

# The impossible existence of the concept of 'matrimonial regime' in common law countries or how to fit a square peg into a round hole

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The concept of matrimonial regime is fundamental to French family law, particularly in the event of divorce.

Under European law, the concept of 'matrimonial regime' was defined in the *De Cavel*<sup>1</sup> decision and was also repeated verbatim in the recent European 'Matrimonial Property Regimes' Regulation<sup>2</sup> as including 'not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage, but also any property relationships between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof.'

In principle, there is also a fundamental distinction between matrimonial regime and spousal support. The landmark ECJ decision, *Van den Boogaard*,<sup>3</sup> effectively defines the two concepts according to the objective sought by the decision in question. Thus, if its objective is to provide for the maintenance of a spouse in need or if the needs and resources of each spouse are taken into consideration to determine its amount, then the decision has to do with spousal support. However, if the subject of the decision relates only to the distribution of property between the spouses, then it is a question of matrimonial regime.

Issues in private international law that relate to this distinction between the concept of 'matrimonial regime,' on one hand, and 'spousal support,' on the other hand, are exacerbated by the entry into force of the 'Matrimonial Property Regimes' Regulation of 29 January 2019, which sets strict rules for jurisdiction and applicable law. In divorce cases, this Regulation is applied in France in an overlapping manner with the European Regulation on spousal support, which has been in effect since 18 June 2011. For this reason, practitioners must be able to determine clearly which situations fall under the 'Matrimonial Property Regimes' Regulation and, on the contrary, which situations fall under European instruments related to spousal support.<sup>4</sup>

Thus, under French law, if a French judge takes into account factors that centre around the needs of the spouses, it is a matter of spousal support obligations, known in France as compensatory allowance ('*prestation compensatoire*') or as alimony ('*pension alimentaire*') when it is part of the duty of support during divorce proceedings. On the contrary, these criteria are, in principle, absent in France at the stage of liquidating the matrimonial regime.

1 *De Cavel v De Cavel*: 143/78 [1979] ECR 1055.

2 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

3 ECJ, 27 February 1997, *Mr. A. van den Boogaard v Ms. P. Laumen*.

4 The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations and Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

In common law countries,<sup>5</sup> English and American judges, like French judges, do make a distinction between the payment of spousal support after divorce and the division of property. One notices, however, that, in practice, while French judges mathematically implement the rules that apply to liquidating matrimonial regimes, it is different for judges in common law countries, who divide property according to more subjective and discretionary criteria.

In light of this reality, the real issue is the fact that the notion of matrimonial regime is a concept that simply does not exist in common law countries.

Indeed, the French practice shows that, very often, the particularities of the rules of common law countries regarding the division of spouses' property at the time of divorce are disregarded, since, by using a very artificial fiction, attempts are made to equate these rules with those of a similar matrimonial regime in French law.

French practitioners of private international family law thus find themselves confronted with a situation like that of a child who tries desperately to fit a square into a round hole without changing the shapes. It is simply not possible to fit them together and it is illusory to insist on applying the rules of French matrimonial regimes by analogy.

The purpose of this article is to describe, by comparison with French law, the rules of common law countries on the management of property during the marriage and then in the event of divorce (1).

This analysis will show that it is simply impossible to analogise to the rules of the French Civil Code if one truly wants to apply foreign rules (2).

## 1. Rules on management and division of property in common law countries

### 1.1. Rules on management of spouses' property during the marriage

**French rules** – Under French law, marriage has a direct effect on the spouses' estate and the management of property accumulated during the marriage. Their married life is, in fact, governed by the default regime of community of acquired assets (*communauté réduite aux acquêts*) if the spouses have not chosen another regime and, conversely, very different rules apply to the management of their property during the marriage if another matrimonial regime applies.

For example, under the French community property regime, common assets consist of property obtained after the marriage as well as the fruits of separate property, and separate assets consist of property acquired either before the marriage or after the marriage through inheritance, bequest or gift. Liabilities consist of debts incurred during the marriage (except for compensation). Each spouse may manage common property on his or her own; however, neither spouse may dispose of it on his or her own.

**English rules** – Conversely, during the marriage, the English regime more closely resembles a separation of property regime in the sense that marriage is deemed not to have any effect on the spouses' property rights.<sup>6</sup> This lack of interdependence between spouses and of solidarity in relation to creditors does, in fact, remind one of the French separation of property regime.

Thus, marriage is deemed not to have any impact on the spouses' property relations: Each remains the owner of the property he or she acquired prior to the marriage, and property acquired after the marriage belongs to him or her just as if he or she were not

<sup>5</sup> The common law countries described in this article are essentially the United Kingdom and the United States. It should be noted, however, that most other common law countries in the world follow the rules of one or other of these countries in a relatively similar manner. Thus, the rules in Hong Kong or Singapore are very similar to British rules. Canadian rules (except for the province of Québec) are also very similar to American rules.

<sup>6</sup> L. Neville Brown, C.A. Weston, *JurisClasseur Droit Comparé, Grande-Bretagne – Droit anglais – Introduction générale – Les époux – les enfants*, 92.

married. Consequently, during the marriage, the applicable rules are those of relevant ordinary law depending on the issues involved. For example, spouses' capacity to enter into contracts and related issues, such as one spouse's responsibility for the debts of the other spouse, are governed by contract law.<sup>7</sup> Property and inheritance law (particularly with the system of recording titles) governs other issues which, under French law, would be governed by the matrimonial regime. Regarding the marital home, supposing that it was acquired in the name of both spouses, if it is sold, the spouses will share the price equally, even if one of them paid the entirety or the vast majority of the price, due to a presumption of donation which works in favour of married couples.<sup>8</sup>

**American rules** – Under American law, even though there is no concept of matrimonial regime per se, the idea is even more present than in English law since there is a clear distinction between marital property and separate property.

The majority of states maintain separation of property as the default. Therefore, each spouse may dispose of his or her own property, even though both spouses must consent to alienate or mortgage shared immovable property.<sup>9</sup> Variations do exist, however, depending on the state in question.

Thus, although the majority of states are referred to as 'separation of property' states, a minority of states are considered 'community property' states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, Wisconsin<sup>10</sup>). These rules are different at the time of divorce, as explained below.

## 1.2. Rules on division of property at the time of divorce

Obviously, it is at the time of divorce that the question of the judge's power to divide spouses' property generally becomes important. It will then be noted that, as a matter of principle, French judges apply rules that are at odds with those implemented by common law countries.

The objectivity and rigor (and sometimes even injustice) of civil law rules on liquidating the French matrimonial regime contrast with the discretionary and very subjective powers that judges in common law countries apply in the interest of fairness.<sup>11</sup>

**French rules** – It will be recalled that, in French law, under the default matrimonial property regime, each spouse takes back his or her own property, and common assets are liquidated, then divided, in order to establish what compensation is due. Under the regime of community of acquired assets, each spouse has the right to share in half the value of the net assets that are found in the other's estate, measured according to the double estimate of the original estate and the final estate. Under the separation of property regime, each spouse takes back his or her own property and joint property is divided. Whether or not a marriage contract exists is obviously a determining factor and French judges strictly apply marriage contracts.

Therefore, under French law, the matrimonial regime is liquidated and divided without taking into account the needs of the spouses, which are largely taken into consideration, however, when calculating the compensatory allowance. Courts, however, constantly recall that the purpose of the compensatory allowance is not to

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* – provided that no 'declaration of trust' is made by either spouse.

<sup>9</sup> M. Revillard, *JurisClasseur Notarial Formulaire*, Fasc 40: *Législation comparée – Amérique, Régimes matrimoniaux et successions*, 22 Jan 2018, updated 26 Mar 2019.

<sup>10</sup> M. Revillard, *Droit international privé et communautaire*, Défrénois 2010, p. 235.

<sup>11</sup> L. Ferguson, 'Fairness' and the Eye of the Beholder: A Comparative Perspective on Financial Remedies upon Relationship Breakdown,' available on the website [www.iafl.com](http://www.iafl.com) which cites the British author J. Scherpe: '[f]rom an English point of view it is often argued that [the] certainty of matrimonial property regimes comes at the expense of fairness'

compensate the spouses' matrimonial regime (particularly in the case of separation of property).

**English rules** – Under English law, at the time of divorce, the judge rules on financial effects<sup>12</sup> ('financial provision order' in the form of periodic payments or a flat sum) as well as on property<sup>13</sup> ('property adjustment, lump sum and pension order') and these financial determinations are contained in a single decision ('a financial remedy order').

In the absence of a prenuptial agreement or foreign marriage contract,<sup>14</sup> under English law, judges are first likely to divide property, depending on the circumstances, on the basis of the 'yardstick of equal division'<sup>15</sup>: The judge starts from the principle that property will be divided equally between the two spouses, and then sometimes adjusts the percentages according to the circumstances, it being specified that the starting point must be equal division (unlike the default regime under French law, the judge does not necessarily distinguish between property acquired prior to the marriage and property acquired during the marriage when making this equal division of property). This principle of equitable division obviously can only be applied in circumstances where the spouses have an estate and assets to be divided.

The judge, therefore, has the power to set aside an equal division depending on the circumstances, particularly with respect to

the nature of the property in question,<sup>16</sup> the spouses' respective financial capacities, and their standard of living during the marriage.

Other factors may be taken into account in order to set aside equality: the length (short) of the marriage,<sup>17</sup> (particularly without children) the fact that the property was received as an inheritance or gift, whether there are more assets than necessary to meet the parties' needs, illiquidity of the existing assets, etc.<sup>18</sup>

However, the fact that only one spouse earned income during the marriage is not enough to set aside an equal division, since English judges consider the contribution of the spouse who took care of the home and raised the children to be very important also<sup>19</sup> (there should be no discrimination between the homemaker and the breadwinner).

Finally, it is important to note that English judges' jurisdictional powers are centered around three concepts: compensation, sharing, and needs. The 'sharing' powers of English judges relate to the spouses' rights over the property, for which the initial presumption is that of a division of property, while the concept of 'needs' aims to take into account the needs of the spouses, particularly the needs of shelter and basic necessities. The concept of 'compensation' is rarely implemented by English judges.<sup>20</sup>

This distinction is very important because it finally allows one, to a certain extent, to

<sup>12</sup> Matrimonial Causes Act 1973, s 23.

<sup>13</sup> Matrimonial Causes Act 1973, s 24.

<sup>14</sup> If there is a prenuptial agreement or a foreign marriage contract, British courts take a radically different approach and they have fundamentally changed their approach since the famous English *Radmacher* decision, which is the landmark decision on this issue (*Radmacher v Granatino* [2009] EWCA Civ 649 [2009] 2 FLR 1181 para [107]). If there is a marriage contract which is considered valid and which provides rules for separating the spouses' property at the time of divorce, the British judge's 'sharing' power is set aside and the sums the parties are ordered to pay are, except in exceptional cases, based solely on the notion of 'needs.' Thus, one arrives at a result similar to the result that would be obtained before a French judge who would strictly apply the separation of property contract and order that a sum be paid as compensatory allowance. Cf., for an implementation of these principles by British courts: *Z v Z (Divorce: Jurisdiction)* [2010] 1 FLR 694, *Luckwell v Limata* [2014] EWHC 536 (Fam), [2014] 2 FLR 1252 and *KA v MA (prenuptial agreement: needs)* [2018] EWHC 499 (Fam), [2018] 2 FLR 1285, although this principle was recently strictly limited in an appeals court decision *Brack v Brack* [2018] EWCA Civ 2862.

<sup>15</sup> *White v White* [2000] 2 FLR 981.

<sup>16</sup> N. Khawam, AJ Famille, November 2015, Divorce dans le monde, 573.

<sup>17</sup> *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

<sup>18</sup> J. Stewart, Family law, European Lawyer Reference, 2<sup>nd</sup> ed. 2013, p. 171

<sup>19</sup> *White v White* above.

<sup>20</sup> For example, the case of a party who entirely sacrificed his or her own career to follow the other party, but the circumstances must be very specific.



distinguish the powers of English judges with respect to ‘matrimonial regime’ from their powers with respect to ‘spousal support’ (as this distinction is made in the *Van den Boogaard* decision cited above).

In light of all these concepts, when ruling on the financial consequences of divorce, a judge will first consider all the assets (including retirement funds and both liquid and illiquid investments, as well as debts) in order to determine which assets the spouses, respectively, will receive. The judge will then equally divide those assets unless, according to the circumstances, there are reasons not to divide them equally.<sup>21</sup> Such a division, as far as possible, should cover each spouse’s need for capital, interpreted broadly.<sup>22</sup>

In addition to this division, the judge will look at the present and future revenue and resources of each spouse and may then order additional sums (‘periodic payments’) which will take into account the ‘income needs’ of each spouse. This assessment considers the couple’s lifestyle during the marriage, each spouse’s financial potential and capacity to earn income to support this lifestyle, the need to care for minor children, and life expectancy.

This sum will generally be ordered in the form of a life annuity or for a set period. The debtor spouse, however, may propose that this amount be paid in one lump sum (converting the annuity into ‘capitalised maintenance’<sup>23</sup>).

Therefore, one sees that the method English judges follow is, in reality, rather similar to the criteria that French judges use when ruling on compensatory allowances under French law, since French judges, pursuant to Article 271 of the Civil Code, must, in principle, consider ‘the estimated or

foreseeable estate of the spouses, in both capital and revenue, after the matrimonial regime is liquidated.’

**American rules** – In the vast majority of American states, at the time of divorce (and also when there is no prenuptial agreement), spouses keep property that is considered ‘separate property,’ while property that is considered ‘marital property’ is divided equitably according to the spouses’ circumstances (‘equitable distribution’).

The rule is therefore not equal division, but ‘equitable’ division, according to the circumstances. Therefore, although the concept of matrimonial regime is unknown in American law, an American judge’s reasoning is nonetheless similar to that of a French judge insofar as the American judge takes into account the distinction between separate property and communal property and does not create a purely equal division without taking into account each party’s property rights.

Among other factors that an American judge takes into account in order to establish equitable distribution are<sup>24</sup> the length of the marriage, the age and health of the parties, their income potential, their respective contributions during the marriage, the liquidity or illiquidity of the marital property, etc.

This brief description makes it possible to draw attention to all the fundamental differences between the French approach and the approach of common law countries. These differences are teleological, intrinsically related to the role that judges have historically played in these countries. The judge’s discretionary power must be preserved in order to arrive at a just and

21 The length of the marriage is an important criterion here and the longer the marriage, the more the principle of equal division will be strictly applied while considering each spouse’s needs.

22 It will be a matter, in particular, of verifying that each spouse can obtain suitable housing, which is generally referred to as ‘housing needs.’

23 The British regime promotes a clean break regarding both the division of assets and determination of the annuity (which may then be capitalised). According to this principle, the monetary relationship between the spouses, as far as possible, must end after the divorce.

24 Domestic Relations Law §236-B-5 and 6.

equitable result that depends on the circumstances of each case.<sup>25</sup>

How then can a French judge implement these rules, without losing their true nature? Is such a reconciliation possible?

## 2. From analogy to distortion: How can the rules of common law countries be preserved in divorce cases?

### 2.1. The fiction of analogy with a matrimonial regime under French law

Many practical difficulties arise from the failure of French courts to consider the particularities that result from the lack of a concept of matrimonial regime in common law. In fact, French judges, unaware of these issues, take a simplistic view which is not necessarily in accordance with the foreign law and which often leads to results that may be the opposite of those that would have been obtained in the country where the law applies.

The fiction that the English regime can be equated with the French separation of property regime, notwithstanding the principle of equal division at the time of divorce – Thus, French judges generally equate the English ‘default regime’ with a separation of property regime.<sup>26</sup> This analogy is particularly established in academic commentary.<sup>27</sup>

Those who equate the English regime with a separation of property regime acknowledge that there are imperfections, expressed as ‘exceptions to the principle of separation’<sup>28</sup>:

For example, under French law, a spouse under a separation of property regime remains responsible for contributing to the costs of the household to the extent of his or her abilities, or as provided in the marriage contract. However, under English law, there is no law requiring spouses to share household costs equally or even to contribute to them.<sup>29</sup>

Such a simplification is erroneous for two reasons: on one hand, because these systems do not really have a concept of matrimonial regime, and, on the other hand, because equation with a single regime that would apply both at the time of marriage and at the time of its dissolution in the event of separation does not reflect the status of the spouses’ rights at the time of divorce.

English judges have themselves ruled on this issue several times. On one hand, in the *Radmacher* decision<sup>30</sup> (landmark decision on marriage contracts in the United Kingdom), the English judge stated: ‘it is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime.’ On the other hand, in the *Charman* decision,<sup>31</sup> the judge stated, ‘our jurisdiction does not have matrimonial property and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property.’

Such assimilation was also criticised in academic commentary. Thus, in the International Encyclopaedia for Family and Succession Law<sup>32</sup>: ‘It is a matter of debate whether England and Wales actually have what could be termed a ‘matrimonial property regime.’ Certainly, there is no statutory code labelled as such, and [...] the

25 J. Scherp, cited above by L. Ferguson: ‘[w]hile [the English discretionary approach] acknowledges that each marriage is different and that therefore fairness might require tailor-made court orders, such an approach very deliberately sacrifices the legal certainty that matrimonial property regimes can provide to achieve the overarching aim of a ‘fair’ outcome.’

26 For example, CA Limoges, 25 June 2009, No. 08/00106, CA Agen, 27 November 2008, No. 08/00162.

27 For example, M. Revillard, *Droit international privé et communautaire*, Défrénois 2010, p. 235 and M. Souleau-Bertrand, *Le conflit mobile* Dallos, Nouvelle Bibliothèque de Thèses, March 2005, pp. 223 to 225.

28 L. Neville Brown, C.A. Weston, *JurisClasseur Droit Comparé*, Grande-Bretagne – Droit anglais – Introduction générale – Les époux – les enfants, 92.

29 International Encyclopedia for Family and Succession Law, National Monographs/England and Wales, Suppl. 92 (2018), 423: ‘There is no requirement that spouses share the household expenses equally, or even that each should make a fair contribution.’

30 *Radmacher v. Granatino* cited above.

31 *Charman v. Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 para [124].

32 National Monographs/England and Wales, Suppl. 92 (2018), 422.

concept of ‘matrimonial property regime,’ as understood in Continental Europe, is unknown in England.’

Another author<sup>33</sup> wrote:

‘As for the so-called separation of property known in Anglo-American countries, it is no more than a legend ... “[S]eparatist” systems allow for a redistribution of “family property” when the marriage is dissolved to ensure equality between the spouses. Even if a piece of property is the personal property of a spouse, it may be awarded to the other spouse to compensate for inequalities in the estates.’

In reality, the English regime (the solution under American law is equivalent) is very unlike the matrimonial regime under French law, which requires a great deal of attention to be paid during liquidation and division of the regime to the property rights of each spouse and to what was acquired before or during the marriage, together or separately, in order to establish debts and compensation between the spouses and arrive at a distribution of property that reflects the specificities of the regime to which the spouses agreed when they got married. The situation was summarised by a French notary<sup>34</sup>: ‘English law simply does not have the legal category of “matrimonial regimes.” Without the concept of matrimonial regime, notaries cannot rely on notions of “acquests,” “separate” or “personal property,” “compensation” or “debts between spouses.” There is no entitlement to property acquired during the marriage, liquidation of the joint estate or matrimonial benefit under English law.’

Thus, if one insisted on fitting the English regime into a French legal category, it would be necessary to equate the rules that apply

during the marriage with a separation of property regime, and those that apply at the time of divorce with a universal community property regime,<sup>35</sup> but one which would be divided according to principles of equity. This position is, in fact, the closest to the reasoning of a English judge who, far from going into the details of how the spouses managed their finances during the marriage in order to establish debts and compensation according to the actual contributions and property rights of the spouses, takes an extremely broad view, since the judge divides the spouses’ estate into two equitable portions without distinguishing between property acquired before the marriage and property acquired after the marriage.

**The fiction of equating the American regime with a single matrimonial property regime, notwithstanding the principle of ‘equitable distribution’ at the time of divorce** – The rules that apply during the marriage, depending on the state, are comparable to a separation of property regime or a community of acquired assets regime. However, at the time of divorce, a community of acquired assets regime is more analogous (since nearly all states apply the rule of ‘equitable distribution’ or an equivalent rule at the time of divorce).

We could also compare these rules to a partnership of acquests regime given the duality between marriage and divorce.

The analogy with the partnership of acquests is also partially inaccurate insofar as, in the event of death, the rules that applied during the marriage are maintained (which would not be the case under French law where the liquidation rules are identical regardless of whether the dissolution is due to divorce or death).

Finally, it should be noted that applying the rules of French matrimonial regimes will

33 G. Droz, *L’activité notariale internationale*, Collected Courses of The Hague Academy of International Law, Vol. 280 (1999) p. 69.

34 R. Canales, *Les prenuptial agreement et les contrats de mariage: perspective franco-anglaise. Point de vue du notaire français, Droit de la famille* – monthly review LexisNexis Jurisclasseur, June 2015.

35 In fact, under the universal community property regime under French law, the estate comprises, by definition, all the spouses’ property, both assets and liabilities, including property the spouses owned at the time of their marriage or on the date they adopted the regime. Upon dissolution of the marriage, each spouse takes back the property that was not part of the communal property, which is rare in terms of universal community property (referring to property provided for in Article 1404 of the Civil Code).