

NUPTIAL AGREEMENT AS AN INSTRUMENT FOR REGULATING PROPERTY RELATIONS OF SPOUSES IN WESTERN EUROPE

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Abstract

In this paper, the author provides a comparative legal analysis of the legislation of individual countries in terms of the applicable property regimes between spouses and the possibility/impossibility of concluding a nuptial agreement. Namely, the nuptial agreement is considered an achievement of modern law, and one of its principles on which it is based is the possibility of regulating the property relations of the spouses of their own free will. The systems of matrimonial property as well as the possibilities of concluding a nuptial agreement differ in the positive law of different countries. This paper discusses the systems of regulation of property acquired in marriage, as well as the conditions for concluding a nuptial agreement as one of the ways to regulate property relations in the countries of Western Europe. An overview of the legal solutions regarding the property relations between spouses is given. The nuptial agreement, as one of the key achievements of modern law, represents the expansion of the freedom of contract in the sphere of relations that are not exclusively proprietary, such as marital relations. In addition, the paper addresses property relations and nuptial agreements between spouses in the legal systems of Italy, Germany, Austria, France and Switzerland.

Keywords: nuptial agreement, property relations, marital property regimes, countries of Western Europe

BRAČNI UGOVOR KAO INSTRUMENT REGULISANJA IMOVINSKIH ODNOSA SUPRUŽNIKA U ZAPADNOJ EVROPI

Apstrakt

U ovom radu autor daje uporednopravnu analizu zakonodavstava pojedinih zemalja po pitanju važećih imovinskopravnih režima između supružnika i mogućnosti/nemogućnosti zaključenja bračnog ugovora. Bračni ugovor se, naime, smatra tekovinom savremenog prava, a mogućnost uređenja imovinskih odnosa supružnika svojom voljom, jednim od njegovih principa na kojima se zasniva. Sistemi bračne tekovine kao i mogućnosti zaključenja bračnog



ugovora se razlikuju u pozitivnim pravima različitih država. U ovom radu se bavimo sistemima regulisanja imovine stečene u braku kao i uslovima za zaključnje bračnog ugovora kao jednog od načina za regulisanje imovinskih odnosa u zemljama Zapadne Evrope. Dat je pregled zakonskih rešenja po pitanju imovinskih odnosa između supružnika. Bračni ugovor kao jedna od ključnih tekovina savremenog prava predstavlja proširenje slobode ugovaranja u sferi odnosa koji nisu isključivo imovinski kao što su bračni odnosi. U radu se bavimo imovinskim odnosima i bračnim ugovorom između supružnika u pravima Italije, Nemačke, Austrije, Francuske i Švajcarske.

Ključne reči: bračni ugovor, imovinski odnosi, imovinski režimi u braku, zemlje Zapadne Evrope

INTRODUCTION

Regulations in the countries of Western Europe regarding property relations provide for legal and contractual property regimes. Statutory regimes apply in the case when the spouses have not concluded a nuptial agreement. Statutory property regimes can be set up on various principles, from the fact that the regime of joint marital property can be envisaged, to the regime of separation of property of spouses. The statutory property regime may be set as mandatory in whole or in part. A statutory regime may also be provided for an increased value regime, which is a combination of joint and separate property of the spouses. The laws of all countries in question provide for the existence of a nuptial agreement. The nuptial agreement as an achievement of modern law exists in the countries of Western Europe in various variations. The nuptial agreement is defined as a contractual obligation by which the spouses regulate their property relations with respect to the property they acquire during the marriage. What is common to all nuptial agreements is the subject matter of regulation and notarial form. A very important issue in the nuptial agreement is the freedom of contract, which differs according to the regulations of different countries. The freedom of contract in the nuptial agreement ranges from complete freedom, which is limited "only" by imperative norms that regulate public order, to the fact that only a certain, legally stipulated, property regime can be agreed upon by the nuptial agreement. For precisely this reason, concluding the nuptial agreement implies whether or not it leads to the exclusion of the legal property regime. The aim of the research is to analyze the current regulations of Western European countries and to highlight possible similarities and differences in legal regulations in relation to all the above criteria.

Marriage Contract – General Definition

A marriage contract, as an institution of family law, represents an agreement between spouses or future spouses by which they regulate their property relations. By concluding a marriage contract, the statutory property regime between spouses is excluded. The marriage contract falls under the category of contractual (obligational) agreements; however, unlike other contracts, it is, like marriage itself, imbued with emotions, which gives it a unique dimension. "The institution of the marriage contract enables future and current spouses to agree on a regime of separate property and to regulate their relations in accordance with the principle of

freedom of contract, without the previously existing formal limitations" (Pajtić B., *Marriage Contracts in Serbian and European Law*, 2009). The marriage contract is a means of regulating the property relations of marital or premarital partners by which they exclude the statutory property regime and regulate their property relations according to their own free will.

Generally speaking, there are three property regimes that apply to the property of spouses: the joint property system, the separate property system, and a combination of both. The specific features of a marriage contract, as compared to other contracts governed by the law of obligations, are mainly of a family law nature and are as follows:

The contracting parties can only be spouses or future spouses; Time of conclusion – the contract may be concluded either before or during the course of the marriage; The rules of the law of obligations apply to the marriage contract, but it must not be contrary to mandatory provisions of family law; Strictly formal contract – the law prescribes a specific form for the conclusion of this contract and requires its solemnization, i.e., certification by a public notary; It is considered a solemn contract; A marriage contract is also an accessory contract, as it only takes effect upon the conclusion of marriage; The consent of both parties is required both for its conclusion and termination; it cannot be terminated unilaterally; It has an institutional character because it must conform to the fundamental principles and rules of family law; It is a facultative (optional) contract; It is a nominate (named) contract; In essence, it is a commutative legal transaction, although in certain cases it may be aleatory as it concerns property that the spouses do not own at the time of concluding the contract, and whose value and acquisition are uncertain.

In most comparative legal systems, (in addition to the fact that in some of them the law provides for the possibility, and sometimes even the obligation, to choose among several offered property regimes), the provisions of legal regulations in the field of marital-property relations are defined as dispositive. This, practically, means that spouses are allowed to define their mutual rights and obligations in this area differently through a contract (within certain limits), then how those legal matters are regulated by statute (Pajtić B., *Marriage Contracts in Serbian and European Law*, 2009).

Italian legal system

All private law in Italy, including family, inheritance, obligation, property, labor and other laws, is governed by the Civil Code – *Codice civile* (Approvazione del testo del *Codice civile*, RD March 16, 1942, n. 262- CC). According to Kovaček- Stanić, Italian law did not allow nuptial agreements until the reform, as they were considered contrary to public policy since they could influence the spouses in personal decisions such as divorce. On the other hand, agreements that were concluded during the marriage or after its termination were allowed: the regime of separation of property was in force. In addition, spouses may agree that the ownership, management and disposal of joint property will be separate, and that the rules on joint property apply only to individual cases (2002., p. 320). The reform

took place in 1975 when Italian matrimonial law switched from the separation of property regime, in order to protect the constitutional principle of equality, to the community property regime as a legal regime. According to Majstorović, the aim of these legal changes is to reduce the economic and social causes of the weaker position of women in society through legal regulations (2005., p. 43). Article 143 of the CC stipulates that spouses are obliged to make a material contribution to the provision of the family in accordance with their capabilities, working capacity and business environment. This standard is set to the level of a strict norm that must be followed. According to the CC, spouses can choose between the statutory property regime, which entails a regime of joint (or communal) property (*comunione dei beni*) and the alternative regimes of contracted property and the regime of separate property. The community of property system recognizes three types of property: common property, separate property and remaining property that belongs to each spouse during the marriage, and after the termination of the community of property, it is divided between the spouses in equal parts. According to the legal text, the community of property itself consists of the property acquired by the spouses during the marriage, the fructus of special property, the affairs conducted by both spouses and which began after the conclusion of marriage. The management and disposal of common property is regulated by Article 180 para. 1 of the CC, which stipulates that spouses manage and dispose of common property together. In addition, a distinction is made between regular and extraordinary management, where the duties of ordinary management can be undertaken by the spouse without the consent of the other spouse, and the consent of the other spouse is necessary for extraordinary management. The division of common property is regulated by Article 194 of the CC and according to it there is a presumption of equal shares of the spouses, unless otherwise agreed. Spouses can also decide on one of the alternative property regimes, which implies a change in the legal property regime. The condition for the validity of the amendment of the legal property regime is defined in Article 210 of the CC stating that there is no derogation from the provisions relating to the management of goods that are part of the common property, as well as to equality in relation to the goods that would constitute the common property or to the goods that cannot be counted as common property. One of the subsidiary regimes is the separation of property regimes. Namely, Article 179 of the CC provides that each spouse may have his or her own separate property. Special assets include property acquired before the marriage, as well as after the conclusion of the marriage by means of unencumbered legal transactions, property intended for personal use, property for the performance of activities and property acquired on the basis of a claim for damages.

Nuptial agreements are defined in Art. 162 CC, which provides that spouses are free to regulate the subject matter of the nuptial agreement. There is a restriction here that the subject matter of the contract must be within the limits set by law. This would mean that imperative legal norms in this area must be respected. According to these provisions, spouses could also agree on the application of foreign law to mutual property relations, as there is no restriction in this regard. "The elected, i.e. contracted foreign property regimes, would probably then always have to be

subsumed under the models of property relations as defined by the Italian legislature." (Majstorović, 2005). According to the Italian law, the validity of the nuptial agreement is a mandatory condition in the form of a public document. If it is not made in the form of a public document, the nuptial agreement will be null and void. The specificity of the condition of the form is reflected in the existence of *a margine dell'atto di matrimonio*, which implies that the fact of conclusion, the date of conclusion and the name of the notary public who certified the nuptial agreement must be indicated on the margins of the nuptial agreement. According to the Italian CC, the modification or termination of the nuptial agreement requires the permission of the court or other authority, which is regulated by Article 517 of the aforementioned Code. The freedom to conclude a nuptial agreement in Italy is limited between the choice of models and types of contracts offered by law. Therefore, an agreement that is not standardized cannot be concluded. "After all, it is no coincidence that in comparative family law, two terms that are not synonymous are often used—and not interchangeably in this context: agreement and contract. In Italian legal doctrine, there is an increasing reflection on the possibility of introducing atypical contracts." (Ruggeri & Winkler, 2019, p. 185). Italian law on matrimonial property relations is based on a balance between the protection of family values and contractual freedom, with a clear priority given to the statutory regime of community property in order to achieve equality. Marriage contracts are permitted but strictly formalized and limited to the regimes prescribed by law. The system is traditional, but open to further development through legal doctrine and case law.

German legal system

Property relations between spouses in German law are governed by the German Civil Code (Bürgerliches Gesetzbuch, 1896 - BGB), paragraphs 1408-1413. Family law, and therefore the part on property relations, are regulated in the fourth book. With regard to property regimes, the BGB gives spouses the opportunity to choose between several regimes that they can partially or completely change by means of a nuptial agreement. The *Verwaltungsgemeinschaft* was an institute of a community of management that existed according to the BGB, which implied a regime of separation of property of the spouses, but also a community of management. Changes in the BGB took place in 1958, when three property regimes are introduced between spouses: (1) the regime of increase in value, (2) the regime of community of goods, and (3) the regime of separation of goods. According to Mladenović and Panov, the basic property regime determined by law is the regime of increase in value, while subsidiary property regimes can arise on the basis of the nuptial agreement when the spouses can agree to regulate their property relations in marriage either as the acquisition of joint property or as the acquisition of separate property (2003, p.366). This regime is based on the principle that each spouse keeps his or her property for himself, as well as that the initial and final assets are taken into account. In fact, the system of increase in value is applied only when the marriage is dissolved. The initial property is the property that the spouse brought into the marriage at the beginning of the marriage, and the final property is the one

that exists at the time of the termination of the marriage. In the community regime, community property is considered to be all property acquired by the spouses during the marriage, and even property inherited during the marriage. "Special property and property that each spouse keeps for himself or herself are exempt from this. A special property, *sonderguf*, is one that is non-transferable by legal transaction. The spouse manages it independently, and an example of such property could be personal easements." (Hrabar, 1994).

BGB allows the conclusion of a nuptial agreement with certain limitations. One of the limitations relates to the fact that the spouses cannot agree on the application of a foreign or invalid law by means of the nuptial agreement, because in cases of property relations between the spouses, only German law is applied as valid, thus, the principle of territoriality is applied. The provision on the application of foreign law in the nuptial agreement would be null and void, unless one of the spouses lives abroad, in which case the application of the law of that state can be agreed. The nuptial agreement excludes the application of the legal regime of increase in value. The agreement can be concluded even before the marriage is concluded, but it does not begin to have legal effect until the conclusion of the marriage. If the spouses file for divorce within one year from the date of conclusion of the agreement, the provisions of the agreement will not apply, but the provisions of the legal property regime. The spouses in the contract can agree on the terms or a deadline. The same legal rules apply to the nuptial agreement as to all other agreements. The formal requirements for concluding the nuptial agreement are reflected in written form, the simultaneous presence of both spouses, certification by a notary public and a solemn form that prevents possible abuses. The agreement may be concluded by persons who have full legal capacity or persons with partial legal capacity with the consent of the guardian or legal representative. According to Pajtić, the German Civil Code gives the spouses an authority that allows them to agree on the choice of one of the two legal forms of the nuptial agreement, the regime of separate property and the regime of joint property (2009, p. 270). It is specific to mention that the agreed regime of separation of assets must be terminated by settlement in order to conclude a new agreement or apply a legal property regime. German law is characterized by a balanced combination of contractual freedom and legal certainty. The statutory regime of accrued gains protects the interests of both spouses, while the marriage contract allows for precise regulation of relations, subject to strict formal requirements and limitations in order to protect third parties and the weaker party.

Austrian Legal System

The Austrian Civil Code was adopted in 1811 (Allgemeines Bürgerliches Gesetzbuch, No. 1-6/181- NBG). According to it, the rule is that there is a system of separate property between the spouses in terms of property relations, which the spouses can change by contracting a system of joint property. In this regard, even the will of only one party is sufficient. The NBG clearly indicates in paragraph 1233 that the marital bond in itself does not yet establish a community of goods between the spouses. A special contract is required for this. According to Ignjatović, each spouse remains the owner of the property he or she brought into the marriage and disposes of it independently (2008, p. 221). In addition to the fact that spouses are

the sole owners of the property they acquire during the marriage, they are solely responsible for their debts. Thus, there is no liability of one spouse for the debts of the other spouse. This liability can be agreed, but it is not assumed according to the statutory property regime. The same rule applies to the management and disposal of property. Each spouse manages and disposes of his or her own property, unless otherwise agreed. In theory, we come across justifications for such a property regime. In this sense, Majstorović states that this regime does not prevent the joint management of property and that its advantage is precisely that it gives greater protection to the special property of the other spouse and circumvents the (unfair) possibility that after the termination of the marriage, the spouse who has not contributed anything or has contributed very little to the marriage is entitled to half of the property (2005, p. 102).

Paragraph 1217. of the Austrian Civil Code (NGB) regulates nuptial agreements, *ehepakte*, stating that they are concluded most often for the purpose of arranging a dowry, morning gift, community of goods, administration and enjoyment of one's own property, order of inheritance or in the event of death of a certain lifelong usufruct of property and widow's support. There are two types of nuptial agreements: the *generelle ehepakte* agreement is an agreement on the application of the legal regime of separation of property, and the agreement *spezielle ehepakte* by which the spouses fully regulate property relations at their own will with the exclusion of the legal regime. Paragraph 1230 of the NGB refers to another institute, i.e. material benefit, which is defined by the nuptial agreement. "It is a "fidelity fee", a traditional institution of matrimonial law, comprised of goods given by the husband or a third party in favor of the bride, in order to increase her dowry. The wife can enjoy this property only after the death of her spouse. Only in that case do these goods belong to her" (Pajtić, 2009b, p. 270). As far as the nuptial agreement itself is concerned, by excluding the statutory property regime, the spouses independently determine the property regime that they will apply, and all the general provisions of the NGB that apply to agreements in general apply to this agreement. The agreement can be signed by their authorized representatives instead of the spouses, and can be signed before or during the marriage. It should also be noted that nuptial agreements under the Austrian law can be concluded with an indication of the terms or a deadline. As in most countries, compliance with the notarial form is necessary for the validity of the nuptial agreement. According to Majstorović, the reasons for such a determination can be found in the following: "On the one hand, it is very valuable for third parties, primarily for possible creditors of spouses, on the other hand, the spouses themselves are additionally protected. If the required form is not fulfilled, the nuptial agreement is null and void" (2005, p. 81). The contract is entered in the commercial register, which respects the principle of publicity. It is interesting to note that in order to modify or terminate a nuptial agreement in Austria, it is necessary to comply with the terms of the form similar to those for concluding an agreement. "When they conclude a nuptial agreement, the spouses do not immediately become co-owners, but a deed of transfer is required that

determines co-ownership of the joint property. The legal consequence of such a solution is that neither spouse can dispose of the property independently, because co-ownership must be registered in the land registry when it comes to real estate" (Radovanov & Počuča, 2010, p. 108). As for liability for debts in the contractual regime, it also depends on the method specified in the nuptial agreement. If it is a universal union (universelle Gütergemeinschaft), then there is responsibility for the debts of the spouses to each other, if it is not this form of union, but a limited union (beschränkte Gütergemeinschaft) is agreed, then one spouse is not responsible for the debts of the other spouse. The universal community of property implies that all property—whether acquired before or during the marriage—becomes joint property of the spouses, whereas the limited community of property includes only specific assets, most commonly those acquired during the course of the marriage. NBG treats nuptial agreements in the same way as all other agreements, so all general provisions governing the agreements, such as rules on general legal capacity, defects of will, amendments or termination of agreements, apply to them. "Nuptial agreements may be amended an unlimited number of times during the marriage, provided that the interests of the creditors must not be infringed by the amendment of the contract" (Gschnitzer, 1954, p. 208). Based on the analysis of the aforementioned provisions, it can be concluded that the Austrian system of property relations between spouses is based on the principle of separation of property as the default legal regime, whereby marriage does not automatically create a property community between the spouses. Unlike many European systems, which recognize the community of acquired property as the statutory regime (e.g., Switzerland, Germany, Serbia), Austria explicitly requires the conclusion of a marriage contract to establish a community of property, thereby affirming the primacy of contractual will and the freedom to regulate mutual relations.

Swiss Legal System

The area of property relations between spouses in Switzerland is regulated by the Swiss Civil Code of 1907, which came into force in 1912 (Schweizerisches Zivilgesetzbuch - SZ). In 1984, Switzerland passed a series of regulations that succeeded in achieving equality of spouses, since this equality did not exist before by law, and that the dominant position was held by the husband. In Switzerland, three property regimes are applied: the statutory regime of participation in acquired property (Errungenschaftsbeteiligung) during marriage, and two contractual regimes—community of property (Gütergemeinschaft) and separation of property (Gütertrennung). "The community of acquired property regime is considered the primary legal regime, and the other two regimes are subsidiary" (Radovanov & Počuča, 2010). Under the statutory property regime, all property of the spouses is considered joint, and the spouse who claims otherwise must prove it. Art. 200 para. 3 contains an explicit provision that all property of the spouse is to be considered acquired property until proven otherwise. However, there is also the spouse's own, i.e. special property, which includes property that the spouse had before entering into marriage, as well as property for the personal use of one of the spouses, property acquired by inheritance or gift, and property received in exchange for any of the above things. When it comes to the management and disposal of joint

property, it is prescribed that each of the spouses independently manages his/her share of the joint property as well as his/her own property, and that with regard to the property on which co-ownership is based, one spouse may not dispose of someone else's part without the consent of the other spouse. When it comes to the current needs of the family, it is considered that the spouses can represent each other for the duration of the marriage. The Swiss Civil Code does not recognize a combination of property regimes as well as the establishment of a specific property regime only on a part of the property. Namely, the property regime agreement always applies to the entire property of the spouses. In addition to the community of acquired property, there is a regime of separation of property and a regime of community of property. When we talk about the separation of property regime, we can say that it arises, according to Swiss law, on the basis of the law (subject to the fulfillment of certain prerequisites), on the basis of a court decision and at the request of one or both spouses and on the basis of a nuptial agreement that arises by agreement of the spouses. In the case of the division of joint property, a system of increase in the value of property is considered relevant, which is similar to the German method. The method of division is regulated by Article 206 of the Criminal Code. The method is based on the fact that the increased value is considered to be the difference between the initial value at the time of the request and the final value at the time of distribution.

“The community of property regime may arise only on the basis of an agreement between the spouses contained in the nuptial agreement. This regime implies that the entire property of the spouses, both joint and separate, is covered” (Radovanov & Počuča, 2010, p. 182). Therefore, the nuptial agreement fully exists in the Swiss law. In order for it to be valid and have legal effect, it must meet the requirements in terms of the spouse's capacity for judgment, the approval of the legal representative (in cases where the contract is concluded by a minor or a person under guardianship) and in terms of form, which includes written form and public certification of the contract. If any of these conditions are not met, the agreement is not legally valid. In addition to the above-mentioned Code, the general rules concerning agreements and are applied accordingly to the nuptial agreement are the Swiss Code of Obligations of 1911. “Article 19 of the Swiss Code of Obligations has limited the contracting parties both with the obligation to comply with regulations of a coercive nature and respect for public order, as well as the necessity of behavior in accordance with good customs (in legal transactions) and rules related to personality” (Pajtić, 2010, p.375). The Swiss legal system in the field of matrimonial property relations represents a balanced and consistent model that combines clear statutory presumptions, strict formal security, and limited but effective contractual freedom. It can be said that the system is more conservative in terms of flexibility, but it offers greater predictability and legal stability, making it particularly suitable for property planning and the protection of the family in legal transactions.

French Legal System

Property relations between spouses in France are regulated by the Code Civil (CC) of 1804, formerly the Code Napoleon. According to it, the legal property regime was based on the common property of all movable property, regardless of when they were acquired and the property acquired during the marriage, while for real estate acquired before the marriage, the rule was that they represented the separate property of the spouses. "The contemporary French matrimonial property regime is one of the most advanced matrimonial property regimes in comparative law" (Petrušić, 2002, p. 212). Changes in French family law did not occur until 1965, when a significant reform took place. These amendments to the statutory property regime determine the community of acquired property of the spouses during the marriage. All property acquired before the marriage, from then on, has remained in existence as separate property of the spouses. Another, very important change concerned the right of women to independently manage their property, which was given to them by these changes. The next major reform took place in 1985 when women and men were equal in terms of management and disposal of property. According to the French CC, "the conclusion of the marriage does not change the previous property regime (i.e. marriage does not result in the creation of common property)" (Jožef, 2002, p. 344). The Code Civil is of the opinion that marriage does not affect the property relations of the spouses, but at the same time this regulation ensures the right of the spouses to mutually change the legal property regime – the regime of separate property (Pajtić, 2009, p. 273). The CC provides for three property regimes: *Régime en communauté* - the regime of common property; *The régime de séparation de biens* (the regime of separation of property) and the *régime de participation aux acquits* (regime of participation in the matrimonial property). The management and disposal of the acquired property is the right of both spouses, so the legal affairs of one spouse are always binding on the other spouse. The management and disposal of the acquired property can be conducted only by one spouse with the authorization of the other.

CC provides for the existence of the nuptial agreement. However, the agreement cannot exclude the basic property regime. According to Kovaček-Stanić, "spouses cannot enter into an agreement that excludes the basic property regime, according to which they are obliged to cover household expenses, and which provides for provisions on the upbringing of children in the family home" (2008, p.173). The nuptial agreement in France, according to CC article 1394, must be outlined in the form of a notarial deed and the presence of both spouses at the same time at the conclusion of the agreement or by means of a special authorization of attorney is required. After the marriage, the nuptial agreement may be amended on the basis of a request by one spouse in the case of division of property or other judicial protective measures, or on the basis of a joint application of both spouses. "The nuptial agreement must be formulated before the wedding, but it comes into force on the day of the wedding. Up to the day of the wedding, the spouses can make changes to the nuptial agreement by concluding a separate agreement, in the same way and under the same conditions that apply to the conclusion of the nuptial agreement. An amendment is not valid if all those persons who participated in the conclusion of the nuptial agreement did not participate in the conclusion of the agreement." (Petrušić,

2002). The restriction of freedom of agreement is envisaged as a general i.e. the nuptial agreement should not be contrary to good customs. In addition, the provisions of the CC expressly prohibit spouses from derogating from mandatory legal rules governing certain family and inheritance relations by means of their nuptial agreement. According to CC Article 1397, paragraph 6, the decision on the approval of the amendment of the nuptial agreement acquires legal effect against the spouses at the time of its adoption, and with regard to third parties, the legal effect arises only three months after the amendment was entered into the certificate of marriage, unless the conscientious spouses in the legal transactions they conclude with third parties explicitly state that there are changes in the property regime. With regard to the choice of the property regime, French law provides for the freedom of the spouses, both with regard to the choice of the property regime and, subsequently, with regard to the amendment of that regime. It is important for spouses to follow the rules. "Spouses can change the property regime only after the expiration of two years of application of one regime. This change must be made in the form of a notarial deed and the consent of the court is required. The court evaluates whether the change in the property regime is in the interest of the family and only when it determines that it gives its consent" (Ignjatović, 2008, p. 228). "About 10% of spouses decide to conclude a nuptial agreement, as a rule, those who have property of greater value or those who have already been married" (Hamilton et al., 2002, p. 268). The French system of matrimonial property relations allows for a high degree of spousal autonomy, clearly defines the various property regimes, and emphasizes the strong role of notaries and the courts. It ensures the protection of the family and the interests of third parties through strict formal requirements and legal effects. This system represents one of the most developed models in contemporary comparative law, striking a balance between contractual freedom and the protection of family values.

CONCLUSION

Property regimes between spouses differ to a certain extent in the positive legal legislation in the countries of Western Europe. The main differences include different systems of matrimonial property and different restrictions on the conclusion of the nuptial agreement. What is common to all the analyzed legislation is that the nuptial agreement as an institute exists in the applicable regulations. Common characteristics in the legal systems of Western European countries include: the existence of a statutory (default) property regime, the possibility of contractual arrangements, limitations regarding such arrangements, the necessity of complying with formal requirements and notarization, protection of the weaker party and third parties, and the growing importance of contractual freedom within systematic limitations. When we talk about the differences that exist in terms of concluding the nuptial agreement, they are reflected in the fact that the restrictions on contracting the application of foreign law are regulated differently, so in the Italian law it is

allowed, while in Germany the contracted application of foreign law is not allowed. There are also differences in terms of freedom of contract and the subject matter of the nuptial agreement itself. In the German law, there is no complete freedom of the spouses as to the subject matter of the nuptial agreement, but the spouses must opt for one of the two existing legal regimes, while in Austria, for example, this is not the case, where the statutory property regime ceases to apply upon the conclusion of the nuptial agreement. It is also specific that in the Swiss law, the system of community of acquired property can only be determined by an agreement, and this is a solution that differs from other countries. In the French law, the conclusion of the nuptial agreement must be in the interest of the family, and this interest is examined by the court and makes a decision on it, with the provision that there are also numerous restrictions in terms of the scope of the nuptial agreement and the impossibility of derogating from mandatory legal norms. What is common to all the analyzed legal systems is that this institute has not sufficiently achieved its legal reach and that it has not been sufficiently used by the spouses.

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REZIME

U većini zemalja imovinski odnosi između supružnika zasnivaju se na konceptu dispozitivnosti. U ovom radu se ispituje uporednopravna analiza pojedinih zemalja po pitanju aktuelnih imovinskih režima između supružnika i mogućnosti/nemogućnosti zaključenja bračnog ugovora. Naime, bračni ugovor se smatra tekovinom savremenog prava, a principi na kojima počiva savremeno pravo je sama mogućnost uređenja imovinskih odnosa supružnika sopstvenom voljom. Sistemi bračne imovine kao i mogućnosti sklapanja bračnog ugovora razlikuju se u pozitivnim pravima različitih država. U ovom radu se ispituju sistemi uređenja imovine stečene u braku kao i uslovi za zaključivanje bračnog ugovora kao jedan od načina regulisanja imovinskih odnosa. U pogledu imovinskih odnosa između supružnika data su zakonska rešenja. Bračni ugovor je jedno od ključnih dostignuća savremenog prava i kao takav predstavlja proširenje slobode ugovaranja na sferu odnosa koji nisu isključivo svojinski, kao što su bračni odnosi. U ovom radu se ispituju imovinski odnosi i bračni ugovori između supružnika u pravima Italije, Nemačke, Austrije, Francuske i Švajcarske.