equality in family. In a family, the wage earning husband always has a sense of superiority as he has the ability to perform the obligation to pay the costs of the household, while the housewife has a sense of inferiority as she is in an economically weaker position. In modern society, unfortunately more and more people are keen to pursue fame and fortune. The core values of an entire family, such as homemaking/child-caring, are totally being ignored. Thus, I think home education and upbringing are hugely important to promote the awareness of gender equality within the family, and then, a stable society will be successfully built” (Shiu, family law judge)\(^318\).

5.8 Summary of the findings from the interviews
In this chapter, the legal specialists’ responses to the research questions are used to review whether the working of the provisions related to how the Code 2002 values non-financial contributions to the marriage relationship has achieved the substantive gender equality required by gender mainstreaming. The interviews are not nationally representative, but their responses to the working of the Code 2002 indicated that there is a need to consider further reform although the sample is small but very specialist.

5.8.1 All-inclusive definition of ‘domestic labour’
It is clear that under the influence of so called traditional virtues, the concept of ‘domestic labour’ in Taiwan society context is inclusive of everything household-related. What this comes to mean is that the concept could not only include physical labour: homemaking, child-caring, the elderly caring and assistance to husband’s family business, but invisibly spiritual support to her husband.

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317 See Appendix C (4), p. 296.
318 See Appendix C (6), p. 306.
5.8.2 Equalisation claim to property

In the findings from the interviews, it is clear that, in order to reach gender equality, there are two fundamental bases in the Family Law Chapter of Taiwan’s Civil Code 2002 in the terms of how to value the non-financial contributions to the marriage relationship. One of the bases is the separation of property in the default property regime where either the wife or the husband respectively retains their own property from the outset of the marriage until the end of marriage. At the end of the marriage, the homemaking/child-caring party has equalisation claim to the matrimonial property as the entitlement to half of the deferred community of surplus can be earned through homemaking/child-caring during marriage.

The interviews showed that the Code has just placed symbolic recognition of the value of these contributions as there are still difficulties in carrying out the equalisation claim and the entitlement is only realisable in the event of divorce. As a matter of fact, an attempt to compensate the homemaker’s/child-carer’s financial loss through the equalisation claim cannot appropriately reflect the value of non-financial contributions during marriage. Moreover, the Code did not give assurances that the entitlement to half of the deferred community of surplus will finally be realised.

5.8.3 Ostensibly neutral laws

The findings in the interviews also showed another base: that the gender neutral principle has been employed under the Code 2002 in the field of financial support during marriage, such as the agreements of the duty to pay the costs of the household and the special allowance for the homemaker/child-carer. From the participant’s observations on the Code, the issue of how to manage the financial support has been the matter that the Code is most reluctant to deal with. Thus, the Code allows for the spouses’ mutual agreement in the name of gender neutral law as it is seemingly fair to both the breadwinner and homemaker/child-carer.

However, the findings indicate the reality that the Code has no thought of the unequal bargain power between breadwinner and homemaker/child-carer and that in actual fact this would reinforce the homemaker’s/child-carer’s
dependence on the breadwinner. In addition, the cultural obstacle to the agreement of financial support during marriage has never been considered by the Code. Moreover, although the Code has recognised that the obligation to pay the living costs of the household can be performed by carrying out the homemaking/ child-caring, the working of this provision remains to be seen in Taiwan society.

5.8.4 Difficulties in maintenance claim
The participants have observed that maintenance, either during marriage or after divorce, is harder to achieve for the homemaker/ child-carer due to its strict requirements. The non-financial contributions are never the factors to be considered by the courts in a maintenance claim.

5.8.5 Entitlement to the special allowance for the homemaker/ child-carer
Overall the Code has not achieved the goal of substantive gender equality required by the gender mainstreaming. In order to promote the homemaker’s/ child-carer’s financial position during marriage, the participants with one voice suggested that the homemaker/ child-carer should be entitled to the special allowance from the breadwinner.

5.8.6 Enhancement to the gender equality through education
Finally, the findings indicated that the goal of substantive gender equality cannot only be achieved by law. A more effective way to bridge the gap between social norms and legal norms is education as education has a ripple effect within the family and across generations.

5.9 Conclusion
In contrast to the issues indicated in Chapter Four, it is clear that there is a coincidence of the illegality of ostensibly neutral laws between the findings of interviews and the existing issues in Taiwan’s legal context. Either in theory or in practice, the symbolic recognition of the value of non-financial contributions and formal gender equality faced by Taiwan reinforces the homemaker’s/ child-carer’s financial dependence on the breadwinner. In addition, one consideration shall be given to the issue that whether the legal rationality of the new Code 2002 can be justified as ordinary people do not have a good
understanding of the spirit of new law.

Moreover, the point is where there are existing inequalities in the laws, let alone a socially determined real and inalterable difference, gender neutral laws only perpetuate the inequalities and discrimination and are incompatible with the constitutional level and gender mainstreaming.

In the following chapter 6, this study continues to explore the working of English family law, having a completely discretionary system, in terms of valuing the non-financial contributions to the marriage relationship.
CHAPTER SIX
THE VALUE OF NON-FINANCIAL (HOMEMAKING/ CHILD-CARING) CONTRIBUTIONS TO THE MARRIAGE RELATIONSHIP IN ENGLISH LAW CONTEXT

6.1 Introduction
As seen in previous chapters, the Taiwan Civil Code 2002 has on the face of it given legal recognition to the value of non-financial contributions to the marriage relationship. However, it is hard to say whether this recognition has been fully realised in practice.

Having considered Taiwan’s legislation-led move towards a revaluing of domestic contributions in family life through gender mainstreaming and noted due limitations of its operation, this chapter explores how English family law values unpaid non-financial contributions, homemaking and care giving work in marriage, to see whether there are lessons that Taiwan can learn draw on. First it should be noted that in the jurisdiction of England and Wales, their value is only realisable on divorce. Secondly, as will be discussed, this value has changed significantly since 2000 when the landmark case of White was decided by the House of Lords.

However, it is also important to note that the value which English law places on non-financial contributions in any individual case in a marriage is in practice linked to the individual financial situation of the couple on divorce and in particular whether their assets exceed the post-separation needs of the family as a whole. This is a system in which the courts have a great deal of discretion, and where the state’s aim is to achieve fairness. This leads to financial uncertainty post-separation and is one of the factors for which English law in this field is criticised, as well as being one of the most stressful elements in any divorce case for a couple. Unlike in England and Wales, in Taiwan, as aforementioned, and many other jurisdictions, there is a statutory matrimonial property regime in which community of property is the default system during the subsistence of marriage and the common starting point will be that assets built up during the

319 White v White [2001] 1 AC 596.
marriage are owned equally and will therefore be divided equally when the marriage has a breakdown, providing more certain outcomes\textsuperscript{320}. As marriage is regarded in community of property jurisdictions as a ‘contractual regime’, this default position may however be varied by means of a pre-nuptial agreement\textsuperscript{321} between the parties or by the couple opting into one of a range of different but state-prescribed matrimonial regimes, from which couples can choose at the point of marriage or by agreement during the marriage.

Yet in England and Wales, whether marriage is a contractual regime or rather a status is something which is still debated\textsuperscript{322}. As will be discussed below, until very recently, couples had no right to themselves agree at the point of marriage the ownership of ‘matrimonial and non-matrimonial assets’ or their distribution on divorce, even though a pre-nuptial agreement would clearly be a useful tool for couples wishing to reduce uncertainty and to reach a fair distribution of


\textsuperscript{321} In some civil law jurisdictions, the couple may have some freedom to alter the terms of the property regime through prenuptial agreements. The Nordic countries in principle have a deferred community of property. Here, the equal division in many cases can be displaced by prenuptial agreements where there was a considerable disparity in assets between the spouses when entering into marriage. The spouses also can choose to have a complete separation of property and exclude maintenance to a certain extent, but this is subject to scrutiny by the courts in order to make equitable results. Another example can be found in Germany where in principle the spouses are free to conclude agreements regarding property and maintenance where it will be binding unless these agreements were concluded in breach of general contract law rules at the time of separation it would be inequitable for the spouses for holding them. More discussion, see Scherpe, J.M (2007), \textit{op. cit.} However, Taiwanese couples are not free to alter the terms provided in default matrimonial property regime, furthermore, they cannot agree to not to opt in any regimes provided by Taiwan’s Civil Code. In addition, they are not free to conclude agreements regarding maintenance after divorce (alimony) which is seen as contradict to public policy. Under the Code, the spouses may only conclude agreements regarding the following terms, e.g. the residence of matrimonial home, family name of their child, the duty to pay the living costs of the household and the special allowance for the homemaker/ child-carer.

\textsuperscript{322} Some argue that in England and Wales marriage is a status not a contract (e.g. Regan, 1993a), or a contractually acquired status (Dewar and Parker, 2000). For a summary, see the discussion on this in Herring, J., (2009) \textit{Family Law}, (Longman: Harlow), pp. 49 – 50.
matrimonial assets on relationship breakdown. Indeed, this style of contract was seen as contrary to public policy\textsuperscript{323} even though such an agreement could also be used to ensure the economic protection of the non-financial contributor on divorce. Arguably, this may be easier to do when the parties are in harmony, although in England and Wales any such agreement has been left for couples to agree on divorce\textsuperscript{324}, which is often difficult. Otherwise how to divide assets has been left to the discretion of the court at the point of divorce, which can also decide spousal maintenance at the same time. Recently, however, a judgment of the Supreme Court of Justice in England and Wales has ruled in favour of pre-nuptial agreements being effectively binding by in future giving them ‘decisive weight’ \textsuperscript{325}. It was the majority decision of eight of the nine Supreme Court Justices present and this is considered a major step forward for those who argue that married couples should be given the autonomy to regulate their own financial affairs in this way. Given these developments, the chapter is also going to discuss what role a pre-nuptial agreement might play in English family law context in relation to the valuation of non-financial contributions.

The beginning of the 21\textsuperscript{st} century has seen some radical judicial activism in England and Wales in Family Law. Apart from pre-nuptial agreements, recently in private family law, the judicial decisions relevant to unpaid non-financial contributions have greatly changed the direction of legal discourse and placed a gradually increasing value on these unpaid works, taken to be the non-financial contributor’s ultimate worth in the heterosexual married family context\textsuperscript{326}. This chapter therefore also considers some issues arising from this evolving legal framework from the perspective of gender equality. Both the financial support provisions, namely maintenance during marriage, for the economically vulnerable member (usually the non working spouse) and financial provision and ancillary relief on divorce dealing with income and property redistribution will be

\textsuperscript{323} See Hyman v Hyman [1929] AC 601.
\textsuperscript{324} See Edgar v Edgar [1980] 3 ALL ER 887.
\textsuperscript{325} See Radmacher v Granatino [2010] FLR 1900, per Supreme Court Justice, Lord Philips, at para.70.
\textsuperscript{326} The same provisions apply in the same-sex context under the Civil Partnership Act 2004 but no cases have yet been decided but it is assumed the same value will be applied given the statutory terms. See White v White [2001] 1 AC 596, Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, Charman v Charman [2007] EWCA Civ 503.
examined, to see the ways of valuing non-financial contributions to the marriage relationship in English family law context.

In chapter 7, these developments will be compared with those that have taken place at the same time in Taiwan in order to consider what can be learned. As demonstrated, in order to give recognition to the value of the non-financial contributions to the marriage relationship, a deferred community of property regime is employed to entitle the financially weaker party, usually the homemaker/child-carer, to claim half of the deferred community of surplus in the event of divorce under Taiwan’s Civil Code. In contrast to Taiwan, there is no matrimonial property regime legislated for in England and Wales. However, from the recent judicial decisions on financial provision cases, it might be argued that English law has moved away from a welfare-based redistribution of assets to meet a dependant wife’s needs towards an entitlement-based system where entitlement can be earned by carrying out non-financial contributions. Indeed some argue that English law has a judicially created system of community of property, although this is disputed\textsuperscript{327}.

6.2 Unpaid non-financial contributions within marriage

In the traditionally heterosexual family context, one vivid image of the division of household labour is men as breadwinners and women as homemakers. One commentator has suggested, the definition of unpaid non-financial contributions might be “all the unpaid caring and homemaking work undertaken typically by women within the patriarchal family”\textsuperscript{328}. That vivid image in reference to the role that women should play in a marriage relationship has made such contributions traditionally viewed as the natural moral duty of being a good wife, mother or daughter, with no economic value. At most, these non-financial contributions have been seen as a legitimate exchange for the male breadwinner’s

\begin{footnotesize}
\begin{enumerate}
\item Cretney has observed that English law is perhaps moving towards a judicially created system of deferred community, albeit only limited to acquisitions, see Cretney, S., (2003) \textit{op.cit.}, pp.411-412. However, Cooke thinks not, see Cooke, E., (2007) ‘Miller/ McFarlane: Law in Search of Discrimination’, 19 \textit{Child and Family Law Quarterly} 98, p.110.
\end{enumerate}
\end{footnotesize}
statutory and/or moral duty to provide maintenance.

One should not ignore the value that the British welfare state has placed on a wife’s non-financial contributions to marriage, realisable through a right to claim certain contributory benefits on the basis of her husband’s national insurance contribution. Although at the inception of the British welfare state system in 1948, married female homemakers and child-carers were exempted from paying full rate National Insurance contributions and benefits on the basis that their husbands would do so, now they may still claim pension entitlement based on their former husband’s National Insurance contributions, and possibly obtain the full contributory old age pension, despite being divorced. A former husband has no grounds or reason to object to her claim, as his basic state pension entitlements are unaffected. This might be interpreted as showing that the value of non-financial contributions are partly reflected in the state’s support. However, in contrast, the situation regarding private pension entitlement on divorce does need to be agreed or resolved by the court as part of a spouse’s claim for financial provision on divorce under Part II Matrimonial Causes Act 1973 (hereafter MCA 1973). In contrast in Taiwan, pensions, either state or private, are regarded as the personal property of each spouse, not matrimonial property, and they are not to be divided on divorce.

However as has been noted, unlike in Taiwan, it is the judiciary rather than the legislature which has taken the lead in the English private family law context on the issue of valuing non-financial contributions to the welfare of the family on divorce. Recently, on redistributing assets on divorce, it has been emphasised that there is an overall aim of ‘fairness’ which incorporates a principle of non

331 Available at: <http://www.principlefirst.co.uk/pensions-news/state-pension-for-divorced-spouses-from-partners-ni-contributions/> 09/01/11 accessed.
332 See Matrimonial Causes Act 1973 s25B,s25C,s25D and s25E.
333 See interviews in chapter 5, in practice, lawyers and judges held that pensions are irrelevant to the efforts of the marriage and they are not to be distributed in the event of divorce.
334 In Taiwan, the legislature seemed to have taken the lead in the economic protection of the non-financial contributors, however, there still exists a gap between the social norms and legal norms see Chapter 4 and 5.
discrimination as between breadwinners and homemakers. It was stated in the leading judgment of *White*\(^ {335}\) that the division of assets was to be measured against ‘a yardstick of equality’, which should only be departed from where it could be justified. In order to reach fairness in divorce settlements it was stated in the later case of *Miller; McFarlane*\(^ {336}\) that the courts must consider and address three strands of fairness. Firstly, that the parties’ needs must be met. Secondly, that the sharing of the assets must be made against the yardstick of equality and thirdly, the financial loss of homemaker/child-carer must be considered and compensated where appropriate\(^ {337}\). Whilst it should again be stressed that the value of non-financial contributions to the marriage relationship is only realisable in practice on divorce, as will be discussed further below it is only recently that these contributions have been seen as worthy of much greater explicit recognition and greater financial compensation in England and Wales.

In the English law context, non-financial contributions to the marriage relationship have traditionally been seen as an exchange for the duty to support the homemaking spouse financially during marriage and to pay spousal maintenance on divorce\(^ {338}\). In the past, the value of their contributions had not been highly valued by that exchange, arguably because in a patriarchal society these contributions are services which normally should be provided by a good wife, mother and daughter. This section aims to explore what economic protection non-financial contributors can have as such, both during marriage (maintenance) and on divorce (maintenance on divorce and redistribution of matrimonial assets), and how this reflects the value in law of non-financial contributions to the marriage. Accepted functions of family law in England and Wales include that it plays a remedial role in resolving the disputes between members of the family; it provides protection for weaker members of the family,

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335 *White v White* [2001] 1 AC 596.
336 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24
337 See *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, *Charman v Charman* [2007] EWCA Civ 503.
338 This derives from the common law duty of a husband to maintain his wife. In order to place equal duty to maintain between the spouses, this has just been abolished by Equality Act 2010, see s 198, available at: <http://www.legislation.gov.uk/ukpga/2010/15> 02/02/01 accessed.
and it manages the consequences of divorce. This protective role can be seen to include two aspects: the physical and the economic. Over the past century there has been a movement towards greater economic protection, and some argue that the latter is of much greater importance than that of just conferring rights.

6.2.1 Maintenance during marriage

Historically, at common law, the husband had a duty to provide his wife with the necessities of life. However, it could be argued that her living standard was completely dependent on her husband’s goodwill to provide her with her essential needs through the agency of necessity (a concept abolished in this context by the Matrimonial Proceedings and Property Act 1970 which introduced the courts powers of financial provision and ancillary relief on divorce). She could not even demand that her husband provide her with an allowance.

Today, in practice the common law obligations have been replaced by statutory procedures for enforcing maintenance obligations through the courts. There are two principal sources of enforceable maintenance liability for married couples – namely statutory duties and obligations arising under separation agreements.

6.2.1.1 Statutory spousal obligations to maintain

There are main pieces of legislation regarding this duty.

- Domestic Proceedings and Magistrate’s Court Act 1978 (DPMCA 1978 thereafter)

Under Section 2 of the Act, whether or not the parties are separated, either party to a marriage may apply to a magistrates’ court for an order on grounds including that the other party to the marriage:

340 ibid.
341 See Herring, J.,(2009) op.cit., p.154. As noted, this duty has recently been abolished by the Equality Act 2010.
344 Available at:< www.legislation.org.uk>, 19/01/11 accessed.
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‘(a) has failed to provide reasonable maintenance for the applicant; or
(b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family.

A spouse who requires maintenance urgently is more likely to use this approach as it is a more popular and cheaper procedure than under the provisions of the MCA 1973 (discussed below). However, Welstead and Edwards have argued that the DPMCA 1978 has been seen as ‘poor person’s justice’ as the court, in the absence of the other parties’ consent, only can make periodical payments orders and lump sum orders for less than £1000. These provisions are also criticised for being the remnants of old false-based legislation\(^{345}\). Furthermore, the remedy can be seen as a stepping stone to divorce rather than any renegotiation of the financial arrangement during marriage.

In addition, in calculating the level of spousal maintenance under the 1978 Act, the court must have regard to S3 which contains the same factors listed in the Section 25 Matrimonial Causes Act 1973. This includes in both cases the parties’ financial resources and needs, earning capacity, standard of living, age, any disabilities, the contribution of either of the parties to the welfare of the family in the past or in the future and the parties’ conduct. The significance of these criteria is discussed below.

- **Financial provision orders, Section 27 Matrimonial Clauses Act 1973 (MCA1973)**

The MCA1973 also provides another means on seeking maintenance during the marriage. Under s27, either party to a marriage may apply to the court for an order on the ground that the other party to the marriage:

‘(a) has failed to provide reasonable maintenance for the applicant, or
(b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family.’\(^{346}\)

The court decides whether there has been a failure to maintain and considers all the circumstances of the case. Orders may be made for secured or unsecured periodical payments, or in addition unlimited lump sums. However, the

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346 See MCA 1973 s27.
maintenance orders terminate if the payee remarries or dies. Yet, applications under this section of the Act are rare as it is a more expensive procedure than to the Magistrate's court and most people seeking maintenance in the court or high court would also decide to pursue this within divorce proceedings.

- **Maintenance pending suit, Section 22 Matrimonial Clauses Act 1973**

Once a divorce petition has been issued, the 1973 Act provides remedies for post-separation maintenance. S22 provides:

‘On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable’.

Therefore, prior to divorce, nullity or judicial separation, it is possible to apply for the maintenance pending suit, providing a petition has been issued and it is before decree nisi of divorce or of judicial separation is pronounced. Thus although this is a remedy during marriage, it is in contemplation of divorce.

- **Interim lump sum orders, Section 22A (4) Matrimonial Clauses Act 1973**

Similarly and in addition to periodical maintenance providing suit, it is possible to seek lump sum orders under S22A (4).

‘If it would not otherwise be in a position to make a financial provision order in favour of a party or child of the family, the court may make an interim periodical payments order, an interim order for the payment of a lump sum or a series of such orders, in favour of that party or child.’

Once again, these are used during the marriage in contemplation of divorce.

347 See note 341.
348 At a meeting on 25/02/11 at the University of Exeter with Judge Philip Waller, Senior District Judge at the Principal Registry of the Family Division of the High Court in London, in response to a question put to him by the author, he confirmed that applications for maintenance during divorce were very common and indicated in contrast that there were only three applications under s27 to his knowledge during 2010.
349 See MCA 1973 s22.
350 See MCA 1973 s22A (4).
Additional provisions in occupation order, Section 40 Family Law Act 1996 (thereafter FLA 1996)

In addition to maintenance or living expenses under the 1973 Act, there are additional provisions where a spouse is excluded from the home due to violence. The court during marriage can also require payments to maintain the house. Thus in a case of domestic violence, the court may, at or any time after, make an occupation order to ‘impose on either party obligation as to the discharge of rent, mortgage payments or other outgoings affecting the dwelling-house’\(^{351}\).

6.2.1.2 Maintenance through separation agreements

Apart from the statutory obligations to maintain, nowadays private agreements are often used by those who advise on matrimonial financial affairs while waiting for the final financial orders to be made on divorce. However, one issue needs to be considered, what is the legal effect of such an agreement? Although they are valid during the separation, as with pre-nuptial agreements, the court’s power under MCA1973 to redistribute property on divorce cannot be superseded by the terms of the separation agreement, although the court may decide to give effect to the parties’ agreement and it will certainly be taken into account. This will be the case where a signed agreement on legal advice has been reached and is within the boundary of the court’s likely use of its discretion. In the case of S v S, in a marriage of 21 years, the husband and wife were in a round table meeting in an attempt to resolve the ancillary relief proceedings by agreement. Even though an agreement had only been made verbally, the court considered there was a very strong case to suggest that there was a concluded agreement which had been acted on by both parties and gave effect to it\(^{352}\).

In other words, the agreement is only binding to the court if the normal requirements of contract law are in place and its terms are within the court’s own discretionary limits. In particular, whether the agreement is legally enforceable depends on whether the contracting parties may be deemed by the court to have intended it to be enforceable when the agreement is domestic in nature. In the case of Soulsbury v Soulsbury, the husband and his former wife made an agreement for the compromise of an ancillary relief application. This was held to

\(^{351}\) See Family Law Act 1996 s40.
\(^{352}\) S v S [2008] EWHC (Fam) 2038.
give rise to a contract enforceable in law as this was an agreement containing financial arrangements made between spouses and former spouses with the intention of creating legal relations between them, and which was not any longer contrary to public policy\textsuperscript{353}.

As an ordinary rule, the court would not find a contract for maintenance during marriage enforceable as there is a rebuttable presumption that agreements between married couples are not intended to be legally binding\textsuperscript{354} and that such an agreement is founded on an absence of consideration\textsuperscript{355}. In \textit{Balfour v Balfour}\textsuperscript{356} the Court of Appeal were most unwilling to find a contract for maintenance during a marriage relationship. In the past, they have tended to take a very passive and conservative approach to find no contract for maintenance during marriage even where the parties have promised this to each other. As Warrington LJ explained in his opinion:

\begin{quote}
‘The matter really reduces itself to an absurdity when one considers it, because if we were to hold that there was a contract in this case we should have to hold that with regard to all the more or less trivial concerns of life where a wife, at the request of her husband, makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make it, and was bound in honour to continue it so long as he was in a position to do so. The wife on the other hand, so far as I can see, made no bargain at all. That is in my opinion sufficient to dispose of the case’\textsuperscript{357}.
\end{quote}

As discussed already, the common law right to maintain has been supplanted by the statutory reciprocal obligations to maintain (and was very recently abolished by the implementation in October 2010 by the Equality Act 2010), and its content only can be vaguely interpreted. As Ward J has indicated:

\begin{quote}
The strange state of our law is that there may be a so-called common law duty to maintain, but when one analyses what that duty is it seems effectively to come to nothing. Like so many rights, the right extends only so far as the remedy to enforce it extends. There is no longer any agency of necessity and the common law has no remedy. The remedies to enforce a duty to maintain
\end{quote}

\textsuperscript{353} \textit{Soulsbury v Soulsbury} [2007] 3 FCR 811.
\textsuperscript{354} See Herring, J.,(2009), \textit{op.cit}, p.156.
\textsuperscript{356} \textit{Balfour v Balfour} [1919] 2 KB 571.
\textsuperscript{357} \textit{ibid}, at para. 574-575.
are the statutory remedies which are variously laid down in numerous statutes’.

Nowadays although the common law right to maintain has been superseded by the statutory reciprocal obligations of spouses to maintain each other, one can query whether this change has seemingly made the culture of dependency fall away. Arguably the replacement of this duty by gender neutral provisions is a step forward, yet the social reality is that wives are more likely to be dependant than husbands. However, there is a case that the way forward is the abolition of maintenance as the continued existence of the maintenance operates to reinforce the legitimacy of a wife’s economic dependency on her husband, rather than requiring women to be financially independent. Furthermore, maintenance has been seen as ‘symbolic of the culture of dependency’. The same dependency argument also can be found in Taiwanese law context.

In the English law context, the obligation to maintain, both statutory and moral, is the only financial source a stay-at-home party can demand during a marriage, unless there is an ante-nuptial agreement which will arise only in cases where there is great wealth regulated by settlement. However, it is questionable whether the value of non-financial contributions can be appropriately realised during marriage only by maintenance. As Barlow has argued:

‘On divorce prior to 1970, no financial value was placed on a wife’s caregiving during the marriage. This was deemed to be the quid pro quo for having been maintained by her husband, however much greater the “market value” of such caregiving services might actually have been. Only maintenance from income was available at the discretion of the court and only to a blameless wife who remained sexually faithful to her ex-husband, with capital (including family home), being retained by the owner of the property, most often the husband’.

She also indicated that Blackstone’s assessment that mothers were only entitled

359 O’Donovon agreed with that argument on some conditions, such as financial equality and the equality of the division of household labour during marriage. See O’Donovon, K.(1982) ‘Should all maintenance of spouses be abolished?’, Modern Law review 45(4) pp.424-433.
360 Normally, in the past the levels of maintenance are not very high and it would be unimaginably that a wife would prefer to choose not to work in the hope to getting maintenance if she divorces. See O’Donovon, K.(1982), op.cit, at note. 237. However, this situation might change in big money cases post-White.
to moral virtues, not power was until recently undoubtedly true:

‘It is also in the marriage context that unpaid caregiving has been seen as worthy of recognition and financial compensation in England, Wales and Northern Ireland, but again its value is only realizable on divorce. This is a very recent development and a complete reversal of female caregivers’ original legal disempowerment. Indeed, for most if not all of the last century, Blackstone’s assessment that mothers were entitled to “no power, but only reverence and respect” held true. Despite the pivotal caregiving role of a married mother in a child’s birth and upbringing, this carried little or no legal significance right up to the last quarter of the twentieth century.’  

6.2.2. Discretionary system of property redistribution on divorce

Unlike in Taiwan, it is clear there is no community of property regime in the legislation of England and Wales. Cretney has observed that English law is perhaps moving towards a judicially created system of deferred community, albeit only limited to acquisitions; but still essentially a discretionary system under MCA 1973 remains in place.

As discussed above, maintenance during marriage is unable to reflect the value of non-financial contributions as payments are only considered as a stepping stone to divorce and maintenance agreements during marriage are not enforceable. Thus the only way to make this value realisable is through the redistribution of matrimonial property and of income on divorce.

6.2.2.1 Background

In English family law history, prior to the last part of 19th century, the husband and wife become one in law. The wife’s property and legal personality were subsumed under that of her husband. As Blackstone explained:

‘By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband;…Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquired by the marriage’

Finally, the doctrine of unity was abolished by the Married Women’s Property Act 1882 and this Act allowed married women to retain their own property during

362 ibid, p.253.
364 Cited from Herrings (2009), op.cit, p.86.
marriage for the first time. Since then, formal equality between husband and wife, and system of separate property has been established and adopted, but the wife still had no right to make any claim on her husband’s property either during marriage or on divorce. Although a European system of community of property was discussed and rejected, statutory co-ownership of the matrimonial home had a chance to be introduced into England and Wales which would have entitled the wife to a half share in the home. Yet, this too was finally rejected for lack of Parliamentary support. Sir Jocelyn Simon has put the case for entitlement to shared matrimonial property in return non-financial contributions in marriage this way:

‘But men can only earn their incomes and accumulate capital by virtue of the division of Labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it. In such a state of affairs a system of Separation of Goods between married people is singularly ill adapted to do justice. Community of Goods, or at the least community in acquisitions and accumulations, is far more appropriate. And as one leaves the sphere of those who enjoy investment property for that of those whose property largely consists of the home and its contents a regime of Separation is utterly remote from social needs.’

Nonetheless, a system of separate property during marriage was retained over any system of shared matrimonial property. However, it was recognised that husbands rather than wives generally owned property shared by a family. In order to avoid the financial hardship suffered by women on marriage breakdown, major enhancement to family law reform was established by a different route in the 1970s, and particularly the law had begun to place the value on the non-financial contributions, as Hale et al indicate:

367 In 1978, the Law Commission proposed that statute should provide that the matrimonial home be jointly owned by the husband and wife save where the spouses had made express provision for their respective beneficial entitlements. However, this proposal was finally rejected by government. See the Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods, Law Com No 86 (HMSO, 1978).
The Divorce Reform Act 1969 altered completely the conceptual basis of divorce... Necessarily, the preconceptions inherent in the legal status of the husband and the wife, especially in relation to the doctrine of unity and the concept of lifelong support obligation unless the wife committed a matrimonial offence— all this could no longer form the underlying philosophy of a marriage. At the same time, there was awareness that in reality, certainly in conventional marriage and perhaps also in dual career marriages a wife’s performing the ‘domestic chores’ was a significant contribution in its own right towards the resultant value of the family assets. There was also a view, although perhaps it did not play a major role in the reform, that marriage itself was a substantial impediment to a woman’s self-sufficiency in many cases. All this resulted in the enhancement of the Matrimonial Proceedings and Property Act 1970. That Act permitted all financial orders to be made in favour of either husband or wife, enabling the court to rearrange all the couple’s assets through periodical payments (secured and unsecured), lump sum payments and property adjustment orders.  

Subsequently, a discretionary system of redistribution of both income and capital assets was established. The criteria which govern this discretionary system were set out under the section 25 of Matrimonial Causes Act 1973, which are gender neutral, give wide range powers to the court to deal with the parties’ financial rearrangement as it thinks fair. However, the original form of section 25 MCA1973, which was called the ‘minimal loss principle’, was replaced by Matrimonial and Family Proceedings Act 1984 with a new Section 25 that it shall be the duty of the court to decide whether to exercise its powers under MCA 1973 when making financial provision orders having regard to all the circumstances of the case, first consideration shall be given to the welfare of minority, if any. However, Barlow has argued that the non-financial contributor’s share of the assets might have been affected by the repeal of minimal loss principle, as she indicated:  

’in its original form, section 25 provided a guiding principle that the court should endeavour to place the parties as nearly as possible in the financial position they would have been in had the marriage not broken down. However, this minimal loss principle was soon seen to be impossible to achieve even before the legislation was amended to remove it in 1984, and it was the non-financial contributor whose share came to be valued less in financial terms.’  

In addition, the new Section 25A of MCA 1973 also provides that the court has a duty to consider the appropriateness of a ‘clean break’ that is ‘whether it would

be appropriate so as to exercise its powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable\textsuperscript{372}.

As regards the exercise of the powers of the court the court shall in particular have regard to the following criteria:\textsuperscript{373}

\texttt{\textquoteleft(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 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;}

\texttt{(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;}

\texttt{(c) the standard of living enjoyed by the family before the breakdown of the marriage;}

\texttt{(d) the age of each party to the marriage and the duration of the marriage;}

\texttt{(e) any physical or mental disability of either of the parties to the marriage;}

\texttt{(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;}

\texttt{(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;}

\texttt{(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.\textquoteright}

This process within a discretionary system has two primary purposes: financial

\textsuperscript{372} See Section 28 (1A) Matrimonial Causes Act 1973.

compensation for the past contribution to the marriage and maintenance for parties’ future needs\textsuperscript{374}. Among these factors, Diduck has interpreted ‘the contribution of either of the parties to the welfare of the family in the past or in the future and the parties’ conduct’ as a ‘compensation model’\textsuperscript{375} which explicitly explains that maintenance should compensate for the financial advantages or disadvantages to each party of the roles they undertook in the marriage relationship. Through this it entitles the non-financial contributor, namely the homemaker/child-carer, to have a share of assets in the financial divorce settlement by virtue, implicitly, of their ‘contributions’ to the welfare of the family. Thus the statute explicitly recognises non-financial contributions, but leaves their value to be decided by the Court.

However, the statutory provision has received heavy criticism, primarily for its lack of guidance given on the relative importance to be given to the different criteria; this was entirely left to the discretion of the court and no hierarchy was thought appropriate\textsuperscript{376}. Its lack of certainty and its unpredictability may cause high legal costs and unfairness as each party has a justified expectation that they might gain more by taking the dispute to court. It has been left to the courts to develop principles. Nowadays ‘fairness’ has become the overall objective although the interpretation of what is fair in this context has changed over time. As Lord Denning in\textit{Hanlon v The Law Society} explained, in order to reach fairness, all the spousal property and individual finances are placed in a large bag and mixed up together:

\begin{quote}
‘In the property adjustment order (under sections 23 and 24) we have a new concept altogether. The Family Court takes the rights and obligations of the parties all together - and puts the pieces into a mixed bag. Such pieces are the right to occupy the matrimonial home or have a share in it, the obligation to maintain the wife and children, and so forth. The court then takes out the pieces and hands them to the two parties - some to one party and some to the other - so that each can provide for the future with the pieces allotted to him or to her. The court hands them out without paying any too nice a regard to their legal or equitable rights but simply according to what is the fairest provision for the future - for mother and father and the children.’\textsuperscript{377}
\end{quote}

\textsuperscript{375} See Diduck, A. and Kaganas, F., (2006)\textit{op.cit.},p.244.
\textsuperscript{376} See e.g. Piglowska v Piglowska [1999] 1 WLR 1360.
6.2.2.2 The One-third rule in 1970s

As discussed above, the legislation has adopted a gender neutral approach to alleviate the financial hardship suffered principally by wives, either during marriage or on divorce. However, following the 1970s reform, there was incoherence in the judicial decisions in reference to the value of a wife’s non-financial contribution. Barlow described the judicial discourse at that time (and set out further below) as ‘double-edged’, as she observed:

‘Although it might entitle her to a share of the assets (a vast improvement on the previous law in an era where family homes were generally still owned and paid for solely by the husband, with a wife’s non-financial and even financial contributions- such as payment for clothing and utility bills- being less tangible), a wife’s post-divorce financial needs were reduced by virtue of her ability to perform a caregiving role for herself’. 378

Indeed, the law at that time not merely had a strongly rigid image of husbands as breadwinners and wives as homemakers, but had tended to adopt one third rule as starting point to redistribute income and assets, as justified by Lord Denning in Wachtel v Wachtel:

‘There was, we think, much good sense in taking one third as a starting point. When a marriage breaks up, there will thenceforward be two households instead of one. 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. He will also have to provide maintenance for the children. 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. In any case, when there are two households, the greater expense will, in most cases, fall on the husband than the wife’. 379

Thus there was now recognition of a value in homemaking/ child-caring, but it was low as this work was ‘natural’ for women, in contrast to men.

Again, in Trippas v Trippas Lord Denning refused to entitle a homemaking wife to have a share of her husband’s family business, as he explained:

‘When the company was taken over, the husband did in fact give £5,000 to each of the sons. The wife says that she too should have some part of the

379 See Wachtel v Wachtel [1973] Fam.72, at p.94.
money. The wife cannot claim a share in the business as such. She did not give any active help in it. She did not work in it herself. All she did was what a good wife does do. She gave moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going. That does not give her a share. Therefore, it could be concluded that the law at that time not only determined that men’s inability to perform the same homemaking contribution justified reducing a wife’s financial award, but the law also placed much more weight on financial contributions than non-financial contributions in asset redistribution on divorce.

6.2.2.3 The reasonable requirements approach after the mid-1980s

At this stage, the reasonable requirements approach, or rather needs based model dominates the redistribution of financial assets. Once the spouse’s needs are met, such as housing needs or any other reasonable needs, there is no justification for the court for further adjustment. It was as explained in Dart v Dart:

‘The court, when considering financial provision for a wife who had made no direct contribution to the husband’s wealth, had to declare the boundary between the wife’s reasonable and unreasonable requirements. There was no justification for applying a mathematical solution – one-third or one half as suggested in Wachtel v Wachtel... There is no justification for making an award going beyond the spouse’s need founded upon homes, children and lifestyle. Redistribution of capital outside that requirement is not within the statutory provisions.’

Diduck has also argued that it is the husband’s money and assets which are being dealt with but not the wife’s as ‘fairness between those subjects, arising out of that relationship, in the light of the “supporting ideologies of law” resulted in a body of case law in which wifely dependency was confirmed and the protection of property interests appeared to be paramount. Barlow has also argued that the reasonable requirements approach has reinforced the redistribution as welfare-based and limited to needs, rather than

entitlement-based, and this would attribute a lower value to the non-financial contributions to the welfare of the family than to the financial contributions\textsuperscript{385}.

However by the beginning of the 21\textsuperscript{st} century this thinking began to be challenged. This led to a move towards an entitlement model in which non-financial contributions earned an equal share of financial matrimonial asserts and some have likened this to deferred community of property thinking\textsuperscript{386}.

\textbf{6.2.2.4 The yardstick of equality in White v White\textsuperscript{387}}

In 2000, the yardstick of equality was created by the decision of the House of Lords in \textit{White v White} and the equality of division of the family assets should be seen as a ‘yardstick’, as Lord Nicholls explained:

\begin{quote}
‘As a general guide, equality should be departed from only if, and to the extent that, there was good reason for doing so. Moreover, the need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination. However, that general guide was not to introduce a presumption of equal division under another guise, and such a presumption would be an impermissible judicial gloss on the statutory provision. Nor did it introduce a principle that in every case the 'starting point' in relation to a division of the assets of the husband and wife was equality.’\textsuperscript{388}
\end{quote}

This is a clear move away from welfare towards entitlement model and was a radical departure from previous thinking.

At this stage, the Lords also suggested that equal division is an appropriate starting point as there is to be no discrimination between breadwinners and homemakers:

\begin{quote}
‘In seeking to achieve a fair outcome on an application for ancillary relief, as a principle of universal application, there was no place for discrimination between husband and wife and their respective roles. The traditional division
\end{quote}

\textsuperscript{385} See Barlow, A., (2007), \textit{op.cit.}, pp.256-257.
\textsuperscript{387} \textit{White v White} [2001] 1 AC 596.
\textsuperscript{388} See \textit{White v White} [2001] 1 AC 596, at p.605.
of labour was no longer the order of the day and, whatever the division of labour chosen by them, if, in their different spheres, each contributed equally to the family, then in principle did not matter 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. Accordingly, before reaching a decision, a judge would always be well-advised to check his tentative views against the yardstick of equality of division.  

Conceptually this was a monumental shift.

More importantly, Eekelaar has observed that this was a move away from a subjective evaluation of desert to a more objective assessment of entitlement. It began to break the welfare-based dependency construction of a wife’s needs. In other words, the entitlement to the share of assets has been earned through non-financial contributions over the time.

The House of Lords decision in White v White, which incidentally was decided at the time when Taiwan was considering reform of this same issue, opened the door for the court to construct the value of non-financial contributions. However, the principle right away proved difficult to sustain. In Cowan v Cowan, the husband was awarded over fifty per cent of the assets to recognise his ‘stellar’ or ‘really special’ financial contributions to the welfare of family and it justified a departure from the yardstick of equality. Subsequently, there was much discussion over what kind of contributions should be seen as extraordinary. A slippery slope away from equal division had begun. However, in Lambert v Lambert, Thorpe LJ explained that non discrimination must apply, and only in exceptional cases the special contributions of one of the parties would be considered as a good reason to depart from the equality:

“It was unacceptable to place greater value on the contribution of the breadwinner than that of the homemaker as a justification for dividing the product of the breadwinner’s efforts unequally between them[…]Moreover, the danger of gender discrimination resulting from a finding of special financial

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389 ibid.
392 In Lambert v Lambert [2002] 3 FCR 673 and Sorrel v Sorrell [2006] 1FCR 62, Mr.Lambert and Mr. Sorrell were also awarded more than half of the assets to recognise their extraordinary or special contributions to the marriage.
contribution was plain. If all that was regarded was the scale of the breadwinner's success then discrimination was almost bound to follow since there was no equal opportunity for the homemaker to demonstrate the scale of her comparable success. Therefore, special contribution remained a legitimate possibility but only in exceptional circumstances. 393

Thus it was accepted that it is extremely difficult to calculate to what extent the non-financial contributions, including homemaking and child rearing, should be seen as ‘stellar’ or ‘really special’, but there was concern that each party would try and show “special contribution”. As Thorpe LJ explained it further:

‘Whilst I accept Mr Pointer’s submission that the judge has a duty to assess each and every one of the s 25(2) criteria that bear on outcome and equally that judges of the Family Division have great expertise in making value judgments, I do not accept that the duty requires a detailed critical appraisal of the performance of each of the parties during the marriage. Couples who cannot agree division are entitled to seek a judicial decision without exposing themselves to the intrusion, indignity and possible embarrassment of such an appraisal.’ 394

He continued to argue that:

‘Examples cited of the mother who cares for a handicapped child seem to me both theoretical and distasteful. Such sacrifices and achievements are the product of love and commitment and are not to be counted in cash. The more driven the breadwinner the less available will he be physically and emotionally both as a husband and a father. There is also some justification in Mr. Mostyn's emphasis on the extent to which the homemaker frequently sacrifices her potential to generate assets by undertaking the domestic commitment to husband and children. At the same time she risks the outcome of failure and so earns her entitlement to share in the successful outcome.’ 395

Finally, in practice it is difficult for a wife who is claiming her non-financial contributions to be exceptional:

‘In the instant case, the wife's domestic and financial contributions could not be described as exceptional, though they were full. It was part and parcel of marriage to contribute to the purchase and improvement of the marital home, and also to contribute to a child's school fees. Furthermore, it was not exceptional for spouses who were financially able, out of loyalty and/or love for the other spouse to make available funds to the company which he/she ran if it was needed, just as a spouse would do if the breadwinner became ill or incapacitated and was thus unable to earn a living to support the family.’ 396

394 ibid., at para 38.
395 ibid., at para 45.
Indeed, the reality is that the value of non-financial contributions is hard to be calculated in cash as there has been a patriarchal template in which such sacrifices and achievements are the product of love and commitment. In order to keep the gloss of the sanctity of marriage, normally people are required not to account the value in cash as moral familial acts as are instilled ‘natural’ in society’s mindset. However, ironically, on the one hand, the courts held there should be no bias between the breadwinner and homemaker/child-carer, but on the other, they refused to offer equality of opportunity to assess the value of both contributions. Consequently, doing these non-financial contributions out of love, instead, devalues them and makes financial contributions always superior in these terms.

In recent leading cases, discrimination has been the focus on changing the court’s approach to financial provision cases, Lord Nicholls in Miller v Miller; McFarlane v McFarlane restated his argument with the statement:

‘These two appeals concern that most intractable of problems: how to achieve fairness in the division of property following a divorce. In White v White [2001] 1 AC 596, [2001] 1 All ER 1, [2000] 3 WLR 1571 your Lordships’ House sought to assist judges who have the difficult task of exercising the wide discretionary powers conferred on the court by Pt II of the Matrimonial Causes Act 1973. In particular the House emphasised that in seeking a fair outcome there is no place for discrimination between a husband and wife and their respective roles. Discrimination is the antithesis of fairness. In assessing the parties’ contributions to the family there should be no bias in favour of the money-earner and against the home-maker and the child-carer. This is a principle of universal application. It is applicable to all marriages.  

Baroness Hale continued to explain that the major reason to equally value the financial and non-financial contributions is in order to avoid the gender discrimination, as she argued:

‘More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family (as did Mrs Cowan). But in these non-business-partnership, non-family asset cases, the bulk of the property has been generated by one party. Does this provide a reason for departing from the yardstick of equality? On the one hand is the view, already

397 See Miller v Miller; McFarlane v McFarlane [2006] UKHL 24.  
398 Ibid., at para 1.
expressed, that commercial and domestic contributions are intrinsically incommensurable. It is easy to count the money or property which one has acquired. It is impossible to count the value which the other has added to their lives together. One is counted in money or money's worth. The other is counted in domestic comfort and happiness. If the law is to avoid discrimination between the gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise.399

In the case of Charman v Charman400, the court tried to indicate that the special contribution argument could be applied to either financial or non-financial contributions. However, eventually again the court acknowledged that the non-financial contributions are in their nature hard to value and it is difficult to determine to what extent of no financial contributions could have been seen as exceptional or special:

“The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice, and for a self-evident reason, the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party’s success in business during the marriage. The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue.401

This approach has been argued by Herring402 that if the reality is that the claim of special contribution can only be made by a money earner rather than a homemaker/ child-carer, this may amount to gender discrimination from a human rights perspective, as Article 14 of the ECHR states:

“The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status403.

399 ibid., at para 150.
400 Charman v Charman [2007] EWCA Civ 503.
401 ibid., para 80.
403 This Article is available at:
Furthermore, it also could be argued that the special contributions argument in the English law context which provides non-financial contributions with unequal opportunity to be valued is perhaps incompatible with substantive gender equality required by gender mainstreaming thinking.

With regard to the duration of the marriage, the White principle of equality is most readily applied in long marriages, particularly in the case where the total assets exceed the needs for the parties. However, in a shorter marriage of less than twenty years this is not always in this case. As Mostyn QC indicated in the case of GW v RW:

'It seems to me that the assumption of equal value of contribution is very obvious where the marriage is over 20 years. For shorter periods the assumption seems to me to be more problematic. I am not attracted to a formulaic solution, as suggested by John Eekelaar, but I do in essence accept his proposition that the entitlement to an equal division must reflect not only the parties' respective contributions but also an accrual over time.'

'I have to say that whatever intellectual route is adopted I find it to be fundamentally unfair to be required to find that a party who has made domestic contributions during a marriage of 12 years should be awarded the same proportion of the assets as a party who has made the domestic contributions for a period in excess of 20 years.'

However, Bailey-Harris has argued that why should length of marriage matter to the value of the non-financial, but not the financial contributions to the marriage? For doing so, causes indirect discrimination against non-financial contributors:

'Is duration an inherent element in the value of domestic contribution (Eekelaar, 2003) or is such an approach itself discriminatory and therefore prohibited by Lord Nicholls' formulation of principle in White? It may well be that the Lambert approach continues to reflect a process of evaluation steeped in the tradition of a common law jurisdiction, albeit focussed on duration rather than calibre, whereas the true deferred community of property approach adopted in civil law systems reflects the consequences of the status of marriage and the rights and obligations to which that status gives rise,'
Subsequently, the durational approach was rejected by Lord Nicholls in *Miller v Miller; McFarlane v McFarlane*, he continued to state:

‘I am unable to agree with this approach. This approach would mean that on the breakdown of a short marriage the money-earner would have a head start over the home-maker and child-carer. To confine the White approach to the “fruits of a long marital partnership” would be to re-introduce precisely the sort of discrimination the White case [2001] 1 AC 596 was intended to negate.’

The following section now considers the three principles created in *Miller; McFarlane*, in order to reach fairness, in the ancillary relief proceedings. In addition, it will be argued that these latest decisions have introduced the concept of matrimonial and non-matrimonial property to resolve some of the tensions and shows again community of property thinking.

### 6.2.2.5 Three elements of fairness created in *Miller v Miller; McFarlane v McFarlane*

Importantly, since *White v White*, the main objective in ancillary relief has been “fairness”. In *Miller v Miller; McFarlane v McFarlane* the House of Lords have not only set out to explain the requirements of fairness to promote greater certainty and predictability, but have introduced some further recognition of the value of non-financial contributions to the marriage. Apart from giving the first consideration to the welfare of the children of the marriage, Lord Nicholls explained the three elements of fairness lying behind Section 25 of MCA1973: needs, compensation and sharing. These will now be considered.

#### Needs principle

First, fairness requires that needs of spouses and their children should be met. In most cases, there are insufficient resources to meet two families’ needs. He therefore explains the approach which most is taken:

‘What then, in principle, are these requirements? The statute provides that first

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409 See *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.
consideration shall be given to the welfare of the children of the marriage. In the present context nothing further need be said about this primary consideration. Beyond this several elements, or strands, are readily discernible. The first is financial needs. This is one of the matters listed in section 25(2), in paragraph (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.”

This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.\[410\]

Thus where assets do not exceed needs, redistribution of all the assets available maybe be used by the court to ensure that the needs are met and this is where the process stops.

**Compensation principle**

Fairness also requires compensation to redress any future economic inequality between the spouses as a result of the way in which the roles they choose to play in their marriage. It would be imaginable that a husband’s income earning capacity may have been increased because of his wife’s homemaking or carer role in the family. On divorce, the wife would suffer double losses, she not only loses the possibility of sharing in her husband’s increased income, but her earning capacity will definitely be less than if she had gone out to work throughout the marriage, Lord Nicholls continued to explain that:

‘Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted

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410 *ibid*, at para.10-12.
their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.  

‘Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from coterminal. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.'  

**Equal sharing principle**

Thirdly, fairness requires an equal sharing of the assets acquired during the marriage unless there is a good reason to depart from this. This was based on the fact that marriage is an equal partnership. Each party’s contributions to the marriage relationship should have equal value placed on it. Special and exceptional contributions should not be taken into account unless it would be inequitable to disregard them:

‘A third strand is sharing. This “equal sharing” principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie’s observation that “husband and wife are now for all practical purposes equal partners in marriage”: R v R [1992] 1 AC 599, 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: “unless there is good reason to the contrary”. The yardstick of equality is to be applied as an aid, not a rule.’

Although the authority has made the principle of non discrimination between financial and non-financial contributions very clear, it also goes on to set up the

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411 *ibid*, at para.13.
412 *ibid*, at para.15.
413 Lord Nicholls has changed his view here as in White he stated: ‘s25 of the 1973 Act makes no mention of an equal sharing of the parties' assets, even their marriage-related assets. A presumption of equal division would be an impermissible judicial gloss on the statutory provision. That would be so, even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.’
415 See Miller v Miller; McFarlane v McFarlane [2006] UKHL 24. at para.16.
distinction of what property is to be divided equally. Significantly, the Lords in Miller, contrary to what had happened previously, divided all assets into “matrimonial” or “family” assets, which had to be shared equally, and “non-matrimonial” or “non-family” assets that were not to be divided. As Lord Nicholls stated:

‘A complication rears its head at this point. I have referred to the financial fruits of the marriage partnership. In some countries the law draws a sharp distinction between assets acquired during a marriage and other assets. In Scotland, for instance, one of the statutorily prescribed principles is that the parties should share the value of the “matrimonial property” equally or in such proportions as special circumstances may justify. Matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance […] In England and Wales the Matrimonial Causes Act 1973 draws no such distinction. By section 25(2)(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future.

This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.

The matter stands differently regarding property (“non-matrimonial property”) the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant…”

He continued to explain that matrimonial property is not to be divided in a short marriage relationship:

‘In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties.

416 ibid., at para.21-23.
Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the White case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs.\textsuperscript{417}

As for the conception of matrimonial property, however, Baroness Hale used a narrower understanding of what is ‘matrimonial property’:

‘On the other hand, Baroness Hale’s approach takes a more limited conception of matrimonial property, as embracing “family assets” (cf Wachtel v Wachtel [1973] Fam 72, 90 per Lord Denning MR) and family businesses or joint ventures in which both parties work (cf Foster v Foster [2003] 2 FLR 299, 305, para 19, per Hale LJ). In relation to such property she agrees that the yardstick of equality may readily be applied. In contrast, she identifies other “non-business-partnership, non-family assets”, to which that yardstick may not apply with the same force particularly in the case of short marriages; these include on her approach not merely (a) property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps its income or fruits), but also (b) business or investment assets generated solely or mainly by the efforts of one party during the marriage.\textsuperscript{418}

She also indicated that the non-financial contributions are not attributable to the ‘family assets’ where are not to be divided equally:

‘It is not suggested that the domestic partner should share in the risks or potential liabilities, a problem which bedevils many community of property regimes and can give domestic contributions a negative value. It simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, has contributed to their acquisition. If the money maker had not had a wife to look after him, no doubt he would have found others to do it for him. Further, great wealth can be generated in a very short time, as the Miller case shows; but domestic contributions by their very nature take time to mature into contributions to the welfare of the family.\textsuperscript{419}

It is clear that, either from Lord Nicholls’s or Baroness Hale’s view, generally in a big money case involving a short marriage there should be a division of ‘matrimonial property’ or ‘family property’. This perhaps could be interpreted as showing again the community of property thinking; although there is no clear

\textsuperscript{417} ibid., at para.24-25.
\textsuperscript{418} ibid., at para.168.
\textsuperscript{419} ibid., at para.151.
agreement on where assets are matrimonial or non matrimonial, particularly where a business is involved.

Nonetheless, a possible discrimination is revealed from that different view of distinction. The difference between the views would be revealed in a case involving a business activity in which the wife was not involved. This could be accounted as a matrimonial asset subject according to Lord Nicholls’s approach as it was acquired during marriage, while it was not a family asset under Baroness Hale’s view because the wife could not be said to have contributed to its acquisition. The latter approach has been supported in subsequent case. Herring has argued that Baroness Hale’s approach seemed to introduce discrimination between the homemaker/child-carer who also helps in business matters and the homemaker/child-carer who does not, especially in the case that if the homemaker needs to look after the disabled member in the family, having no time to assist her husband with business project. He continued to argue that the distinction per se is gender discrimination, and further consideration should be given to the fact that no distinction should be drawn if the court has difficulty in valuing the homemaking/child-caring while money making is more easily measurable.

In addition, one of the important issues to emerge from Miller v Miller; McFarlane v McFarlane is that periodical payment not only can be used to meet the parties’ needs, but to compensate the wife for the loss of income:

‘...if one party's earning capacity had been advantaged at the expense of the other party during the marriage the court could, where necessary, order the advantaged party to pay compensation to the other out of his enhanced earnings when he received them; that the social desirability of a clean break was insufficient reason for depriving the claimant of that compensation; that, consequently, a periodical payments order might be made for the purpose of affording compensation to the other party as well as meeting financial needs.'

As shown above, it is clear that these three principles created in Miller; McFarlane are used to deal with the property consequence of divorce and the

420 Baroness Hale’s test has been supported in subsequent case, see Charman v Charman [2007] EWCA Civ 503.
422 See Miller v Miller; McFarlane v McFarlane [2006] UKHL 24., at para. 2.
main reason for doing so is to reach fairness. However, in the meantime, English law also faces the difficulty of combining needs, entitlement and compensation in one scheme. Therefore, some consideration might be given to the introduction of a marital property regime to deal with property consequence of divorce, which can effectively secure the protection of property of parties. But this idea has been again refused and pre-nuptial agreements are preferable to the legislation, as Sir Mark Potter indicated in the postscript of Charman v Charman:

‘In the European context this makes sense because in Civilian systems the property consequences of divorce are dealt with by marital property regimes. Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court’s wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce. The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of the Civilian Member States is exacerbated by the fact that our law has so far given little status to pre-nuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract?’ 423

Before the statutory effect is given to pre-nuptial agreements, it remains to be seen whether the impact of the decision of Miller and McFarlane will be as great as has been the decision of White in very big money cases.

6.3 ‘New’ property to be shared: Pensions

Alongside the traditional forms of property, such as houses, incomes and household goods, are to be dealt with in the case of ancillary relief. Pension is one of the most valuable family assets. These have traditionally been neglected and resulted in wives suing their lawyers in negligence424 and have only recently figured in the MCA 1973 following reforms in 2000 and 2002. Poverty among divorced wives became recognised as problematic, particularly following a husband’s retirement when maintenance reduced or ceased and the wife had not remarried or had her own career.

423 See the postscript in Charman v Charman [2007] EWCA 503 Civ. At para 124.
424 See Griffiths v Dawson & Co [1993] 2 FCR 515, the wife sued her lawyer for not having claiming pension entitlement in negligence.
In theory, pensions are seen as 'new' property and to be considered for division. Particularly in the case where the earning parties' license or qualification acquired during a relationship with another, it may attribute the other parties’ non-financial contributions to that earning capacity. Thus the division of pensions can be justified\(^\text{425}\).

Under Section 25B (1) MCA 1973, the court has a duty to consider the parties' pension entitlements on divorce and takes any account of ‘any benefits under a pension arrangement which a party to the marriage has or is likely to have’ and ‘any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage, a party will lose the chance of acquiring’.

The adjustment of a pension arrangement is only applied to private pensions; state pensions are not included\(^\text{426}\). As for private pensions, an adjustment in favour of the non-financial contributors can be claimed under Section 25B-G which was added in 2000.

The criteria to consider the adjustment are set out in s25 MCA. In general, there are no provisions to allow or disallow adjustment according to the quality of the non-financial contributions. The general provision is that the court can take into account the ‘conduct it is inequitable to disregard’.

Interestingly, in recent years, this provision has been used to include pre-nuptial agreements as a factor which could be taken into account even though they are not strictly binding. These amendments in practice permit pension sharing and splitting are the recognition of an increased value of non-financial contributions to a marriage.

### 6.4 The status of pre-nuptial agreement

Given the high divorce rate and the uncertainty of the current law, it is truly understandable that couples might want to make agreements to prescribe their financial arrangements before their marriage has broken down, which avoids the court’s discretionary power to redistribute their assets in England and Wales.

\(^\text{426}\) See MCA 1973 s 27(3).
Under the current legislation, the primary factor for not recognising pre-nuptial agreements as binding is that the right of the court to decide financial relief on divorce cannot be restricted by any agreement\textsuperscript{427}.

In England and Wales, from a historical view it was held in \textit{Hyman v Hyman} that, \textit{‘not merely in the interests of the wife, but also of the public’} \textsuperscript{428}, the jurisdiction or the powers of the court cannot be ousted by the parties’ agreements. In addition, English law refuses to accept pre-nuptial agreements as they have been seen as to undermine the institution of marriage by predicting its dissolution at the outset and were thus contrary to public policy. Any agreements made before marriage that attempted to limit or interfere with the court’s discretion in English law were considered void. However, the court seemed to begin to change its position in \textit{S v S} \textsuperscript{429}, the significance of pre-nuptial agreements seemed to increase within ancillary relief proceedings. As Wilson J stated:

\begin{quote}
‘But there will come a case – were I to refuse a stay, might this be it? – where the circumstances surrounding the prenuptial agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case, prove influential or even crucial\textsuperscript{430}.
\end{quote}

In 2002, the court in \textit{M v M} \textsuperscript{431} allowed the existence of a pre-nuptial agreement to affect the award the wife received. The husband and wife entered into a pre-nuptial agreement in Canada before they married. The pre-nuptial agreement stated that the husband would pay his wife £275,000 if their marriage came to an end. They separated after five years of marriage and wife sought greater settlement of £1,300,000. At that time, husband’s net worth was £7,500,000 and wife was £300,000. The court ordered that wife received a lump of £875,000 plus child maintenance and school fees. However the terms of the pre-nuptial agreements were still not binding to the court and the court may look at it in the particular circumstances and consider what weight should be attached to it:

\begin{flushright}
427 See MCA 1973, s 34(1).
428 \textit{Hyman v Hyman} [1929] AC 601.
430 \textit{ibid.}, at p.103.
431 \textit{M v M} [2002] 1 FLR 65.4
\end{flushright}
‘it did not matter whether the court treated the prenuptial agreement as a circumstance of the case or as an example of conduct which it would be inequitable to disregard; under either approach, while the court was not in any way bound by the terms of a prenuptial agreement, the court should look at it and decide in the particular circumstances what weight should, in justice, be attached to the agreement’.432

Subsequently in the case of K v K433, the prenuptial agreement was upheld. The husband and wife had one child and separated after 14 month of marriage. Before marriage, the husband had assets of £25 million and wife had £1 million. A pre-nuptial agreement was entered into in front of the wife’s father. They had independent legal advice. The marriage ended. Under the terms of pre-nuptial agreement, wife was to receive £100,000 from husband (to be increased by 10% per annum compound). She sought £1.6 million plus maintenance. Husband offered £120,000 plus £600,000 in trust to provide a house for wife and child until the child finished education. The judge held that entry into the agreement should be seen as the example of conduct which it would be inequitable to disregard under Section 25 (2) (g) of the MCA 1973. Although this case does not completely recognise the validity of pre-nuptial agreements, it does contain a checklist of factors to which the court may have consider what weight should be attached to a pre-nuptial agreement, as it was held:

‘The wife understood the pre-nuptial agreement, was properly advised as to its terms and signed it willingly without pressure. There had not been full disclosure, but the husband did not exploit his dominant financial position. Both parties entered into the agreement in the knowledge that the wife was pregnant with their child, and there had been no unforeseen circumstances arising since the agreement which would make it unjust to hold the parties to it. The meaning of the agreement was clear as to capital provision for the wife and there were no grounds for concluding that an injustice would be done by holding the parties to its terms.’434

Recently, as stated already, the law placed more weight on the pre-nuptial agreement in the comments of Sir Mark Potter, President of the Family Division in the postscript to the case of Charman v Charman435.

432 ibid., at p.654.
433 K v K [2003] 2 FLR 120.
434 ibid., at p.120.
In light of the comments, it could be seen as approving that the time for introducing enforceable agreements has come. The latest decision delivered, in *Radmacher v Granatino*, the Lord Phillips states that parties’ autonomy needs to be respected in the case that the prerequisite formalities are met:

‘The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties’ agreement addresses existing circumstances and not merely the contingencies of an uncertain future.’

Thus, a pre-nuptial agreement should be given decisive weight, and whilst still not strictly binding, its influence, particularly for agreements entered into since this decision, has been greatly increased. Currently The Law Commission is also engaged in a project to examine the status and enforceability of pre-nuptial agreements in response to the call for reform.

### 6.5 Conclusion

In an historical view, the unpaid non-financial contributions during marriage have traditionally been ignored as they have been seen as the exchange for the husband’s maintenance. Although the current trend has been to adopt gender neutral law to require the mutual duty to maintain each other, normally during marriage the earning party recognises that he or she has the ability to maintain the other party but that this arrangement of itself cannot be said to promote the economic position of the stay-at-home spouse. Thus maintenance alone either during marriage or on divorce is not a sufficient remedy.

Apart from the maintenance system, the other way used to compensate the financial loss for homemaker for undertaking the homemaking/child-caring in England and Wales is the discretionary property distribution system. 

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437 This project commenced in October 2009 and the Commission plans to publish in early 2011 along with the decisions made in *Radmacher v Granatino*, more details of this project, available at: [http://www.lawcom.gov.uk/marital_property.htm](http://www.lawcom.gov.uk/marital_property.htm) > 07/01/11 accessed.
legislation has adopted the view of gender neutral law in MCA1973 to have all regard to the respective contributions of each of the parties and left the task for the court to exercise its discretionary power to assess the value of the contributions. Recently, pensions have been as ‘new’ property and to be considered by the court on divorce. Although the non-financial contributions are not to be taken into account in the case that the court determines to split the pension scheme under MCA 1973. However, to a certain extent, this could be seen as indirectly placing recognition on the value of non-financial contributions.

From recent judicial decisions, some commentators have argued that there is a move away from welfare-based dependency of wife’s needs towards an entitlement-based system, in which the entitlement can be earned by carrying out homemaking/ child-caring contributions over the time\(^{438}\). Moreover, this move also has been interpreted as the introduction of deferred community of property\(^{439}\).

However, as mentioned already, while embracing a clear rhetoric of non-discrimination, the recent judicial decisions also left unanswered some key gender discrimination issues between the breadwinner and homemaker as they still refuse to assess whether the value of non-financial contributions is ‘special’ as its value in nature is difficult to assess in any monetary terms. Therefore, one can still ask whether the judicially created law has placed full recognition on the value of non-financial contributions to the marriage relationship or whether these decisions can still be seen to permit some remaining elements of direct or indirect discrimination against non-financial contributors that White was seeking to avoid.

Although the decision in Miller v Miller; McFarlane v McFarlane has provided an outline of how law places the value on non-financial contributions, it has difficulty in combining the three elements of the principles of fairness identified, namely the strands of needs, sharing and compensation, within one regime\(^{440}\). In the

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\(^{438}\) See Eekelaar, J.,(2001) op.cit.


\(^{440}\) Jo Miles has highlighted the difficulties of exercising the principles of sharing, compensation and need in the wake of Miller; McFarlane, ‘Charman v Charman
meantime, they not only cause much confusion, but they have left many issues unresolved. Moreover, it is likely to increase rather than decrease litigation costs on the following issues.

Firstly, many disputes will be over to whether an asset is a matrimonial or a non-matrimonial asset;

Secondly, either husband or wife will continue to argue that they have made exceptional or special contributions to the welfare of family, attempting to make it a good reason not to order equal division of matrimonial assets;

Thirdly, non-financial contributors may attempt to prove that their contributions to homemaking or caring work help to produce non-matrimonial assets, and in big money cases, the wealthy spouse will maintain that the assets are generated because of their own efforts and therefore should not be redistributed.

Fourthly, the principle of equal division of so-called matrimonial assets may become an unrealistic slogan as in most cases assets are insufficient to meet their needs; finally unequal division will be the only result, but greater proportionate value can be placed on non-financial contributions in this way where assets are limited.

Last but not least, how to make a fair redistribution of matrimonial property on divorce has been very controversial in English law context. Indeed it is extremely difficult to keep a good balance between flexibility and certainty as there is no community of property in England and Wales so far. It was found in Charman v

(No 4), see Miles, J., (2008) Making sense of need, compensation and equal sharing after Miller; McFarlane, 20 Child and Family Law Quarterly 378 whilst Rebecca Bailey-Harris has argued that the law lacks ‘predictability in practice or policy coherence’, see Bailey-Harris, R., (2005) op.cit.


One of the main criticisms of the law in this regard is that it has resulted in a lack of clarity and certainty for practitioners and their clients, see Eekelaar,J., ‘Miller v Miller: the Descent into Chaos’ [2005] Fam Law 870 and Francis,N., ‘If It’s Broken – Fix It’ [2006] Fam Law 104.
Charman, in order to respect the party’s autonomy and to meet the public need, there is a need to give serious consideration to recognise the status and enforceability of the pre-nuptial agreements. Meanwhile, it also implicitly indicated that enforceable pre-nuptial agreements are preferable to the state of the current law and the introduction of community of property has been objected to again. Finally, one serious consideration should be given to the debate of whether to recognise the status of pre-nuptial agreement, as ‘fairness’ under such an agreement is only achievable in the case that both parties have equal bargaining power. Specifically, family law should play a more positive protective role to remedy the inequality of the division of family role reinforced by patriarchal thinking, rather than enshrine the gloss of party autonomy and risk ignoring the human rights of the vulnerable party in a relationship, usually the homemaker/child-carer.
CHAPTER SEVEN
THE VALUATION OF NON-FINANCIAL CONTRIBUTIONS TO THE MARRIAGE RELATIONSHIP IN COMPARATIVE CONTEXT: ENGLAND AND WALES / TAIWAN

7.1 Introduction and background
In order to enable a full understanding of the parallel points to be compared, a brief background of both jurisdictions will be given before comparing in this chapter.

In Taiwan, heterosexual marriage is the only adult couple relationship which is legally recognised in the Taiwan Civil Code and family law context. Same sex marriage and cohabitation are still not recognised by law and are not protected by any extension of the effects of marriage. Therefore in this Chapter, the comparison between the two jurisdictions of England and Wales and Taiwan in terms of the discussions on how law values non-financial contributions is limited to the heterosexual marriage context.

Even today in England and Wales it is mostly women who are playing or presumed to play the role of child-carer/homemaker. Although women’s employment is increasing, it is increasing at a much faster rate than men’s participation in child-care and homemaking. This implies that women are primarily bearing the heavy burden of employment and child care and homemaking work and this is confirmed by Scott writing in 2005 as the Research Director for the ESRC Network on Gender Inequalities and Production and Reproduction, who states:

‘New research from the Network shows that while there has been immense shifts in women’s lives, in the way family and work responsibilities are combined, the evidence does not support great optimism about the future involvement of men in family chores and care’.


444 J. Scott, op cit., above.
Perhaps surprisingly, from a legal historical point of view, in the context of how to enhance the valuation in family law of non-financial contributions to married relationships, England and Wales and Taiwan can actually be seen to be at similar stages of legal development. In 2002 in Taiwan, legislation gave express recognition of the value on such non-financial contributions through family law reforms; whilst at around the same time, arguably a similar increased weight of recognition was also given to these non-financial contributors by developments in binding case law, beginning with the House of Lords decision of White v White in England and Wales445. These parallel developments towards the same end yet approached in very different ways in different societies makes, it is suggested, a comparison of these jurisdictions (never previously attempted in this context), appropriate, timely and interesting. This chapter will consider the developments, noting some of the similarities and differences of approach in these jurisdictions.

Beginning with the similarities, both these jurisdictions have for some time adopted a system of separation of property during marriage which reflects the thinking that husband and wife should be treated as equals and retain their own property throughout the marriage. Yet at the same time, the parties to a marriage in both jurisdictions have both a moral and a legal duty to maintain each other. However, more importantly for this chapter’s purposes here, neither jurisdiction had until recently faced the problem of the value of non-financial contributions to the marriage relationship where these are not equally borne and both have sidestepped the issue by only making financial compensation for this realisable if and when the marriage breaks down in practice. Given that in both jurisdictions, the majority of non-financial contributions to marriage are made by women, this issue is clearly gendered and one, where substantive gender equality is sought within society, which needs to be addressed.

As already discussed in Chapter two, gender mainstreaming has been seen as the highest guideline to deal with gender issues and thus it can also be applied to the family area. The ultimate goal of gender mainstreaming is to reach substantive equality between men and women, rather than formal equality. To avoid gender discrimination against women, most jurisdictions eliminate male

445 White v White [2001] 1 AC 596.
dominated law and adopt gender neutral law in their legislation, as do England and Wales and Taiwan. However, it was concluded that in practice the goal of substantive gender equality is less likely to be reached if a jurisdiction only relies on gender neutral law, as it is still very difficult to make gender equality a reality within social norms.

Therefore, this chapter intends to set out the strengths, weaknesses, similarities and differences in the approach to valuing non-financial contributions to married relationships in England and Wales/ Taiwan. It will consider whether there are things which each jurisdiction can learn from the other; whether it is possible to suggest an ideal legal approach to overcome the internal cultural resistance to more appropriate valuation of non-financial contributions to married relationships in England and Wales and particularly in Taiwan, which has been the focus of the empirical study for this thesis. It does not intend to propose legal transplantation as such as a solution for either of these jurisdictions on this issue and, given the cultural gulf between the two societies, it is aware of the danger of ignoring institutional disjunctions in a comparative study, as Watson argued:446

> ‘I think I have no need to stress that I have long held that a transplanted rule is not the same thing as it was in its previous home. Nor need I stress my long-held view that it is rules - not just statutory rules - institutions, legal concepts, and structures that are borrowed, not the 'spirit' of a legal system. Rules, institutions, concepts, and structures might almost be termed tangibles, can easily be reduced to writing, and are accessible.’

One reason which helps justify this comparative study is that it presents the opportunity to compare the similarity and differences in approach of two jurisdictions which bear the hallmarks of two of the major families of legal systems,447 one civil law and one common law and which confronted the issue of how to value non-financial contributions at almost the same moment in time. The method here used is the combined method of micro-comparison and macro-comparison based on a selection of themes to provide a wider discussion of these themes and the issues are raised by comparison448.

447 De Cruz, P., (2007) op.cit., p.228.
448 A micro-comparison which includes a study of a specific institution or issue that
The following discussion will be focused on how well the law values non-financial contributions to married relationships and on what financial protection the non working (or financially weaker) spouse can have throughout the marriage in these different jurisdictions. The discussion is divided into three sections: 7.2 pre marriage, 7.3 during marriage and 7.4 on divorce.

7.2 Pre-marriage
One of the legal consequences of marriage is the creation of a potential property relationship between the parties. Taiwan has introduced the matrimonial property regime to regulate financial arrangements for the parties, while now pre-nuptial agreements (to alter the statutory but discretionary distribution of assets on divorce) are preferable in England and Wales as they do not have a statutory matrimonial property regime. However, under the Code, Taiwanese couples still have some limited freedom to make pre-nuptial agreement on certain terms.

7.2.1 Attitude towards the pre-nuptial agreement
This section considers the legislation’s and society’s attitude toward to pre-nuptial agreements in both jurisdictions. A comparative perspective will be made in a later section.

7.2.1.1 Taiwanese legislation
Apart from the couple’s domicile and children’s family name, in the Taiwanese family law context, the Civil Code also allows the couple to sign a pre-nuptial agreement in relation to a number of matters related to the recognition of the value of non-financial contributions to married relationships. These will be now considered in turn.
The matrimonial property regimes in Taiwan

Couples can in their pre-nuptial agreement select one of three types of matrimonial property regimes that govern the ownership and ways of managing the property of the couple during marriage and when they divorce as provided by the Code. The regimes also stipulate the rights each spouse has on the property acquired by either of the spouses, or both.

The spouses may agree on their matrimonial property regime at the time of marriage. If nothing is agreed, the default/statutory property regime will be automatically applicable. The majority of the population are subject to this regime as on one the hand the Code presumes that it is the proper financial arrangement for the couple, on the other it ascribes the non working spouse’s entitlement to the share of matrimonial property to his/her non-financial contributions to the married relationship.

The current default property regime is similar to the deferred community system which means that the spouses maintain their individual property during marriage but on dissolution, a community of matrimonial property is created. Couples are not allowed to alter any terms provided by the Code and cannot agree which matrimonial assets are excluded from the community. However, the community is only limited to the acquisitions during marriage where the lower income party is entitled to claim half of the deferred community of surplus in the event of divorce 449.

The division of household labour

The couple may agree on the division of household labour during the marriage through the pre-nuptial agreement. However, the couples are also obliged to do their best to maintain the household in principle. They cannot contract out of this even where they agree to do so. Thus where they agree to maintain the household even though there is a breach, the court may order the spouse who breaches the agreement to have a heavier duty to pay the living costs of the household than that set out in the agreement.

449 The operation of the property distribution system in Taiwanese law context, see chapter 4.
The living costs of the household

The couple may agree on which party, solely or jointly, should have the financial obligation to support the household and his/her proportion of this obligation to pay the living costs of the household, according to each party’s income or household labour.

The concept of living costs of the household in Taiwanese family law context means that each party has the joint obligation to pay the household expenditures. At the same time, the Code also provides that such an obligation can exempt a party from engaging in homemaking/ child care.

Broadly speaking, the concept of ‘living costs’ includes the costs needed for household living and the children’s education. However, it differs from the concept of maintenance as there are strict requirements for a maintenance application. For example, to be eligible, the applicant must be a person who cannot support themselves. However, marriage as a relationship, entities each spouse who is homemaker/ child-carer or breadwinner to have equal living standard. In practice, the maintenance claim can be made during the marriage and after divorce, however, it is quite difficult for the financially weaker party, usually the homemaker/ child-carer, to successfully claim maintenance from a breadwinner in a case of unequal living standard, although the weaker party’s living standard is very low compared with the breadwinner’s. In such a case, the court would consider they have not reached the level where they ‘cannot support themselves’. On the other hand, the claim for the living costs of the household might be easier to make out than a maintenance claim as there is no specific requirement for the former. However, a sole breadwinner is the only money maker in the family and has to bear the majority of the duty to pay the living expenses for the household. It has been questioned in the Taiwanese family law context where the homemaker’s/ child-carer’s personal needs can be covered by the ‘living expenses for the household’.

The purpose of the ‘living expenses for the household’ is to pay off all the costs are relevant to the household. Therefore, if the homemaker/ child-carer use this money to meet his/ her personal needs, he/ she might be accused of embezzlement. See Chapter 5, the interview findings.
The special allowance for the homemaker/child-carer

The main purpose of the special allowance for the homemaker/child-carer is to promote the economic position of the non working spouse during marriage. This allowance has been seen as the effective means to reduce the homemaker's/child-carer’s dependence on the breadwinner as the sum payable is contractually owed by the homemaker rather than an unreliable gift. The husband and the wife may contract a certain amount of money paid by one for the other's free disposition in a pre-nuptial agreement and will thus recognise the non-financial contribution as having a value over and above the living expenses of that spouse.

7.2.1.2 Taiwanese judiciary decision

The content of a prenuptial agreement can vary widely. In general, any prenuptial agreement which includes the above terms for a special allowance or living expenses is binding on the court.

However, if the agreement includes the terms of provision for division of property and spousal support in the event of divorce for the forfeiture of assets as a result of divorce on the grounds of adultery and the terms for further conditions of guardianship, these terms are seen as ‘contrary to social order and public policy’ as there is a contingency that the parties are about to separate. It is interesting to note that the position of pre-nuptial agreements is in this regard similar to that in England and Wales prior to recent developments, as discussed below.

Finally, the court will still distribute the property according to the matrimonial property regime the couple has opted into. The court would accept a prenuptial agreement that includes the terms for the compensation for ‘mental losses’ on the grounds of adultery.

7.2.1.3 Taiwanese society’s attitude toward prenuptial agreement

In general, society’s attitude towards prenuptial agreements in Taiwan has been negative as on one hand the couples do not have a good understanding of the law, on the other, as mentioned already, Taiwan has adopted the matrimonial property regime. See the Taiwan Supreme Court Precedent 1961, No.2596. Available at: <http://jirs.judicial.gov.tw/index.htm>, 20/01/11 accessed.
property regimes as the primary means of regulation, rather than pre-nuptial agreements. Therefore, couples think there is no need to sign up a prenuptial agreement as it would be seen as unconventional, although it is quite permissible by law as set out above. However, in practice the research evidence undertaken for this thesis suggests that couples preferred to make a verbal agreement rather than a written agreement about the division of household labour and the appropriate payment to the non-financial contributor, revealing a gap between the protection the law affords and the willingness of people to seek this protection due to social convention\textsuperscript{452}.

7.2.1.4 The legislation in England and Wales

The prenuptial agreements are not currently enforceable as the court’s jurisdiction cannot be superseded by an agreement between the parties\textsuperscript{453}.

As seen in Chapter 6, the court is conferred wide distributive powers by the Matrimonial Clauses Act 1973 (hereafter MCA 1973) which can be exercised upon the ending of the marriage through divorce. Under these powers the court can make property adjustments orders; it can order the property to be sold and direct to whom the proceeds should be paid; it can order the one-off payment of lump sums; it can order the sharing of pension rights and it can order continuing maintenance payments both in favour of the former spouse and of any child of the family, where the child support legislation does not prevent an order being made\textsuperscript{454}.

In addition, when the court exercises its powers, the MCA1973 requires the court “to have regard to all the circumstances of the case first consideration being given to the welfare while a minor or any child of the family who has not attained the age of eighteen”,\textsuperscript{455} “to consider whether it would be appropriate so to exercise those powers that the financial obligation of each party towards each other will be terminated as soon after the grant of the decree as the court

\textsuperscript{452} See Chapter 5, the interview findings.
\textsuperscript{453} Recently, however, a recent judgment of the Supreme Court of Justice in England and Wales has ruled in favour of pre-nuptial agreements being effectively binding by giving them ‘decisive weight’ See \textit{Radmacher v Granatino} [2010] FLR 1900, per Supreme Court Justice, Lord Philips, at para.70.
\textsuperscript{454} Section 8 Child Support Act 1991.
\textsuperscript{455} MCA 1973 s 25(1).
considers just and reasonable”, to have regard to each party’s current and future income, earning capacity, property and other financial resources, their financial needs, the family’s standard of living should the marriage has no breakdown, the spouses’ age and any disability, the length of the marriage, each party’s financial or non-financial contributions to the welfare of the family and each party’s conduct it would be inequitable to disregard.

These powers are wide ranging as above, and prenuptial agreements are now seen to be relevant as one of the “circumstances of the case” or as “the conduct of each of the parties”.

7.2.1.5 English judiciary decision-making

The development of the law in England and Wales has been slow and inconsistent. Over the past decade, a good summary of the recent case law prior to the recent Supreme Court decision in Radmacher (cited from Sharp, C.) can be made as follows:

- The court’s jurisdiction cannot be overridden by the prenuptial agreements.
- Prenuptial agreements include the terms to forego claims for ancillary relief that amount to valuable consideration cannot be enforced, unless subsequently embodied in a court order.
- Prenuptial agreements will be taken into account as either a relevant circumstances under Section 25(1) or as a matter of conduct under Section 25(2) (g) of the MCA 1973. They will not be the sole consideration as the court must consider all factors listed under Section 25.
- The weight to be given to prenuptial agreements will be entirely on a case to case basis.
- A well informed agreement between parties of equal bargaining power to arrange their own affairs has greater chance to be given effect by the court.

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456 MCA 1973 s 25A(1).
457 These criteria are listed in MCA 1973 s25(2).
458 See MCA 1973 s 25(1).
The prenuptial agreements should be considered binding unless the change of parties circumstances would cause injustice.

In addition, and prior to the developments in the case law, in 1998 the government suggested that a prenuptial agreement should be given greater significance which includes safeguards as below.461

- Full disclosure of each party’s financial position to the other;
- Independent competent legal advice;
- No disparity of bargaining power, no undue pressure exerted to sign the agreements;
- The agreements must provide for a fair settlement, particularly meeting the needs of both the parties and their children.

As mentioned already, in the case of White the House of Lords made clear that the primary object of the court’s powers in ancillary relief proceedings was to reach a fair outcome between the parties, measured against the yardstick of equality and stated explicitly that there should be no bias between breadwinner and homemaker/child-carer462. A few years later, that approach was refined in the case of Miller; McFarlane, where the House of Lords identified three principles to explain the ingredients of fairness to help the court exercise its powers to the redistribution of assets following a divorce. These were the principles of needs, compensation and sharing. However, this case also introduced the new concept of categorising assets as matrimonial or non matrimonial – which were terms which echoed those of community of property - and this categorisation also affected how the categories of assets should be distributed463. Even so, in the meantime, the judgments have failed to set out the question of identifying non matrimonial or family property so that they caused more confusion of giving it a clear advice about it464.

462 White v White [2001] 1 AC 596.
463 Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, at para 167.
This categorisation, the interpretation of fairness placing an equal value on financial and non-financial contributions to a marriage, together with the increasing willingness of the courts to take pre-nuptial agreements into account when making ancillary relief orders has also affected the nature of pre-nuptial agreements. Some have argued that when making prenuptial agreements which are not strictly binding, it becomes more necessary to take the separate potential claims of needs, compensation and shares into account to ensure they will be influential in shaping the courts’ decision.\textsuperscript{465}

Recently, in the latest decision of \textit{Radmacher v Granatino}\textsuperscript{466}, a milestone has been reached in the legal recognition of prenuptial agreements by the court. The French husband and the German wife were married in London in 1998. Prior to the marriage they signed a German Pre-nuptial Agreement. The agreement provided that a portion of her family’s considerable wealth would be transferred if an agreement was signed and neither party was to acquire any benefit from the property of the other during the marriage or on its dissolution. At that time, the husband worked as a banker and refused independent advice on the agreement. The parties separated in 2006 after 8 years of marriage and with two children. By this time the husband worked as an academic at Oxford. In this case, the essential point of principle is now established, as Lord Philips stated:

\begin{quote}
‘\textit{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.}\textsuperscript{467}
\end{quote}

The justification for this is that the parties’ autonomy needs to be respected\textsuperscript{468}. Notwithstanding a big step towards binding prenuptial agreements, however, it still remains questionable for further debate whether there is now a rebuttable presumption that the court will give effect to prenuptial agreements, freely entered and well understood, provided it is not unfair in the prevailing circumstances. Yet it is feared, that ancillary relief litigation will not be reduced as

\textsuperscript{466} \textit{Radmacher v Granatino} [2010] UKSC 42.
\textsuperscript{467} \textit{ibid.}, at para 75.
\textsuperscript{468} \textit{ibid.}, at para 78.
there is an interim period where it still is not clear that a pre-nuptial agreement will be enforceable because it would not have been at the time it was made. In addition, parties are now encouraged to make prenuptial agreements and to expect that the court is likely to enforce their prenuptial agreements. Whether the Law Commission can recommend a better solution and draw up a draft Bill by 2012 remains to be seen.

### 7.2.1.6 English society’s attitude toward pre-nuptial agreement

As noted already, the effect of *Radmacher v Granatino* on prenuptial agreements is that the parties are now encouraged to make a prenuptial agreement as it is presumed that from that time on, such agreements will be presumptively valid as the latest decision established that pre-nuptial agreements are no longer contractually void for public policy reasons. However, they will not be able to be enforced as contracts, because an attempt to enforce one as a contract could always be thwarted by an application for ancillary relief.

One of the reasons that there is a greater need for pre-nuptial agreements in England and Wales is in this study’s view because there is no community of property regime in this jurisdiction giving rise to a lack of certainty of outcome on divorce. People are likely to prefer to make their own financial arrangements at the point of marriage about what will happen to their assets on divorce in anticipation of the likely division of household labour during marriage and their agreed notions of fairness and the value to be ascribed to each spouse’s role within the marriage at that time, instead of leaving their future in the discretion of unknown judges at the point of divorce. Prenuptial agreements also allow people to take more responsibility for ordering their own future and avoiding the financial risk of marriage which results from the extreme uncertainty and insecurity about what they are getting into.

471 ibid., at para 52.
Prior to *Radmacher v Granatino*, sections of the public and the legal profession appeared to strongly demand that prenuptial agreements should be enforced.

One piece of market research from the Internet Bank Smile reveals that although prenuptial agreements are not enforceable in the UK, 46% of those who were surveyed want binding prenuptial agreements. In addition, *Resolution*, the biggest group of family law lawyers in the UK, has also called for the legal enforceability for prenuptial agreements subject to an overriding safeguard of significant injustice. Resolution stated that:

‘It is an anomalous position that husbands and wives (and in the future registered same sex partners) are unable to bind themselves with a contractual premarital/partnership agreement, whereas cohabitants can. Instead, divorcing couples and separating registered partners face financial outcomes which represent a judicial lottery based on the exercise of statutory discretion. It is felt that the increased demand for pre-marital agreements reflects the higher number of second and subsequent marriages; the wider multicultural and multinational community in which we live and the general public being more attuned to the idea of self-ordering. With the media following high profile marriages and divorces, there is a greater desire towards self-ordering and the concept of preventative medicine to mitigate the cost of litigation.’

However, recently Emma Hitchings’ academic report on pre-nuptial agreements commissioned by Law Commission indicated that the couple preferred to seek verbal advice rather than turn it into an agreement:

‘The number of pre-nuptial agreements that practitioners are advising upon is not particularly large, even the practitioners who have the largest marital

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473 Over 5,650 people responded to an online pre-nuptial questionnaire on the smile website in February 2004, available at: <http://www.prnewswire.co.uk/cgi/news/release?id=121959> 27/01/11 accessed


475 See Emma Hitchings’ academic research on pre-nuptial agreement which was commissioned by Law Commission in 2009, available at: <http://www.lawcom.gov.uk/docs/hitchings-report.pdf> 02/02/11 accessed
property agreement caseloads are rarely advising in excess of 15-20 per annum. Furthermore, although it appears that the perception amongst the sample is that there has been an increase in at least the number of enquiries in the last few years, the data is inconclusive as to whether this has transferred into an increase in the number of actual agreements. Likewise, very few practitioners in the sample have had experience of advising upon and drafting post-nuptial agreements.’

Therefore, the impact of *Radmacher v Granatino* on people’s attitude towards pre-nuptial agreements remains to be seen.

### 7.2.1.7 Individual’s autonomy

As noted above, the court in the case of *Radmacher v Granatino* has not only taken a large step forward towards acknowledging that prenuptial agreements should be contractually binding under English law, but it has taken a leap forward and stated that due respect should be given to party autonomy and that contracts should be available as an alternative to increase more certainty and predictability in the event of marriage breakdown. It could be characterised as a move away from state control towards more party autonomy and more possibilities for self regulation. Making prenuptial agreements are no longer considered as contrary to public policy. Furthermore, greater weight is given to party autonomy, as Lord Philips stated.\[^{476}\]

\[^{476}\] *The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties’ agreement addresses existing circumstances and not merely the contingencies of an uncertain future’*

However, Baroness Hale’s dissenting judgment in *Radmacher v Granatino* drew attention to some issues and indicated that the court should not introduce a presumption or starting point in favour of holding the parties to agreements when considering a pre-nuptial agreement as the guiding principle should be fairness, which has been established in *White, Miller and McFarlane*, in the light of the actual and foreseeable circumstances at the time when the court reviews this agreement\[^{477}\]. For example, she continued to argue that the Court of Appeal was

\[^{477}\] *ibid.*, at para 169.
in error to treat the parties as if they had never married but only cohabited, and
the court failed to consider that the husband’s role as father to the children was a
relevant factor to be considered even after the children attained their majority
when the court reviews the agreement478. Finally, she argued that the husband
should be granted his English home for life479.

In addition, an important issue arises that where the distinction between the
party autonomy and the court’s intervention shall be drawn. Lowe and Kay have
argued that one person’s autonomy and freedom might be gained at the
expense of another’s. In addition they also have argued that the law’s protective
role towards the interests of potentially vulnerable parties, typically women and
children, cannot be subject to the party autonomy in the event of unequal
bargaining powers between parties and changes of the parties’ existing
circumstance. Therefore, playing overemphasis on party autonomy would
undermine the English redistributive system based on fairness480.

7.2.2 Comparative perspectives on prenuptial agreements
The division of matrimonial assets is based on the prevailing ideology of
marriage as an equal co-operative partnership of efforts. The contributions of
both spouses are equally recognised whether he or she acts the role of
breadwinner or homemaker/child-carer, as both roles must be performed equally
well if the marriage relationship is to develop. When the marriage comes to an
end, these contributions, either financial or non-financial, are translated into
economic assets in the distribution. In addition, well-drafted prenuptial
agreements can be seen as a tool to allow the parties to prescribe their financial
arrangement prior to marriage if they wish.

In other words, before entering into the marriage, the effective tool to regulate
marital affairs might be employed by the couple is the prenuptial agreement,
although they might be seen as the most unromantic document for them.
However, they are not only used to protect the matrimonial property rights, in

478 ibid., at para 192.
479 ibid., at para 194.
480 See Lowe, N. and Kay, R.,(2009) The Status of Prenuptial Agreements in
English Law- Eccentricity or Sensible Pragmatism?, in Family Finances, Bea
Verschraegen ed.,(Vienna: Jan Sramek Verlag) pp.395-413.
order to reach a fair distribution of the assets, for both parties in the event of divorce. More importantly, they can provide the possibility to evaluate the non-financial contributions to the married couple prior to marriage if they are well-drafted and could be used to place a clear value on them agreed by the couple. Used in this way, they can be seen as a new construction of fairness within English law.

The approaches used in the prenuptial agreements in England and Wales and Taiwan clearly differ from each other due to diverse legislative frameworks. However, in Taiwan, the couple has limited freedom as to what may be agreed in the pre-nuptial agreement in terms of property arrangements as their property relationship has been set out through their choice of property regime. The property distribution is one of the most significant legal consequences on marriage breakdown. In order to avoid injustice, the role family law plays to keep a good balance between party autonomy and property protection for the vulnerable party within family is hugely important. Maybe one of the functions of the prenuptial agreements and their effect in protecting the economic position of the homemaker/child-carer is potentially critical. However, if the status of pre-nuptial agreement is recognised in the future, it might be hard to promote the weaker party’s economic position in the case that there is unequal bargaining power between the parties in reality. The potential benefits and disadvantages of autonomy to reach wide ranging prenuptial agreements is therefore a key matter for this study.

7.2.2.1 The content and scope of prenuptial agreements

(A) Taiwanese perspective

In general, the scope of pre-nuptial agreements is limited here. Currently, there is no need for the Taiwanese couple to decide their financial arrangements in the event of divorce as the Civil Code has provided them with a choice of matrimonial property regimes. The spouses are only allowed to choose one of the regimes stated in the Civil Code. The spouses are not allowed to modify the statutory rules of the regimes or introduce any regime known by foreign law that is not recognised by the Taiwanese Civil Code. It is also forbidden to mix different regimes. Such limited freedom of contracting in prenuptial agreements is justified not only by the desire to recognise the value of non-financial
contributions in advance and fair distribution of matrimonial property on divorce, but by providing certainty and predictability of the property distribution. Thus whereas in England and Wales prenuptials are seen as an instrument of achieving certainty in Taiwan to certain extent this certainty has been achieved through matrimonial property regime.

Apart from translating the value of non-financial contributions to the marriage relationship into economic assets at the end of marriage relationship through the division of the community surplus, the Code provides the non working spouse with certain financial resources during marriage. Under the Taiwanese Civil Code, generally the spouses have the joint duty to pay off the living expenses for the household with their income, according to their respective economic ability or household labour. Yet, how to share the duty and its proportion might be concluded by means of prenuptial agreements. The Code here provides that the homemaking/child-caring spouse’s duty to pay off the living expenses for the household can be proportionately reduced according to the extent of his/her non-financial contributions to the married relationship as it also means that the non working spouse is building up savings. Therefore, the spouses may agree on the terms that include the division of household labour and the proportion of pay-off duty by prenuptial agreements.

In addition, the other financial resource is available to further promote the non working spouse’s economic position is the freedom to contract for a special allowance payable to the homemaker/ child-carer. The amended Code 2002 recognised the enforceability of prenuptial agreements in which the husband and the wife contract a certain amount of money paid by one for the other's free disposition during marriage. Yet conversely this means that the value of the homemaking/ child-caring contributions to the married relationship contracted for in this way is only realisable if there is a prenuptial agreement including terms of special allowance for homemaker/child-carer or the duty to pay off the living expenses for the household. Furthermore, under the influence of Confucian thinking, the husband and wife are expected to play the role set out in San-Gang and Wu-Chang. The prevailing ideology of marriage as an equal co-operative partnership of efforts is less likely to exist in a society where the Confucian thinking widely spreads.
Although the Code declares that the couple may make agreements and they can be enforced by the court to ensure each party’s economic position during marriage, the conclusion to be drawn from the empirical research conducted for this study is that prenuptial agreements are not in reality popular in Taiwan, as people do not have a good understanding of law and they have been greatly influenced by the Confucian thinking\(^ {481}\). It needs to be made clear at this point that the gulf between legal norms and social norms proves that the goal of substantive gender equality has not been achieved required by gender mainstreaming policy. Whether further reform is needed remains to be seen and will be discussed below.

**B) English perspective**

In contrast with Taiwan, there is no true community property system recognised within the English legal framework or even though judiciary activism. The discretionary English law applied by the courts has sacrificed certainty and predictability because they want to keep flexibility in ancillary relief proceedings on a case by case basis, which can reach fairness by exercising the principles of needs, sharing and compensation in ancillary relief proceedings. This state of affairs makes it likely that it will reinforce the English couples’ desire for the enforceability of prenuptial agreements as they really want to deal with their own financial affairs in a more secured and certain way in the event of divorce.

Since the case of *Hyman v Hyman*\(^ {482}\) the principle was settled that public policy should preclude enforcement of the prenuptial agreement in the event of divorce as ‘it was a contract immoral in its nature, opposed to the fundamental sanctity of marriage and contrary to the law of England’\(^ {483}\). However, the notion of public policy shifts as the society has changed dramatically since that time. Public policy now requires that prenuptial agreements be enforced as long as they are well drafted with certain conditions.

As has been demonstrated, in recent years there has been a judicial trend in

\(^{481}\) See Chapter 4.

\(^{482}\) *Hyman v Hyman* [1929] AC 601.

\(^{483}\) *ibid.*, at p.621.
England and Wales towards allowing prenuptial agreements to be given greater weight\(^\text{484}\). The landmark decision of the Supreme Court over the validity of a pre-nuptial agreement has been ruled that a German heiress can keep her £100m fortune, in a move which it could open the door to such agreements taking their place in English law and the party autonomy can be gradually respected within a limited circumstance\(^\text{485}\).

In Taiwan, the scope of prenuptial agreements is subject to the Code. English couples therefore enjoy more autonomy in prenuptial contracting relative to Taiwanese couples. However in England and Wales, it can be seen that the contents mostly used in the prenuptial agreements are focused on making a good solution to the property distribution in the event of divorce; how to deal with the income management during marriage is rarely mentioned. Thus, in reality one conclusion can be made is that to give proper recognition to the value of homemaking/child-carer contributions to the married relationship is not likely to be achieved by making prenuptial agreements in both these societies and jurisdictions. Unless specific guidance was given that, for example, couples should address this in terms of the division of household labour and the foreseeable consequences of such division was factored into the agreement, the issue of the value of non-financial contributions is likely to remain unspoken within pre-nuptial agreements. Moreover, in England and Wales it really depends how pre-nuptial agreements are used and whether they are used as a way of safeguarding assets from the homemaker/ child-carer to which she otherwise would have been entitled under the White/ Miller; McFarlane sharing principle or in contracts giving non-financial contributions a clear value. Perhaps it is argued in terms of autonomy but is also about protecting the assets of the higher economic position partner from being shared with the lower partner.

7.2.2.2 Bargaining power
As already mentioned, the fairness through pre-nuptial agreements is only possible in the case that the parties have equal bargaining power. English couples enjoy more autonomy in prenuptial contracting relative to Taiwanese couples. Currently the general notion espoused by English case law is that

\(^{484}\) See note 450.
\(^{485}\) See *Radmacher v Granatino* [2010] UKSC 42.
people might be able to manage their property affairs as long as a well drafted prenuptial agreement is made that fulfils certain safeguards. It may become commonplace for couples to make prenuptial agreements when they decide to enter into a marriage. In addition, by referring to the safeguards set out in the recent case law, such as full disclosure and independent competent legal advice for each party, sufficient knowledge enables couples to make a binding prenuptial agreement. This should also avoid unequal bargaining power or undue pressure between parties. More importantly, these safeguards enhance the awareness of the economically weaker party, typically the homemaker/child-carer, to feel more confident to negotiate with the financially stronger party, traditionally the breadwinner/money maker, although there is a risk that the other party decides not to marry at all.

From the Taiwanese standpoint, although the Code allows couples to make prenuptial agreements on certain terms which are used to protect the value of non-financial contributions so as to promote the economic position of the non-working spouse, it has not provided any safeguards or guidelines governing the process of making a prenuptial agreement. Moreover in this area the Code remains vague and general. The making of prenuptial agreements is nothing different from a commercial contract. At a theoretical level, a prenuptial agreement might be enforced by the court in a case where there was equal bargaining power between parties. Apart from the cultural factors rooted in Taiwanese society, the shortage of the safeguards also leads to reduce the desire for prenuptial agreements.

7.2.2.3 Party autonomy

In the English law context, the issue of party autonomy prompts the question of whether prenuptial agreements are simply a way for wealthy people to ensure that the financial weaker party to a marriage will not get the financial settlement they would be entitled to in the courts. If the reality is that it is usually the husband who is the financially stronger party to a marriage, pre-nuptial agreements are likely to be detrimental to women to some degree. Therefore, complete autonomy should arguably not be given to the parties until the goal of gender equality can be achieved in the society. In fact giving complete party autonomy might lead to substantial gender inequality as the contractual
inequality still subsists within society. Family law's protective role should continue to play as long as the existence of gender inequality continues. Of course, to achieve the overall object of gender equality, substantively not just formally, it cannot be enough only to rely on law as it has its own limitations. However, at least the law can bring its educational function into full play so as to begin to change people's mindset.

In general the notion of party autonomy originated from the principle of contract law and it also applies in family law area, although one may query how appropriate this is. However, unlike the commercial contract or agreement, the agreements made in family law area often have the matrimonial or parental elements which are closely linked to public policy. Family law would lose its protective role to intervene in cases where there was an injustice if equivalent weight is given to both commercial contracts and family law agreements as no recognition of the gender and power issues are factored in.

In recent developments, English law has proposed significant safeguards against any unjust marital agreements made by the parties, although these were not applied strictly in Radmacher. In particular, Mr. Radmacher did not get legal advice and the agreement was in a language he did not understand. To a certain degree, the English proposals aim to keep the social order at the expense of the parties’ freedom as to contractual content. According to the Law Commission’s consultation paper on marital property agreements, the formalities should be required in a well-drafted agreement: Contractual safeguards, signed writing, financial disclosure, legal advice and timing requirements.486

However, in this regard, similar safeguards or criteria seem not to be found in the Taiwanese legal framework. The Code ostensibly declares that it allows the couple to agree in the terms of living expenses for household and special allowance for the homemaker/child-carer so as to promote the economic position of financially weaker spouse. However, the reality is that on one hand the Code has provided the couples with the opportunity to arrange their financial

arrangement during marriage, which has been seen as private area and the Code does not want to intervene. On the other the Code has not directed the couples how to make a just agreement. Without these safeguards, the Taiwanese court would only rule the case according to their terms embodied in the agreement although to hold either of the parties to the agreement is obviously unfair. The Code seemingly has given complete autonomy to the couples, but in reality it fails to avoid unjust agreements or take account of unequal bargaining power. The shortage of safeguards also affects the couple’s willingness to consider the making of a prenuptial agreement.

7.3 During Marriage: maintenance as the main financial resource
Both jurisdictions have introduced the separation of property during marriage and they only deal with property distribution in the event of divorce. In general, Taiwan has three types of matrimonial property regime that govern property ownership and ways of managing the property of the couple during marriage and the distribution of matrimonial property in the event of divorce. The regime also states the rights and duties each spouse has on the property acquired by either of the spouses, or both. The spouses may agree on their matrimonial property regime at the time of marriage or change the regime in written agreement after marriage. If nothing is otherwise agreed, the couple remain in the default statutory property regime, which is community of surplus, where it is a regime based on separation of property during the marriage, with the surplus divided in the event of divorce. Apart from the default statutory regime, spouses may choose from the contractual property regimes in Taiwan, which include separation of property and community of property. Therefore, there is no need for Taiwanese couples to make agreement regarding to their ownership or management of property during marriage or on divorce. In this regard, English law is also based on the separation of property during marriage; however it has conferred the powers of the distribution of property at the end of marriage under MCA 1973 to the courts.

Putting the issue of which approach employed can reach a just and fair outcome for the non working spouse aside, it is clear that both jurisdictions have a trend not to intervene in the financial arrangements during marriage as maintenance has been seen as the only financial support for those who are not money
learners who typically are housewives and this is very difficult to obtain during marriage in either Jurisdiction.

7.3.1 Taiwanese perspective

Without making the agreements of living expenses for the household and special allowance for the homemaker/child-carer, the only financial resource the non working spouse is mainly from the working spouse’s maintenance.

When applying for the maintenance, the Code also put restrictions on those who are entitled to claim for maintenance. Basically, the claimants shall be limited to those who ‘cannot maintain the living’ and are ‘unable to earn the living’. However, in practice, the Taiwanese Supreme Court did not make the identical decisions, the previous precedent emphasised that two strict requirements should apply to the spouse maintenance, the husband and the wife are allowed to apply for spouse maintenance only in the circumstance that the claimant is not only unable to maintain themselves but unable to earn their living. But this decision was overridden by the later decision. Therefore, the husband or the wife may apply for spousal maintenance as long as the claimant is unable to maintain themselves, an easier test to satisfy.

It is obvious that the nature of maintenance is not being considered as the exchange for non-financial contributions which the homemaker/child-carer has made. Under the Code, acting the role of a homemaker/child-carer does not of itself entitle them to maintenance. Doing the housework/child-caring is never taken by the court as a specific consideration for the claim of maintenance. In addition, the Code only allows non working spouses to claim for the maintenance in the event that they cannot maintain themselves, but unequal living standard between them is not a justification to award maintenance. In other words, the respondent’s duty to maintain can be seen as completely performed by the court, usually are male/breadwinner, as long as he provides the minimum living standard for the claimant, usually are female/homemaker/child-carer. Furthermore, the maintenance claim will not be awarded in the case

that the respondent has provided the claimant with income to pay off the living expenses for the household, even though the amount is inadequate. However, one issue that arises is that the purpose of the living expenses for the household is to pay any debts occurred during marriage on the ground of maintaining a household. It is not relevant to meet the claimant’s personal needs. If the earning party has paid the income for living expenses for the household, the court normally would hold that the homemaking/child-caring party would not have reached the level of ‘cannot support themselves’.

Therefore, during the subsistence of the marriage relationship, the Code does only provide an unrealisable right for the economically weaker party. A possible financial resource for the homemaker/child-carer might be created by means of reciprocal maintenance. Nevertheless, as a matter of fact, it indirectly reinforces the non working spouse’s economic dependency on the money earner, making separation unthinkable for the vast majority.

7.3.2 English perspective
Without having State support, the only financial support an English homemaker/child-carer during marriage can rely on is through the spousal maintenance obligation. However, the eligibility of State support depends on applicant’s earning and income size and some criteria need to be met, such as disability or poverty.

Apart from the statutory spousal obligations to maintain, the couple may agree on terms of maintenance on separation. In brief, a maintenance agreement is an agreement in writing made between spouses and dealing with their financial arrangement or separation. It must also be:

‘(a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or
(b) a separation agreement which contains no financial arrangements in

489 In England and Wales, the state may provide financial support to individuals and families through two main mechanisms: tax allowances and social security benefits. See Lowe, N., and Douglas, G., (2007) op.cit., Ch.17, pp.919-926.
And further, financial arrangements are defined as:

‘...provision governing the rights and liabilities towards one another when living separately of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or disposition or use of any property, including such rights and liability with respect to the maintenance or education of any child, whether or not a child of the family’.

Traditionally the object of making a maintenance agreement was to stipulate that the extent of a husband’s maintenance obligations to his wife once and for all and to give her the sense of security that she would be entitled to the stipulated provision. However, the law now makes it impossible for a private agreement or covenant to be made which cannot be scrutinised by the court on divorce and currently the maintenance agreements have become uncommon in recent years, the reasons can be concluded as follows:

Firstly, in many cases the economically weaker party, usually the wife, will have the best of both worlds, because she can hold the other to his covenant and also take other proceedings to obtain maintenance.

Secondly, spouses in separation are to divorce in due course and final resolution of their financial and property relationship might be dealt with by courts.

Thirdly, either party should be able to seek a variation in the event of change of circumstances.

Fourthly, the use of consent order is very common. The agreement in this case is approved by the court and is embodied in a consent order by the court which settles the rights and duties of the parties at the time of divorce, is fully

490 See MCA 1973 s 34.
491 See MCA 1973 s 34(2).
enforceable as if the court alone had imposed it, but saves the high cost of full court hearing.

**7.3.3 Comparative study on the potential income sources during marriage**

**7.3.3.1 Similarities**

(A) Reinforcing homemaker’s/ child-carer’s dependency on the money maker

In essence, the legal right to maintenance is the main financial source for the spouses in England/Wales and Taiwan in the absence of any private agreements made between parties. Although the laws have always restated that the spouses have a mutual duty to maintain each other, it remains questionable what the non working spouse can do in a situation where the other party chooses to mean to him/her, refusing to provide equal living standard for them. Inevitably the right to maintenance is not realisable until goes to court and this in England and Wales and Taiwan at least, is perhaps in contemplation of divorce.

Moreover, in the absence of state support, the reality is that only the money maker is presumed to have financial ability to maintain his/her non working spouse with income. Thus, it is impossible to carry out the idea of reciprocal obligation to maintain in the case where there are unequal economic positions between parties, unless non-financial contributions are seen as a means of fulfilling that ‘obligation to maintain’ which is not in any direct sense in either jurisdiction. In most cases it is very obvious that the claim of maintenance is always made by the financially weaker party, rather than by economically stronger party. Thus, the financially stronger party always plays the role of giver while the other party acts as the receiver from a financial perspective. This in itself reveals a need for the law to consider the financial value of non-financial contributions to a marriage.

(B) Maintenance agreements are not very common

It is not very common to arrange the financial affairs during marriage by maintenance agreements. From the empirical research conducted in Taiwan, it can be proved that any agreements with marital element has been seen as
unconventional and people have few desire to make that agreement\textsuperscript{493}.

In England and Wales maintenance agreements made prior to or during marriage are not so common in recent years on the ground that the court has powers to vary the agreements.

\textbf{(C) Reciprocal duty to maintain: a gender neutral perspective}

Both England and Wales and Taiwan have been greatly influenced by patriarchal thinking for a long time. This has been seen as not only a cultural but also a traditional barrier to gender equality. In the past, male/breadwinner has the moral or legal duty to maintain all the members of the family, as a matter of course, he was the main controller and manager of the family income. In order to manifest that marriage is an equal partnership in which either of the parties should have equal rights and duties in their marriage relationship, the law introduced the gender neutral law to provide that the reciprocal duty to maintain each other to equalised the duty to maintain for both of the sexes. However, before the power argument within family has been completely resolved, the function of gender neutral law can only be seen as formally protective as it might have ignored the inequality issues within the family. In addition, the introduction of gender neutral law could imply that the law is unwilling to intervene in the private family area.

\textbf{7.3.3.2 Dissimilarities}

\textbf{(A) Different requirements for maintenance claim}

The requirements for the maintenance during marriage in England and Wales are not so as strict as in Taiwan. The only requirement for English court to decide is whether the maintenance in question is ‘reasonable’ or not, which is based on the case by case approach. However in Taiwan, the Code has put more strict requirements on the maintenance claim. First, the claimants must live in the level of ‘\textit{cannot maintain themselves’}. Second, they are ineligible to maintenance claim if they were given the money for living expense for the household by the other party. For those reasons, it is rarely to see the successful case of maintenance claim in practice\textsuperscript{494}. By contrast, Taiwanese couples face a

\textsuperscript{493} See note 345.

\textsuperscript{494} In the past decade from 2000-2010, there was very few maintenance claim
more difficult economic position than English couples as long as the other party is very mean with the sums paid to them as living expenses or is unwilling to pay the maintenance.

(B) Maintenance on separation

There is no separation system in Taiwan when the couple has difficulties with their marriage. Some argue that the notion of living expenses for the household only applies to the reality that the couple lives in the same household. They are ineligible for the claim of living expenses for the household once they do not live together. From the moment that the couple separate, a spouse is only eligible for the maintenance claim. Therefore, the same strict requirements of a maintenance claim apply to separated spouses. It means that the claimant in separation is not only ineligible for the claim for the living expenses for the household as the reality of cohabitation has gone, but is also subject to the strict requirements of maintenance claims which are, as discussed above, difficult to seek.

(C) Can non-financial contributions be viewed as the exchange of maintenance?

Under the Taiwanese Civil Code, the nature of maintenance is entirely irrelevant to the homemaking/child-caring contributions. In other words, the value of non-financial contributions to the married relationship cannot be accumulated and linked to the entitlement to maintenance. The entitlement results from the legal consequence of marriage rather than the non-financial contributions to the marriage relationship. Therefore, it is impossible to appropriately reflect the value of non-financial contributions through the payment of maintenance, their value is determined solely under the applicable community of property regime.

By contrast, in common law within the marriage contract, child-caring and homemaking has been seen as the moral duty of the good wife, mother and daughter, and that duty is performed in exchange for the male money maker’s

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495 See Chapter 4.
duty to provide maintenance. In the case of *White*[^496], Lord Nicholls emphasised that there can no longer be gender discrimination when determining the allocation of maintenance or ancillary relief. He stated:

> '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 favor of the money-earner and the child-carer'

The House of Lords also recognised that by being at home and looking after children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills[^497].

Therefore, it is clear that at least the homemaker/child-carer is entitled to the breadwinner’s maintenance in this sense. In the case of maintenance claim, homemaking/child-caring contributions is one of the factors that the court should have all regard to in the case of maintenance claim[^498]. Compensation for relationship generated disadvantage can equally be paid by way of maintenance as from property adjustment as happened in McFarlane and here a clear value has been given to non-financial contributions.

### 7.4 On divorce: property distribution and maintenance after divorce

In the first part of this century England and Wales and Taiwan have given greater recognition to the value of non-financial contributions to the married relationship in their legal frameworks. The systems also provide financial compensation for those who suffer the economic loss from acting as the role of homemaker/child-carer at the end of a marriage. However, as discussed already, the value of the non-financial contributions is not realisable until the breakdown of marriage. The following section explores how these jurisdictions value non-financial contributions to the married relationship by distribution of assets.

[^496]: *White v White* [2001] 1 AC 596.
[^497]: *ibid*.
[^498]: MCA 1973 s25(2)(f).
7.4.1 Taiwanese Perspective

7.4.1.1 The entitlement to half of the deferred community of surplus

The amendments made to the Civil Code in 2002 where, Taiwan has adopted a mixed system situated somewhere between Germany and Swiss law\(^{499}\), were not only in order to place proper recognition of the value of non-financial contributions to the married relationship, but also were to advocate that marriage is a partnership. The regime is now deferred community of surplus which is set as the default property regime. Normally, the spouse with the larger increase in property or income gives half of the difference to the other party, that is to say, the party who has earned or accrued more assets, income or property during the marriage has to hand over half the value of surplus to the other party who has less property or income. Basically, the objective of this regime is to ensure that the wife who has played the role of homemaker/ child-carer, and therefore not had the opportunity to earn income of her own or save any money, will have an equal share in the surplus of property.

This regime applies automatically to married couples who have not expressly arranged another type of regime. It is a regime based on separation of property during the marriage, with the surplus equally divided in the event of divorce, if any. During the marriage, each party retains uses and manages their respective property. Any property acquired before marriage, by gift or inheritance is not to be divided in the event of divorce as they are not from the consequence of both parties’ common efforts to the marriage. The savings made during the marriage, e.g. salaries, income and interest, can be used and managed independently by each spouse.

In other words, the community is only limited to acquisition. The legislature declared that under that regime, the value of non-financial contributions is accumulated during the marriage and thus entitles the homemaker/child-carer to

\(^{499}\) Germany’s system is known as community of surplus (Zugewinngemeinschaft) where is a regime based on separation of property during marriage, with surplus divided at the end of marriage; Swiss system is the deferred community of acquisitions (Errungenschaftsbeteiligung) where each spouse has his/her separate property during marriage, upon divorce, there is a distribution of goods. See Ryznar, M., and Stępień-Sporek, A., (2009) ‘To Have and to Hold, for Richer and Richer: Prenuptial Agreements in the Comparative Context’, available at : <http://works.bepress.com/margaret_ryznar/6/> 10/01/11 accessed.
claim the community of surplus, if any. However, in a childless marriage, where one party has worked extremely hard in accumulating a fortune while the other has done little, it might not be fair to hold the parties to fifty-fifty distribution of the surplus of property. Either of the parties may apply to the court to vary the distribution in the event of obvious unfairness, of which this may be an example.

Apart from default property regime, spouses can also choose either a separate property regime or community property regime by agreement. The types of regime can be changed at any time during marriage. The making, alteration of agreement should be registered in a special register kept by a court.

Under the separate property regime, each spouse respectively owns and manages the property acquired before marriage and in the course of it. Neither of the spouses has a right to the other’s property. Therefore, the wife and husband continue to own their property separately during marriage. There is no property distribution at the end of marriage. In order to keep respective property separately, wealthy couples where each owns significant assets in their own right are keen on this regime.

Under the community property regime, all property and income acquired by a husband and wife during marriage is jointly owned, unless they are personal goods which are exclusively at the disposition of each of the spouses. Meanwhile, they are able to establish the rules on the composition of each spouse’s separate capital and community property. They can also change the rules of management of the community property, but they have equal division of community property on divorce.

Generally under Taiwanese Civil Code, the spouse must choose one of the above regimes as their property arrangement. In any event the obligation to pay the living expenses for the household and maintain to each other cannot be

500 See Taiwan Civil Code, §1030-1, at note 2.
501 ibid., §1044.
502 ibid., §1031-§1041.
eliminated by any agreements and is quite separate from the matrimonial property arrangement chosen by the couple.

7.4.1.2 Maintenance after divorce (alimony)
Apart from the property distribution on divorce, another means used to compensate the party’s financial disadvantage suffered during marriage by undertaking the homemaking/child-caring is the alimony claim. In Taiwan family law context, the term ‘maintenance’ only refers to the financial support provided by the earning party during marriage while the financial support to ex spouse after divorce is called ‘alimony’. Normally, in an alimony claim, the no fault party, may claim for alimony as long as he/she has difficulty in earning a living on account of a judicial decree of divorce503.

In addition, if the claimant party has suffered damage due to a judicial decree of divorce, then he/she may claim compensation from the other party at fault. Furthermore, the claimant party may still claim an equitable compensation in money for a non-pecuniary loss, provided that he/she is not at fault504.

However, the non-financial (homemaking/child-caring) contributions are not to be considered by the court when deciding the amount of alimony or damage compensation.505 Furthermore, another factor is not to be considered is that the standard of living enjoyed before divorce. Again, the Code also shows its weakness of maintaining the financial weaker spouse after divorce.

7.4.2 English perspective
7.4.2.1 The separation of property
In England and Wales, there is no community property legislation. Since 1882, the Married Women’s Property Act set out the separate property principle which means that the couple has no proprietary consequence through marriage, any property they owned before marriage still belongs to them respectively, in the absence of any enforceable agreement to the contrary506.

503 ibid., §1057.
504 ibid., §1056.
505 See Chapter 5, the interviews conducted in Taiwan.
506 There is a trend to recognise the agreement by the court, see Radmacher v Granatino [2010] UKSC 42.
7.4.2.2 Ancillary relief on divorce
All ancillary relief applications are governed by the provisions of MCA 1973, the purpose of the process of redistribution of property is that it not only compensates for the past in terms of contributions to the marriage, but provides maintenance where appropriate\textsuperscript{507}.

Under MCA 1973, the orders available to the court are: property adjustment orders\textsuperscript{508}; financial provision orders\textsuperscript{509} and pension orders\textsuperscript{510}.

7.4.2.3 Property adjustment orders: Family Home
Generally upon divorce, the English court has wide and far-reaching discretionary powers under MCA 1973 to make orders with regard to the couple’s assets, both moveable and immovable, including the matrimonial home.

As far as the matrimonial home is concerned, in 1970s, one approach has been used by the House of Lords to entitle the spouse whose name was not on the deeds (usually the wife) to have a share in the proceeds of sale of the home under a constructive trust, provided her non monetary contributions were substantial and can be linked to the acquisition of the property\textsuperscript{511}. Subsequent matrimonial legislation now contained in the MCA 1973 provided a discretionary family law remedy to more explicitly redistribute assets on divorce, with statutory co-ownership of the family home having been rejected by Parliament\textsuperscript{512}.

The family home normally represents one of the most valuable resources that the spouse might have. In the case where the sale of the family home is insufficient to allow to them to buy individual properties on divorce, the Mesher orders\textsuperscript{513} may be made by the court which provides for sale of the party in the

\begin{flushright}
\textsuperscript{507} Welstead, M., and Edwards, S.,(2008) op.cit., p.150.\\ 
\textsuperscript{508} MCA 1973, s24.\\ 
\textsuperscript{509} See MCA 1973, s22; s23.\\ 
\textsuperscript{510} ibid., s24(b),(c),(d).\\ 
\textsuperscript{513} See Mesher v Mesher [1980] 1 ALL ER 126.\
\end{flushright}
cases that when the children reach the age of 18 or complete their education. In a childless marriage, the court may make a *Martin orders*\(^\text{514}\) for one party to remain in the marital home and postpone the sale of family home.

### 7.4.2.4 Financial provision orders: The distribution of matrimonial assets— a move from welfare-based system to entitlement-based system

Under MCA 1973, English courts have powers to make orders for interim and final maintenance and periodical payments; or a property adjustment order of any asset owned by either spouse. However, the distribution of assets on divorce is governed by statute, namely MCA 1973. The courts also have the duty to interpret the statutory provisions with very wide discretion under s.25 MCA 1973, exercising their powers on a case by case basis in line with the seven guidelines listed in s.25, with no hierarchy of importance. More importantly, the observation on the principles established by the ruling of the courts in ancillary relief proceedings is the vital step to understand English law.

From the mid-1970 until 2000, the focus was on the importance of needs and reasonable requirements of the spouse rather than a mathematical calculation for the division of the matrimonial assets. This approach was used in cases where the assets are greater than the needs of both spouses; it was often the case that the spouse, usually the wife, would receive less than fifty percent of the matrimonial assets. Clearly this approach was criticised as potentially discriminatory against women and failed to protect the non-working mother. It was not until the case of *White v White* where the dependence on the need approach for the consideration of ancillary relief could be reversed. Meanwhile, greater judicial recognition of the value of homemaking/child-caring services in financial awards on divorce, as Lord Nicholls stated:

> ‘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.’\(^\text{515}\)

As Eekelaar observed, the welfare-based dependency of a wife’s needs has

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514 See *Martin v Martin* [1978] Fam 12.
515 See *White v White* [2001] 1 AC 596, p.605.
turned into entitlement-based model, with entitlement having been accumulated through homemaking/child-caring contributions.\(^{516}\)

Subsequently, in Court of Appeal in *Lambert and Lambert*, the court reconfirmed that the non discrimination principle must apply:

"The husband in this case was a hard working, dedicated husband, a father and provider over 32 years. By the same token the wife was a hard working and dedicated housewife, a mother and homemaker over the same period. 'Each in their different spheres contributed equally to the family' per Lord Nicholls. To find otherwise would, on the facts of this case in my judgment, amount to blatant discrimination. The husband's role was the glamorous, interesting and exciting one. The wife's involved the more mundane daily round of the consistent carer. That was the way in which the parties to this marriage chose, between themselves, to organise the overall matrimonial division of labour. How can it then 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?\(^{517}\)

Moreover, Cretney also has observed that the combined effect of the ruling of the House of Lords in *White v White* and the Court of Appeal in *Lambert v Lambert* has introduced into English law a regime of deferred community of property limited to acquisitions, particular in cases where assets exceed needs.\(^{518}\)

**7.4.2.5 Compensation approach**

In the decision of *Miller and MacFarlane*,\(^{519}\) it has placed some further recognition of the value of homemaking/child-caring contributions. The Lords made it clear that the requirements of fairness can be met through three principles:

1. Needs principle: the parties’ needs have to be met;
2. Equal sharing principle: the fruits of the matrimonial partnership have to be shared equally;
3. Compensation principle: to compensate loss of the party who suffered the

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517  See *Lambert v Lambert* [2002] EWCA Civ. 1685, Per Thoepe LJ at para.22 citing Cloeridge J in *G v G*.  
519  See *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.
‘relationship-generated disadvantage’

from the way they conducted their marriage. As Lord Nicholls stated that:

‘the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband’s enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer’

He further went on indicating that compensation and needs are distinct concepts although they are sometimes overlapping. However, a claimant wife may be still entitled to compensation although she is able to earn her own living.

The latest decision has made the principle of non discrimination against homemaker/child-carer very clear. It has also made it clear that a bigger financial award might be made to the economically weaker spouse with continuing caring responsibility with children. Nonetheless, Barlow has argued that it might have caused certain discrimination against the wives who have a paid work and still do the majority of child-caring as their relationship-generated disadvantage are potentially ignored.

7.4.2.6 Pension orders

The court has powers to make two types of orders regarding pensions: (A) Pension attachment orders, and (B) Pension sharing orders

(A) Pension attachment orders:

The court may order the person who is responsible for the pension arrangement to make payment for the benefit of pensioner’s spouse when

520 ibid., at para.140.
521 ibid., at para.13.
522 ibid., at para.15.
524 Formally know as earmarking, which are financial provision order made under s 23 MCA 1973.
525 A pension arrangement is defined as an occupational pension scheme or personal pension scheme, a retirement annuity contract, an annuity or insurance policy purchased, or transferred, for the purpose of giving effect to rights under an occupational or personal pension, and an annuity purchased or entered into for
such payment is due on retirement\textsuperscript{526}.

**(B) Pension sharing orders.**\textsuperscript{527}

A more useful way may be this. The Welfare Reform and Pension Act 1999 introduced pension-sharing orders. At the time of divorce, the pension is valued and a transfer for a proportion of it is made to the ex-spouse. He/she may transfer the value of ordered share into his/her own pension fund in his/her own right and under his/her own control\textsuperscript{528}.

### 7.4.3 Comparative perspectives on distribution of assets

#### 7.4.3.1 Similarities

**(A) Separation of property**

Under the default property regime in Taiwan, the spouses are formally equal, and each spouse has substantial freedom to deal with his/her own property and income during marriage. In English law, there is no proprietary consequence that comes from the effect of marriage as the doctrine of separate property applies. The parties may make their own maintenance and separation agreement but are subject to safeguards, such as no fraud or undue pressure. Nonetheless, the separation of property of itself cannot bring any significant economic effect to the non working spouse without other assets as he/she has lost the opportunity to earn income of his/her own, therefore unable to accumulate any property.

**(B) Deferred community of property**

As discussed already, Taiwan has deferred community to deal with the couple’s property relationship in the event of divorce. During marriage, either party retains and manages their own property, only property acquired during marriage shall be divided on divorce, inheritance and gift are excluded.

By contrast, it is very clear that there is no statutory community of property in England and Wales. However, as noted already one commentator has argued,

\begin{quote}
the purpose of discharging liability in respect of a pension credit. See s 25D(3)
\end{quote}

\textsuperscript{526} See s MCA 1973, 25B(4) and s 25C (2)(a).

\textsuperscript{527} A separate order made under a 24B MCA1973.

\textsuperscript{528} The basic state pension is not sharable, but the state earnings-related pension, such as SERPS maybe sharable. See Costley-White, T., ‘SERPS- the Forgotten Asset’, [2002] Family Law 222.
there might be a deferred community of property imposed by recent judicial decisions, albeit community limited to acquisitions.

(C) The value of homemaking/child-caring contributions is only realisable on divorce

These jurisdictions intend to recognise the value of non-financial contributions by means of fair distribution of matrimonial assets. However, the consequence of distribution of matrimonial assets only takes place when the marriage comes to an end. It is also clear that the value of non-financial contributions has no chance to be legally assessed prior to the breakdown of marriage.

Therefore, both jurisdictions declare that equal weight should be given to financial or non-financial contributions, and they provide that the earning party is legally obligated to maintain the homemaker/child-carer, if not the case, the parties may make agreement of financial provision to protect the non working spouse’s economic position.

However the dilemma is that the parties are not legally obligated to make any agreement in this regard. Granted that they really want to do unequal bargain power between them is another point needs to be taken into account. As a result, it would reinforce the non working spouse’s dependency on the working spouse in the absence of any agreement on financial provision.

(D) Compensation approach

Both English law and the Taiwanese Code use the compensation approach to compensate the financial double loss of giving up career and being a homemaker/child-carer without being paid in the event of divorce. One important issue that needs to be posed here is the fact that the homemaker/child-carer had no chance to be compensated should their marriage not come to an end. In other words, the compensation approach has indirectly forced the non working spouse to seriously consider their position if they are not provided with sufficient financial provision: to face an economic dilemma in the subsistence of marriage or simply to divorce. It could be argued that on one hand the laws advocate the non-financial contributions to married relationship
should be worthy of recognition, on the other hand they fail to provide substantially financial supportive approach for the financially weaker party during marriage. Therefore, one consideration should be given to the provision that provides more positively substantive support for the weaker party.

(E) Gender neutral law
The division of breadwinner/homemaker has been supported by the patriarchal family and it also has profound impact on the modern social norms in terms of assessing the homemaking/child-caring contributions. It is clear that the idea of gender neutrality has been employed by both of the jurisdictions so as to educate people that financial and non-financial contributions should be equally valued in law. However, in reality the gender neutral law has its own limits in the cases that the social norm has not reached that level.

In addition, another point to show gender neutrality is the adoption of separation of property representing that either party is treated as equals in economic. Either party has complete capacity of their own property. Besides that, both parties have the duty to maintain each other also reflect the gender neutral law as the duty does not vary from different family roles.

(F) Entitlement based distribution of matrimonial assets
In any type of community of property, including universal or deferred community, the value of non-financial contributions is accumulated during the marriage and thus entitles the homemaker/child-carer to claim the community of property. Taiwan has adopted this system to entitle the homemaker/child-carer to claim the community of surplus, if any.

In contrast to Taiwan, there is no community of property in legislation in England and Wales. However, as noted above, there is a trend to move from welfare based style of the needs of homemaker/ child-carer towards entitlement based distribution of matrimonial assets where the entitlement can be earned through the time.
7.4.3.2 Dissimilarities

(A) Family home
Generally under the Taiwanese Civil Code the value of non-financial contributions is not a factor to be considered by the courts when they distribute the family home; it is entirely decided by the principles of contract law and does not of itself fall within the community property. Basically, the party whose name on the deeds owns the family home unless the other party proves that he/she has made payment of the purchase of the house. Granted that the wife is the resident parent in the event of divorce and takes the continuing child-caring, the court still does not takes that into account. There is no difference in a marriage with/without a child. In addition, there is no notion like Mesher orders and Martin orders under the Code. In this regard, Taiwanese Code shows its weakness to provide the standard of living for the wife should the marriage not break down.

(B) A new asset to be divided: private pensions
As noted already, English court has wide range powers to divide the property owned by the spouses, either acquired before or during marriage, including any tangible or intangible property. Recently, pensions are regarded as a new type of property to be divided in English law as they might be seen as the notion of a person’s earning power as a form of property, particularly when the power results from a qualification or certificate obtained with another supporting spouse. For doing so, it has placed further recognition of non-financial contributions to the married relationship.

However, in practice, the Taiwanese courts have not adopted this notion of new property as they consider it as the personal property and not to be divided like gift or inheritance. To a certain extent, this would diminish the assessment of the homemaking/child-caring contributions.

(C) Maintenance or alimony post divorce
As mentioned already, in an alimony claim, the no fault party, either the husband or the wife, may claim for alimony as long as he/she has difficulty in support himself/herself on account of a judicial decree of divorce. The requirement is almost the same as that of maintenance claim.

Generally, the Taiwanese Civil Code is very weak in this regard, and the provisions relating to maintenance after divorce (alimony) are hollow as well. The alimony claim is usually subject to the strict requirements under the Code. Thus, the courts never take the non-financial contributions as a factor to decide the alimony claim, besides, neither the Code provides that non-financial contributions shall be considered in the claim.

By contrast, England and Wales has a well-rounded discretionary system of maintenance that Taiwan can learn from to complement its own legal shortage regarding maintenance.

In the English law context, the court have regards to all the factors listed in s.25(2) MCA1973, considering the needs of the awarded party, their own income and the ability to earn income, and the payer’s income, to decide the maintenance on a case to case basis. Financial support can also be reviewed, if circumstances change, and a court can adjust the term and the amount of the maintenance order. Moreover, maintenance is also used to compensate for the financial advantages or disadvantages to each party of the roles they undertook in the marriage relationship.

It might be more positive to secure the value of non-financial contributions to the marriage relationship if the strong points in this maintenance discretionary system can be introduced into Taiwan.

In practice, the non-financial contributions are not a factor considered by the court to decide the size of alimony or damage compensation. Furthermore, another factor disregarded by the court concerns the standard of living had before divorce. This would also indirectly discriminate the financial weaker spouse. Again, the Code shows the flaws in supporting the financial weaker spouse after divorce.

(D) Duration of marriage

Under the Code, the financial consequence of ending a marriage arises from the effect of marriage per se. Therefore, the duration of the marriage cannot be a
factor which affects the party’s entitlement to the distribution of matrimonial assets even though in an extremely short marriage, e.g. one day of marriage. However, either party may apply for the court to readjust the property distribution if there is any grave unfairness.

There are three types of matrimonial property regimes to be chosen under the Code and they provide different degree of protection of the matrimonial property. In this regard, there is no bias against short marriage because the entitlement to half of the deferred community of property arises from the legal consequence of marriage, and cannot be earned over time.

7.5 Conclusion
In this chapter a combined method of micro and macro comparison has been employed to address how the law assesses the value of homemaking/child-caring contributions to married relationship between England and Wales/Taiwan. It examined what kind of financial support a non working spouse may have in different stages. Normally, two means of financial support that are used to the protection of the economic position of the homemaker/child-carer are the property distribution and maintenance system.

Prior to marriage, the parties may agree on the prenuptial agreements to regulate their own financial affairs, although conceptually their function has been seen to be quite different. However, prenuptial agreements are not very common in Taiwan as on one hand they are unacceptable by the social norms which are greatly influenced by Confucian thinking, on the other there is already a matrimonial property regime in place, and the couples can save time to think about the prenuptial agreements. In England and Wales, recently couples may have more freedom to make prenuptial agreements due to the effect of the case of Radmacher v Granatino. There is a project of marital property agreement under the consideration of Law Commission to review the status and enforceability of pre-nuptial agreements. How to keep a proper balance between social order and party autonomy remains to be seen. By contrast, Taiwanese couples may have lost a certain degree of party autonomy as the state has decided the proper solution to their property arrangement in the event of divorce,
through the matrimonial property regime. However, on the other hand, their property relationship has been confirmed and secured upon the point of entering into marriage. This could also avoid the unequal bargaining power argument in the case that English couple wants to draft a pre-nuptial agreement to prescribe their financial arrangement.

During marriage, either Taiwanese or English couples may agree on the maintenance agreement to regulate their financial arrangement, but the couples are not legally obligated to make such an agreement. Therefore, the only financial provision they have is the maintenance from the other. Moreover the Taiwanese couples are subject to the strict requirements of maintenance claim. Although both of the jurisdictions have placed greater recognition of non-financial contributions, the value of those contributions is only realisable in the event of divorce.

In the event of divorce, both of the jurisdictions have employed the compensation approach in property distribution and a discretionary maintenance system to compensate the homemaker/child-carer for their financial disadvantage suffered during marriage. Taiwan has entitled the financial weaker party to half of the deferred community of surplus while England and Wales exercises its discretionary power under MCA 1973 to have regard to any circumstance in ancillary relief proceedings and achieve fairness. The best advantage of a community of property regime is that it avoids unpredictability and uncertainty, and further it provides the property protection to financial weaker party, usually are the homemaker/ child-carer, in advance through the marriage. However, the party’s and child’s needs are less of a concern, e.g., the court usually distributes the proceeds of the sale of the family home to both parties. In addition, pension rights are not to be divided as the court still regards them as personal property, not matrimonial property.

With regard to maintenance/alimony claim, Taiwanese couples are subject to certain requirements, furthermore, the homemaking/child-caring contribution are not a factor to be considered by the courts when they decide the size of alimony. However, in England and Wales, the non-financial contributions are to be taken into account in ancillary relief proceedings.
By contrast, England and Wales shows its strength and flexibility in this regard, apart from the equal sharing and compensation, the party’s and child’s needs are of the first importance. It might be wise for Taiwan to learn from the needs principle.

Generally, as observed already, each jurisdiction has its own strengths and weaknesses. Both of the jurisdictions on one hand advocated that gender neutral law can give proper recognition of homemaking/child-caring contributions. However on the other, the current laws with formal equality have made a situation where the value is only realisable on divorce. They are still a long way from the substantial gender equality required by gender mainstreaming. Therefore, more substantial economic support for the homemaker/child-carer throughout the marriage is needed. Findings and implications for further reform will be provided in the following chapter.
8.1 Introduction
In this final chapter, the main research questions in chapter 3 are revisited before considering how the law in Taiwan might be improved to better reflect the true value of non-financial contributions to a marriage relationship at the beginning of the 21st century. In addition, common principles are drawn out in order to make specific recommendations for an ideal model for Taiwan family law reform. These have been reached by taking into account the theoretical principles of gender mainstreaming which aim to achieve substantive gender equality, the findings from the empirical study with expert family law practitioners and academics in Taiwan which has underlined the continuing power of social norms founded in Confucian thinking, as well as the different approaches taken in England and Wales to the same issues as revealed by this study’s comparative analysis. Finally this chapter also suggests some areas for further investigation.

8.2 Findings of the research questions
The three key research questions identified at the outset of this study are addressed first in the light of the findings on these issues in the following sections 8.3 – 8.5.

8.3 How do the laws, from a comparative perspective, assess the value of the non-financial contributions to the marriage relationship?
As has been seen, there are some mechanisms to reflect the value of non-financial contributions to the marriage relationship in both jurisdictions. These mechanisms provided by the law can be divided into two aspects: a maintenance system (i.e. redistribution of income) and property distribution. Both jurisdictions provide provisions to reflect the value of non-financial contributions at different stages throughout the marriage That is before marriage, during marriage and after divorce.
8.3.1 Before marriage

In Taiwan, the scope of pre-nuptial agreements that a couple can make differs from that in England and Wales as the former is with community of property while the latter is without such a system. Therefore, as regard to the protection of property, it has been presumed by the Taiwan Civil Code that homemaker/child-carer has entitlement to half of the deferred community of surplus in the event of divorce. Thus, the system can be seen as the secure means to reflect the value of non-financial contributions to the marriage relationship. This entitlement to the property distribution is one of the legal consequences of marriage and directly reflects the value of non-financial contributions. As was discussed in chapter 5, this aspect of the 2002 reforms is working satisfactorily. There is no need (or indeed possibility) for Taiwanese couples to prescribe their financial property arrangements through pre-nuptial agreements as the Code has set out the rules for them. However, this does nothing to provide the non-financial contributor with income or access to property during the marriage itself. Apart from the matrimonial property regime, the Code also allows the parties to agree on the proportion to be paid by each party under the duty to pay the living costs of the household. It also allows them to agree on a special allowance for the homemaker/child-carer, which can be seen as the entitlement to financial support over and above their living costs during marriage. Thus conceptually this is quite different from maintenance as it is an income payable to the wife for her own use in recompense for her non-financial contributions, over and above sums paid for her living costs. However, a clear finding of this study is that these special allowance agreements are few and far between in practice which can be demonstrated by the findings of interviews in chapter 5. It is here that it is suggested reform is needed as discussed further below.

By contrast, the scope of pre-nuptial agreements in England and Wales are wider than that in Taiwan as there is no community of property in English legislation, (although some commentators have argued that England and Wales might have arrived at a de facto system of deferred community of property limited to acquisitions imposed by judicial decisions). Thus parties are completely free to agree on property distribution in case of divorce, but the enforceability of the agreement is subject to the discretion of the court.
In ancillary relief proceedings, the court is conferred the absolute discretionary powers under MCA 1973 to property distribution and maintenance allocation. Therefore, in order to avoid uncertainty and lack of clarity, binding pre-nuptial agreements might be preferable to English couples in the future. However, the status of (binding) pre-nuptial agreement was held to be contrary to public policy, until recently in the latest decision of *Radmacher v Granatino*[^530], a milestone was reached in the legal recognition of prenuptial agreements by the court. Currently, the status and enforceability of pre-nuptial agreements is under the consideration of Law Commission. However, one study on practitioners’ experience showed that the number of enquiries appeared to be smaller than actual agreements and so how many people will use such agreements in future remains to be seen. Moreover, pre-nuptial agreements in certain cases are used to protect the wealthy party’s property from being distributed by the other party, rather than assure the financial position of the non-financial contributor to the marriage which is how they are used in Taiwan.

Generally, from a comparative perspective, in practice prenuptial agreements are not so common in either jurisdiction. However, even though currently it has been seen as unconventional to agree on the payment of special allowance in Taiwan society, this principle is a good one in terms of a mechanism through which a value can be ascribed to non-financial contributions to a marriage. Particularly, it is suggested, the homemaker’s/child-carer’s economic position can be promoted if in Taiwan the parties become legally obligated to agree on the payment of the special allowance before entering marriage, rather than leaving it as an option on which couples can agree if they wish to. More generally, if pre-nuptial agreements were seen as a means of recognizing the value of non-financial contributions in both jurisdictions, rather than a means of ring-fencing assets in England and Wales or as an optional extra in Taiwan, both legal systems would be moving towards a better system of recognition of their value.

### 8.3.2 During marriage

As shown already, both jurisdictions provide that couples have legal and moral duties to maintain each other. However, the reality is that the breadwinner is the

[^530]: [2010] UKSC 42
only source of family income and manages the income. Some important issues in common arise: What if the breadwinner is miserly to the homemaker/child-carer? To what extent should a breadwinner provide maintenance for the homemaker/child-carer? Maintenance applications have difficulty in being granted due to strict requirements in Taiwan while an English spouse can apply for maintenance as long as the other party fails to provide reasonable maintenance, with the standard of living of the couple being a factor for consideration.

In theory maintenance agreements may provide a solution to these arguments above. However, maintenance agreements are not so common in either jurisdiction. This may be because these maintenance agreements are unromantic as is the case with pre-nuptial agreements and social and cultural norms operate to prevent couples seeing this as an appropriate thing to do, however sensible it might actually be.

Apart from the duty to maintain each other, there are some other forms of financial support that Taiwanese couples may have during marriage. These arise out of the ability to agree on the proportion of the living costs of the household each spouse is under a duty to pay and also on the special allowance for the homemaker/child-carer. Ironically, the empirical study discussed in chapter 5 reveals that these agreements are also few and far between in practice, with social and cultural norms acting against a willingness to discuss and enter into such agreements before marriage.

Overall, the homemakers/child-carers in Taiwan still suffer relationship generated disadvantage during the marriage if the breadwinner is miserly, although the Code restates the duty to maintain each other. In addition, it could be argued that the current Taiwanese maintenance system is totally based on the dependency of the wife/homemaker/child-carer on the husband/breadwinner in the case where the parties have not agreed on the payment for special allowance or the living costs of the household during marriage. Furthermore, under the Taiwanese Civil Code the content of the duty to maintain is just for basic needs, not to provide for adequate financial support during marriage. By contrast, English law provides a more useful mechanism in this
regard where the party may apply to the court if the other party fails to provide reasonable maintenance and the couple’s standard of living is taken into account. It is argued here that by making a legal declaration of the payment to be made in respect of living costs (and any special allowance), it transforms this into a legal entitlement (rather than a discretionary gift) and marks the income of the breadwinner as shared income. Again this is conceptually different to maintenance and in line with thinking of marriage as a partnership of equals who each happens to contribute in different ways (financial and non-financial).

8.3.3 After divorce
As mentioned already, Taiwan has introduced the deferred community of surplus as the default matrimonial property regime in which the Code has set out the rules of property distribution. The Code entitles the financially weaker party, typically homemakers/child-carers, to have entitlement to half of the deferred community of surplus to reflect the value of homemaking/child-caring contributions they have undertaken during marriage.

In England and Wales, three strands of fairness, needs, equal sharing and compensation, have been created in recent judicial decisions so as to provide guiding principles in the ancillary relief proceedings which do not discriminate between breadwinner and homemaker/child-carer. Even though it has been noted that the recent judicial decisions also caused confusion of the distinction between matrimonial/family and non-matrimonial/non-family property which may indirectly discriminate against the homemaker/child-carer, the discretionary maintenance system which is now founded on these principles could be seen as another useful means to compensate the financial loss of the homemaker/child-carer. It is clear that normally English courts would consider the non-financial contributions when deciding the maintenance after divorce while Taiwanese courts do not do so. In Taiwan, these contributions are irrelevant to the alimony applications (maintenance after divorce). Without any adequate maintenance after divorce, the only economic protection of the homemaker/child-carer is the entitlement to half of the deferred community of surplus on divorce. The weaker party’s essential needs, typically the housing need, can be met, is not a factor court will consider. Indeed, it is suggested that there is urgent need for Taiwan to adopt an English-style discretionary maintenance system to
compensate for the relationship generated disadvantage suffered by homemaker/child-carer where appropriate.

8.4 How do the gender neutral laws conceptualise the value of non-financial (homemaking/child-caring) contributions, before, during and after marriage?

Normally the legislation uses the adoption of gender neutral laws to give equal value to both financial and non-financial contributions. In addition, a compensation approach can be used to compensate the relationship generated disadvantage.

8.4.1 Adoption of gender neutral law

Society ought to be concerned with women’s poor situation and not just regard women’s experience as individualised cases. There is no real justification for such an unequal division of household labour founded on women’s own goodwill and love. To do this is to devalue non-financial contributions to family life and to society in general. In addition, the wage difference between men and women is normally seen as a result of natural physical differences, yet this is no longer a convincing argument in modern society.

These prejudices against taking steps to enhance women’s position normally come from the lack of gender awareness in the society. In order to respond to the calls for gender equality in family law, some significant trends in amending the legislation framework can be identified. These trends include two preferred approaches within family law. One trend is to degender the laws, namely the elimination of the laws discriminates against women. This approach recognises that in principle financial and non-financial contributions to the welfare of family should be equally valued. The other trend is a preference to settle major family issues by mutual agreement, such as prenuptial agreements or maintenance agreements, which signals autonomy of the parties, which is attractive, but sidesteps the use of the power of the law to achieve substantive equality in practice for all couples.

Thus, it could be argued that these methods of approach whilst on the surface aiming to achieve equality, in reality fail to do so as equality as expressed in legal
norms does not of itself promote equality in terms of social and cultural norms. This is often a far slower process and may well need stronger encouragement than the ability to make an agreement. Some studies cited in this thesis also showed that there is still a gulf between the legal norms and social norms and the interview study set out in Chapter 5 confirms that this appears to be the case in this sphere at least in Taiwan. Particularly in family law area, the economic position between husband/ breadwinner and wife/ homemaker/ child-carer remains unequal although the laws have declared that the value of financial and non-financial contributions should be equally assessed. However, the economic position of women/ wives has not been automatically promoted because the laws have placed legal recognition to the value of non-financial contributions. Gender neutral laws at the most reach the level of formal gender equality.

In addition, as aforementioned, for parties it is not so common to enter into the prenuptial agreements or maintenance agreements in which they agree to regulate their duties and rights during marriage in both jurisdictions, and thus social and cultural and social norms can be seen to operate in active opposition to the new legal norms which encourage the making of an agreement to place a high value on non-financial contributions to a marriage.

**8.4.2 Compensation for the financial loss suffered during marriage**

Another approach which can be used to conceptualise the value of non-financial contributions is the introduction of a compensation approach. In order to redress the relationship generated disadvantages the homemaker/ child-carer suffer from by undertaking homemaking/ child-caring.

Both jurisdictions have introduced the compensation approach to compensate the financial loss suffered by homemaker/ child-carer in the event of divorce. The non-financial contributions can no longer be seen as activities undertaken out of love and without value and they need to be compensated in due course. However, it could be argued that that value is only realisable in the event of divorce by distributing property and maintenance applications. Particularly in Taiwan, as discussed above, the relationship generated disadvantage can only be compensated by entitlement to half of the surplus of deferred community of property. It is less likely to compensate the disadvantage through maintenance
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after divorce (alimony). Thus it is questionable whether the value of non-financial contributions can be sufficiently reflected under the Code in Taiwan.

8.5 How the law through gender mainstreaming reconceptualises the value of non-financial contributions?

It was accepted that equal legal treatment will not necessarily lead to substantive equality while the living conditions of women and men in society differ. It could be argued that equal legal treatment of women and men can only reach formal equality at the most and risks ignoring the more difficult issue of whether substantive equality is being achieved within society.

Therefore, gender neutral law is a legal form in which equal treatment is given to men and women, but ignores the reality that the living conditions of men and women in society may differ. For instance, the primary purpose of gender neutral law introduced in family law area is to eliminate any law which discriminates against women in any other form than to give equal treatment to men and women. However, in reality, even where gender neutral laws have placed equal recognition to the financial and non-financial contributions, this fails to remove the inequality in the family and society unless there is substantive support actually available for the economically vulnerable spouse.

Gender Mainstreaming is not just about promoting women’s legal rights, which can be rendered meaningless if social and cultural norms operate against their realisation in practice. More importantly, it also refers to the integration of gender equality considerations in all social policy development, legislation, process and decision making, planning and monitoring of programmes towards the realisation of substantive gender equality between women and men. In order to redress the gender neutral law’s failure to properly reflect the value of non-financial contributions, the financial loss of homemaker/child-carer can only be compensated in the event of divorce. There is a need to reconceptualise the value of non-financial contributions through gender mainstreaming in which it requires that the law should provide different treatments for those who are economically vulnerable members within the family, such as homemaker/child-carer, as a compensation approach alone is insufficient to reflect the value of non-financial contributions during marriage. Thus, the goal of substantive
gender equality can only be achieved by mainstreaming gender perspective into the family area.

8.6 Implications
This section deals with implications for an ideal model to further family law reform in both English and Taiwan family law context, to take better account of non-financial contributions to the marriage relationship. As discussed in Chapter 7, both English and Taiwanese family law have their strengths and weakness as in dealing with the point in question. That is to say one ideal mixed approach which draws on the strengths of each to offset the weakness of the other might in principle be possible. Alternatively it might be more pragmatic for each jurisdiction to borrow from the other. Moreover, this approach on a legal level should be mindful of the problem that as long as gender inequality caused by patriarchal thinking within the family has not been completely removed in social norms, in reality gender neutral solutions are unlikely to be sufficient on their own.

In the following sections common principles for England/ Wales and Taiwan will be considered to reflect the value of non-financial (homemaking/ child-caring) contributions to the marriage relationship.

8.6.1 Marriage should be regarded as a partnership of equals
The first common principle is that marriage should be regarded as a partnership of equals. Historically, in both jurisdictions the nature of marriage has been dominated by patriarchal thinking, both legally and socially. Male dominated thinking has been dominant and underpinned domestic life through legal and social norms. Under the influence of 21st Century thinking on gender equality, a patriarchal relationship is no longer accepted as a foundation stone in a modern marriage relationship and legal norms has been adjusting to new principles. Accordingly, in both jurisdictions gender neutral law has superseded the former male dominated provisions and implies that marriage should be approached as a partnership where both parties are treated as equals, both personally and economically.

Within a married relationship, there should consequently be no difference in legal capacity or personality between the parties and in principle men/ husbands share equal rights and duties with women/ wives within the family. Moreover,
there should be no bias in the division of family roles, both breadwinner and homemaker/child-carer are essential to a family. Any advantages or disadvantages created by the marriage relationship should be shared equally and relationship generated disadvantage should be avoided and compensated. This is the first principle which is suggested by this thesis and it must be adopted and realised in both jurisdictions.

Therefore, one of the legal consequences of marriage could be the principle that equal profit sharing should be applied in the event of divorce where there is any accrual of profit. It is suggested here that adopting the partnership principle can avoid the practical difficulty and debates in calculating the value of non-financial contributions to the married relationship as so far there is no mechanism that has been employed in any jurisdiction consistently to precisely assess their value. Such a principle of equal division of profit is thus a very good starting point to symbolise an equal partnership and provide a practical means of sharing accumulated profit made during the marriage on divorce.

Under the Taiwanese Civil Code, it is clear that to a certain degree the Code has partly recognised the concept that marriage should be seen as an equal partnership and both financial and non-financial contributions to the marriage relationship should be valued equally, thus, allowing either party the entitlement to the deferred community of surplus in the event of divorce. The only exception is where there is an unjust property distribution\textsuperscript{531}. The provision found in s.25 MCA 1973 where the court shall have all regard to the factors contained in s.25, including valuing either party’s contributions to the welfare of the family, either financially or non-financially\textsuperscript{532}, in the ancillary relief proceedings, which following \textit{White v White}\textsuperscript{533} must be valued equally has a similar effect.

Another point to support the transformation of marriage into partnership of equals is the adoption of separation of property in England/Wales and Taiwan. This could be seen as the first step towards gender equality within family law. Clearly, it is fair to both the husband and the wife to have complete legal capacity

\textsuperscript{531} As for the practical difficulty in this provision, see section 5.5.1.1.4.
\textsuperscript{532} See s25(2)(e) MCA 1973.
\textsuperscript{533} \textit{White v White} [2000] 3 FCR 555.
of ownership over his/ her own property during marriage. It also abolishes old notions embodied in law that a husband owns the property belonging to his wife; although it does nothing to enable parties to share ownership of assets during marriage in contrast to say the French immediate community of acquest approach.534

More importantly, it is self evident that on marriage the parties will each contribute different assets, abilities, skills, personalities to the relationship. They could be financial and/or non-financial through the division of family roles. Each party will enjoy and share all of the above things throughout the marriage. If the relationship includes the mutual sharing of all aspects of their lives, this should include the sharing of marital assets at the end of marriage. At least, each party’s contributions, including financial or non-financial, to the relationship can be reflected by the sharing of marital assets. Therefore, the entitlement to the marital assets can be justified by the partnership principle and is ideal where there are sufficient assets to share.

8.6.2 Reconceptualisation of the value of non-financial contributions to the marriage relationship
In order to reconceptualise the value of non-financial contributions, there are two other common principles which shall be considered.

8.6.2.1 From a welfare to an entitlement approach
A second principle, it is suggested should be that the non-financial contributor to the marriage relationship requires an entitlement approach and their contributions have a financial value in their own right. In the vivid image of male/breadwinner and female/homemaker family, the homemaking/child-caring contributions have traditionally been seen as the moral duty of a competent wife, mother and daughter(in law) with no pecuniary value. The duty is traditionally

534 The effect of immediate community regimes is that marriage creates a community where a body of property is automatically jointly owned throughout the marriage, in contrast to deferred schemes which only effect joint ownership at the point of divorce. Both parties have the power to manage and control the community property. See Cooke, E., Barlow, A., Akoto., T and Callus, T.,(2005) ‘Community of Property: A Regime for England and Wales?’ International Family Law, September, pp.133-137.
performed in exchange for the male breadwinner’s duty to provide financial support or maintenance during marriage. This patriarchal template devalues the non-financial contributions to the marriage, and reinforces men’s power over the family economy. It is in this way, it is suggested, that the ideology of female homemaker’s/child-carer’s dependence on the male breadwinner has been shaped.

In the 21st century, such a patriarchal template should be discarded for a modern marriage and reconceptualised. Both husband and wife should have the moral and legal duty to maintain each other, and further it cannot just be the male breadwinner’s unilateral duty to maintain the female homemaker/child-carer. Nonetheless, the duty to maintain must be capable of being performed by carrying out domestic management. That is to say, the respective duty in a marriage relationship is that the working spouse shall work hard to maintain a household, including providing the non working spouse with reasonable financial support, while the non working spouse shall provide domestic services to maintain a quality life. Parties to a marriage should also be able to agree other models of contribution providing financial and non-financial contributions are seen as having equal value.

However, the primary spirit of carrying out homemaking/child-caring is to devote oneself to the family, rather than to seek to the economic remuneration for the domestic services as one would in the wage economy of the public sphere. In the private family sphere both parties play their proper role within the family to create a harmonious family life, where there should be no bias between breadwinner and homemaker/child-carer. Conceptually, breadwinning and homemaking must be acknowledged (legally and socially) to have equal value and each style of contribution must give an equal entitlement to a share in the family's standard of living. This would remove the idea of unilateral economic dependency and make clear the joint enterprise approach to marriage.

However, in the evolution of gender equality, the first stage is to eliminate the discriminatory law against women, enabling men and women to receive same treatment in law. In this stage, the level of gender equality is formal, not substantive, because the law per se is not able to remedy the inequality which
continues to exist in social norms even where it is a wave of it. Sometimes equal treatment causes certain inequality.

In both the modern jurisdictions of England/Wales and Taiwan, it is clear that the recognition of the value of non-financial contributions to the marriage relationship is accepted as appropriate, although it still could be argued that this recognition remains symbolic.

Both of these jurisdictions have treated both parties as equals during marriage and employ a compensatory approach to compensate the homemaker’s/child-carer’s double financial losses, including giving up a paid job and carrying out household management without being paid, at the point when their marriage comes to an end. In Taiwan, the homemaker’s/child-carer’s economic loss is compensated through matrimonial property where the non working spouse has an entitlement to one half of the deferred community of surplus. In English law in addition to the statutory provision, there are three latest guidelines on how to achieve fairness to direct the courts’ interpretation of their duty and discretionary ancillary relief proceedings. These are the needs principle, the sharing principle and the compensation principle. Among these guidelines, the compensation approach can be used to compensate for the ‘relationship-generated disadvantage’ by undertaking the homemaking/child-caring within marriage and may be additional to their needs or even to their equal share as in McFarlane.\textsuperscript{535} However, the compensation principle is not the first consideration; it is discretionary and only considered where in rare circumstances equal sharing is not considered sufficient and where assets exceed needs. Moreover, it is argued that it is unfair for the homemaking/child-caring spouse not to share the fruits acquired during marriage by way of statutory entitlement although other commentators have interpreted the recent developments of financial provision cases as introducing an egalitarian discourse of partnership.\textsuperscript{536} Indeed some argued that it is too generous to non-financial contributors. In England and Wales, the law is trying to ensure that where assets do not exceed needs, their needs are met even if that result is an unequal division of assets, which will

\textsuperscript{535} McFarlane v McFarlane [2006] UKHL 24.
move to the non-financial contributors and can exceed a ceiling of equal shares. Thus here there is a welfare approach which provides a safety net guaranteeing that needs are met. Yet where assets exceed needs, an equal sharing and compensation approach is adopted. Is this dual approach sustainable? Does this seem conceptually appropriate?

As has been argued, marriage should be regarded as a partnership of equals. The parties committed themselves to sharing their lives. When their partnership comes to an end each is entitled to an equal share of the assets of the partnership, unless there is good reason for not doing so.

Unlike financial contributions to the marriage relationship, the value of non-financial contributions is hard to calculate. In order to avoid this difficulty, most civil law jurisdictions usually employ a matrimonial property regime to entitle the party to have entitlement to the share of property as they hold that the entitlement should be earned throughout the marriage by carrying out domestic contributions.

If marriage can be seen as a partnership, surely the conceptual starting point of partnership law that the partnership assets and / or any profits are to be equally divided should apply. This would make clear that being a partner to the marriage relationship, the homemaker/ child-carer is entitled to a share of the property on account of their homemaking/ child-caring contributions, not from the breadwinner’s generosity.

It is therefore suggested if the entitlement approach can be employed on asset distribution in the event of divorce a default regime; it provides the financially weaker party with more positive protection in property distribution than a welfare approach. A decision would then be needed as to whether the pre-nuptial agreements which contain terms of preventing one’s assets from being shared with the economic weaker party should be permitted. The assets to be included or excluded would also need to be addressed. More importantly, this approach also reduces the high litigation costs of ancillary relief.

8.6.2.2 Beyond entitlement-A need for secure financial support system?
The third common principle that should be taken into account is the need for secure financial support system. It does mean that where the share of assets were insufficient to meet a party’s need that high levels of maintenance or state social security would be needed. However, asset division would be certain and conceptual clarity as entitlement rather than through dependence would be achieved.

Apart from the property distribution, maintenance is another means of compensating the weaker economic party. During marriage, typically the wife undertakes the homemaking/child-caring at the expense of giving up the opportunity to work out to earn income. This makes the typically female homemaker/child-carer to be in a financially disadvantageous position during marriage as they have to depend on the working party’s maintenance from income. Upon the point of marriage breakdown, on one hand, the female homemaker/child-carer also faces the difficulty in employment as her social status and economic condition has changed during the period of marriage relationship. On the other, she would suffer heavier economic burden in the case she has to look after the child. Here relationship generated disadvantage is clearly suffered by the non-financial contributor and their entitlement under the division of the community of property is likely to be insufficient to meet their needs.

Therefore, the content of the duty to maintain should provide for adequate financial support during marriage not just for basic needs. In addition, on divorce maintenance should reflect the standard of living experienced during the marriage. This extended duty to maintain should not apply, if the non-financial contributing spouse is or becomes economically independent from their ex partner.

Thus, it is suggested that a discretionary and relatively generous maintenance system is needed to compensate for the homemaker’s/child-carer’s financial loss suffered during marriage both on divorce and where the other party fails to provide reasonable maintenance during marriage. This entitlement to maintenance is in addition to the entitlement due under the community regime where appropriate. From the Taiwan perspective, this would involve a move
towards achieving substantive equality as envisaged by gender mainstreaming. Furthermore, if a contractual entitlement to pay living costs and special allowance as part of the partnership of the outset of the marriage, post-divorce maintenance would be viewed conceptually as the extension of this entitlement, rather than a signifier of dependency. Non-financial contributions would just be viewed as realising their financial value accrued through relationship-generated disadvantage.

8.6.3 Mainstreaming gender perspective into family law
The fourth principle is mainstreaming a gender perspective into family law. As mentioned already, this is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve substantive gender equality.

Family law is the most multi-faceted of all areas and it includes every aspect of state’s legal intervention to the private lives of those who are related by blood or affinity. Surely, the family law area should be reviewed in a gender mainstreaming perspective. In particular the economic relationship between husband and wife within the family needs to be readjusted in a gender perspective.

Both England/Wales and Taiwan have employed a compensation approach to compensate the homemaker’s/child-carer’s double financial loss for giving up employment and doing household affairs without wage, and both jurisdictions have placed formal recognition of the value of non-financial contributions to the married relationship. However, whether the compensation approach is wholly satisfactory still remains questionable as this approach fails to provide any duly and substantive financial support for the weaker economic party during marriage. The value of non-financial contributions to the marriage relationship is only realisable on divorce either by property distribution or maintenance. Thus, in order to improve the unequal economic position between homemaker/
child-carer and breadwinner, in addition to the maintenance, a different treatment could be considered to give to those who suffered financial disadvantages for undertaking homemaking/child-caring. The law should employ more positively substantive means to promote the homemaker’s/child-carer’s economic status, such as special allowance in Taiwan, to redress the inequality with gender awareness.

8.6.4 An ideal combined model to reach substantive gender equality within family-community of property alongside discretionary maintenance system

In this section, it is proposed that a modified model might reach the goal of substantive gender equality to redress the shortcomings existing in Taiwan.

8.6.4.1 Community of property is insufficient to compensate the relationship generated disadvantage

As discussed above, it is questionable whether the jurisdiction of Taiwan has assessed the value of non-financial contributions with sufficient gender awareness, whilst it has recognised an entitlement to property distribution for undertaking the homemaking/child-caring in the event of divorce, the value is only realisable on marriage breakdown, and is not combined with robust maintenance and alimony provisions. Moreover, the ‘new’ property, pensions, cannot be divided between spouses in Taiwan. It is argued that a stronger compensation approach is needed to redress relationship generated disadvantage, during and after marriage. One ironic question arises: could it be said that compensation approach encourages divorce if the homemaker/child-carer has a strong desire to claim that share of property? However, it could equally be argued that such an approach would strengthen marriage as an equal partnership.

Moreover, as stated in previous chapters, so called gender equality has two levels of equality, formal gender equality and substantive gender equality. Only the latter can redress the inequality created by operation of social norms and reach the goal of substantive gender equality. Overall, the goal of substantive gender equality has not been achieved in terms of the economic protection of the homemaker/child-carer in Taiwan. One clear problem is that unless a
prenuptial agreement is agreed for payment of a special allowance (very rare\textsuperscript{537}), the value of non-financial contributions to the marriage relationship is only realisable in the event of divorce. Thus, the non working party, typically homemaker/ child-carer, would suffer financial disadvantage if the breadwinner is miserly as the breadwinner is the only source of family income and has absolute financial control. Thus, the complete economic dependence on the working party reinforces gender inequality within a family.

Therefore, economic independence cannot be guaranteed through the introduction of separation of property, let alone the equality of legal capacity and personal dignity. Without having any other financial support during marriage, the introduction of separation of property at the most can only prevent one’s property from being violated, but it cannot shake the patriarchal knot throughout the marriage.

In addition, in contrast to England/ Wales, there are strict requirements for a maintenance claim in Taiwan. In practice it is difficult to have this successfully awarded. Therefore, a combined model which includes the system of entitlement to property distribution system alongside a discretionary maintenance system to redress relationship generated disadvantage and in response to the party’s needs should be seriously considered in Taiwan. In addition, it is suggested that a well-drafted prenuptial agreements could play a stronger role in resolving the problems of relationship generated disadvantage.

8.6.4.2 A discretionary maintenance system for Taiwan

As discussed above, another legal consequence of marriage is the creation of the spousal relationship kinship, as such, that is the origins of the duty to maintain. Maintenance is another important means to compensate the non working party’s financial loss for undertaking the homemaking/ child-caring.

In the patriarchal society, the male not only played the role of the head of the family, but he was the only person earning income and had the duty to provide the maintenance for his family members.

\textsuperscript{537} See section 5.3.1.
In order to respond to the call for gender equality, a duty to maintain each other was placed on both of the sexes. However, the Taiwanese Civil Code is very weak in this regard, and the provisions in relation to the maintenance during marriage or after divorce (alimony) are still hollow. The maintenance claim is usually subject to the strict requirements under the Code. Thus, the courts never take the non-financial contributions as a factor to decide the maintenance claim, either during marriage or after divorce, besides, neither does the Code provide that non-financial contributions shall be considered in the claim.

In contrast to Taiwan, England and Wales has a well-rounded maintenance discretionary system that Taiwan can refer to. Taiwan here may learn lesson from England and Wales to complement the legal shortage in reference to the maintenance discretionary system.

In the English law context, spousal maintenance is awarded if one party, commonly the non working spouse, cannot adequately support themselves without payment from the other. The amount of maintenance depends on the ‘needs model’ where the court considers the needs of the awarded party, their own income and the ability to earn income, and the payer’s income. The standard of living of the family is also taken into account when assessing needs. Spousal maintenance automatically ends in the case that the recipient remarries or either party dies. Financial support can also be reviewed, if circumstances change, and a court can adjust the term and the amount of the maintenance order.

Moreover, the ‘compensation model’ explicitly explains that maintenance should compensate for the financial advantages or disadvantages to each party of the roles they undertook in the marriage relationship and this can be awarded over and above maintenance for needs. The court should consider the factors, as s25 MCA (2) provides:

‘(f) the contributions which each of the parties has made or is likely in

538 MCA 1973, s.25, subsection (2)(a), (b), (c), (d) and (e) has been interpreted as needs-based model or income security model. See Diduck, A. and Kaganas, F., (2006) Family Law, Gender and the State, (Hart: USA) p.244.
539 ibid.
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.'

It might more positively achieve an increased recognition of the value of non-financial contributions to the marriage relationship if these strong criteria in this maintenance discretionary system can be introduced into the maintenance claim after divorce (alimony) in Taiwan. The issue of maintenance after divorce reinforcing the welfare model and the idea of the homemaker’s/child-carer’s dependency on the breadwinner is potentially problematic from a feminist perspective. However, if it is produced alongside the reconceptualised special allowance, the living expense duty should itself be recast as an extension of these acknowledged entitlements, rather than a welfare dependent measure.

8.7 Proposed combined model for Taiwan

Through the discussion above, an ideal mixed model to secure the value of non-financial contributions has been emerging.

First, before marriage, prenuptial agreements should play a stronger role in agreeing the distribution of family income during marriage, in accordance with their agreed prospective roles and styles of contribution. It is suggested that both parties have a duty to agree on the amount of special allowance for the homemaker/child-carer, where this division of roles is to occur. In addition, the ideal model should include the community of property in dealing with the property relationship between parties. This is not only to reduce the high legal costs of pre-nuptial agreements, but also to avoid the uncertainty and unpredictability in a discretionary property distribution system. Moreover, the state may set up the forms of property regimes for those who wish to marry to choose from. Thus, the property rights of the financially weaker party, usually the homemaker/child-carer, can be secured in advance before entering into
marriage and are a clear legal entitlement.

Secondly, during marriage, a wife's, daughter's and mother's homemaking/child-caring should not be viewed as being performed in exchange for the male breadwinner’s maintenance as it would perpetuate the financial weaker party’s dependence on the stronger party. Therefore, the duty to maintain each other during marriage should be equally placed on the parties and should be incorporated into the pre-nuptial agreements setting out the agreed obligations and entitlement to share each other’s income and contributions to the household as equal partners. Either party should maintain the other party to the same standard of living as themselves to achieve a shared equality of living standards and may apply to the court if the payer fails to provide reasonable maintenance.

Thirdly, apart from the property distribution through the property regime, the discretionary maintenance system containing the elements of a compensation approach shall be employed on marriage breakdown. Proper compensation for financial loss should be awarded to the economically weaker party, usually the homemaker/child-carer but not always, for undertaking non-financial contributions to enable them to restart a new life and help them to be financially independent.

In this way, the principles of marriage as an equal partnership based on the joint enterprise of family life will be realised and recognised in law through a reconceptualisation of non-financial contributions to a marriage as having a clear and positive economic value in their own right, rather than an undervalued performance of a moral duty underpinned by social and cultural norms.

8.8 Final reflection on this thesis
In this last section of this thesis, areas for further Investigation are considered.

Firstly, this thesis is only focused on the value of non-financial contributions to heterosexual marriage context. However, with the development of society, the concept of family changes rapidly and it may include cohabitation and same sex marriage context. In the same sex marriage, it might be less likely that the same
argument exists as there is no gender issue in their relationship. As for the cohabitation context, some researchers in England and Wales show that the domestic contributions argument also exists in this non marriage relationship. However, this is perhaps not an argument in Taiwan as cohabitation relationship is not recognised by law. In contrast, the domestic arguments between cohabiting parties have been totally ignored and relevant literatures are few and far between. It is evident that Taiwan can learn from England and Wales in this regard.

Secondly, in English law perspective, it is evident that so far England and Wales has no community of property in its legislation although few commentators have argued this system has been imposed by judicial decisions. Both community of property and pre-nuptial agreements are the means to settle the property arguments in the event of divorce. Each of them has its own strength and weakness and which system is suitable for England and Wales is a matter of legislation. The latter now is under the consideration of Law Commission, how to make well-drafted pre-nuptial agreements, properly exercise three strands of fairness, which equally assesses the value of financial and non-financial contributions would be another focus remains to be seen.

Thirdly, from the Taiwan law perspective, it has been weak in regard to the financial compensation after divorce, although the Code has provided property protection for the financially weaker party through the matrimonial property regime. The discretionary maintenance system of England and Wales offers a paradigm Taiwan can learn from.

Fourthly, as required by gender mainstreaming, different treatment may result in substantive gender equality in certain circumstance. Therefore, it is justifiable to provide the vulnerable party with more substantive support during marriage, such as special allowance for the homemaker/child-carer. Whether such an allowance to reflect and recognise the value of contributions made by homemaking/child-caring can be applied to England and Wales also remains an area further discussion.
APPENDIX A: Interview Questions

The purpose of interview
The main aim of this study intends to seek the feasibility of reconceptualising the value of non-financial contribution to marriage relationship. The interviews are employed as the main research instrument from the following aspects, in terms of academic researcher and practitioners.

The interview questions are as follows:

■ Academic researcher:

1. What is the concept of the value of non-financial contributions and how these contributions are valued under the theory of gender mainstreaming? What do you think about the reconceptualisation of the above value?

2. What do you think about the Civil Code 2002 stipulates that homemaking contributions can exempt the homemaker from the payment of living expenses for the household, although the Code did not specify how to apply it concretely?

3. How is the operation of the spousal duty to maintain under the Civil Code both in theory and in practice?

4. How do you interpret the special allowance for the homemaker under the current Code? What is the difference if you use the gender mainstreaming theory to interpret it?

5. Do you have any comment to add on?

■ Legal practitioners: Judge

1. What is the concept of the value of non-financial contributions and how these contributions are valued under the theory of gender mainstreaming? What do you think about the reconceptualisation of the above value?

2. To what extent can a couple conclude the pre-nuptial agreement regarding the financial arrangement? What is the feasibility of it?

3. What criterion and requirements do you use in a case of maintenance
Appendix A

application and the special allowance for the homemaker during marriage?
婚姻關係存續中，有無當事人因生活困苦而訴請扶養費或自由處分金？判定條件基準為何？那一方主動提出訴訟較多？有關自由處分金，現行法交由當事人自行協議，你的看法如何？會過度評價嗎？需要法制化嗎？

4. What criterion do you use when judging the alimony (maintenance after divorce) in a divorce case? Would you consider the non-financial contributions?
婚姻關係結束時，離婚訴訟中，在請求贍養費給予時，您會因家務勞動之價值再次考慮進去嗎？

5. Do you have any comment to add on?
關於上述訪談，您有無任何意見要補充？

Legal practitioners: Lawyer

1. What is the concept of the value of non-financial contributions and how these contributions are valued under the theory of gender mainstreaming? What do you think about the reconceptualisation of the above value?
你認為性別主流化下的家務勞動價值是什麼以及應如何受到評價？在現行法之架構下，這個概念要如何落實並適用？對於家務勞動有無再予以概念化之必要？

2. To what extent can a couple conclude the pre-nuptial agreement regarding the financial arrangement? What is the feasibility of it?
婚前協議（有關財務部份）在台灣之可行性如何？可否被執行？您如何處理？

3. Can you give me some examples of recent cases where the client claims for maintenance or special allowance during marriage?
在如何之情況下，於婚姻關係存續中，當事人會主張請求扶養費？請求的條件為何法院才會判勝訴？都是哪些人？再婚者？

4. Can you give me some examples of recent cases where the client claims for alimony? Under what circumstance is the value of homemaking likely to be assessed when seeking alimony?
在請求贍養費時，你會特別強調家務勞動之價值嗎？

5. Do you have any comment to add on?
關於上述訪談，您有無任何意見要補充？
APPENDIX B: Consent Form- English Version

CONSENT FORM

I have been fully informed about the aims and purposes of the project.

I understand that:

there is no compulsion for me to participate in this research project and, if I do choose to participate, I may at any stage withdraw my participation

I have the right to refuse permission for the publication of any information about me

any information which I give will be used solely for the purposes of this research project, which may include publications

If applicable, the information which I give may be shared between any of the other researcher(s) participating in this project in an anonymised form

all information I give will be treated as confidential

the researcher(s) will make every effort to preserve my anonymity

.......................................................... ..................................................
(Signature of participant) (Date)

One copy of this form will be kept by the participant; a second copy will be kept by the researcher(s)

If you have any concerns about the project that you would like to discuss, please contact: Chung-Yang Chen (cc310@ex.ac.uk)

Data Protection Act: The University of Exeter is a data collector and is registered with the Office of the Data Protection Commissioner as required to do under the Data Protection Act 1998. The information you provide will be used for research purposes and will be processed in accordance with the University’s registration and current data protection legislation. Data will be confidential to the researcher(s) and will not be disclosed to any unauthorised third parties without further agreement by the participant. Reports based on the data will be in anonymised form.
APPENDIX B: Consent Form - Example in Chinese Version

訪談協議書

本人(以下簡稱受訪者)為協助陳重陽(以下簡稱研究者), 進行「結合文化與傳統-從性別主流化談家務勞動價值之再概念化：台灣與英國之比較法研究」之研究，同意接受研究者之深度訪談, 為維持受訪者於研究過程中之隱私與權益, 和確保研究過程中之正確與嚴謹度, 於此定下協議, 供雙方遵行, 以求研究進行順利。

1. 為確保受訪者之自願性與權益，研究者在研究開始前會完全告知受訪者之研究目的、資料使用方式、彼此權利義務，並在確認受訪者的受訪意願後，才會開始進行研究。

2. 訪談內容僅作為本論文研究之用途，決不外洩。於論文裡針對訪談分析的資料中，除非獲得受訪者之許可，整個過程必需遵循保密和匿名的原則，受訪者的真實姓名或任何可供辨識身分的資料，無法從文字中得知，分析資料中若有涉及真實案例中當事人之隱私，亦必遵循保密和匿名的原則。

3. 研究者與受訪者訪談時間約一小时，全程以錄音方式進行，於本研究完成後由您決定銷毀或歸還於本人，受訪者有權利拒絕回答不願回應之問題，並有權利選擇在任何時間退出研究。

4. 若是在研究過程中，受訪者有任何疑慮，可隨時提出與研究者討論並共同解決，受訪者於訪談結束後保留增減刪除之權利並得要求譯本。

受訪者 簽名：
研究者 簽名：

中華民國九十八年八月一日
CHEN: How good do you think is the definition of the domestic labour?

KUO: As you know, I did my Ph.D in Germany. In Germany, “domestic labour” is a concept that differs from “labour within the family”. In Japan, they hold the same position. “Labour within the family” refers to the labour that makes profits economically, e.g. you are a helper on the farm your husband’s family owns, then you are entitled to the wages. However, from the surveys I have done throughout Taiwan a couple of years ago, the interesting result was that most Taiwanese regarded “domestic labour” and the “labour within the family” as the same, e.g. you help in your family business but are not being paid. In Taiwan, such labour is still covered within the concept of “domestic labour”. Both in Germany and Japan, these two types of labour are different concepts, but in Taiwan people think they are the same and that they have no market value. In practice, we have difficulty on how to distinguish “domestic labour” from “labour within the family”. I guessed this was because of cultural difference when I was engaged in this survey. Since it was so difficult to distinguish between “domestic labour” and “labour within the family”, finally we decided not to differentiate these concepts. Therefore, we held the position that the marriage relationship should be regarded as a partnership, and there was no need to decide what type of labour should be regarded as “domestic labour”, and what should not. Therefore, currently in Taiwan, as long as the homemaker’s labour is emotionally supportive and benefits the wage earner’s business, e.g. the husband can have a comfortable break when he comes from work, the emotional contributions made by the wife do play an important role for the development of his business. In this case, the labour she does should be classified as being in the category of “domestic labour”, although in reality it is without market value and does not bring any monetary value to the marriage relationship. I remember a German case where there was a wealthy married woman. She directed the servants to do the housework, rather than do the housework herself. She was once injured in an accident, and she was unable to direct the servants for a few months. Legal action was taken by her against the injuring party and the court held the position that the plaintiff’s efforts of conducting housework could be seen as part of domestic labour, although she was not engaged in the housework in person, such as laundry and dish washing. Finally her claim for the pecuniary loss during the period of injury was granted. But it is impossible for us to reach the same conclusion in Taiwan due to different legal culture. In sum, the context of “domestic labour” as we define it in Taiwan is the labour with non-economic value which makes this unable to be measured with a market value.

CHEN: Domestic contributions to the marriage relationship have been valued in the Civil Code 2002. How well do you think the pre-nuptial agreement adopts the idea?

KUO: We have been thinking about the nature of a marriage agreement. Is it similar to a commercial agreement? Well… it is absolutely not. Perhaps we could regard it
as a quasi-partnership agreement. In a partnership agreement, one partner definitely could bargain the terms with the other partner for their rights and obligations. They may decide how to run the business and share the profits made from the partnership. Similarly the couple in the marriage relationship could also agree to the same terms. Therefore, the Civil Code leaves room for negotiation by the couple. Generally, the Code already told you that the value of the homemaker’s non-financial contributions to the marriage relationship should be equally valued. And it encouraged you to make agreements with each other in terms of the special allowance for the homemaker and the obligation to pay for the living expenses. However, it is unimaginable to divide all the assets into two parts on a 50-50 basis during marriage. Whereas the marriage relationship is a long-lasting relationship, the value of the homemaker’s non-financial contributions to the family would not have a chance to be assessed until the marriage breaks down and in the absence of a mutual agreement by the parties. I think the right to claim for half of the deferred community of surplus is probably the fairest way to distribute the assets when the marriage breaks down, although it is unrealistic and unimaginable to divide all assets into parts that belong to each party. But I still doubt that the value of the homemaker’s contributions can be entirely reflected in such a way during marriage.

CHEN: How good do you think are the provisions in reference to the obligation to pay the living expenses? Are the domestic contributions being taken into account?

KUO: When we were engaged in the amendment of the Code, somehow, someway, we agreed that the domestic contributions needed to be valued properly. But how to value, it was really tough work. My point is that a marriage relationship is similar to a partnership. Financial contributions and non-financial contributions to the marriage relationship should be equally valued. In order to maintain the marriage, either party has the same duty to perform the obligation to maintain the family, either financial or non-financial. Therefore, the formal meaning of the Code was to tell people that the law has valued the contributions made by the homemaker and the breadwinner on an equal basis. The housewives’ domestic contributions could exempt them from the obligation to pay the living expenses. Moreover, the breadwinner is unable to earn any income without the homemaker’s non-financial contributions. The accumulated assets during marriage should be seen as deriving from the financial and non-financial contributions to the marriage relationship. And either party’s contributions, financial or non-financial, to the marriage relationship enables each of them to claim for the remainder of matrimonial property when a marriage breaks down. Surely, one party may assert that the other party loses the rights to share the assets as the other party fails to make the contributions to the quasi partnership, viz the marriage relationship. However, such an obligation to contribute to a marriage relationship is not enforceable by law even if either party refuses to perform it. But personally speaking, I think the special allowance for the homemaker should be enforced by the court. I do really hope some cases can be found in the future. I have discussed this issue with few family law division judges. Their unanimous opinion on this matter was that the power to interfere was not conferred on the judges under the Non Contentious Proceedings Act in the absence of a mutual agreement. Therefore, the judges currently still have no power to grant the claim of the special allowance for the homemaker.

CHEN: How good do you think is the spousal duty to maintain each other?

KUO: Well... It is unlikely to enforce the duty to maintain under the Code. Only in the case of malicious abandonment, you could claim for the spouse’s maintenance. Furthermore, under the current default property regime of 2002, all assets acquired
during marriage can be retained by each party separately. On one hand it is less likely for a full time homemaker to have any financial income during marriage, on the other hand it is impossible to have any acquisition of property during marriage. The court would not grant you any maintenance unless in the case of malicious abandonment. Imagine that if you were a homemaker and intend to buy a piece of cloth, but your husband refuses to buy it for you. Will you not feel quite helpless? Moreover, it is unfair to the wife if her husband is working in China and is having a relationship with another woman. His Taiwanese wife is still unable to claim for the maintenance. That is why we have been promoting the special allowance for the homemaker in Taiwan. Somehow at least this allowance maintains the wife’s minimum standard of living in Taiwan.

CHEN: How good do you think is the special allowance for the homemaker? Is the special allowance for the homemaker a legal affirmation of the value of domestic contributions to the marriage relationship?

KUO: Yes, surely it is. In 1985 the introduction of the remainder of matrimonial property was adopted by the legislature. However, it was too late because the right to claim for remainder of matrimonial property could not be carried out until a marriage breaks down. The unrealistic thing is that you even cannot measure the invisible value of homemaker’s contributions in daily life. The idea of special allowance for the homemaker was entirely based on profit sharing between the couple. The allowance could be seen as the advance bonus to the quasi partnership, namely marriage. And this allowance is only for individual use, at one’s own disposal. The purpose of such an allowance is totally different from the living expenses which shall be used for family expenditure. You could use the special allowance to buy any thing as you wish without the other party’s consent. It was the key index of the promotion of housewives’ dignity. As I knew so far, the special allowance mostly occurred in the single income families. However, the Code doesn’t exclude dual income families from applying to it. Currently, Taiwanese housewives usually claim for special allowance when their husbands are working in China. I guess it is to prevent the husband from having a relationship with another woman.

CHEN: Are there any official statistics available?

KUO: No, I guess not. In practice, that is because no couple is willing to go to the court to claim for it. They think it is just a family matter and there is no need to go to court.

CHEN: Do you think the special allowance would damage family harmony?

KUO: It is clear that most couples looked on the proposal of the special allowance from the sidelines. However, I guessed some couples have got used to it gradually. They might say they already agree on the special allowance in other forms, such as offering the housewife a free trip as a reward for her hard-working homemaking, instead of giving money to her. Moreover, in New Year, some husbands give cash gifts to their wives. Moreover, the wealthy husbands are keener to flaunt their generosity towards their wives by giving them a valuable gift. I found the same results in my survey throughout Taiwan. However, this still completely depends on the husband’s generosity.

CHEN: How well do you think the Code protects the value of non-financial contributions to the marriage relationship?
**Kuo:** The basic protection of a homemaker is the right to claim for the remainder of matrimonial property. Therefore, you could claim for the remainder of the matrimonial property when marriage breaks down.

**Chen:** What is the object of this right?

**Kuo:** As provided in the Code, all assets are divided into two sections, the property acquired before marriage and the property acquired during marriage. You could claim for the share of increased value, after deducting the two sections of property.

**Chen:** How well do you think the insurance benefit and pensions are being taken into account by court?

**Kuo:** The insurance benefit is not included because it is a private insurance. It is disputable whether the pension can be distributed.

**Chen:** Do you think the earning capacity is being taken into account by court?

**Kuo:** No, it will not affect the distribution. Marriage is like the drawing in a lottery, a wealthy living is not guaranteed to any one who wants to enter into a marriage. Sometimes you win some, but you may lose some. The law interferes with this matter only in the circumstance when an unusual event occurs, e.g. malicious conveyance of property. Otherwise the court will only distribute the assets which you have owned on the dissolution of marriage.

**Chen:** Do you think the provisions in reference to the protection of homemaker under the Code are compatible with the requirements of the gender mainstreaming theory?

**Kuo:** We have made the first step in this area, but we have not completely carried out the ideas. Compared with Japan, in Taiwan the protection of the homemaker is not from the woman’s angle, but from the angle of gender. Therefore, the Code of 2002 is based on gender neutral basis and we have made more progress than Japan. The term ‘homemaker’ refers to either housewife or househusband.

**Chen:** Do you think there should be any further law reforms?

**Kuo:** First of all, we need to reform the procedural statutes. Besides, we need more accumulations of homemaker’s domestic contribution-related cases. We hope more cases can be made from the angle of the compensation of damages, In the event of a torts case, an injured homemaker should claim for the compensation of damages. The amount of compensation for the homemaker’s loss should be seen as equivalent to the value of domestic contributions. In practice, the next step is to turn the abstract concept of the value of the domestic contributions into the concrete loss which a homemaker has. We can try to measure the value of the domestic contributions step by step.

**Chen:** Do you think the Code only provides the homemaker with a contingent right in terms of the protection of domestic contributions?

**Kuo:** Currently the difficulty in this issue is that the court does not have the power conferred under the Code to intervene in the special allowance for the homemaker/child-carer in the absence of a mutual agreement. Therefore, the procedural statutes need further reform to give the court power to award the special allowance.
for the homemaker/child-carer. In addition, we have been encouraging more housewives can apply to courts for the allowance. On one hand people would take the allowance for more granted if more cases could be made. On the other it is the educational aim of the Code to make people to get used to it.

**CHEN:** Do you think the emphasis on the value of domestic contributions would be a barrier to family harmony and a couple’s interests?

**KUO:** I don’t think so…. The emphasis on the value of domestic contributions will not affect the family harmony at all. The emphasis on this issue does not imply that one has to pay for the homemaker’s service. Besides, it tells you that the invisible heart exists at any time everywhere in your daily life. However, once again, at least the current Code has promoted the gender equality within couples. After that, the next important thing is to see how to implement these ideas into people’s lives.

**CHEN:** Do you have any opinion you want to add?

**KUO:** You could check the registration book of matrimonial property scheme in the court. In reality very few couples claim for the remainder of matrimonial property. That is one of the examples that you do not want to claim for it although you are given the right to under the Code.
APPENDIX C: Interview Transcript (2)

Date of Interview: 07. 16. 2009, 10.30-12.00 A.M.
CHEN: Chung-Yang CHEN (Interviewer)
LEE: Lecturer of Law School (Interviewee)

(The content of this interview was selectively transcribed with relevant information to the interviewer’s questions, omitting some irrelevant conversation.)

CHEN: How good do you think is the definition of domestic labour?

LEE: In general, domestic labour includes the activity that offers the family members food, clothing, accommodation and transportation, and also caring and the division of household tasks. In daily activities, caring includes child and elderly care. The household tasks refer to food and clothes preparation and maintenance of the house. One interesting issue arises, when you ask what activities are exactly seen as the household tasks? I used to read a book, it said the household tasks are relevant to the activity that no one would appreciate after you have finished it. However, someone will be aware of it as long as you have not done it. In other words, the activity does not look like requiring too much time and strenuous efforts. However, it would seriously affect the family life if no one gets it done. Furthermore, a tidy environment probably affects the family members’ either mental or physical health. Therefore, what kinds of activities are counted as domestic labour? I roughly divided them into two sections. The first section is about the caring for the child, elderly and the spouse. The second section is about the maintenance of the state of family life.

CHEN: Do you think domestic labour includes the contributions that are non-financial, but help to maintain a family?

LEE: I totally concur on this statement. The activity should be helpful to maintain a family life although it does not have any economic value. Furthermore, it also includes the activity that benefits the other party’s career and business. As I know, in another country, the activity that benefits the obtainment of a degree was also being seen as the non-financial contributions, e.g. if the parties are teachers, one party supports the other party to study abroad for a Masters or Ph.D. I know many couples, they keep multi-status relations with each other, and they not only have the couple relationship, but have an employer-employee relationship. As a result of multi-status relationships in various occasions, the wife acts as either the spouse or the helper of her husband’s business without wages. If she essentially contributes to her husband’s business, then, we could technically calculate how many contributions she has made to her husband’s business. I realise that to calculate how much value domestic labour has is an extremely controversial issue. We once sought the economists’ advice to calculate the value of non-financial contributions and tried to quantitative the homemaker’s domestic contributions in monetary value. However, in the end we doubted how many people would accept it.

CHEN: How well do you think the provisions in reference to the protection of the homemaker under the Code are being taken action? Is there any case of pre-nuptial agreement?

LEE: In my career experience, very few couples chose the pre-nuptial agreement as
a written document. However, many couples came to seek verbal legal advice on this issue. Most of them show many concerns on what agreement they may agree on in terms of the living expenses and special allowance for the homemaker. In addition, the awakening foundation has provided couples with a draft of a pre-nuptial agreement in which the division of household tasks and the amount of special allowance for the homemaker are written down. The couples are suggested to consider this draft in terms of the above issues before entering into marriage.

CHEN: How good do you think is the special allowance for the homemaker?

LEE: Well…They might not know what the legal jargon of the special allowance is. However, they already showed that they have concerns about it although they did not use the jargon, e.g. mostly the wife makes enquiries of how much living expenses she is entitled to when she acts as a housewife or what happens to her property which she acquired before marriage and if she gave up her job for the marriage. Anyway, finally they did not determine the amount of special allowance for the homemaker. The money was called the special allowance for the homemaker under the Code in 2002. Afterward, my clients, most of them were females, used this term to ask me more details about the allowance. However, personally I have not written any pre-nuptial agreements for any of my clients.

CHEN: What is the reason for the couples’ unwillingness to sign up a pre-nuptial agreement?

LEE: I think some couples probably already take care about the financial arrangement before entering into marriage, particularly in the circumstance where a loss of income occurs before and after marriage. One party might probably have promised another party not to worry about this matter but this promise was not being done in written document. You know… it is quite hard to get it done in written agreement when one falls in love. Somehow it is a taboo subject if one party continues to push another party to sign the pre-nuptial agreement. Most of the couples are ashamed of focusing on the subject in our culture. If one of them insists on a written agreement, unavoidably the other would doubt the sincerity of love.

CHEN: What do you think about the obligation to pay the living expenses?

LEE: Lots of couples come for advice in relation to this subject. The most frequent questions they have asked are in relation to how to bear the proportion to pay the living expenses in the presence or absence of child and employment, e.g. who should pay the bills or education fees. The couples were mostly interested in the article 1003-1 of the Code that before and after it was reviewed. The change in the current article of 1003-1 is that it provides that the non-financial and financial contributions should be equally valued. Therefore, the person who is making non-financial contributions to the marriage relationship can exempt from the obligation to pay living expenses, which has been legally recognised by the Code. The extent of bearing the obligation to pay living expenses depends on each party’s economic status and the division of household tasks. In general, the Code leaves room for the parties’ negotiation of the obligation to pay living expenses. In court, if there are any disputes over the proportion of the obligation to pay living expenses, an appropriate proportion of bearing the obligation will be made by the judge’s discretionary power on a case by case basis. Normally it would be in the proportion of 1:1 if both parties make similar extent of contributions to the family, either financial or non-financial. However, the Code does not elaborate on the case where one party is the sole homemaker and the other party is the wage earner. In addition, I
would say that article 1030-1 is nothing but a slogan and it has not given any substantial economic support to the homemakers. However it does have some significant effects on ordinary life. At least, it has reminded the couples that financial and non-financial contributions to the family life have equal values. As I know, the Pen-Wan Ru Foundation organises a campaign where women are trained as domestic workers by specialists on household tasks. Then, the well trained domestic workers offer the household services to another family and they earn wages by hourly rate. Thus, the domestic workers help themselves and each other. Today I help you with the child-caring, then, tomorrow you help me with the laundry in return. It is interesting that the housewives do the same household tasks without any wages in their own family. But the value of the domestic contributions is obviously shown when they do the same services for another family. The housewives become more self-confident as long as they are economically independent from their husbands. This campaign not only helps promote the woman’s economic status, but changes the household tasks into an activity with values. In order to avoid the disputes over the proportion of obligation to pay the living expenses by making non-financial contributions, I often suggest to the couple to consider the pre-nuptial agreement of living expenses either before or during marriage. In contrast to the cases before marriage, more clients come for legal advice of bearing the obligation to pay living expenses after they got married, particularly in the early years. The most frequently asked question by wives is which party has to take the responsibility to bear the obligation to pay the living expenses. It is also interesting that husbands ask me the same question about why wives always suppose husbands have to pay the living expenses. My advice is to tell them that although the Code has given legal recognition to the non-financial contributions, the court will decide the proportion of duty each party should bear according to the contributions he or she has made on a case by case basis when they have a dispute over this matter. We do hope the courts can unify the decisions as soon as possible. Moreover, the Code has provided that the non-financial contribution can be seen as the way to bear the obligation to pay living expenses. It is a great idea of the current Code to value the non-financial contributions to the marriage relationship. But the social norm still has certain impacts on how to implement this idea. To be honest, it is less likely to change people’s thinking in a short period. Probably the public just needs more time to accept it. However, there is no denying that the Code has gradually affected people’s thinking. Personally I concurred in the article 1030-1 under the Code, but to solely rely on the Code is not enough to implement the idea. All we need to do is to popularise this new idea to the public, either to wives or husbands, to affect the social norm. We do not intend to provoke a conflict between husbands and wives. We try to convince husbands and wives of accepting that domestic contributions can exempt the homemakers from the obligation to pay the living expenses instead. Furthermore, promoting the idea to value non-financial contributions to the family is not an attempt to encourage the homemakers to leave household tasks. I think an ideal method would be that each party should have a sense of jointly taking the responsibility and sharing the rights of a family. Take myself, for example, my husband is a lawyer too, some clients wondered how we manage our marriage life by law. The fact is we do not, as we think mutual communications and respect can help maintain a good marriage. We do not need the law at all. You know...gender equality is also important in a family. You could find that the central idea of gender equality is of the human dignity on the constitutional level. You should see your partner as an equal and keep him/her in the state of being worthy of esteem and respect. I always think that the ideal family should be like a forum for negotiation and mutual communication and it should be based on mutual help, trust and respect which are behind the family law. But you know... we still need more education on this matter.
CHEN: How good do you think is the special allowance for the homemaker?

LEE: A very small number of couples make the agreement after years of marriage. But I never heard about anyone who made the agreement before marriage. Although they have not used the legal jargon ‘special allowance’, I entirely realised what they really want is the special allowance for the homemaker. Before they came to see me they already had a verbal agreement but they hope for me to make terms in written agreement which stipulate that one party is eligible to claim for a certain amount of monthly money for free disposal from the other party. Finally, in order to avoid further disputes I would use the legal jargon embodied that agreement. Well... I must stress it again... just very few couples come to seek legal advice in my office. However, many people make enquiries with me about this matter when I had a chance to hold a talk to the public. The most frequently asked question by the wife is if she could negotiate the special allowance with her husband... My answer is a definite yes. However, unfortunately, it is a shame that either party is not entitled to have right of claim for the allowance under the current Code. The Code just leaves room for mutual agreement. Many issues arise: What is the cause of action for the claimant? Can the allowance be legally enforced in the absence of a mutual agreement? We have been keeping our eyes on the ongoing debates. In addition, the article 1018-1 under the Code provides that, with the exception of living expenses of the household, the husband and the wife may contract a certain amount of money paid by one for the other's free disposition. The term 'may' was used in that article, not 'shall' or another stronger word instead. Therefore, either party is not obligated to sign an agreement of special allowance. Neither party needs to make a similar agreement by any law. If the allowance is not being stipulated in a written agreement, either party has no right of claim for it. My personal understanding of the main idea of the article 1018-1 is that it just intends to propagate the importance of the homemaker's non-financial contributions. In fact such propagation does not take action very well in real family life. If you want to promote the homemaker's economic status, you still need a written agreement and then it can be enforced by the court. I used to do one or two similar cases where the husband agreed to offer his wife a certain amount of money at her free disposal, although the couples did not realise this money was what we called special allowance for the homemaker. In those cases, I helped them clarify this legal jargon and acted as the witness if they wanted the term to be covered in the agreement.

CHEN: What was the amount of money you suggested?

LEE: It all depended on the wage earner's economic situation and social status. However the prerequisite was that you must have a written agreement between you and your partner. In general, the money they agreed on was small after deducting the cost of living expenses, such as mortgage, bills and the education fees for a child, from the wage earner's income. And the homemaker normally would expect more money in order to provide the children with a quality life. I would consider this point when I suggested the amount to them. On the whole, the amount that I suggested was from 15,000 to 20,000 NT dollars which is acceptable in a middle class family. There is a referable index which shows that in Taipei city the monthly expenditure for an adult is between 24,000 to 25,000 NT dollars. I think it is reasonable to stipulate the amount less than the monthly expenditure if you could live in an acceptable way. In addition, I think the agreement of a special allowance usually happens in the single income families. I never heard of the same situation occurring in dual income families. I guess that is partly because the parties are both wage earners and have an independent economic status. How to bear the obligation
to pay the living expenses normally is a big concern of dual income families. I never heard of any agreements of special allowance made in dual income families. However, I think in single income families, the housewives desire to have periodical money at their disposal from their husbands as they do not have any income. In most cases, if a husband does not specify the purpose of the money, normally the wife would use it to pay the living expenses but does not dare to spend the money for herself.

CHEN: Are the wives aware that there are different purposes for the money in the living expenses and special allowance?

LEE: Yes, they were well aware of it. In the case of domestic violence or adultery in particular where the parties have reached the reconciliation. The wife demands that her faulty husband should offer her a certain amount of money at her free disposal as terms of reconciliation.

CHEN: Do you think there is any other protection for the homemaker under the Code?

LEE: I think article 1030-1 is another protection of the homemaker. It provides the right of claim for the remainder of matrimonial property. On the one hand, it is the most specific protection under the Code. On the other hand, this article also implies the result of a marriage breakdown.

CHEN: What do you think is the duty to maintain each other?

LEE: In the past, more wives claimed for the maintenance than husbands. However the situation changed, the numbers of marital immigrants increased over the last decades, mostly a Taiwanese old man with a young foreign wife, more husbands claim for the maintenance from their wives. In that case we might have reached the goal of gender equality as not only wives can apply for maintenance. However, majority of the Taiwanese couples are presumed to automatically adopt the default matrimonial property regime in the absence of a contrary agreement. Therefore, it is not very often in Taiwan that couples would sign a pre-nuptial agreement before marriage. They would never consider the pre-nuptial agreement until they have problems in the marriage. In fact I think that the current Code just provides the homemakers with very limited and passive protection. The homemakers have to endure the unfair treatment, such as shortage of living expenses if the husband is unwilling to provide his partner with enough money for living expenses. I used to deal with a case where the husband owned the house and let his wife and children live on the unwanted leftovers from the restaurant and market. He asserted that there was no shortage of food and accommodation. Furthermore, he insisted that he had completely performed the duty to maintain his family. In my opinion, the current Code has not provided the economically weaker parties with adequate protection. On the one hand, the value of domestic contributions is not being seen at all until the marriage comes to an end. On the other hand, it also requires much time and work in divorce proceedings. Perhaps the claim for the right of the remainder of the matrimonial property would take years to be carried out. Although the Code has given legal recognition to the domestic contributions, for me it is just a slogan. Furthermore, the applicant needs to prepay the divorce court fees before filing for legal action. Can you imagine that housewives with no income could afford the court fees? In practice it is a hollow slogan although the housewife is entitled to claim for the remainder of matrimonial property. I suggest further law reform is needed, so as to provide the economically weaker parties with more substantial protections.
CHEN: Could you talk me more about the duty to maintain each other?

LEE: There are very strict requirements of applying for spouse maintenance. In practice, the child maintenance is considered by court prior to the spouse maintenance as the Code provides that the right of claim for child maintenance shall not be affected by divorce. Normally the housewives only live on a limited financial resource if the wage earner is very mean about the money. If you do not want to divorce you could go to court and claim for the living expense of the household from the wage earner in the absence of an agreement of special allowance or living expenses. It is more easily than to claim maintenance. Such a method is applicable to any matrimonial property regimes under the Code.

CHEN: In practice, how well do you think the right of claim for the remainder of matrimonial property is working?

LEE: Of course the Code has given the legal recognition to the domestic contribution and quantified its value as the right of claim for the remainder of matrimonial property. However, not so many couples have a good understanding of how to carry out this right. In practice, it is quite difficult even for the judge to make a property list and correctly redistribute the marital assets. To decide which property is in the category of assets acquired before or after marriage has always been the controversial issue in a divorce. You need to prove that you own the property. In that case many issues may arise, such as the depreciation of the assets and stock assessment. It really takes time and money.

CHEN: How do you think about the retirement pensions and insurance?

LEE: The insurance has not been taken into account by court. However some argued that the court should distribute the retirement pensions, but some disagreed with that. There is shortage of debates and literature in this area.

CHEN: What about the earning capacity?

LEE: Theoretically I would say yes, but it is less likely to be carried out unless you have any formal position in your husband’s company. If you were just a helper with no wages…that is impossible.

CHEN: How good do you think is the alimony application?

LEE: There are very strict requirements to apply for alimony under the Code. Normally the alimony would only be granted under the circumstance that the claiming applicant has difficulties in earning a living. We have been pushing the legislation to loosen the requirements of applying for the alimony. However, there has been a debate on the nature of alimony. My understanding of its nature under the Code is that the alimony is seen as the compensation for loss, not the extension of duty to maintain each other. Thus, the homemaker’s domestic contributions would not be taken into account by court in an alimony application.

CHEN: How good do you think are the adjustments in the distribution of matrimonial property?

LEE: I never had such cases in my career.
CHEN: Do you think the Code overvalues the domestic contributions?

LEE: No, not at all.

CHEN: Why?

LEE: It is meaningful that the Code has given the recognition to the domestic contributions. The Pen-Wan Ru Foundation was engaged in a project where married women were trained as professional domestic workers. The well trained women offer service to other families so that they can earn money. In that project it has proved that the homemaker's domestic contributions may have some value. However, it would be great if the value of the domestic contributions can be protected by means of a secured matrimonial property system by law.

CHEN: Do you think the current Code looks at both sides of the spouses’ interests and family harmony?

LEE: In the past, more emphasis was put on the family harmony. But at present, the spouses’ interests might be firstly considered prior to the family harmony within a family.

CHEN: In general, how well do you think the Code is compatible with the gender mainstreaming?

LEE: I think Taiwan was already in the lead in this area among the South East Asian countries…but still have a far way to go…first of all, we need more education of gender equality to overcome the cultural issue.

CHEN: Any further opinions to add on this interview?

LEE: The authorities require that any bills should conform to the valuation form of gender mainstreaming before they are enacted. It can prove that we have been implementing the gender mainstreaming.
APPENDIX C: Interview Transcript (3)

Date of interview: 27.07.09, 14.00 -15.30 P.M.
CHEN: Chung-Yang CHEN (Interviewer)
YOU: Senior Lawyer (Interviewee)

(The content of this interview was selectively transcribed with relevant information to the interviewer’s questions, omitting some irrelevant conversation.)

CHEN: How good do you think is the definition of the domestic labour?

YOU: Normally in Taiwan, in order to maintain a harmonious marriage, an ideal relationship is supposed to be so that one party acts as the breadwinner while the other party is a homemaker. The concept of homemaking is quite broad, and it includes both material and spiritual support. The material support includes child-caring, doing the laundry and cooking, etc. The spiritual support is about encouraging the other party to share the joy and sorrows of married life. In short, all the non-financial contributions made to maintain the married life, either material or spiritual contributions, can be counted as the domestic contributions. The breadwinner often has a paid job. However in most cases the homemaker does the homemaking without any wage. Anyway whatever contributions the homemaker makes to the married life is so-called domestic labour.

CHEN: Do you think domestic labour includes the contributions that are non-financial, but help to maintain a family?

YOU: You are exactly right. There are many ways to maintain a family life, but most people overemphasise the importance of financial contributions to the marriage relationship. They ignore the non-financial contributions which are also necessary to maintain a family.

CHEN: How well do you think the provisions in reference to the protection of homemaker under the Code are being put into action? Is there any case of pre-nuptial agreement?

YOU: In Taiwan, pre-nuptial agreements are not very popular. Couples are unwilling to talk about this topic before entering into marriage. The Awakening Women Foundation has been advocating a draft of a pre-nuptial agreement which contains the child’s family name, domicile, and the obligation to pay living expenses and the special allowance for the homemaker. Some couples came for legal advice about the pre-nuptial agreement because they were not sure of what legal effect the agreement would result in and how it affects their life. The parties mostly were unwilling to negotiate the terms with each other due to the emotional factors. Unlike parties of commercial contracts, either party will do their best to negotiate with each other in order to act in the best interest for their own business. However, if it occurs in the marriage relationship, we are worried about that their affection might be affected. Thus, in most situations, we did not feel we must encourage the parties to sign a pre-nuptial agreement. However, what we could do is at least to explain to them what marital rights and obligations a couple can have under the Code. Currently the Code of 2002 has stipulated that the homemaker's domestic contributions to the marriage relationship enable her or him to be exempt from the obligation to pay living expenses. It is true that the breadwinner had a higher
economic status than the homemaker in the past. Without the words of the Code, the homemakers saw themselves as petty and low. Many years ago we once had dealt with a case where the husband disallowed his wife to use the bedroom and kitchen because the husband saw his wife as a parasite. As the law required the spouse to have the obligation for cohabitation, the husband did not dare to demand her to move out. We were wondering what the value of a homemaker’s domestic contributions was under this circumstance. In the past, we believed that such an unequal treatment totally resulted from the dichotomy of the breadwinner/homemaker model. But currently under the Code, the contributions made by either the breadwinner or the homemaker has been equally valued. With regard to practical cases, and how a couple arranges the division of household labour, the Code leaves room for negotiations between the parties. You could probably have fewer obligations to pay living expenses for doing more housework. The concept of the special allowance for the homemaker is totally different from the living expenses. At the outset, the special allowance is mainly aimed at promoting the housewife’s economic status. Therefore it shall not be considered as part of the living expenses. It is the amount of money that differs greatly from the living expenses. When the wage earning husband hands in money to the homemaker to cover the living expenses, he might think he has done his duty to pay living expenses. However, in fact it still takes time and work to do shopping and taking children home after school. Someone needs to do that business. These non-financial contributions to the family life should be equally valued with the breadwinner’s financial contributions. Also the non-financial contributions should enable a homemaker to be exempt to a certain extent of the obligation to pay living expenses. However, which party is willing to be in charge of the work that requires much time and effort? Surely the homemaker would take this role, as you need to pay if the child-caring is done by someone else. But the homemaker is unable to claim for the wage if he or she is engaged in doing this work. Such unpaid work results in the homemaker’s low economic status within a family. The worst situation is when the housewife does not have the money at her disposal. Sometimes she needs her husband’s generosity even though she just wants to buy her mother a small birthday gift. Someone suggested that this problem can be resolved if the housewife could claim more money for living expenses from her husband. But it is questionable whether the wife can use this money for different purposes. It could be argued that the housewife would probably be accused of embezzlement if she misspends the money which only should be used in living expenses. Furthermore, the housewife would face the same dilemma if there is no distinction between the special allowance for the homemaker and the money for living expenses. In Germany, the concept of living expenses is broader than that in Taiwan, it covers not only the actual expenditures for the whole family, but includes the expense for offering a quality life for every family member which conforms to human dignity. Furthermore, the expense of offering equal quality life between spouses is needed. In Taiwan, someone considers expanding the scope of the costs of the household, and then the housewives can claim more money for her own use. Spouses always quarrel with each other over the management of the money for living expenses once there is emotional disharmony. In that case, the worst situation is that the economically weaker party, normally the housewife, has less power for negotiation. In addition, the reason why we advocated introducing the special allowance for the homemaker was the idea that saving is getting. We could say that the money saved monthly resulting from the non-financial contributions to the marriage relationship shall be owned jointly. With regard to the money management, the Code leaves room for the parties’ negotiation on a case by case basis. Therefore, I think at least the housewife is partly entitled to some money at her disposal. She can manage this money without her husband’s permission and use this money to do whatever she
likes. This sum of money is the origin of the special allowance for the homemaker and totally differs from the concept of money for living expenses.

CHEN: How good do you think are the provisions in reference to the protection of the homemaker under the Code?

YOU: Yes, we do have some protection under the Code. It is the right of claim for the remainder of matrimonial property. We proposed the special allowance for the homemaker when we were engaged in the law reform in 2002. Quite a few women indicated that they deeply appreciated that introduction. Such an allowance helped them to maintain personal dignity and gain economic independence from their husbands. They gained lots of self confidence they never had before. At least, they felt that homemaker was no longer a humble position. Furthermore, in Taiwan, the husbands mostly have a stronger economic status than the wives. In that case, the husband usually pays the house loan in his name with his income while the wife pays the living expense with her slender earnings. In a case of a marriage breakdown, the husband would assert that he owns the house as he had paid the loan, whereas the wife paid the living expenses but gained nothing in the end. Since the law requires that the parties should maintain the marriage together with one heart, in the case of a marriage breakdown, the surplus of earnings, after subtracting the expenses from all incomes, if any, shall be shared jointly by the parties. That was the main reason why we first introduced the right to claim for the remainder of matrimonial property in Taiwan based on the German Code of 1985. As to the issue of special allowance for the homemaker, the parties are not allowed to distribute assets acquired during the subsistence of the marriage. So, the claim for the remainder of matrimonial property is only a contingent right, it does not necessary come true during marriage. Therefore, we proposed giving the housewife a sum of money for free disposal, which is called special allowance for the homemaker. But it was a pity that the legislature did not completely accept our proposal of the special allowance. The current version under the Code is different from the idea we suggested in 2002. The Ministry of Justice was strongly opposed to this idea at that time. One official representative argued that the Code already provided the housewife with enough protection, such as the right to claim for the remainder of matrimonial property and the exemption from obligation to pay living expenses by domestic contributions. If not so, the housewife should request additional pocket money from her husband or the couple could talk over broadening the range of living expense. There was no need to entitle the housewife to claim the special allowance. We were opposed to using the name of ‘pocket money’, because this term probably referred to the wife’s subordinate status to her husband. We contended that to a certain extent the parties in the marriage relationship are similar to a commercial partnership, they should see each other as equals, treat each other with respect, and they share jointly what they have earned in the subsistence of the marriage. Either partner has the vested right to share the profits, this origin of right does not derive from the other partner’s generosity at all. However, the Ministry of Justice completely denied the original idea of the special allowance for the homemaker. The current language of the special allowance under the Code is the compromise between the administration and legislation. The final language under the Code is that the parties “may agree on” the special allowance. One controversial issue still remains whether the court has the power to interfere with the individuals in the absence of a mutual agreement. In practice, the court has rejected the right of claim for the allowance when a party applies to the court. The parties have no right of claim conferred on the Code and this remains the main problem to be resolved. Another point which needs to be addressed is that in some families, the husband hands in the salary to his wife, and she is in charge of the money management. The
husband asks her for money when he needs it. In that case it is ok if nothing went wrong in their life. However, it is unavoidable that the husband might sue his wife for embezzlement if something went wrong with their relationship. Therefore, we advocated that parties can share the net earnings, after deducting the amount of living cost from the total incomes every month. A certain proportion of spending money for individual free disposal may be agreed on out of these net earnings. Once again, a marriage relationship is like a partnership, the partners see each other as equals of personality and dignity. That was the origin of why we strongly advocated that the homemaker should be given a right under the Code to claim for the special allowance. The couple should agree on how to distribute the net earnings, to manage and use the share that he or she is entitled to. Once again, these earnings do not belong to the wage earner alone.

**CHEN:** Do you think the Code leaves room for the parties' negotiations of the special allowance and living expenses?

**YOU:** Personally, I still advocate that the homemaker deserves a right of claim for the special allowance. Although the Code already has left room for the parties' negotiations, but what further action can the parties take in the absence of a mutual agreement on special allowance? The court decisions were very clear that the parties were not entitled to have rights of claim unless the agreement has been made.

**CHEN:** Any proposals for a law reform?

**YOU:** The special allowance for the homemaker/child-carer was grounded on the standpoint that the domestic contribution to the family is of great value. The initial idea of the allowance was misunderstood as calculating the value of doing the household affair with a market price... The 'domestic labour' within the household greatly differs from the market labour in a paid employment. The value of domestic contributions to the marriage relationship is less likely to be calculated with the market price. The special allowance for the homemaker/child-carer is based on the concept of the advance bonus of the accrual accumulated during the marriage. In the spirit of the special allowance for the homemaker/child-carer, either domestic or non-financial contributions to the marriage relationship are equally valued...I think the Code should provide that the parties shall agree on the amount of a special allowance if they have any adequate income. Some argued that the government should take the responsibility to pay the wage to the homemaker for household labour. I personally disagreed with them on this point. I think having a family depends on one's free decision and the government does not require you to do that. It is impossible to demand of the government to take the responsibility for the wage of the homemakers.

**CHEN:** Are there any other provisions to protect the value of domestic labour?

**YOU:** Well...You still need to negotiate with your partner if you really want the special allowance.

With regard to the right of claim for the remainder of matrimonial property, it is the problem related to the preservative measures of property. If the respondent is hiding the property, the court only requires one tenth of the cash deposit, it was one third before, if the claimant applies for the order of attachment of property. To some extent it can prevent the respondent from hiding the property.

**CHEN:** How good do you think is the duty to maintain each other in the absence of
any agreement of living expenses and special allowance?

YOU: I feel it is still a bit late although you have made the agreement and want to enforce it. Your claim does not necessarily come true as the other party has already hidden the property. Therefore, the maintenance claim might be the only financial resource for the economically weaker party to apply for in the absence of an agreement of the living expenses and special allowance.

CHEN: What do you think about the right of claim for the remainder of the matrimonial property on dissolution of the marriage?

YOU: We designed a regime of sharing the assets acquired during the marriage on dissolution of the marriage. The system is that either party is entitled to take out the asset value that he or she brought into the marriage, such as inheritance and solatium. Afterward they share what they have built together. On dissolution of the marriage, either by death or divorce, the accrual or growth to each party’s estate is worked out. This is done by calculating the net value at dissolution minus the net value at commencement of the marriage. If one of the estates has grown more than the other during the marriage, the party with the smaller growth has a claim against the party with the greater growth, for half the difference. However, in practice, it is quite hard to obtain the full disclosure of the other party’s assets. The court may require that the respondent has to make a full and honest disclosure. But the respondent mostly does not obey the order to make an honest disclosure as the court demands. The tax authority is also of little help with this matter if the respondent has hidden the property or intentionally conveyed the property to a third party prior to the commencement of the proceedings. In some jurisdictions, the respondent is probably being accused by the court of contempt because of dishonest disclosure. An actuary report is necessary while divorce action is filed. Actuaries act as the expert witnesses in court cases requiring specialist experience, for example in calculating the worth of the parties’ assets. The introduction of the actuary also avoids dishonest disclosure of the property. The lack of actuary greatly caused uneven distribution of matrimonial property in Taiwan. Furthermore, it is hard to share the assets in a legal way and the claimant usually needs to resort to the illegal commercial collectors. The imperfect tax law also affects the sum of the maintenance claim. In the U.S., it is likely to invalidate the respondent’s professional license as long as the respondent stops paying the maintenance without a good reason. So, an urgent need of actuaries in court cases might be necessary for further legal reform. In the case of a divorce by mutual agreement, somehow there might be a fair distribution of property as long as the settlement satisfies the divorcing parties.

CHEN: How about the economic status and earning capacity? Can they be seen as property and be distributed?

YOU: I have not thought of it. As I understood, in the U.S the earning capacity is one of the factors that should be taken into account by the court on divorce. However, it is quite difficult to follow suit here.

CHEN: How good do you think is the alimony claim in Taiwan?

YOU: In Taiwan, there are strict requirements for the alimony claim in divorce proceedings. In practice the court only ordered the alimony to those who are unable to earn the living on account of the divorce decree. The definition of ‘unable to earn the living’ is that the claimant must have no ability to work and pay for his life. We
have been proposing to adopt American law. The wife who acts as child-carer is
ettitled to be maintained by her husband with the same living standard as they had
before the divorce. This is the provision contrast to Taiwan where the claimant is
only eligible to claim for compensation of mental loss, not alimony. We still need
further reform on this point.

CHEN: How good do you think is the adjustment in the claim for the remainder of
marrimonial property?

YOU: Most couples rarely apply to the court for this adjustment. In general, it usually
happens in a big money case and homemaking/ child-caring contribution in never
taken into account by the court. I am dealing with a case at present where the wife
demands of the husband to give full disclosure of the assets, but he tries to find an
excuse and hide the assets. Mostly the real property is much easier to be found as
we have a registration system. However, it is hard to find any other intangible assets.
I used to deal with a case where a wealthy business not only had hid all of his assets,
but still asserted his half share of the wife’s assets. I think that the lawmakers are
always largely inactive on social problems. They will not make any reforms until the
problem causes widespread discontents again. They always think the current Code
is satisfactory.

CHEN: Do you think the Code overvalues the domestic contributions to the
marriage relationship?

YOU: I do not think so. But there are still arguments of pro and con. It is certainly
ture that the spirits of the Code in valuing the domestic labour has not been carried
out at present.

CHEN: In general, how well do you think the Code is compatible with the gender
mainstreaming?

YOU: The idea of gender mainstreaming was promoted by the government.
However, the idea of affirmation of the value of non-financial contributions
completely resulted from the women’s suffering experiences. That is the difference
between the ideas. But, there are additional protective provisions for a homemaker
which have not been passed under the Code as we mentioned earlier. Although the
Code was amended in 2002, I think not so many people have a good understanding
of what it is about. However, it is gratifying for us that the Code has declared that the
domestic labour is no longer of little value. In addition, the reduction of the cash
deposit of property attachment is compatible with gender mainstreaming as in most
cases normally wives are the claimants and in an economically weaker position. It is
one of the examples of the treatment by gender differences as required by the
substantive gender equality. However, overall we need further reform to give more
substantial economic protection to homemaker/ child-carer.

CHEN: How well do you think the current Code looks at both sides of the spouses’
interests and the family harmony?

YOU: Under the previous Code, it implied that the woman was nothing but acting as
the role of giving birth to a child. In order to reach the best interest of a family, the
woman often made sacrifices for her family and her role was always subordinate to
that of the man. We have been advocating that the law should treat woman as an
individual with complete freedom and autonomy. Therefore, the individual’s equal
rights, information and status are essential to built up a harmonious family.
Exploiting the domestic labour makes it impossible to bring about the family harmony at all. The directions of gender equality have been the guideline of each of the amendments to the Family Law Chapter under the Code. Historically, Taiwan opted out of the United Nations in 1971. During the decade from 1975 to 1985, the UN required that each member of the UN has to abolish the laws which discriminated women. Although Taiwan was not a member in that decade, we still have made major amendments to the Code. At that period, the laws were male dominated and filled with gender blindness. From 1980 on, we, Awakening Foundation and Warm-life Foundation, proceeded to carry out the movement of family law reforms. These reforms were based on the women’s experiences and focused on women’s subjectivity, enabling them to have an equal partnership in the marriage relationship. Such social movements were different from the ones which were led by the government.

CHEN: Do you have any opinion about the topic which you would like to add?

YOU: I would appreciate it if you could introduce the experiences from England. We probably can learn a lesson from that jurisdiction.
APPENDIX C: Interview Transcript (4)

Date of interview: 03.08.09, 18.00-19.30 P.M.
CHEN: Chung-Yang CHEN (Interviewer)
JENG: Civil Law Judge (Interviewee)

(The content of this interview was selectively transcribed with relevant information to the interviewer’s questions, omitting some irrelevant conversation.)

CHEN: How good do you think is the definition of domestic labour?

JENG: During the 1900s the women’s organisations proposed a law reform project on the family chapter under the Code, advocating that the value of a woman’s work as homemaker is totally ignored in society. Moreover, when the couple has a quarrel, the husband often considers his wife as a parasite as she does not have any income. At that moment in order to achieve the goal of gender equality, we held the position that either monetary or domestic contributions to the marriage relationship could be seen as the ways of performing the obligation to pay the living expenses. In addition, the sphere of domestic contributions should include not only housework but children’s upbringing and education. Thus, you save the costs for hiring a babysitter and domestic worker.

CHEN: Do you think domestic labour includes the contributions that are non-financial but help to maintain a family?

JENG: Yes, I totally concur on this explanation.

CHEN: How well do you think the provisions in reference to the protection of homemaker under the Code are being put into action? Is there any case of pre-nuptial agreement?

JENG: The new provision was passed in 2002. However, only legal practitioners were familiar with it. The ordinary people had no idea of the concept of domestic contributions. Furthermore, they did not have a good understanding that the value of domestic labour can be transferred into the way of performing the obligation of paying living expenses. They received very few legal propaganda and education. With regard to pre-nuptial agreements I never heard of any case of it. It is probably that we do not have any pre-marriage education so that most people even do not know how to start to make an agreement. In addition, in our culture most people do not want to mention the financial arrangement when their relationship is going well. The wedding preparation is probably the only concern for the couple before entering into marriage. They do not agree on any agreement, but I heard some of them making agreements during marriage, particularly in a lawyer’s family. It rarely happens in an ordinary person’s family.

CHEN: How good do you think are the provisions in reference to the protection of homemaker under the Code?

JENG: Well...the Code states that the value of domestic contributions can be seen as the way of performing the obligation to pay the living expenses. However, in fact, the majority of lawmakers thought it was an unnecessary provision because it was seemingly like calculating the wage for doing housework. Finally, they just intended
to propagandise this concept to ordinary people rather than to seriously implement this provision. As a result, the provision becomes nothing but a slogan that the domestic contributions needed to be valued. In practice, this provision does not take any action.

CHEN: How good do you think are the provision in reference to the obligation to pay the living expenses? Are the domestic contributions being taken into account?

JENG: In practice, in fact the spouses already have fallen out with each other when they claim for the living expenses. Particularly in separation, the courts usually decide the amount of living expenses according to personal needs rather than whole family needs. In general, the child maintenance is included in the part of the living expenses which the residential parent needs. Here, the value of domestic contributions would never be taken into account when the courts decide the amount of living expenses.

CHEN: Do you think the duty to maintain spouses overlap with the obligation to pay living expenses during marriage?

JENG: In general, a party’s claims for living expenses come up during the separation. It is not common to see a party applying for spouse maintenance during marriage. However, I do not think the application will easily succeed due to the strict requirements. Anyway very few people have claims for spouse maintenance during marriage. But it is very common to see one party to make an application for child maintenance from the other party either during marriage or after divorce. According to the previous precedents, the duty to maintain a child was combined with child custody by the courts. You will not be granted child custody rights unless you have the ability to maintain the child. Therefore in the past, women did not dare to divorce and could not but bear an awful marriage as the court would not grant a woman with no income the custody rights. In 1996, the child custody provision favourable to wage earners/fathers was repealed so that the obligation for parents to maintain their child should not be affected by the annulment of the marriage or the divorce which was provided in Article 1116-2 of the Code. After then, it was easier for women to be granted the custody of a child. In addition, during a separation, the court may order the wage earning husband to pay the whole living expenses if the other party has no income but looks after the child. Therefore, the value of domestic contributions has a chance to be valued and the residential parent/mother is exempted from paying the living expenses due to child-caring. In sum, it is very hard to show the value of domestic contributions in any way during marriage.

CHEN: How good do you think is the duty to maintain during marriage?

JENG: In practice, there are very harsh requirements of spouse maintenance application. It is impossible for anyone who has an income, even the income is quite low, to be granted maintenance. You could say the only solution to an awful marriage is to divorce if your husband is unwilling to take the mutual duty to maintain you.

CHEN: How good do you think is the nature of special allowance for the homemaker?

JENG: When we proposed the special allowance to the lawmakers, many of them questioned that it was embarrassing and not worth filing for such small money. As far as I know nobody comes to court and applies for the allowance. For all I know,
the central idea of the special allowance for the homemaker was to promote the housewives’ economic status and dignity, enabling them to have small money at their free disposal as in Taiwan many housewives secretly hid money for personal savings.

CHEN: How good do you think is the chance to grant a homemaker the substantive claim for the special allowance?

JENG: At present I have never heard of any case of the special allowance for homemaker. It is because the couples’ conservative attitudes toward the marriage in Taiwan cause them not to apply for the allowance. Therefore, I would like to suggest that a special allowance for homemakers may be settled by mediation rather than in court.

CHEN: How well do you think are the claims for the remainder of matrimonial property implemented?

JENG: The Code was promulgated in 1930 and it had many provisions which were discriminations against women, for example, if property could not be proven to be owned by the wife, it was automatically assumed to be owned by the husband. In 1985, the introduction of the concept of remainder of matrimonial property enabled either party to have a half share of the matrimonial property. However, if there is a big difference between parties in contributions to the matrimonial property, equal distribution is still unfair. Therefore, you need to prove that you have made major contributions to the matrimonial property and the court may consider adjustment or waive the share of distribution.

CHEN: Do you know of any real cases?

JENG: The average divorce rate is about 60,000 couples per year in Taiwan. The number is down to 30,000 couples this year. However, claiming for readjustment only occurs in a judicial divorce, particularly in a big money case. It is common to see the parties claim for readjustment of the share. However, homemaking/child-caring contribution is never a factor considered by the court to exercise the readjustment of the property redistribution. With regard to the divorces by mutual consent, we are unable to know the fact of divorce settlements by mutual consent as they are not open to public.

CHEN: How good do you think are the national pensions and insurance? Can they be distributed?

JENG: I know some have argued that retirement pensions could be seen as part of income and should be distributed on divorce. I am personally opposed to this idea as it is against its purpose of the employer to provide the employee with the minimum safeguard of living.

CHEN: What about the economic status and earning capacity? Can they be seen as property and be distributed?

JENG: It is impossible to reach a conclusion of equal distribution of matrimonial property in a case where a husband with high earning capacity makes a large fortune, while his wife acts in the role of housewife. If the difference of financial contributions to the marriage relationship is too big, then the wealthy husband may apply for readjustment.
CHEN: How good do you think is the alimony application? Can the domestic contributions be taken into account?

JENG: To be honest, it is quite difficult to be granted alimony by using this reason. The applicant must meet two requirements: he/she must be the innocent party for the divorce and has difficulties in livelihood due to the decree of divorce. A large amount of alimony nearly occurs in divorce with mutual consent. It rarely happens in the judicial decree of divorce as the courts have to comply with the strict requirements. The courts are only concerned about how you start your future life, but do not take into account what previous domestic contributions you have made.

CHEN: How well do you think the Code values domestic contributions?

JENG: You cannot just rely on the law as law has its limits. The core of this matter is education, particularly family upbringing. In Taiwan mammonism has spread and people are pursuing material wealth and possessions. Parents are only concerned about children’s school results rather than their moral education. Therefore, I would suggest parents not only to instil the idea of domestic contributions being as important as financial contributions to their child, but also to teach them about gender equality in domestic upbringing.

CHEN: In general, how well do you think the Code is compatible with the gender mainstreaming?

JENG: It is too hard to achieve this goal and it might be achieved in fifty years. It is not so easy to implement the idea within a family, and we still need more education on gender issues.

CHEN: How well do you think whether the current Code looks at both sides of spouses' interests and family harmony?

JENG: Once again, we cannot just rely on the law although it was announced that domestic contributions are valuable. However, it is more relevant to home upbringing. Only education can influence people's thinking on the division of housework.

CHEN: Any opinions you want to add?

JENG: It is fairer to the parties after the Code amendment 2002. The Code was modelled on the matrimonial property under the Swiss Civil Code, which implements the gender equality. However in practice, many wealthy parties are hiding the assets to avoid the distribution of matrimonial property. The consequences of law enforcement are not going very well. Therefore, I suggest the parties to register their house in joint names which can safeguard their property.
Appendix C: Interview Transcript (5)

Date of interview: 07.08.09, 14.00-15.30 P.M.
CHEN: Chung-Yang CHEN (Interviewer)
GI: Senior Lawyer (Interviewee)

(The content of this interview was selectively transcribed with relevant information to the interviewer's questions, omitting some irrelevant conversation.)

CHEN: How good do you think is the definition of the domestic labour?

GI: I think it is a very complicated question and hard to be answered. As far as I know, in 2002, the aim of revising the matrimonial property regime was that the marriage relationship should be regarded as quasi-partnership. In order to maintain the partnership, you could decide what contribution you can make to it either financial or non-financial. In general, the husband hardly concentrates on his business if his wife does not run the household well. The husband can save the cost for hiring a housekeeper or babysitter if the wife plays the role of housewife. Therefore, the husband can accumulate his income. This partnership commences upon the point of entering marriage and ends in divorce or death. We calculate how much profit comes from the partnership when the partnership ends, if any; husband and wife are entitled to share the profit equally.

CHEN: Do you think the definitions of domestic labour includes the behaviour which is non-financial, however beneficial to one party’s commercial business?

GI: Yes, nearly, but it is not clear enough. You know... a housewife’s domestic labour is a kind of mental and physical effort to the family. The ‘home’ is different from another group as the home provides the members of the family with a sense of belonging. In most cases, this sense of belonging, a personal subjective feeling, usually reinforces the reason why so many women are willing to give up their well-paid career upon marriage. In a marriage relationship, in any event, someone needs to take the responsibility to look after the family, but why do always women solely decide to take this responsibility? Women are always willing to make sacrifices for the family. However, they are not given weight relative to the efforts they have made to the family. In addition, it is difficult for married women to be accepted by an employer when they want to return to their careers. Women really did great sacrifices for her family. Therefore, I would give more weight to the importance of mental and physical efforts, in particular the definition of household domestic labour.

CHEN: How often do you think a couple agrees on the value of domestic contributions to the marriage relationship before entering into the marriage?

GI: Very rarely...You are not permitted to do this in traditional Chinese culture, namely Confucian thinking. In traditional thinking, a marriage relationship is a combination of body and mind. You are expected to be totally willing to devote your whole life to each other. Thus, everyone regards your sacrifices for the family as natural and normal contributions. However, your life ends up with nothing in the event of a marriage breakdown. It is a bit late to regret not having the pre-nuptial agreement. Therefore, I feel it is so foolish to get married without describing the
financial arrangement in a pre-nuptial agreement. I never did. I have not discussed how to take the responsibility of paying the living expenses with my husband, however, we did agree on the division of household labour as I was not only a housewife. So, we need to share the housework. Law is not necessarily the best and only solution to any problem arising from marriage relationships. Husband and wife need to negotiate a suitable way with each other for their life, and then they will have their own sweet memory. In Chinese thinking the wife has to look after her parents-in-law. However, the husband does not have to do so. Historically the wife has been expected to honor her husband’s family with her morality and conduct, but not the family she comes from. The law actually applied in society is entirely different than the one existing in the statutes and cases. This is why I think people still live in a state of chaos. Therefore, the law does not take great action under the influence of traditional thinking. It would be a big challenge to traditional thinking if you wanted to give recognition to the value of domestic contributions to the marriage relationship. I was once on a TV talk show, one famous male writer made a joke about the pre-nuptial agreement. On that show he voiced his doubts about the purpose of the agreement and admitted that many men never took this agreement seriously. The promise was nothing but sweet talk to make women dreamy. Men just wanted to please their wife before entering marriage and always made a lame excuse. I think what he said was completely based on the traditional views on gender role. It is very difficult to request a husband to affirm the value of domestic contributions by law, unless he is willing to do so from the bottom of his heart. Finally we found our efforts seemed hopeless. Maybe we should instil the respect for the law in those who want to get married. As far as I know, there is no case of pre-nuptial agreement, no case of special allowance for the homemaker. Last year I had a case where my client was an employed woman and had a similar level of income to her husband. After giving birth to twins she gave up her career for child-caring. Her husband sarcastically began to mock her as a parasite of the family. Moreover, she paid the living expenses with her own savings, but this still did not satisfy her husband. Finally the husband took a divorce action against her. So, where is the special allowance? It is impossible to make such an agreement of special allowance for a homemaker unless you have enough income.

CHEN: How well do you think the Article 1030-1 takes action? Can domestic contributions exempt the homemaker from the obligation to pay living expenses?

GI: The provisions under the Code seem perfect. However in practice, it is very rare to value the domestic contributions to the marriage relationship. Normally, the court counts the child maintenance as part of the living expenses. In most divorce cases, the parties’ economic status is the chief consideration of deciding how child custody decisions are made. The decision of the custody of a child is bound to a party’s economic status. The court holds that the stronger the economic status you have, the greater is your ability to pay the living expenses, of course including child maintenance. You had better not act as a housewife if you wish to obtain the custody of a child as the court decision is never in favour of a parent with no income. Therefore, the divorced women are forced to return to work in order to win the child custody war. But you know...It is not so easy for divorced women to restart or return to work when they are no longer young. Moreover, if the parents have similar economic condition, the court would order each parent to pay child maintenance on a 50-50 basis. In addition, the court would not require the non-resident parent to pay more child maintenance than the resident parent who looks after child. In other words, it never happens that a non-resident parent pays all the child maintenance and the resident parent, who is a housewife, pays nothing. Furthermore, the value of domestic contributions is never being taken into account by court when the court
considers the amount of child maintenance (living expenses). The chief consideration in a child custody case is the parties’ economic status, not how much domestic contributions the resident parent can or will make. As I remember, it happened once in a case the court held that the ratio of share of the child support obligation (living expenses), resident to non-resident parent, was 3 to 7. I suggested that the resident parent’s looking after the child shall be taken into account. Finally the court accepted and reduced the support ratio to 2 to 8. That was the only case where the value of domestic contributions was once considered.

CHEN: Do you think the duty to pay living expenses overlaps with the duty to maintain each other?

GI: I think so. The duty to pay living expenses is mostly the same as the duty to maintain each other. These two duties are overlapping. In fact, the domestic contributions cannot be measured by any economic value. Moreover, its value is far greater than the monetary value. There is no case that the wage earner, usually the husband, would give the housewife monetary compensation for her loss for doing housework. Some questions arise from the situation if the wife needs to buy a birthday gift for her friend. Would the money spent be counted in the living expenses? What if she buys herself a cup of tea? I think the answer is probably no as the money she spent is seen as part of the living expenses. She is not allowed to use this money at her disposal. In addition, the unfairest situation is that the wage earner can manage his own income without the housewife’s permission. However, the housewife has to ask for “his” money if she needs it. No matter how well the housewife does the housework, she would never ever be given a reward. On the contrary, the husband would possibly get promotion or reward if he works harder. No matter how much housework a housewife does, the husband always takes it for granted. Do you ever think if the housewife works outside home, she can make money and use her income at her disposal? Anyway, she does not get what she deserves to have as she chooses to act in the role of housewife. The money given to her by her husband can be only used to pay living expenses, not for personal expenses. Therefore, we insist that the purpose of special allowance for a homemaker is different from the money for living expenses. We defined the special allowance for homemaker as a certain amount of money which is at a housewife’s free disposal without the husband’s consent. What mental and physical efforts the housewife makes is the most significant contribution to the family, which cannot necessarily be measured on a monetary level. You are willing to do housework as you recognise yourself as a member of your family. The efforts she made should be seen as contributions to the family, not sacrifices. Furthermore, although the Code provides the special allowance for the homemaker, it does not mean a result has been reached that domestic contribution has been properly valued. Under the current Code, you have to negotiate the special allowance with your husband if you need it. The court’s intervention and mediation are prohibited in the absence of mutual agreement.

In 2002, unfortunately the lawmakers rejected our proposal modelled on Swiss Civil Code to the amount of special allowance which was 6% of total income. The lawmakers intended not to get the clause of special allowance passed as they thought there was no need to interfere with family matters. The current provision is just a compromise and it has never even taken action. In addition, under the Code, the wage earning husband still has the power of money over his wife. The quality of the housewife’s life simply depends on her husband’s generosity. The court would not order the wage earning husband to pay maintenance during marriage as long as he provides his wife with a minimum standard of living, although this living is close to the poverty line.
CHEN: Do you think the special allowance for the homemaker is being seen as the way of valuing domestic labour?

GI: Well… not exactly. At that moment, we just wanted to calculate the maximum of living expenses. As far as I know, the court held that the living expenses only include food, clothes, housing and transportation. Such basic support is nothing but a minimum standard of living. You have to live on your husband’s favour if you want some money to use. With regard to the special allowance of the homemaker, it not only allows the housewife a certain amount of money to use without the wage earning husband’s consent, but promotes and enhances the housewife’s dignity. I strongly advocate that the legislation towards a special allowance is necessary for the housewife, and in due course the court may interfere with this matter. Such legislation can be seen as greatly contributing to the housewife’s dignity and the affirmation of value of domestic labour of women, and/or wives and mothers. Leaving room for mutual agreement between husband and wife would perhaps be an unworkable idea that gets them no where. In fact we know there are some parts where housewives manage the husbands’ income. However, what the law needs to do first is to protect those who do not actually manage the family income and still suffer the economical disadvantage. Unfortunately at present it is far from satisfactory.

CHEN: Do you think the wage earning husband should have a certain amount of money at his disposal?

GI: There is no need to legislate this money as he can manage all income he has earned. In addition, the current default matrimonial property regime is based on the separation of estates. Either party pays the living expenses according to his or her economic status and to the extent of domestic contributions. Therefore, the housewife is unable to decide the amount the wage earning husband should pay for the living expenses. It really depends on how much the husband is willing to pay.

CHEN: How good do you think is the reminder of the matrimonial property regime?

GI: Any assets acquired after the date of divorce are not taken into account by court. If the wage earning husband retires in two years after divorce, he earns the retirement pensions alone. However, I hold that the law should entitle the wife to share the retirement pension because of her domestic contributions prior to divorce.

CHEN: Do you think future earning capacity should be taken into account?

GI: Of course, yes. The wage earning husband is entitled to have a retirement pension when he retires. I think the housewives have done contributions to their husband’s retirement pension scheme. Ironically, the housewives devote themselves to their families but own nothing in the end. The worst thing is that they even need to spend time on striving for economic independence on their husband. What a big sacrifice they have to make.

CHEN: Do you think the future earning capacity can be taken into account by court in an alimony application?

GI: That is impossible… under the current Code. The Code provides that the purpose of alimony is unrelated to the value of domestic contributions to the marriage relationship. In addition, the requirements of claiming for alimony are very
strict as the claimant must be unable to earn a living because of the consequence of divorce. Perhaps only two kinds of persons are qualified claimants, the elderly and the disabled people. Therefore, no housewife would claim for alimony at the risk of losing the war of custody of child as the court assumes that you do not have the ability to raise children. Further, more in-depth, the court holds the view that the Code already enables you to claim half of the deferred community of surplus, why more? You already have enough financial resource to restart your life. Thus you will not have any difficulty in earning a living.

CHEN: How good do you think is the adjustment in the remainder of matrimonial property?

GI: The court would not adopt this adjustment as long as divorce settlement has been made between parties. It probably happens in an extreme case, for example, where one party is a housewife while the other one is a sluggard who did not contribute anything to family. However, homemaking/ child-caring contribution cannot be justified to deserve a greater share when the court exercises the readjustment of the property. Anyway, it is very rarely to see one. Mostly it happens in a big money case.

CHEN: Overall, how well do you think the Code values the homemaker’s domestic contributions?

GI: Under the Code, the housewife’s domestic labour has not even nearly been valued. So far the idea of valuing domestic labour has far from been carried out. The alimony probably is the only way to compensate the housewife for her passive loss. However, it is still quite hard to get the awards by the requirement under the current Code.

CHEN: Overall, how good do you think is the protection of the housewife’s domestic labour?

GI: I would say all the provisions in reference to the protection of the homemaker are nothing more than a contingent right for a housewife. You are unable to implement the right conferred by the Code until the dissolution of a marriage.

CHEN: Do you think the provisions in reference to the protection of homemaker under the Code are compatible with the theory of gender mainstreaming?

GI: No, absolutely not, not yet… As you do not see any value of ‘domestic labour’ is realisable until divorce. In addition, the Code does little to compensate the housewife for her loss. The goal of gender equality has not been achieved yet in this regard.

CHEN: Any proposals to further law reforms?

GI: Once again, we should legislate the special allowance to a homemaker/child-carer and then the wage earning husband is obligated to offer the housewife this allowance in the absence of a mutual agreement. Moreover, the court should take homemaking/ child-caring into account when deciding to share the obligation to pay the costs of the household between parties, rather than invariably emphasise the monetary contributions. The party who contributes more non-financially to the family should be reduced comparatively obligation to pay the costs of the household.
CHEN: How well do you think the current Code looks at both sides of spouses’ interests and family harmony?

GI: The current Code only provides the couple with a minimum standard of living, and it is still far from the spouse’s interests and quality life. Only in the circumstance that one party suffers with bad life, normally are the women, then the family harmony will appear. To be honest, the central idea why we value the domestic contributions is to encourage everyone to show respect to housewives, not just to give them monetary rewards. In fact it is too late when the court intervenes in this family issue. Therefore, I think the special allowance for the homemaker is probably the best way to promote the housewife’s economic status and dignity.

CHEN: Any opinions you want to add?

GI: In this society, I think we were lost for a long time. Nowadays the authority only places importance on economic issues. They do very little for moral education. If we have a high level sense of morality, maybe we do not need the law any longer to interfere with the family issues.
Date of interview: 28.08.09, 14.00-15.30 P.M.
CHEN: Chung-Yang CHEN (Interviewer)
SHIU: Civil Law Judge (Interviewee)

(The content of this interview was selectively transcribed with relevant information to the interviewer’s questions, omitting some irrelevant conversation.)

CHEN: How good do you think is the definition of domestic labour?

SHIU: It is too difficult to define this concept as it has various ranges of things in our daily life. It could broadly include food, clothing, housing, transportation, education and entertainment - whatever. Moreover, spiritual and emotional support, such as the inner life and belief, are included. In a traditional dichotomy men are breadwinners/ women are housewives. I believe that the role of homemaker does not only stand for an actual provider of living essentials, but she is also the heart of family. Therefore, my brief definition of domestic labour is that it includes all the mental and physical efforts made by a housewife/househusband to maintain and develop the family life. These contributions include all spiritual and material support in daily life, for example, food, clothing, housing, transportation, education and entertainment.

CHEN: Do you think domestic labour includes the contributions that are non-financial, but help to maintain a family?

SHIU: Yes, I totally concur on this explanation.

CHEN: How well do you think the provisions in reference to the protection of the homemaker under the Code are being put into action? Is there any case of pre-nuptial agreement?

SHIU: In fact, so far I have never seen any case of pre-nuptial agreements. I doubt that the pre-nuptial agreement can take any action if the marrying parties do not have a common belief about how to manage their future life. You know...lives are probably changeable every minute and every moment. The pre-nuptial agreement is not necessarily so binding on the parties. It is unconvincing that proper protection is given to the housewife/househusband only by means of a pre-nuptial agreement. All I know from being a judge is that the parties give a verbal agreement at most rather than a written agreement, if any. However, the verbal agreement has no legitimacy and it is unenforceable. Ironically, the solemn pledge of love, affection and support between the couples probably become a fleeting illusion when the love story ends in a divorce.

CHEN: How good do you think are the provisions in reference to the protection of homemaker under the Code?

SHIU: Well...the Code provides the default property regime for married couples. This regime can be seen as the way of valuing the housewife’s domestic labour, enabling her to have a share of matrimonial property on the dissolution of marriage. In most cases, the default regime is automatically applied to the majority of married coupes if they do not have made any property agreement before getting married.
The Code enables either party under this regime to have rights to claim for the remainder of matrimonial property, if any, on the dissolution of marriage. However, it deserves to be mentioned that the rights are not applicable to those who adopt other property regimes, such as community of property and separation of estates.

**CHEN:** How good do you think are the provisions in reference to the obligation to pay the living expenses? Are the domestic contributions being taken into account?

**SHIU:** It is quite difficult to implement the provisions in real life only by means of legal language under the Code. The key point is whether people are willing to do what the provisions prescribe. I believe that the marrying parties ought to have a common belief of living together and be ready to share a future life before they decide to give life to each other. For example, agreeing on the division of households. We do not necessarily need the law’s intervention in every minute and moment. But, at least, I think the current law also functions as an educational means to instil respect for the dignity of the homemaker and making homemaking valuable for married couples.

**CHEN:** How well do you think the Code provide protection for the economically weaker party?

**SHIU:** The provision in reference to the protection of the economically weaker party under the Code did not take action very well in a family although the Code states that the couple has a duty to maintain each other. Over the past thousands of years, the rigid roles of men and women have been shaped by traditional rites and moralities. The man is responsible for matters outside the home and the woman for household matters. However, in fact at that stage the position of a homemaker was very high and important in patriarchal society. She was not only mainly in charge of the preparations of the necessities of a household but also managed the life style of the entire clan. Therefore, she played a decisive role of managing the household affairs and won respect from other members within the family. But patriarchy also brought some abuses that overvalued the financial contributions and did not give any value to the homemaker’s domestic contributions. If we could strengthen the concept of duty to maintain each other, the housewife’s domestic labour would probably have a chance to be valued by receiving support from the spouse. However, in Taiwan, people feel it is quite strange to act the role of househusband and the househusbands are probably being laughed at as being dependent on their wage earning wife. The different awareness of gender roles in society is really a difficult issue. I think the problem is that it is all about the cultural and traditional thinking, affecting how people make the division of domestic household and paid work in daily life. Similarly, the duty to maintain each other does not take action well under the Code. It is a cultural issue, not a legal one.

**CHEN:** How well do you think the requirements of applying for a spousal maintenance?

**SHIU:** Very rare...because the requirements of applying for a spouse’s maintenance are very strict so that they prefer to apply for the living expenses rather than spouse maintenance. In addition, the Code provides that either party has the obligation to pay the living expenses according to their economic condition and domestic contributions. We still have difficulty on using a mathematic formula to calculate the value of domestic contributions. The number of women’s participation in paid employment is increasing. However, women’s participation in housework still remains relatively high. Once again, it is also about cultural matters, men are
unwilling to do housework.

**CHEN:** How good do you think is the nature of special allowance?

**SHIU:** So far nobody has come to court and applied for it. I never heard of a case from my other colleagues. Maybe it is because the cultural reason for not doing so. The provision is probably nothing else but the lawmaker’s kindness.

**CHEN:** How good do you think is the distribution of matrimonial property? Would the value of domestic contributions be taken into account?

**SHIU:** I distribute the property according to the provisions in reference to the remainder of matrimonial property under the default property regime. Further, I will take the value of domestic contributions into account in a judicial divorce. I once dealt with a case where the wife acted as the sole role of wage earner due to her injured husband’s inability to work. Also, she has been looking after the children until they had grown up. The husband tried to claim the remainder of matrimonial property when they divorced. She argued that her husband had not made any contributions to the family, either financial or non-financial. I rejected the husband’s claim and made the decision in favour of the wife.

**CHEN:** How good do you think are the regulations of savings insurance investment and retirement pension? Can they be distributed?

**SHIU:** We have already taken the savings insurance investment into account when we distribute the matrimonial property. But I do not think the retirement pensions should be included.

**CHEN:** What about the earning capacity?

**SHIU:** In practice, any tangible or intangible assets are to be divided. It includes the real property, e.g., the land and house. Chattels and valuable goods are also to be divided, such as car and shares. The courts will assess the value of the assets and divide them afterward. But I do not think the future earning capacity can be seen as any type of property and needs to be divided.

**CHEN:** What are the provisions for the claim for alimony?

**SHIU:** There are strict requirements of applying for alimony in a judicial divorce. The court has a discretionary power to decide the amount of alimony on a case to case basis. Unfortunately, the domestic contribution is never being taken into account in an alimony application. With regard to divorce by mutual consent, the court has nothing to do with alimony as the couples do not need the court’s intervention in the divorce settlements.

**CHEN:** How well do you think the Code values the homemaker’s domestic contributions?

**SHIU:** The provisions in reference to matrimonial property regime under the Code are seemingly fair to either party, enabling each party to claim the other’s property on divorce. However, I think the best solution to reach fairness is through the mediation before court and this also saves litigation costs.

**CHEN:** How well do you think the current Code is compatible with the gender
SHIU: Well...still long way to go. We need to strengthen the education of gender equality in family. It would be great to make law reforms from a gender mainstreaming perspective so that men and women benefit equally.

CHEN: How well do you think the current Code looks at both sides of spouses’ interests and family harmony?

SHIU: The provisions under the current Code are meaningful to gender equality in family. In a family, the wage earning husband always has a sense of superiority as he has the ability to share the cost of living, while the housewife has a sense of inferiority as she is in an economically weaker position. In modern society, unfortunately more and more people are keen to pursue fame and fortune. The core values of an entire family, such as homemaking, are totally being ignored. Thus, I think home education and upbringing are hugely important to promote the awareness of gender equality within the family, and then, a stable society will be successfully built.

CHEN: Any opinion you want to add?

SHIU: Well...no, thanks.
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