The Partnership of Acquests as the Proposed Legal Matrimonial Property Regime of the Province of Quebec

The Sub-Committee appointed by the Quebec Civil Code Reform Commission to study the question of matrimonial regimes has recently submitted its report;[1] amidst a wide variety of recommended changes, the principal policy decision made by the Committee concerns the selection of the Partnership of Acquests (*Société des Acquêts*) as the proposed legal regime of the province.[2]

I

Although the basic principle of matrimonial property relations, admitted by all of the major jurisdictions in the western world, is the freedom which the consorts have to choose the regime best suited to their needs,[3] the legal regime, nevertheless, has an important role to play. The Legislator should take care to set up a regime which will do more than operate as a mere receptacle for those ignorant or negligent few who fail to choose another system by ante-nuptial contract; it must be a regime which will be accepted by the majority of the population, who are people of average means and circumstances. Those individuals in exceptional categories where, for example, the wife exercises a profession, will no doubt draft a marriage contract which suits their particular economic status. The legal regime, if it is to appeal to average persons, should be practical, easy to understand and in accordance with the basic customs of the jurisdiction.

> Le Régime légal n'est pas une construction plus ou moins abstraite ou théorique qu'on puisse implanter subitement dans un pays — il faut tenir compte des moeurs, des traditions, des habitudes, de l'histoire.[4]

The Matrimonial Regimes Committee found little difficulty in deciding that the existing legal regime, the Community of Moveables and Acquests,[5] was no longer suitable.[6] Separation of Property, often cited as the obvious choice to become Quebec's new legal regime on

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[1] *Report of the Matrimonial Regimes Committee*, Mimeographed Text, (Montreal, 1966). Hereinafter referred to as *Report*.

[2] For an excellent analysis of the new regime by the Chairman of the Committee, see Comtois, *Pourquoi la société d'acquêts?*, (1967), 27 R. du B. 602.

[3] See, however, Caparros and Morisset, *Réflexions sur le rapport du Comité des régimes matrimoniaux*, (1966-67), 8 C. de D. 143 at pp. 178 *et seq.*, where the authors propose certain basic rules as imperative elements in all matrimonial property regimes.

[4] M. Lyon-Caen in *Travaux de la Commission de Réforme du Code Civil, 1948-49*, (Paris, 1949), p. 172.

[5] As set out in 1270-1383 C.C.

[6] *Report*, p. 4.

the grounds that it seems to be favoured by most consorts,[7] was also rejected.[8]

The Committee chose instead a hybrid system of deferred community in which certain property is owned separately as long as the consorts remain married, but which falls into the community at the termination of the marriage. This system seeks to combine the principal advantage of the separatist regime — namely, the respect granted to the equality and independence of the consorts — with some participation in the economic results of marriage upon dissolution.

The basic principles of this regime are not new; although usually regarded as a product of the twentieth century, it has been a conventional regime in the Austrian Civil Code since 1811,[9] and was incorporated as the legal regime in Costa Rica in 1888.[10] More recent examples are the legal regimes in force in the Scandinavian countries since the 1920's, the German legal regime of *Zugewinngemeinschaft* and the French *Participation aux Acquêts*.

The particular features of this Partnership of Acquests [11] are set out in Chapter Two of the Draft Articles of the Report under the headings (a) What Things compose the Partnership of Acquests, (b) The administration of the Property and the Liability for Debts, and (c) The Dissolution and Liquidation of the Regime.

II

(a) What Things compose the Partnership of Acquests

What is to be the extent of the sharing of property between consorts upon dissolution of the marriage? According to the original draft, the acquests to be divided were to include only the proceeds of the work of the consorts, and not that of their private property, for

> it seemed in keeping with the psychology of Quebec consorts that they share what they have owned in common but that they retain as their own what came from their work previous to marriage, and property coming from their families.[12]

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[7] See, for example, *The Report of the General Council of the Bar of the Province of Quebec*, (1967), 27 R. du B. 62; and briefs submitted to the Committee by the *Ligue des droits de l'homme* and the *Fédération des femmes du Québec* outlined in Comtois, *loc. cit.*, at pp. 607-608.

[8] *Report*, p. 6.

[9] Imre Zajtay, *Quelques projets de réforme du régime matrimonial légal en France, Belgique et Allemagne*, [1955] Rev. Int. Dr. Comp. 572.

[10] *Ibid.*

[11] The term "Société d'acquets" or partnership of acquests is also used by the French *notariat* to describe the regime which arises from the insertion of a clause of deferred division of acquests in a marriage contract stipulating separation of property.

[12] *Report*, p. 30.

The Committee has recently decided, however, to enlarge the scope of the assets, so as to allow the consorts to share in all savings accumulated during marriage regardless of their source.[13] This change is to be welcomed for a number of reasons. Firstly, if the acquests consisted only of the savings provided by earned income of the spouses, the protection afforded the wife at the dissolution of the marriage would be inadequate to offset effectively the principle of freedom of willing. Secondly, the distinction between the savings from the revenues of personal property, and those from the earned income would have necessitated the keeping of detailed accounts between the consorts, which is not only impractical, but also contrary to the unity and spirit of the marriage. Finally, the expanded scope of these acquests does not in any way diminish the control of the consorts over their personal property, since it is only the *proceeds* of the fruits and revenues therefrom (i.e. what is not spent) which become part of the acquests.

b) The Administration of the Property and the Liability for Debts.

Each consort has the complete administration and enjoyment of all his property, whether it be private or acquests,[14] and this property is liable for all his debts.[15]

With regard to each consort's right to dispose freely of his property, however, a problem arises; for, in order to guarantee that something will remain of the acquests to be divided upon dissolution of the marriage, some restrictions upon the independence of the consorts must be imposed.

The Legislator is here faced with the task of balancing two irreconcilable principles. On the one hand, more importance may be attached to the independence of the consorts, as in the German legal regime of 1958, where only the alienation of the entire patrimony or household objects without the consent of the other consort is prohibited.[16] Other jurisdictions, such as Sweden, on the other hand, have adopted strict rules requiring the other spouse's consent to a disposition of immoveable property, even if it be by onerous title.[17]

The Committee restricted only the gratuitous disposition of acquests, for which the concurrence of the other consort must be obtained.[18] In principle, this decision appears sound. It is obvious

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[13] Comtois, *loc. cit.*, at p. 614.
[14] Draft art. 1278.
[15] Draft art. 1279.
[16] J. Leyser, *Equality of the Spouses under the New German Law*, (1958), 7 Am. J. Comp. L. 276 at p. 280.
[17] Zajtay, *loc. cit.*, p. 576.
[18] Draft art. 1278.

that in a jurisdiction such as Quebec, where the principle of freedom of willing prevails, some special provision must protect the wife against the possibility of disinheritance. Then, too, if the Committee had gone further and imposed restrictions upon alienation by onerous title, complexity and uncertainty would have resulted — especially in the consort's relations with third parties. The wife should be protected against the possibility of the husband giving away his acquests, but should not be allowed to intervene merely in the event of a bad bargain.

Two criticisms of the provision may be suggested:

Firstly, one class of property, the family house and furniture, is fundamentally different from other property for it, above all, represents the *de facto* community of interests during the marriage. It may be argued, therefore, that the Committee could have better protected the interests of the family by requiring common consent before items in this special category be alienated.

Secondly, an expansion of the scope of this gratuitous disposition provision might considerably simplify the regime. During the marriage, as a general rule each consort has complete control over his own patrimony; it is often difficult to determine, however, what property in fact is in that patrimony because of the inevitable confusion of property which results from the community of interests. To this difficulty is added the necessity of distinguishing which property in that patrimony, once its contents have been defined, is destined to become an acquest upon dissolution and which is to remain a *propre;* this situation arises as a result of Draft Article 1278, which provides that common consent is required only for the gratuitous disposition of acquests. This seems to be an acceptance by the Committee, albeit to a lesser degree, of the very principle with which they found fault in the French Renoult Draft:

> Quite rightly, objections were especially made ... to the troublesome necessity of distinguishing private property and acquests during the whole of the course of the marriage.[19]

This deficiency may be overcome by amending Draft Article 1278 to read "any of his property" instead of "acquests", although admittedly, this would have the effect of diminishing the power of each consort over his own *propres.*

c) The Dissolution and Liquidation of the Regime

When the marriage is dissolved, the liquidation of the regime takes place according to the rules set down in Articles 1282 and

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[19] *Report,* pp. 9-10.

following of the Draft. The high degree of independence and control which each spouse exercises over his property forced the Committee to recommend the right of option of participation in the common portion of the other's property.[20] Double renunciation makes the regime one of separation of property. In the event of a unilateral renunciation, there is only partition in the common mass of the renouncing consort's property; the patrimony of the accepting consort remains unchanged. The partition into *propres* and acquests is facilitated by a presumption in favour of acquests.[21] Adjustments of compensation are carried out,[22] and then the mass of acquests is divided in half between the consorts. This partition may be made in value at the choice of the one whose acquests are partitioned.[23]

The consorts are liable jointly and severally to creditors for unpaid debts which are liabilities of the acquests.[24]

III

Taken as a whole, the Partnership of Acquests is an important addition to the matrimonial property law of Quebec, but only, it is submitted, as a conventional regime. For a number of reasons, it would fail to provide a satisfactory legal regime for this Province.

It is, first of all, too complex. A legal regime exists for the great mass of the people, who must be able to understand what will, in effect, happen to their property. In this regard, complete separation of property is ideal, but even consorts married in community find little difficulty in visualizing a third entity representing the interests of the *ménage* as a whole, as opposed to their own individual *propres*. The Partnership of Acquests, however, involves an abstract concept of retroactivity which is difficult for the layman to comprehend; the partition which occurs on dissolution operates on the property which the consort regarded as his own throughout the duration of the marriage. The philosophy of the regime is more than a combination of the basic principles of community and separation — it represents a new concept which is presently unknown and unfamiliar to Quebec consorts.

Secondly, it is questionable whether the regime of Partnership of Acquests really provides adequate protection for the wife at the dissolution of the marriage. Unless she keeps accurate records, the wife may find it difficult to prove the ownership of her own *propres*,

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[20] Draft art. 1283.
[21] Draft art. 1290.
[22] Draft art. 1291.
[23] Draft art. 1292.
[24] Draft art. 1293.

which will be subject to partition as part of the acquests. As regards the scope of the acquests themselves, even though it has now been enlarged to include savings from the consorts' private property, it still seems too limited and too dependent upon the good will of the husband to fully protect the wife. The possibility that in such a system the wife might well be left with no savings in which to share was realized in Germany, where the law grants the surviving consort the option of demanding one-quarter of the predeceased's estate instead of sharing in the gains.[25]

Thirdly, the Partnership of Acquests is essentially a separatist regime. No community exists during the marriage and even upon the dissolution, the so-called sharing in the acquisitions amounts to little more than a claim upon the other spouse for equalization of the profits produced by the marriage. The population of Quebec, as a whole, it is submitted, is not ready to accept a quasi-separatist system as the legal regime of the Province. The extensive popularity which separation of property now enjoys seems to be analogous to a victory by default,[26] and the Legislator should be extremely cautious in establishing a variation of this system as the legal regime. In the words of Dean Ripert:

> les pays qui ne connaissent pas la séparation de biens comme régime légal, hésiteront toujours à détruire chez eux des règles traditionnelles qu'ils considèrent comme conformes à la nature même du mariage, pour adopter un régime de séparation de biens qui est un régime d'intérêts égoïstes.[27]

Despite the economic and sociological changes which have occurred in the province during the last fifty years, some basic concepts and values have remained. One of these is the French-Canadian attitude towards the family and marriage, which still differs fundamentally from that of other North Americans. The essential unity of the *ménage* persists, notwithstanding the widespread demand for equality of the sexes and the undermining of family ties by the new urban, industrial society.

> Si l'on se place... sur le terrain social, la famille québecoise demeure au fond ce qu'elle n'a jamais cessé d'être, malgré certains bouleversements apparents... Malgré une apparente américanisation de la vie québecoise, malgré l'attraction exercée par les grandes villes sur les populations de la campagne, la famille québecoise reste encore en cette seconde moitié du 20e siècle relativement stable et serrée autour de son chef.[28]

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[25] Leyser, *loc. cit.*, at p. 281.

[26] Roger Comtois, *Traité Théorique et Pratique de la Communauté de Biens*, (Montréal, 1964), p. 329.

[27] G. Ripert, *Le Régime Matrimonial de Droit Commun*, (1937), 4 Travaux de la Semaine Internationale de Droit, p. 8; as quoted in E. Caparros, *Antithèses et Synthèses des Régimes Matrimoniaux*, (1965-66), 7 C. de D. 289 at p. 295.

[28] Louis Baudouin, *Immutabilité ou Mutabilité des Conventions Matrimoniales*, (1954-55), 1 McGill L.J. 259 at p. 270.

IV

Which system, then, is best suited to be the legal regime of this Province? The answer would seem to be Community of Property.

Given the principle of freedom of willing which is part of our law,[29] the fundamental aim of the legal regime should be the adequate protection of the wife upon dissolution of the marriage. In fact, even if our laws relating to testamentary freedom were amended to automatically provide a fixed portion for the surviving consort, a hypothesis which is beyond the scope of this comment, this would be of no assistance to the large body of individuals who are divorced or separated. Considerations of independence and equality for the wife are only of secondary importance, especially in view of the *de facto* authority which the husband normally exercises over the property of the consorts.

If this legal community of property is to become the regime of the majority, however, it must be amended considerably to bring it in line with modern developments. This independence of the consorts must be increased by reducing the scope of the community so that it includes only the acquisitions which accrue to the consorts during marriage, by reason of their industry. Revenues and fruits from *propres* would remain as private property, since only in this way will the wife have complete powers of ownership over what belongs to her. The content of the community would still be sufficient to protect the wife, since it would include all earned income, and not merely the savings thereof. The wife's participation in the management of the common property should be increased by requiring her consent for all important transactions. Finally, and probably most important of all if this regime is to obtain any sort of public approval, it must be given a name which does not include the term "community"; for the use of such a word would involve association with the existing legal regime, against which Quebec consorts have very strong psychological feelings. This disapproval stems almost entirely from its provisions regarding the subjugation of the wife — a subjugation which this community of acquests, for the most part, removes.

Such a system no doubt contains many deficiences. Yet no legal regime may hope to satisfy all of the many conflicting and contradictory needs which the interests of the consorts demand. The Community of Acquests, it is submitted, is the system which contains the most advantages for the ordinary Quebec household.

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[29] Art. 831 C.C.

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