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The Legal Marital Property Regime According to the *Projet* of the French Commission for Revision of the *Code Civil**

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Among the problems presented by the proposed revision of the *Code Civil*, one of the most important and pressing, as well as the most delicate, concerned the legal marital property *régime*. The problem is important because the system adopted will apply to all persons married without entering into a marriage contract, that is, to the vast majority of married persons. French law, of course, recognizes the principle of freedom in marriage contracts, and those who wish to modify the legal community property *régime* or submit to a different system (separation of property, dotal *régime*) may execute such contracts before notaries. But as a matter of fact such contracts are rare. The problem is parti-

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* Translated by Donald J. Tate, Editor-in-Chief, Louisiana Law Review.

The purpose of the Commission for Revision of the French *Code Civil*, created by the decree of June 7, 1945, is to prepare a general revision of the *Code Civil*. Placed under the presidency of M. de la Morandière, Dean of the Faculty of Law of Paris, Member of the *Institut*, the commission consists of twelve members, three professors of the Faculty of Law of Paris, three members of the *Conseil d'Etat*, three judges, and three attorneys or ministerial officials. It consists also of a secretariat composed of a Secretary-General, a professor of law, and three secretaries, either judges or attorneys.

The commission has already established a preliminary *projet* of the preliminary book and the first book of the future *Code Civil*. The preliminary book contains particularly the general provisions concerning the application of laws, the status of foreigners, and the international conflict of laws. The first book contains provisions respecting physical persons and the family, and especially the rules concerning the status of persons, marriage and divorce, marital property *régimes*, filiation, and the protection of minors and other persons lacking capacity. The commission is presently studying the provisions of Book II (successions, donations and testaments).

The works of the commission are published by the Librairie du Recueil Sirey, 22 rue Soufflot, Paris (V^e^).

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cularly delicate because the legal system adopted must suit families whose habits, social levels, and ways of life differ profoundly.

As a matter of fact, while recent laws (law of February 18, 1938, and law of September 22, 1942) have given the wife full capacity and have rendered the juridical relations between spouses somewhat more flexible, the legal marital property system is still the one adopted in 1804, the community of movables and acquisitions. Under this system the husband has extensive power over the property of both spouses; and the wife, although she has legal capacity, plays only a minor role. This discord between the principle proclaimed by the legislator and the actual position of the married woman has not escaped attention. During recent years, various proposals to modify the present legal *régime* have been submitted to the parliament.[1] It is therefore not surprising that the Commission for Revision of the *Code Civil* devoted numerous sessions—both of sub-committees and of the plenary commission—to the examination of the problem and the drafting of provisions for the system selected.[2]

I

It was necessary for the commission to resolve at the outset the preliminary question whether it should contemplate a change in the community property system established by the *Code Civil*, a system which, at least in essential principles, has not been modified since 1804. This is, of course, the community of movables and acquisitions. It provides for both common and separate property. Only the immovables belonging to the spouse at the time of the marriage and those acquired by the spouse during the marriage by inheritance or donation remain separate property. On the other hand, the immovables acquired during the marriage under onerous title and *all movables*, regardless of their origin and the date of their acquisition, are common property. As under all community property systems, the husband has far greater powers than the wife. He has the administration of both his separate property and the common property and—at least in principle—can freely dispose of one and the

1. The most recent proposals contemplate the substitution of the *régime* of sharing in acquisitions for the present legal *régime*. See particularly the bills introduced by M. Monneville (1946), M. Caillavet (1950), and by Mme. Poinso-Chapuis (1951).

2. See TRAVAUX DE LA COMMISSION DE RÉFORME DU CODE CIVIL ANNÉE—1948-1949, 333 *et seq.* (1950); TRAVAUX ANNÉE—1949-1950, 123 *et seq.* (1951); TRAVAUX ANNÉE—1950-1951, 351 *et seq.* (1952).

other. Moreover, he has the enjoyment and administration of the wife's separate property, but he cannot dispose of it. Consequently, under this system, the wife has very limited powers. She can dispose of only the naked ownership of her separate property, which is of little practical importance.

This system, established by the Custom (*coûtume*), was retained without difficulty at the time of the redaction of the French Civil Code, since in 1804 it was still suited to the nature of fortunes and the social position of the wife. In that period, immovables formed the essential and stable element of private fortunes and it was considered desirable to keep this element within the family. The system adopted, by excluding the immovables from the community, achieved the desired result. In view of the small value of movables, it was not considered objectionable to include them in the community and divide them between the spouses upon dissolution of the marriage. Moreover, this method had the advantage of avoiding the difficulties of proof often involved in determining the origin and composition of the movables belonging to each spouse. The *régime* adopted, in assigning the wife a limited role in the management of the family property, also reflected the customs of the era. In that period the wife, who lacked juridical capacity, took little part in business and social activities.

It is precisely in regard to these two features that criticism of the community property *régime* is today becoming strong. In the first place, the inclusion of the spouses' movable property in the community does not correspond to the present nature of private fortunes or to the wishes of the interested parties. The considerable development of movable fortunes since 1804 no longer permits viewing movables as negligible; the ancient adage, *res mobilis res vilis*, does not fit our times. Besides movables proper—already more important, generally, than in the past—movables include transferable securities (stocks or debentures of commercial and industrial companies, and government bonds), which are of considerable value today, and commercial enterprises, the importance of which has likewise increased with the development of commerce and industry. Moreover, inclusion of these things in the community and their division upon dissolution of the marriage no longer seems equitable. This inequity is evident when the fortune of one of the spouses consists of immovables and that of the other, equally valuable, consists exclusively of movables. Is it not inequitable that the latter is

obliged to divide his fortune with the other without receiving a counterpart?

Furthermore, the system of community of movables and acquisitions, its critics say, no longer conforms to the present position of the wife. In our day, the wife participates in social life. She is advocate, physician, and civil servant. She manages industrial and commercial enterprises. In the field of law, she has won political equality and full civil capacity. Why then, ask these critics, does the woman, who is the man's equal in the social sphere, continue to be regarded in the household as a person lacking capacity, subject like a minor to a sort of tutorship of the husband? Undoubtedly, there is some exaggeration in this last criticism. In harmonious families, the wife is by no means conscious of being under the husband's tutorship. All important decisions are the product of common accord and, generally, the wife knows quite well how to make her point of view prevail.

Moreover, it is important to note that certain Code provisions or ancillary laws assign the wife a more important role than that which the principles of the community *régime* seem to give her. Thus the Code itself requires the concurrence of the wife in a sale of immovables by the husband—the wife must join in the sale in order to renounce her legal mortgage. Since the enactment of a law of September 22, 1942, modifying article 1422 of the *Code Civil*, this concurrence is likewise required for all donations of common property by the husband. The wife also enjoys certain powers, either under certain laws (power to bind the husband for necessities of the household, possibility of having a bank account opened) or by virtue of judicial authorization (possibility of obtaining authorization to represent the husband under article 219 of the *Code Civil*). Finally, it must be noted that, since the enactment of the law of July 13, 1907, the wife who pursues a calling separate from that of her husband may dispose freely of the things she acquires with her earnings (the system of *biens réservés*). However, according to an important body of opinion, the powers thus conferred upon the wife are still greatly inadequate and profound reforms are still needed.

II

Agreement, therefore, was easily reached on the need for revising the legal marital *régime*. But the next difficulty lay in selecting the system to be substituted for the community of

movables and acquisitions. To meet the criticisms of the existing *régime*, it was necessary that the new one should, on the one hand, permit each spouse to keep as separate all of his or her property, both movable and immovable, and, on the other, assure the wife more independence from the husband. Among the systems fulfilling these two requirements are notably the *régime* of separation of property and the *régime* of sharing in acquisitions.

The *régime* of separation of property has an immediate appeal in its simplicity. Each spouse remains owner of the property which he owned at the time of the marriage and of that which he acquires thereafter; he has the administration and enjoyment of this property. Consequently, neither a settlement nor a partition takes place upon dissolution of the marriage. This *régime* also has the advantage of assuring the wife complete independence and of making her, in the management of the family interests, the equal of her husband. Moreover, it has been emphasized that the system of separation of property is the legal *régime* in numerous foreign countries.

However, many jurists consider that this *régime* is not fully satisfactory and, indeed, that it has serious disadvantages. In the first place, it is emphasized that its alleged simplicity is more apparent than real. As a matter of fact, upon dissolution of the marriage, the *régime* of separation of property requires a settlement for the same reason as do all other *régimes*. This settlement is generally difficult, owing to the inevitable intermingling of the property of the spouses. It is frequently asserted that, owing to negligence or inexperience, married persons under this system often have but one bank account. How could one in such a situation determine, except arbitrarily, what belongs to each spouse? Furthermore, it is said, if the *régime* of separation of property confers independence upon the wife in principle, it still does not, in fact, assure the protection of her property. As indicated above, the wife often leaves the management of her property to the husband and permits him to make purchases and sales of movable assets without retaining evidence of the transactions. Upon dissolution of the marriage, she is frequently faced with the impossibility of establishing what her property is. Thus, her situation is worse than that of the wife under the community system. Finally, the most serious and most repeated criticism of the *régime* of separation of property is that it fails to provide for the spouses' sharing in the property accumulated during the marriage. The sharing of gains is indeed one of the fundamental

elements of the French tradition. A system which does not provide for sharing would not be readily accepted, especially since the rights of the surviving spouse are so restricted in French law (precisely because the community property system exists). Undoubtedly this difficulty could be overcome by joining to the *régime* of separation of property a community of acquisitions. But then the *régime* of separation of property would become a complex system, and experience seems to indicate that it would not function satisfactorily.

The system of sharing in acquisitions seems to be a perfection of the *régime* of separation of property. It is a new system, initially inspired by Swedish legislation. It has been adopted, not only by Sweden, but by various other countries, and, notably by Colombia in South America. This *régime* was also studied in France by a commission formed at the Ministry of Justice in 1925; and a government bill, submitted in 1932 but not passed by the legislature, proposed its adoption.

This system ingeniously combines the *régime* of separation of property with the community property system limited to acquisitions. During the marriage, the spouses live as if they had been married under the *régime* of separation of property pure and simple. Each administers the property he owned when married and the property he acquires thereafter and disposes of one and the other freely. At the dissolution of the marriage, however, a mass is formed consisting of all the property acquired during the marriage by either spouse. This mass of acquisitions is divided equally between them. But the partition, in principle, is not in kind but solely according to value, each spouse having the right to keep his acquisitions on condition that he account to the other for the value of the part to which the latter is entitled. This system offers certain advantages of the two systems whose principles it combines. Like the *régime* of separation of property, it assures the spouses independence during the marriage. Like the community *régime* limited to acquisitions, it provides for sharing by both spouses in the savings made during the marriage.

However, this *régime* has provoked various criticisms. First of all, critics have said that it is a mere product of the mind and has not yet undergone, at least in France, the test of experience. They have also objected that it is a complicated system which will not function satisfactorily unless it is used by experienced spouses; it is especially dangerous for the wife, who,

from inexperience, will leave the management of her property to the husband. Finally, they have said that this system is best suited to spouses who pursue independent callings or have separate sources of income—which is not the case most frequently encountered. For example, the wives of working men, small businessmen or farmers usually do not engage in pursuits which provide them separate income. In cases of this type, and they seem the most numerous, the system of sharing in acquisitions seems poorly adapted to the conditions under which the spouses live.

III

Consequently, a majority of the commission favored a third system—the community limited to acquisitions—although some members were firm believers in one or the other of the systems above discussed. The commission was of the opinion that the system of community limited to acquisitions was the one best suited to most spouses at the present time. In those families where the spouses work together (farmers, working men, small businessmen), the *régime* reflects, in simple fashion, the unity of interest existing between them. In families where the husband alone works, it allows the wife to share in the savings which result from good management of the household interests. On the other hand, since the community is limited to acquisitions, each spouse retains as separate all property, movable or immovable, belonging to him prior to the marriage and all property coming to him by succession or donation. Thus, the community system limited to acquisitions escapes, on this score, the criticisms of the existing *régime*. Furthermore, the commission believed that the community system limited to acquisitions would find ready public acceptance, because it is already the system most often adopted by spouses entering into a marriage contract. However, the new legal system differs considerably from the community of acquisitions presently existing as a contractual system under the *Code Civil*. The commission gave consideration to certain criticisms addressed to this latter *régime* by the proponents of the *régime* of separation of property and the system of sharing in acquisitions. Accordingly, while preserving the framework of the traditional system, the commission sought to suppress or attenuate certain provisions now under criticism.

In the first place, in order to give expression to the evolution of the wife's social and juridical position, the commission

sought to augment her powers in the management of the family interests. The commission even wished to give the wife the same powers as the husband; but if such a reform seemed practicable in the personal relations of the spouses either between each other (fixing of domicile, pursuit of a calling) or between themselves and their children (paternal authority), it did not seem possible in the management of the family's pecuniary interests, in view of the difficulties which could thereby be created in the relations of the spouses with third parties. However, although the preliminary projet continues to assign the husband the preponderant role, it increases the wife's participation in the management of the common property and the administration of her separate property by requiring her to join in all major juridical acts.

The preliminary projet provides that the husband cannot, without the wife's consent, dispose gratuitously of the common property nor dispose, even by onerous title, of certain important property (immovables, commercial enterprises, movables needed for the family's current living or for the pursuit of the spouses' common calling). The wife's consent is likewise required for certain other major juridical acts (collection of capital, disposition of patent and trademark rights, copyrights, and artistic property rights, leasing of immovables or commercial enterprises).

The commission even considered requiring the wife's consent for the alienation of securities belonging to the community. But by reason of the multiplicity of transactions in which transferable securities may be involved and the rapidity with which these transactions must sometimes be made, it seemed to the commission that the need for securing the wife's consent would result in excessive inconvenience for the spouses which might be detrimental to their interests.

Although the husband remains the administrator of the wife's separate property, she nevertheless enjoys a right of control over the major juridical acts which the husband, as administrator, may be called upon to make. The consent of the wife will be required for the leasing of her most important separate property (immovables and commercial enterprises), for the transfer of interests in patent and trademark rights, copyrights, and artistic properties, and, finally, for the collection of her separate capital. Thus the husband will no longer be able to abuse his power to execute acts prejudicial to the wife, as, for example, in case of separation in fact or on the eve of a divorce. Moreover,

the *projet* is not confined to protecting the wife against the husband's abusive exercise of his powers but protects her also against his malicious refusal or inaction. In such cases, the *projet* permits the wife to obtain authority to act from the court, if the contemplated act is justified by the family's interests.

The wife's role in the management of the family property having thus been considerably enlarged, the commission considered it unnecessary to preserve the special *régime* (*biens réservés*) allowing the wife to retain as separate the property acquired by her in pursuit of a professional activity. This system had been instituted solely by reason of the wife's want of control over the ordinary community property. Having given the wife effective powers, the commission believed it inadvisable to preserve this special system, which had created serious problems and which had been little used in practice.

In the second place, the commission also sought to avoid, as well as possible, another disadvantage of the community *régime*, namely, the need for a partition of the common property upon dissolution of the marriage. In most cases this partition is a difficult operation, the results of which are not always satisfactory. If the partition is made in kind, it is not always possible to assign each claimant the property he wishes to retain, and the drawing of lots, required in certain cases by law, usually leaves all interested parties discontented. If the partition cannot be made in kind, resort to public auction becomes necessary and this usually takes the property out of the family. In keeping with the present tendencies of the legislation and the provisions already in force with respect to agricultural enterprises, the commission sought to exempt from the drawing of lots or the public auction certain goods which the claimants, and especially the surviving spouse, may have a great interest in keeping. This purpose was applied particularly to the industrial, commercial or agricultural enterprise which provided the livelihood of the spouses, and the house or apartment in which they lived. The preliminary *projet* provides that the surviving spouse shall have the right under certain conditions to have these things adjudged to her preferentially in the partition. Of course, the value of this property will be fixed as of the day of the partition so that the children or other heirs will suffer no detriment.

The preliminary *projet* introduces into the community of acquisitions numerous other reforms of lesser importance which it is not possible to analyze here. In preparing the *projet*, the

commission sought to resolve all difficulties which experience had revealed in both the active and passive components of the community, its administration and its liquidation.

Finally, it should be noted that, according to the preliminary *projet*, the marital system adopted by the spouses at the time of the marriage is no longer an immutable *régime* which governs the marriage until its dissolution. Abandoning the principle of immutability of marriage contracts, the preliminary *projet* allows the spouses to modify, under judicial supervision, the marital *régime* they adopted when the rules of that system prove antagonistic to the family's interests. This important reform seems likely to introduce much more flexibility into the operation of marital property systems by permitting the spouses to submit, during the marriage, to the system which best corresponds to their respective interests.

In selecting the new legal system and specifying its mode of operation, the commission, like the redactors of the *Code Civil* of 1804, was careful not to break with the tradition of French law. It considered the system of community limited to acquisitions the one best fulfilling present needs—at least in most of the cases—and restricted itself to a few amendments designed to "modernize" that *régime* to a reasonable degree. While the reform thus effected may not seem spectacular, it will fulfill the wishes of the public, it seems, and its placement in operation will encounter no serious obstacle. Undoubtedly, certain members of the commission wished to see a more modern system adopted as the legal *régime*, for example, the *régime* of sharing in acquisitions. While their views were not adopted by the majority of the commission, the *régime* of sharing in acquisitions has nevertheless found a place in the new *Code Civil*. The preliminary *projet* preserves that *régime* as a contractual *régime* which spouses who enter into a marriage contract may adopt. Thus the practice will be to put this new *régime* to the test and evaluate its merits. Economic and social evolution will continue and the time will perhaps come when this system will in turn be selected as the legal system. But the transition will be smooth and free of danger.