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The Married Woman in Ascendance, the Mother Country in Retreat: from Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866-1991

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LAW, WHEN LEFT TO ITS OWN DEVICES, is often accused of misrepresenting history—of depicting an otherwise appreciable reality as if through bent glass. The fish-eye lens of law no doubt gives a distorted picture of the history of the Quebec family, but the effect is not altogether displeasing. One example is law's account of the developing economic power of married women from the mid-nineteenth century to the present day. Here, law's lens, without seeking the illusion, bends women's history into shape. Through it, legislative changes to married women's rights and powers in 1931, 1964, 1969, 1980, and 1989 appear as a series of definitively connected images, cutting a straight line from apparent inequality, as against the rights of their husbands, towards formal and then substantive equality. Law's history of the Quebec family can become one of inexorable progress towards a "just" treatment for women in marriage. Matrimonial law scholars have seen this development as a sort of *étapisme* for private law, in which the married woman emerges in gradual but glorious ascendance.

This pictorial history is bookended by two different Quebec civil codes, serving as exaggerated "before" and "after" images in the movement towards equality in marriage. The law consolidated in the *Civil Code of Lower Canada* in 1866 had spousal inequality as a defining feature—*les pouvoirs au mari*, said a maxim inherited from old French law, *la protection à la femme*. At the other extreme, the 1991 *Civil Code of Québec*, itself a consolidation of existing imperative rules in this

regard, is designed to force what article 392 calls “the same rights and obligations” on spouses, both during and at the dissolution of marriage. Not surprisingly, law reformers have, in the recent past, congratulated themselves by adopting finishing touches and enacting crowning achievements which they perceive to be, inevitably, the “aboutissement d’une longue démarche.”¹

long process” included, for Minister Monique Gagnon-Tremblay, the reforms to the civil codes in 1931, 1964, 1969, and 1980 under study in this paper: see Quebec, Assemblée nationale, *Journal des débats* (6 June 1989) at 6461 and 6462ff. But just as law’s fish eye lens can distort the past, it also draws into its field of vision images on the periphery of history that might be overlooked by a viewer with a different focus. An example is the extent to which French legal sources have tinted developments in the Quebec law of matrimonial property. Placed end to end in this light, the reforms appear as successive stages in an ever-diminishing dependence of Quebec law on the French legal system from which it was derivative. Again, the *Civil Code of Lower Canada* and the *Civil Code of Québec* provide first and last glimpses of how the impact of French law varied across the intervening reforms. Over this 125 year period, the influence of the juridical “mother country” was at its apparent pinnacle at codification in 1866, which dutifully reproduced the essence of the *communauté de meubles et conquêts immeubles* of the *Coutume de Paris*, earlier transplanted from *ancien régime* France. At the other end of the spectrum, the matrimonial public order at the core of the 1991 *Civil Code of Québec* reflects ideas borrowed from several foreign models, alongside a depth of local experience, such that modern matrimonial law appears to owe only the smallest debt to its once venerated point of reference.

From this changed perspective, the history of Quebec law reform holds a new and unheralded message. The dates of each plodding advance in the rights and powers of married women appear to correspond precisely with points in a steady decline in a discourse and attitude of servility towards French legal ideas. The changes of 1931, 1964, 1969, 1980 and 1989 marked breaks, *par petits pas*, with French law as the controlling ideal for the reform of Quebec law. A perception took hold that as local law distanced itself from France as the exclusive source of newness, it quietly affirmed itself as a mature and autonomous legal order. In this sense the transition from the *Civil Code of Lower Canada* to the *Civil Code of Québec*, at least from the point of view of the sources of matrimonial law, may reflect the transition for Quebec’s “common law” from colonial to national status. Comparative lawyers might be inclined to see the development of matrimonial property law from this different perspective: also as *étapiste*, but as connected steps in the history of sources of Quebec law in which the French civilian model is in graceful and grandmotherly decline.

Each reform since 1866 is thus a composite of dual images of the married woman in ascendance and the mother country in retreat. These were connected phenomena and it will be argued here that the link between them illuminates, in part, the itinerary

¹ This is how the 1989 reform for the mandatory sharing of the value of a “family patrimony” was characterised by the minister responsible of the status of women when “Bill 146” received second reading in the National Assembly. The “

of decolonisation for Quebec law and its emergence as a distinctive legal order. Identical ideological influences found expression both in law's attitude to the status of the married woman, on the one hand, and to the status of Quebec law as against the French model on the other. Two distinct periods are discernible. The first, covering the first one hundred years of post-Code reform, was characterised by an overarching attachment to tradition, which restrained both the increased rights and powers of married women and the increased profile of Quebec law as against its French counterpart. A study of lawyers' rhetoric accompanying the reforms shows that married women and the Quebec legal system inched from inequality to equality together, both eking out a sluggish emancipation from a once-dominant partner (I). The second period, covering a short twenty years from the implementation of the "partnership of acquests" in 1970 to the enactment of the *Civil Code of Québec*, was characterised by opposite phenomena. After formal equality was attained for married women, as against their husbands, and for Quebec law, as against French law, both the married woman and Quebec law embarked on a quickened ascension towards a more 'substantive' equality. For the married woman, this found expression in the spirited appearance of public order rules for marriage and, for Quebec law, through the confident emergence of a distinctive national law of matrimonial property (II).

I. The Advent of Formal Equality in the Waning Spirit of Legal Colonialism, 1866-1970

"Le droit n'a guère changé, parce que la femme reste la même": with this blunt stick, Quebec's first civil law reform commission after codification proclaimed its opposition to change in 1931, both as a matter of philosophical principle and in respect of the married woman.² Motionlessness is the best description for the first one hundred years of Quebec's common law, in its codal expression, as it related to a woman's place in marriage. While the married woman was granted increased powers in 1931, then legal capacity in 1964, these reforms were above all designed to keep law's family as it "always" had been. It is not much of an exaggeration to say that the married woman would be emancipated as the law itself stood still. The "general laws and customs of the country,"³ replicating a perceived hierarchy in nature, clung explicitly to the idea that "a husband owes protection to his wife, a wife obedience to her husband"⁴ until 1964 and, thereafter, implicitly through the

² Quebec, "*Premier rapport de la Commission des droits civils de la femme*" [C.-É. Dorion, chair] (1930) 32 *Revue du Notariat* 229 at 242.

³ This expression is taken from art. 1260 *Civil Code of Lower Canada*, repealed by *Statutes of Québec* 1969, c. 77: "If no covenants be made, or if the contrary have not been stipulated, the consorts are presumed to have intended to subject themselves to the general laws and customs of the country, and particularly to the legal community of property, and to the customary or legal dower in favor of the wife and of the children to be born of the marriage." For a textual reconstruction of Quebec's "common law" since codification see P.-A. Crépeau and J.E.C. Brierley, *Code civil-Civil Code 1866-1980: An Historical and Critical Edition* (Montreal: Chambre des notaires du Québec, SOQUII, 1981) and its *Supplement* (Montreal: SOQUII, 1983).

⁴ Imposed on all marriages, by art. 174 C.C.L.C., repealed S.Q. 1964, c. 66, this formed part of the "rights and duties of husband and wife" which constituted the principal rules for matrimonial law beyond those of the chosen régime (former arts. 173-184 C.C.L.C.).

husband's powers of administration in the legal régime of community of property until 1970.⁵ The hierarchy was replicated again, through this period, in Quebec's submissiveness to French law. By allying themselves with the mother country, law reformers came to expect protection—a safe newness—from French legal sources and, in return, pledged obedience to that law in the local initiatives that ever so slowly changed family law. In a manner not unlike the loyalty that other Canadian provinces expressed to England's imperial common law, Quebec proceeded by mimicking French law reforms and by celebrating a legal colonialism which provided comfort and gave shape to a docile *Civil Code of Lower Canada*.

But if the reforms of 1931 and 1964 were above all expressions of ideological conservatism and legal colonialism, they carried in them the far-off promise of formal equality for both the married woman and Quebec law. Viewed retrospectively from the enactment of the partnership of acquests in 1969, these traditionalist and colonialist reforms take on a different meaning. The married woman, in a fit and a start, broke the hold of conservatism on the Civil Code in her slow movement towards formal equality (A). In the same way, 1931 and 1964 bear signs of a *fin de règne* for French law in its imperialist posture, permitting an emancipation in 1970 of Quebec's once colonial code in matters pertaining to property rights in marriage (B).

A. The Sluggish Emancipation of the Married Woman

Both the slowness and the sheepishness with which women were granted formal equality in marriage create a picture that cries out for nuance: a cartoon image of a Quebec society steeped in the old ways, a social and legal backwater, insulated from the forces of modernity.⁶ Yet unfair as it may be, this caricature does not invent but merely amplifies a truth for the law relating to the married woman. The history of Quebec private law was dominated by an ideological choice, among those empowered to do the choosing, to maintain with care a near-feudal family law perceived as the social foundation for old ways to be preserved. Against the background of the *ancien droit* as brought forward in the 1866 Code, the adoption of rules for a category of property reserved to the administration of married women in 1931⁷ and the repeal of their incapacity in 1964⁸ did loom large. But on closer examination 1931 and 1964 were minimalist reforms, explained in part by the conservative instinct that characterised much of legal thinking over this one hundred year period. The traditional legal order and its supporting ideology would eventually give way, but the slowness

⁵ Community of property was displaced as the legal or default régime by the "partnership of acquests," enacted by S.Q. 1969, c. 77 (in force 1 July 1970).

⁶ Lawyers have invoked this idea, in cartoon dimensions, to explain Quebec family law to outsiders: see, e.g., Henri Turgeon, who sought to explain the development in the legal capacity of married women through an examination of the "character" of the French-Canadian people: "Matrimonial Property Law in the Province of Quebec" in W. Friedmann, ed., *Matrimonial Property Law*, vol. II (Toronto: University of Toronto Press, 1955) 139 at 143-4.

⁷ *An Act to amend the Civil Code and the Code of Civil Procedure respecting the civil rights of women*, S.Q. 1930-31, c. 101, esp s. 27 adding arts 1425ff. C.C.L.C.

⁸ *An Act respecting the legal capacity of married women*, S.Q.1964, c. 66.

of the onset of formal equality is indicative of a resistance to change that was the basic philosophical premise of family law in the period from the codification of the 1860s to the reforms of the 1960s.

The reform of 1866 did reorganise family law, but it was a newness in shape only. The consolidation of the law relating to married women, as in virtually all of the *Civil Code of Lower Canada*, represented a conscious act of solidarity with the established order.⁹ The codifiers set the tone for the next several generations of law-makers in matrimonial law: "The system which we adopt is that of the *Coutume de Paris*, with only a few exceptional changes."¹⁰ The three central themes of the *ancien droit* as it related to marriage—incapacity for married women and their relative powerlessness under the legal régime, a marked preference for sharing property in society's legal prototype for marriage, and freedom of contract—were carried forward into the *Civil Code of Lower Canada*. But the legislature made its predilection for a community régime under the control of the husband plain; it was to be a "communauté à peine altérée"¹¹ from Old France, as it had already been adapted to local living. Changes made in the Quebec Code of 1866 were not concessions to modernity. Generally, the "new" French Napoleonic *Code civil* of 1804—already over 50 years old and, in spite of the circumstances leading to its enactment, hardly a revolutionary document in these matters¹²—was not followed except as to form. The few increased powers extended to married women by the *Code civil des Français* were said not to be necessary in Lower Canada where the family would be what it had been. The husband would be, in Lower Canada, "maître et Seigneur" in marriage in much the same way as he had been in the *ancien régime*.¹³ What is striking, however, is that the very same description persisted into this century and was seen as current through the 1960s to describe the relations between husband and wife.¹⁴

⁹ See *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil Matters and Procedure*, 20 Victoria, S. C. 1857, c. 43, esp. ss. 4, 6, and 7. On the making of the *Civil Code of Lower Canada*, John E.C. Brierley's "Quebec's Civil Law Codification Viewed and Reviewed" (1968) 14 McGill Law Journal 521 remains authoritative.

¹⁰ *Fifth Report of the Commissioners charged with the Codification of the Laws of Lower Canada* (Quebec City: George E. Desbarats, 1865) at 200. For the short list of adjustments to the old law at codification see Thomas McCord, *The Civil Code of Lower Canada* (Montreal: Dawson Bros., 1867) at xxv-xxvi.

¹¹ Roger Comtois, *Traité théorique et pratique de la communauté de biens* (Montreal: Recueil de droit et de jurisprudence, 1964) at para. 8. This remarkable work, which remains the most useful technical resource on community of property, referred regularly to the provisions of the *Coutume de Paris* as "encore en vigueur chez nous" (see e.g., para. 213).

¹² A. Valette, "De la durée persistante de l'ensemble du droit civil français pendant et depuis la révolution de 1789" in *Mélanges de droit, de jurisprudence et de législation* (Paris: A. Marescq aîné & Delamotte fils, 1880), t. 1, 443, esp. at 456ff.

¹³ E.g., the codifiers' refusal to adopt art. 1422 C.c.F. limiting the husband's power to dispose of community property by gratuitous title without the consent of his wife: *supra*, note 10 at 202. Symbolic of the resistance to change was the 1866 "improvement" to women's legal condition in art. 1380: wives were henceforth allowed to retain wearing apparel and personal linen upon renouncing the community, exclusive of all jewelry other than wedding presents (repealed by S.Q. 1980, c. 39).

¹⁴ E.g., *M.N.R. v. Sura*, [1962] S.C.R. 65 at 69 in which the Supreme Court of Canada, in the lead-

The spirit of conservation was championed, in the law's official circles, as a defining feature of Quebec's Code and explained the near absence of reforms in matrimonial law through the 1920s.¹⁵ The traditional law was seen to consecrate a conception of family founded on laws of natural and even divine inspiration.¹⁶ Community of property, based on sharing of assets under the largely unfettered control of the husband, allowed men and women to play roles nature had designated for them in marriage. Incapacity was said not to be rooted in the weakness of women—didn't spinsters and widows have full enjoyment and exercise of civil rights?—but on "marital authority," which itself was essential to the way in which society was constructed. From the outside, Quebec was held up as a grand experiment wherein old laws and old values were part of everyday life.¹⁷ Inside Quebec, the century turned without meaningful change for the married woman or a sense that such change was in order.¹⁸ In law's literature, the married woman became a sort of legal icon, untouchable except at the expense of displacing virtues upon which tradition was founded. At the edges of matrimonial property, the law of intestate successions was amended to raise the surviving spouse to the status of a "legitimate heir." But this was only achieved after ten years of debate that engaged the fiercest fighting of traditionalists which, if anything, seemed to steel their resolve.¹⁹ Only in the 1920s did regular signs appear that the official policy of *immobilisme* was deserving of review.²⁰ Not all calls for change had the same motivation: some

ing case defining the juridical nature of community of property, referred to this turn of phrase found in art. CCXXV of the *Coutume de Paris*.

¹⁵ See arts 194, 1265, 1301, 1310-1314c, 1323-1337, 1342 and 1350 C.C.L.C., amended between 1888 and 1920. Apart from minor adjustments, the omnipotence of the husband only flinched once, down to the 1920s, in relieving a woman legally separated from obtaining her estranged husband's authorization in order to take action before the courts: S.Q. 1919-20, c. 77, amending arts 210, 1318 C.C.L.C.

¹⁶ Notary Édouard Beaudry explained that "il fallait...qu'il y eût une suprématie et que cette suprématie appartint à celui que la nature avait désigné spécialement pour l'exercer": *Questionnaire annoté du Code civil du Bas-Canada* (Montreal: C. O. Beauchemin & Valois, 1872) at 245. Part of a relatively widespread practice of presenting the law in questions and answers, as a catechism, this book bears the mark of a devotional zeal that its author brought to the study of law (see esp. "erreurs sur le mariage chrétien" at 236).

¹⁷ One could see, according to a French lawyer, "... dans le Bas-Canada de vieilles institutions que l'on [était] réduit à étudier en France dans des textes morts": Albert Aftalion, *La femme mariée* (Paris: A. Pedone, 1899) at 359. See also Louis Autier, *La survivance de la seconde Coutume de Paris, Le droit civil du Bas-Canada* (Rouen: Imp. des «Petites affiches», 1923), esp. at 68-9.

¹⁸ Contentment animated Pierre-Basile Mignault's account of Quebec law at the centenary of the French Code: "Le Code civil du Canada" in *Le Code civil 1804-1904: Livre du centenaire* (1904) (Paris: Ed. Duchemin, 1979) t. II, 723 esp. at 728. Similarly, in respect of the married woman, see Louis Loranger, *De l'incapacité légale de la femme mariée* (Montreal: C. Théoret, 1901), esp. chapter 1.

¹⁹ Before the so-called "Loi Pérodeau" (*An Act to amend the Civil Code respecting successions*, S.Q. 1915, the spouse inherited only after relations to the twelfth degree, and even then had to suffer the indignity of being judicially put into possession. As an example of how this divided Quebec jurists into camps along modernist/traditionalist lines, see the exchange of letter between McGill Law Dean F. Walton and Supreme Court Judge P.-B. Mignault reprinted in "Droits du conjoint survivant" (1913) 15 *Revue du Notariat* 129.

lawyers, notaries and their clients had earlier denounced the place of women under old French law as an affront to modern times and expressed this aversion by opting out of the legal régime.²¹ But by the late 1920s, general attention was focused on the need for change, largely as a result of the efforts of a French-Canadian women's group, the Fédération Nationale St-Jean-Baptiste, and of its president, self-taught lawyer Marie Gérin-Lajoie.²² Gérin-Lajoie gave expression to an increasing view that the legal régime, as it then stood, had become obsolete: "nos lois croulent parce que les mots en sont vides de sens et que l'esprit en est absent."²³ But community of property was not to be repealed or replaced by the formal egalitarianism of separation of property, to the detriment of women in their natural roles of wives and mothers in the home.²⁴ Proposals came forward for a series of measures to increase economic powers of women in marriage, but offered up as a way of preserving the great institutions of the past rather than overturning them. There was a growing realisation in these conservative circles that community of property had to change in order to stay the same.

By 1930, law reform became a conservative, mainstream project. To be sure, in some quarters even a progressive conservatism was too much. For some, the moderate Gérin-Lajoie and her colleagues were the "nouvelles Misses Pankhurst"²⁵ while others, such as the honorary president of the Conseil provincial des fermières, felt the Code needed no adjustment because women were already well protected, in keeping with all that was sacred.²⁶ The dominant view was, however, that community of property had to be updated to remain attractive to spouses, and thereby ensure that the structure of the family would remain the same: "qu'on fasse passer dans

²⁰ As early as 1900 Marie Lacoste Gérin-Lajoie had begun calling for changes in matrimonial law, and by 1914 she had articulated the need to renovate community of property to better serve the interests of women, specifically by classing certain moveables as private property and extending women's powers over community property: see, e.g., "Condition légale de la femme IV(a)" (1914) 1 *La Bonne Parole* (N^o 1) 2-3.

²¹ While no reliable empirical study of notarial practice for the period has ever been conducted, it was accepted as common knowledge that English-speaking couples opted for separate property régimes in disproportionate numbers (see, e.g., Turgeon, *supra* note 6 at 139-144). Whether this reflects a real or imagined pattern of urban behaviour, of a social class, of cultural affinity, or simply English-speaking notarial practice is a matter for future research.

²² On the F.N.S.J.B. and its efforts to improve the status of women through law, see Marie Lavigne, Yolande Pinard and Jennifer Stoddart, "La Fédération Nationale Saint-Jean-Baptiste et les revendications féministes au début du 20^e siècle" in M. Lavigne & Y. Pinard, eds., *Travailleuses et féministes: Les femmes dans la société québécoise* (Montreal: Boréal Express, 1983) 199 at 205ff.

²³ "La Communauté Légale: Sauvons nos lois françaises" (Montreal: Fédération Nationale St-Jean-Baptiste, 1927 [pamphlet]) at 10.

²⁴ There was the occasional iconoclastic call, outside the English-speaking Bar, for separation as to property as a new legal régime: see, e.g., Flavien Coulombe. "De nos régimes matrimoniaux" (1920-21) 23 *Revue du Notariat* 161 at 165 where a country notary expressed confidence in usual testamentary practices as adequate protection for married women.

²⁵ Henri Turgeon, "Observations [sur la loi du 11 mars 1931]" (1931) 34 *Revue du Notariat* 144 at 145.

²⁶ "Le Code civil protège la femme et la famille dans toute la mesure des principes les plus sacrés": Rolande-S. Désilets, "Nos droits et nos devoirs" (1930) 11 *La Bonne Fermière* (N^o 1) at 3.

toutes ses dispositions la justice de son principe; qu'on lui enlève ses allures vieilles et démodées."²⁷

What was the full character of ideological influences associated with the conservative approach to law reform? Plainly connected to the fear of fundamental change was a sense that the old law was the root of a perceived Quebec identity. For some jurists, legal conservatism was consonant with a conservative brand of Catholic thinking fundamental to Quebec society's sense of self. Judge, law dean and family law reformer Charles-Édouard Dorion regularly denounced those who questioned the husband's status as head of the family as atheists,²⁸ as did, not surprisingly, the law reform commission he chaired in 1930.²⁹ Furthermore, keeping family law as it was represented for some a part of a broader socio-political project. Mignault spoke for many jurists in his characterization of the Civil Code as "ce que nous avons de plus précieux après notre religion et notre langue."³⁰ Law was an instrument for propping up a paradise soon to be lost. At stake was a French-Canadian way of life perceived to be threatened by the forces of the twentieth century, and retaining the old law would perpetuate the old ways. A current of nostalgia pervaded early twentieth century legal writing on the family, whereby old ways and old laws were romanticised beyond recognition. This attachment to tradition was, of course, a venerable theme in Quebec law,³¹ reaching a high-water mark in the 1920s and 1930s.³² When "notre droit privé" was linked to the "national spirit" of Quebecers,³³ and community of property was said to be part of the "national patrimony" of Quebec,³⁴ retaining the old law became easy to style as a matter of *survivance*.

Conservatism, Catholicism and *survivance*: all contributed to the dominant discourse for matrimonial law reform and the response to reforms through the 1960s. In 1931, when the Dorion Commission proposed to give married women powers over their wages and impose a slender limit on the husband's control over community property, its members sought to do so while leaving nature's hierarchy in marriage

27 Paul Paquette, "Notre régime de séparation de biens" (1921) 23 *Revue du Notariat* 121 at 126.

28 "En dehors des milieux catholiques, on discute beaucoup l'autorité du mari dans la famille. C'est le penchant naturel de tous ceux qui nient Dieu, principe de toute autorité, ou qui diminuent la vérité intégrale": C.-É. Dorion, "La philosophie du Code civil" (1925-26) 4 *Revue du Droit* 136 at 141.

29 For the Dorion Commission, the status of women as consecrated by the old law conformed to "l'inéluctable nature et à nos moeurs chrétiennes", *Premier rapport*, *supra* note 2 at 239.

30 "L'avenir de notre droit civil" (1923) *Revue de Droit* 104. He allied the politics of national identity with the politics of conservation: "C'est [i.e., the Code] un héritage que nous avons reçu de nos pères à charge de le conserver et de le rendre."

31 See Sylvio Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec: la sauvegarde de l'intégrité du droit civil" (1987) 32 *McGill Law Journal* 559.

32 See H. Glenn, "Le droit comparé et la Cour suprême du Canada" in E. Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 197 in which the Supreme Court, and particularly Justice P.-B. Mignault, is allied with this ideological reading of Quebec private law.

33 The Dorion Commission said that private law was the "fond de l'âme nationale" of Quebec: *Premier rapport*, *supra* note 2 at 233.

34 Marie Gérin-Lajoie, "La Communauté Légale", *supra* note 23 at 5 said that the legal régime was a "partie importante de notre patrimoine national."

intact. "Ce qui importe plus que l'égalité," wrote the Commissioners in their final report, "c'est le respect de l'ordre."³⁵ There was no question of radically changing the financial obligations flowing from marriage: "comme l'homme, comme le mariage, la femme est la même Créée pour être la compagne de l'homme, elle est toujours et par-dessus tout épouse et mère."³⁶ Incapacity was to stay in place—it was, after all, the "sauvegarde de la famille"³⁷—and changes brought to community of property were designed as adjustments rather than shifts in policy, since "[i]l n'est pas question d'abolir la communauté mais de la rénover."³⁸

The same minimalist approach to law reform would persist over the next thirty-five years. If reformers were to touch the "ossature"³⁹ of the codal expression of matrimonial law, they had to proceed with caution. Transformations in society were not to dictate changes to law, but law was to stand firm so as to inhibit social change.⁴⁰ One very striking exposition of this conservative approach to law reform appeared in an account of the 1938 visit of France's great legal historian, François Olivier-Martin, to Quebec. The editor of the *Revue du Droit* reminded readers of the importance of Olivier-Martin's account of the *Coutume de Paris* not only for understanding Quebec law's past, but also for its future: "pour y découvrir la formule de certains amendements peut-être nécessaires, qui replaceraient la famille dans son cadre naturel, à égale distance des règles trop artificielles du droit romain et des prétentions exagérées de certains juristes féminisants à rebours."⁴¹ This contentment with reform-by-tinkering lingered through the 1940s and 1950s, sustaining first one,⁴² and then another⁴³ missed opportunity to improve the status of women in

³⁵ Quebec, *Deuxième rapport de la Commission des droits civils de la femme*, Archives nationales du Québec (Q.) E17, Art. 635, Doc. #1871, (1930), at 106. On the conservatism of the Dorion Commission see Jennifer Stoddart, "Quebec's Legal Elite Looks at Women's Rights: The Dorion Commission 1929-1931" in D.H. Flaherty, ed., *Essays in Canadian Legal History*, vol. I (Toronto: University of Toronto Press, 1981) 323 esp. at 334ff.

³⁶ *Premier rapport*, *supra* note 2 at 243.

³⁷ *Ibid.* at 241.

³⁸ *Ibid.* at 245.

³⁹ Lucien Tremblay, *Les biens réservés de la femme mariée* (Montreal: Wilson & Lafleur, 1946) at para. 9, said that the 1931 reform touched the core of Quebec law and said that all such efforts should be attended to with an "extrême prudence."

⁴⁰ This remarkable idea was alluded to explicitly by the Dorion Commission, *Premier rapport*, *supra* note 2 at 243-4: "[C]'est la tâche du législateur d'observer cette évolution; c'est son devoir, dans la mesure où la loi peut agir, d'en diriger le cours, d'en favoriser, selon le cas, ou d'en contrarier l'essor."

⁴¹ Léo Pelland, "Monsieur Olivier Martin" (1938) 3 *Revue de Droit* 128 at 130-1.

⁴² Spurred on, no doubt, by the advent of legal capacity in France in 1942 and by the recognition of the right to vote in Quebec in 1940, Me Léon Méthot was named by the provincial government in 1946 to prepare a report on the legal status of the married woman. The report was never made public but some of the submissions before it were: see, e.g., *Chambre des notaires*, "Droits civils de la femme mariée" (1947) 49 *Revue du Notariat* 423 in which arguments for the retention of some form of marital authority were advanced before Me Méthot.

⁴³ The Civil Code was amended by S.Q. 1954-55, c. 48a, s. 3 to eliminate "married women" from the list of those persons incapable of contracting at art. 986 C.C.L.C., but did not change art. 176 C.C.L.C. or the rules on matrimonial régimes which left incapacity and relative powerlessness as the

marriage. The law of marriage was a coherent whole which was “trop vitalement important pour qu’on en bouleverse subitement l’économie,”⁴⁴ wrote one leading author. To this a judge added, at an important comparative law conference held in Quebec City in 1952, that Quebecers should pay homage to the Code which, despite its age, “reste toujours jeune et sait s’adapter de façon étonnante aux formes les plus modernes de notre activité nationale.”⁴⁵ Law reform for the married woman would not come at the expense of tradition, and the minority of jurists “dits ‘progressifs’”⁴⁶ were roundly denounced as shortsighted and disrespectful of the past.

When emancipation of married women came in 1964, it was cloaked in this same conservative spirit. The married woman finally did cast off her incapacity to exercise civil rights, but the reform left community of property in place as the legal régime, still organised around the principle of *les pouvoirs au mari, la protection à la femme*.⁴⁷ Reformers promised a complete revision of the law of matrimonial régimes, but this was not for now. For the moment, a tepid recognition of formal equality would suffice. The Nadeau Commission responsible for the 1964 reform made plain that the family structure would not change: “Il faut reconnaître à la femme mariée, dans son rôle de collaboratrice du mari au sein du foyer, son égalité de droits”.⁴⁸ For Nadeau, as for Dorion thirty years before, reform should not cause a “loss of the cohesion or unity within the household”; and the improvement in the legal status of married women should not result in any “sacrifice” of principles basic to the civil law.⁴⁹ The language of the new provisions of the Code seemed to confirm a lingering fear of real change.⁵⁰ A married woman was still “obliged to live with her husband; and ... [to] follow him and reside wherever he fixes the residence of the family” and the husband was “obliged to supply his wife with all the necessities of life, according to his means and condition.”⁵¹ Importantly, while she had full legal capacity, the

rule. These “articles moyenâgeux,” as Antonio Perrault described them, and the conservative conception of the family that they reinforced, remained in place: “La femme mariée” (1955) 15 *Revue du Barreau* 37.

⁴⁴ Gérard Trudel, “Capacité de la femme mariée, 1923-1947” (1948) 26 *Canadian Bar Review* 147 at 155. Trudel further contended that “l’égalité absolue des époux dans le mariage est une impossibilité de fait que les lois doivent sanctionner, sous peine de saboter l’institution même et d’affaiblir la cellule familiale” at 154.

⁴⁵ Élie Salvas, “L’évolution de la condition respective du mari et de la femme dans le mariage” in *Travaux de l’Association Henri Capitant pour la culture juridique française, 1952*, t. VII (Montreal: E. Doucet, 1956) 116 at 135.

⁴⁶ Émile Colas, “Évolutions juridiques sur un même thème: le mari” (1953) 13 *Revue de Barreau* 163 at 178.

⁴⁷ Community of property was patched up by giving married women increased but still subordinate powers to their husband under the legal régime: see arts 1292, 1297 and 1298 C.C.L.C., as amended by S.Q. 1964, c. 66.

⁴⁸ Office de révision du Code civil, *Rapport sur la capacité juridique de la femme mariée* (Montreal: 1969) at 22.

⁴⁹ *Ibid.* at 38-9.

⁵⁰ E.g., the very terms by which the legislature expressed the formal equality brought about by S.Q. 1964, c. 66: “The wife participates with the husband in ensuring the moral and material control of the family ...” (art. 174).

newly adopted article 177 C.C.L.C. made it more than necessarily clear that this was subject “to such restrictions as arise from her matrimonial régime,” including those pertaining to community of property.

The fact that community of property remained the legal régime from 1964 until the next changes in 1970 was the traditionalists’ last success in imposing the old conception of the family on the Code.⁵² There continued to be voices raised in support of the community: “Il n’y a là rien qui ne soit bon, excellent,” wrote one law dean in 1964, returning to the old argument that the principle of sharing of property under the administration of the husband was inspired by the rules of natural law, “en ce sens qu’il découle de la nature même et des fins de l’institution du mariage.”⁵³ But the speech given by Claire Kirkland-Casgrain in the Legislative Assembly announcing the reform barely hides her sense, to be vindicated in the very near future, that this was the old law’s last gasp and that reform of all matrimonial law along the lines of a new conception of equality was now unstoppable.⁵⁴

Mindful of tradition while not kowtowing to the past, the partnership of acquests was, in its original conception, a masterful compromise between tradition and novelty; a renovation of the old idea that marriage brought with it a necessary sharing of property, but now fully respecting spousal equality and autonomy during the marriage itself.⁵⁵ This new legal régime “synthesized”⁵⁶ part of the old logic of sharing from the community with the apparent advantages, from the point of view

⁵¹ Art. 175, first paragraph and art. 176 C.C.L.C., as amended by S.Q. 1964, c. 66.

⁵² There were more tenacious hold-outs beyond the law of matrimonial property, notably art. 243 C.C.L.C., which provided that the father alone exercised paternal authority over children during marriage: repealed by S.Q. 1977, c. 72.

⁵³ Pierre Azard, “Préface” in Comtois, *supra* note 11 at 8-9. See also Jean Pineau, “L’autorité dans la famille” (1965) 7 Cahiers de Droit 201 at 215 and Jean-Louis Baudouin, “Examen critique de la réforme sur la capacité de la femme mariée québécoise” (1965) 43 Canadian Bar Review 393 at 407ff

⁵⁴ Quebec, *Debates of the Legislative Assembly* (11 Feb. 1964) at 891-6. Quebec’s first woman member of parliament was not shy to appeal to the conservative instinct of her colleagues in her efforts to promote the adoption of “Bill 16.” She reassured them that the Bill had no other goal than “d’affranchir celle que Dieu leur a donné comme compagne, celle qui partage avec eux le travail, le succès et les désappointements” (at 896). Coming as they did, after the stagnation in law reform down to 1964, the changes enacted five years later appeared as a breath of wholly new and fresh air. The Code was amended, at article 177, to provide that “the legal capacity of each of the consorts is not diminished by marriage. Only their powers can be limited by the matrimonial régime.” Under the new legal régime that replaced community of property in 1970, the technical supremacy of the husband became a thing of the past. Article 1266o C.C.L.C. gave both spouses free administration of all their property, whether “private” or “acquests,” for the life of the “partnership of acquests” that would exist between them. The hierarchy that God and nature were to have imposed on marriage, as understood by the Civil Code through community of property, was finally over-thrown with the recognition that both spouses had equal powers over family finances. In this sense, 1970 represented the end of a conservative reign over family law and its reform and can rightly be thought of as a moment of great innovation in the history of Quebec private law. The novelty came not just for the techniques of matrimonial law, but also in respect of the ideology underlying law reform itself. The new rules were enacted not out of a fear of change but in celebration of it; and 1970 was the point at which law reformers saw modernisation, rather than conservation, as the keystone for altering the law of matrimonial property.

⁵⁵ Gérard Cornu’s description of the parallel change to French law in 1965 is apposite for the 1970 Quebec reform: “une loi qui rénove et innove en conservant”: *Les régimes matrimoniaux*, 4th ed.

of administration of assets, of separation of property. The economic risk that the traditional division of labour between the spouses entailed remained foremost for those drafting the shared-property régime of the partnership of acquests, and it was at dissolution of marriage that the legal régime's communitarian aspect found (and finds today) its plainest expression.⁵⁷ This has moved some jurists, inclined to see the new régime as part of a long-standing tradition, to signal a "détermination et une ... constance de la part du législateur dans la vision qu'il a du mariage" and to denounce those whose memories are too short to recognise this legacy from community of property.⁵⁸ Whatever the merits of this position, it is striking to observe the extent to which equality as a policy goal was to be achieved under the new régime by using the language and techniques of the past.

1970 was, then, a step forward by law reformers who were, to a large extent, still facing backwards. But while not a complete break with the past, it did constitute a shift in influence between conservatives and modernists in the law reform community. Prior to 1970, the view that modernisation was perhaps not a wholly bad thing was a minority position. Still faint voices in the 1920s, the dissenters said that law had to conform to reality, rather than to tradition, in order to be effective. Gérin-Lajoie, for example, was not shy to criticize freedom of contract in marriage and suggest that new social circumstances required a community, in part, redefined.⁵⁹ Others, while endeavouring to be respectful of the past, called for substantial change: "Soyons prudents", said one critic of the status quo who advocated separation as to property as a new legal régime, "mais soyons de notre temps."⁶⁰ It is even fair to see, hiding in the Dorion Commission and the minimalist reforms of 1931, an acceptance of the view that change was necessary. 1931 opened the door, over the coming years, for dissent to be expressed more openly in legal circles.⁶¹ Thus, while later calls

(Paris:P.U.F., 1984) at 55.

⁵⁶ A common term used to describe how the rules for pooling of property had been updated to fit the modern imperative of formal equality: e.g., J.E.C. Brierley, "Husband and Wife in the Law of Quebec: A 1970 Conspectus" in D. Mendes da Costa, ed., *Studies in Canadian Family Law*, vol. II (Toronto: Butterworths, 1972) 795 at 820 where this idea is fully developed. Other aspects of the new régime pointed to its roots in the past; e.g., the presumption of acquests as a continued sign of the legislative preference for sharing (art. 1266n).

⁵⁷ See Quebec, *An Act respecting matrimonial régimes* (Bill 10, first reading) 4th sess., 28th Leg. (1969), "Explanatory Notes" at IV: "[i]t is still usual in Quebec households for the wife to devote all her time to the care of the family and for the husband to be the only one able to amass an estate by his work" (signed "Office of the Revision of the Civil Code, Paul-A. Crépeau, Pres. ").

⁵⁸ E.g., Danielle Burman and Jean Pineau, *Le «patrimoine familial» (projet de loi 146)* (Montreal: Éd. Thémis, 1991) at 3 and 55ff.

⁵⁹ See, e.g., her speech before the Committee for Public Bills of the Quebec Legislative Assembly, *La femme et le Code civil, Plaidoirie de Mme Gérin-Lajoie devant le Comité des Bills Publics, en faveur de certains amendements au Code civil de la Province de Québec* (Montreal: Fédération Nationale St-Jean-Baptiste, 1929), esp. at 7-13, and 19-22. While she was an agent for change, Marie Gérin-Lajoie is best viewed as a "progressive" conservative: see generally N. Kasirer, "Apostolat juridique: Teaching Everyday Law in the Life of Marie Lacoste Gérin-Lajoie (1867-1945)" (1992) 30 *Osgoode Hall Law Journal* 427.

⁶⁰ Édouard Biron, "La femme et notre droit civil" (1920-21) 23 *Revue du Notariat* 89 at 96, whose rallying cry ended a rather scattered plea for a modern legal régime.

for the repeal of incapacity were inevitably expressed in the most moderate of terms, rarely calling into question the predominance of the husband in family finances,⁶² the way was cleared for the idea that the old law could no longer provide the prototype for marriage in a modern Quebec: “[N]otre peuple n’est pas, comme en 1866, un peuple d’agriculteurs,” as said one commentator in 1952.⁶³ While modernism was trumped by the continued attachment to tradition among most Quebec jurists, even in the official reports relating to the emancipation in 1964, new ideas were not completely absent. 1970 represented the shift whereby conservatism was at last relegated to a minority view.

The euphoria accompanying enactment of the partnership of acquests certainly paled against the lack of cheer that had characterised the legislature’s record to 1970. While late in coming, Bill 10 brought conviction to the earlier proclamation of formal equality in marriage. The partnership of acquests was generally seen as a welcome affront to the past, made gentle by the fact that the new régime remained true to the shared property model at the dissolution of marriage. Still, the reformers had taken their distance from tradition, and they were fêted in most quarters for having brought a happy innovation of sameness to spouses who did not make marriage contracts. However, after formal equality had been recognized as the foundation of a new matrimonial *statut*, its fragility became apparent. As if in a last fit of hesitation, the Civil Code had seemed reluctant to consecrate the essence of 1964 and 1970 in turns of phrase that reflected a sameness between women and men.⁶⁴ Despite the pomp of the latter reform, the *droit commun* remained littered with souvenirs of another time: not until reforms enacted well after 1970 did formal equality become entrenched systematically elsewhere in the Code, such as in the law of contract⁶⁵ and successions.⁶⁶ By the time formal equality had swept fully through Quebec’s common law, it had been overtaken by equality of condition as the primary policy goal.

61 Before a Quebec audience French jurist Marc Ancel called the parallel amendment to French law “la brèche la plus importante dans le système de l’incapacité de la femme et des pouvoirs du mari” since 1804: *Capitant* 1952, *supra* note 45, 82 at 87.

62 This included calls for change by feminists who wrote in legal journals: see, e.g., Thérèse Casgrain, “Les droits civils de la femme” (1942) 2 *Revue de Barreau* 6, and Gertrude Wasserman, “Puissance maritale” (1953) 13 *Revue de Barreau* 359, both of whom called for the repeal of incapacity but not of community of property.

63 Quebec City lawyer Jean Turgeon said this in a muted plea for the repeal of incapacity in *Capitant* 1952, *supra* note 45, 65 at 67.

64 E.g., art. 175 C.C.L.C. which still obliged the wife “to live with her husband” and, in a similar vein, art. 83 C.C.L.C. which continued to provide that “[a] married woman, not separated from bed and board, has no other domicile than that of her husband.” Both provisions were repealed by S.Q. 1980, c. 39.

65 E.g., art. 996 which still seemed to presume that only husbands made contracts: “[f]ear suffered by a contracting party is a cause of nullity whether it is fear of injury to himself, or to his wife, children or other near kindred,” repealed by S.Q. 1980, c. 39.

66 E.g., art. 844 pertaining to authentic wills: “... [a]liens and women may serve as witnesses, but a woman cannot be a witness with her husband, nor can the wife of the notary drawing up the will ... act as witness,” repealed by S.Q. 1980, c. 39. Women were entitled to become notaries by virtue of S.Q. 1956, c. 62.

B. Reluctant Emancipation from a Colonial Code

With the old law went the old way of making laws. 1970 represented not just a more meaningful equality between spouses, it also brought new techniques for reform and an important moment in a gradual nationalisation of Quebec private law. If the story of the first hundred years of the married woman's sluggish emancipation is retold from the perspective of the sources of family law, France takes the role of the husband and Quebec becomes the wife: the same themes of protection and obedience that animated matrimonial law down to the 1960s can be seen in the colonial relationship between Quebec law and French legal sources. France — or a *certainne idée de la France* — dictated the movement of Quebec law from 1866 to 1969; but it did so with decreasing effectiveness so that the emancipation of married women, made complete by the partnership of acquests, was accompanied by the emancipation of the once colonial Quebec Civil Code. The analogy is so unnervingly precise that, once identified, it threatens to turn on itself. It is not easy to say, for the period that concerns us here, whether a legal conservatism in the law of marriage bred a legal colonialism in its sources, or vice versa. Equally, did the move to modernity spawn the brand of legal nationalism that culminated in a "made in Quebec" matrimonial régime or, conversely, was it the newfound control over law-making that allowed Quebec family law to repeal the old legal ways?

Not unlike the image of a husband and wife forming one single person, France and Quebec were most often thought of as partaking of a single system of legal ideas for marriage in 1866. Quebec law, whether by reason of the newness of the conception of a national legal system or by virtue of the limited objectives of its technical codification, was not spoken of in legal literature in terms that we associate today with the idea of "national law."⁶⁷ Quebec matrimonial lawyers' instincts were unswervingly monojural: looking to France was not a comparative endeavour, and French law and French law books were not perceived to be foreign sources. Quebec was subsumed in a broader "French" legal tradition, not always well defined, such that legal self-determination over *les affaires de famille* was not fully present. Thus the reform of 1866, which brought about a consolidation of old French law in matrimonial property, announced not just a legal inheritance but also a dependence upon France which, given the manner in which it continued over the coming years, can fairly be styled as legal colonialism.

Using 1866 as a point of departure, at what point did Quebec law become something other than a distant mirror for French legal ideas? The makings for a break were indeed present from the start, but nothing seemed able to displace the dominant position of the French model on Quebec law's conception of marriage. Quebec legislators seemed in no hurry to consecrate a local conception of the financial consequences of marriage in distinctively local texts. Down to the 1960s, in fact, law reform was seen as an opportunity for *rapprochement* rather than *rupture* with the French legal model for relations between husband and wife.

⁶⁷ See H.P. Glenn, "Droit comparé et droit québécois" (1990) 24 *Revue juridique Thémis* 339 at 344 where Quebec law of 1866 is described as "un droit n'ayant pas (encore) atteint le stade de cohérence autonome où le droit est devenu quelque chose de pur."

The reforms of 1931 and 1964 were part of a conditioned reflex. Mimicking French law was the most “natural” way of improving the prototype for marriage in the *Civil Code of Lower Canada*. Judging from the texts themselves, the amendments reserving property to the administration of married women were a faithful reproduction of a French law enacted a generation before.⁶⁸ Similarly, French reforms repealing the incapacity in 1938 and 1942 were consciously copied in Quebec, to bring an equally shy emancipation to married women in itself.⁶⁹ There were of course differences,⁷⁰ but, as Quebec lawyers were quick to point out, the *Civil Code of Lower Canada* would remain, a century after codification, true to its origins in linking the fortunes of the married woman in Quebec to her counterpart in France. And because French law was to be a model to the exclusion of others, parroting French reforms was all the more an act of loyalty and devotion. There were those who spoke of frames of reference other than France for matrimonial law reform over this long period, but this was generally done in a spirit of legal tourism rather than as genuine comparison.⁷¹ Quebec law’s first duty in marriage, like that of the married woman prior to 1964, was to obey a higher and natural authority. But what is striking, in examining the dominant attitude to law reform in this period, is that legal colonialism was not so much suffered, or even tolerated, but it was in fact cheered on as the healthiest way for Quebec law to develop in keeping with its own identity.

Alongside conservatism, legal colonialism was therefore a dominant force contributing to how the law was to change. Positive law was slow to progress because Quebec law reformers’ attachment to traditional values was compounded by an alliance with the civil law tradition to which they felt contentedly bound. “La France est là pour nous servir de guide!”⁷² said Marie Gérin-Lajoie in support of her moderate pleas for change in the 1920s and, to buttress her calls for adjustments to community of property, she would openly invoke Quebec law’s duty to follow the path already cleared by France. “Sauvons nos lois françaises,” she implored and, specifically, the legal régime of community of property “qui incarne le génie français et qui fournit le prototype d’un idéal.”⁷³ The Dorion Commission vigorously

⁶⁸ *Loi relative au libre salaire de la femme mariée et à la contribution des époux aux charges du ménage*, 13-16 July 1907, D. 1907.4.149, explicitly acknowledged as the source by the Dorion Commission, *Premier rapport*, *supra* note 2 at 270.

⁶⁹ *Loi portant modification des textes au Code civil relatifs à la capacité de la femme mariée*, 18 February 1938, D. 1939.4.1 and *Loi sur les effets du mariage quant aux droits et devoirs des époux*, 22 September 1942, D. 1943.50, explicitly acknowledged as the inspiration for the Quebec texts in the *Debates of the Legislative Assembly* (11 February 1964) at 893.

⁷⁰ Some differences were important: for example the 1907 law was enacted outside the *Code civil* unlike its Quebec counterpart at arts. 1425ff. C.C.L.C. ; and, in respect of incapacity, the French Code continued after 1942 to proclaim that the husband was “chef de la famille” unlike art. 177 C.C.L.C. after 1964.

⁷¹ For example, the Dorion Commission even reviewed the law of ancient Egypt before copying French texts into the Quebec Code: *Premier rapport*, *supra* note 2 at 243.

⁷² *La femme et le Code civil*, *supra* note 59 at 22.

⁷³ “La Communauté Légale”, *supra* note 23 at 5. For Gérin-Lajoie, art. 1422 of the French Code and the French law of 1907 were to be “adopted” since the mother country was the “source naturelle qui alimente notre Code civil dans la question qui nous intéresse”: *La femme et le Code civil*, *supra*

embraced post-1804 French law for changes that would insure that Quebeckers would "remain who we are," and insisted that French ideas were acceptable because they were not "foreign" sources.⁷⁴ The legislature followed suit by copying article 1422 of the French Code and much of France's 1907 *Loi relative au libre salaire de la femme mariée* into the *Civil Code of Lower Canada*.

The same discourse of deference to French law — or of "obedience," to use the term of Ernest Caparros⁷⁵ — coloured discussion of the ways and means for increasing married women's powers over the next forty years. An active stance was taken against the specificity of Quebec law among advocates of reform. It was in the coming years that the Bar of Montreal, in a high moment of obsequiousness, published the proceedings of a joint France-Quebec colloquium under the title "*Le droit civil français*,"⁷⁶ only to be bettered, some fifteen years later, by another such gathering in which many Quebec participants called for reforms to the Civil Code which would accentuate the relationship between Quebec law and France.⁷⁷ One measure of the ascendancy of legal colonialism was the prevalent sense that the repeal of incapacity for Quebec was justified by the French reforms of 1938 and 1942.⁷⁸ Thérèse Casgrain invoked the "lesson" that France, after 1942, had for Quebeckers who should follow the example as the "héritiers du Code Napoléon."⁷⁹ When law reformer André Nadeau did take up the task of drafting provisions for the repeal of incapacity in 1963, his point of departure and point of conclusion was the *French Code civil*.⁸⁰

note 59 at 14.

⁷⁴ See, e.g., Quebec, "Deuxième rapport de la Commission des droits civils de la femme" [C.-É. Dorion, chair] (1930) 32 *Revue du Notariat* 310 at 339-40 and 351.

⁷⁵ *Les lignes de force de l'évolution des régimes matrimoniaux en droit comparé et québécois* (Montreal: P.U.M. 1975) at para. 27. This book, the published version of Caparros' doctoral thesis, is the most complete study of the history of Quebec matrimonial law in a comparative setting.

⁷⁶ *Le droit civil français, Livre-souvenir des Journées du droit civil français* (Montreal: Bar of Montreal, 1936). The tone of this remarkable book, for our chosen subject, is given by Quebec judge Édouard Fabre-Surveyer ("Préface" at [ii]) when he referred to the chapter that a modern French author (Aftalion, *supra* note 17) had devoted to the matrimonial laws of "Lower Canada" as "quatre pages émuës."

⁷⁷ See *Capitant 1952*, *supra* note 45, notably the "Canadian" reports on matrimonial law of Judge Elie Salvas (at 116), and notary Armand Lavallée (at 156). Some of the reports did endeavour to show up differences between the two settings: see especially that of Ottawa lawyer Luc-André Couture (at 353).

⁷⁸ The devotional fervour spilled quickly onto the floor of the Quebec Legislative Assembly when a back-bencher presented a bill to repeal incapacity patently inspired by the new French texts: see *An Act to amend the Civil Code and the Code of Civil Procedure respecting the rights of women*, 4th sess., 20th Leg., 1939 (Mr. [René] Chaloult).

⁷⁹ "Les droits civils de la femme" (1942) 2 *Revue de Barreau* 2 at 7. See also Jacques Charpentier and Jacques Hamelin, "La capacité de la femme mariée en droit français" (1947) 7 *Revue de Barreau* 244 at 244n [note signed Antonio Perrault].

⁸⁰ Nadeau made his approach clear to Attorney-General G.-É. Lapalme: "Je crois que l'on peut s'inspirer à cet égard de l'exemple français," he wrote in the preface to his report and in the document itself he constantly referred to the French Code as justification for the position he took, often citing no other authorities or reasons for his proposals: *supra* note 48 at 1, 14-6, 19, 21, 29, 31-3 and 37.

This state of happy subjection plainly inhibited the process by which Quebec law might differentiate itself and created the appearance of a community of ideas between France and Quebec more pointed, no doubt, in matrimonial law than in other facets of political and cultural life. Much vaunted by Quebec jurists pledging fealty and by those in France sunning themselves in the *rayonnement* of the French Code,⁸¹ this community of ideas should by no means be mistaken for a nascent civilian *jus commune*. The transnational character of the exchange was very much a one-way proposition, thereby representing a source of comfort to those who saw copying as a technique to make sterling Quebec reforms,⁸² and of frustration to others bristling under the weight of juridical vassalage.⁸³ Conservatism slowed the enthusiasm to copy right away,⁸⁴ but deference to France was unquestionably a dominant feature of the law reform landscape as late as 1964. One can hardly speak of the Quebec legal “system” as the equal of France, if one was to speak of it at all, at least for matrimonial law. Few were those at this time who, like René David, dared ask if an “aspect juridique de l’américanisme”⁸⁵ might move Quebec law away from its French heritage. If one aspect of cultural nationalism is the affirmation of the nation-state through locally produced law, then legal nationalism slowed to nothingness in the deep shadow of Quebec’s French inheritance.

Many factors contributed to the ascendance of the French model in matrimonial law reform. Some affinities were truly natural, to be sure, particularly the shared French language⁸⁶ and a shared civilian conceptual vocabulary for matrimonial régimes. But just as legal conservatism was, in part, an ideological project for law reform, so too was legal colonialism. The attitude of servility consecrated French law as an exclusive model for new ideas and was accompanied by a rejection of foreign legal influences on the family on grounds of the integrity of the civilian legal tradition. The need to keep that which was “foreign,” incarnated by an often

⁸¹ E.g., in works designed for Quebec audiences, Henri Capitant, “L’évolution du droit de la famille depuis le Code civil,” *Livre-souvenir 1936*, *supra* note 76 at 1, who spoke of the French Code as “notre patrimoine commun”; and Léon Julliot de la Morandière who praised “l’extraordinaire vitalité de ce rameau de droit français”: “Préface” in Louis Baudouin, *et al.*, *Quelques aspects du droit de la Province de Québec* (Paris: Cujas, 1963) at I.

⁸² On occasion, law reformers were even chided for not following the French example closely enough: see e.g., Comtois, *supra* note 11 at 355-6.

⁸³ Pierre Carignan and Albert Mayrand, “Le Code civil français et son influence en Amérique — Province de Québec” in *L’influence du Code civil dans le monde* (Paris: A. Pedone, 1954) 783 at 803 in which the regret is expressed that French law reformers had not been attentive to ideas originating in Quebec. It bears mention that the authors were part of the first generation of Quebec career law professors, anxious to create an indigenous *doctrine québécoise*.

⁸⁴ According to Carignan and Mayrand, *ibid.* at 802, traditionalism encouraged Quebec reformers to study innovations from outside for a time, “quitte à les imiter lorsque l’expérience réussit.”

⁸⁵ René David, “Le Code civil français et son influence en Amérique — Rapport général” in *supra* note 83, 723 at 723. This paper, which considered the importance of a “nationalisme juridique américain,” (at 726) also commented on Louisiana private law.

⁸⁶ In *La réception des droits privés étrangers comme phénomène de sociologie juridique* (Paris: L.G.D.J., 1975) at 67, A.V. Papachristos chose Quebec’s link to France as an example to show how a common language can be a “renfort décisif” in connecting one legal order to another.

imprecise sense of the "common law," from infiltrating the family was of prime importance when reforms were mooted from the 1920s onwards. English law, perceived to be connected with a wrongheaded form of equality expressed in separate property arrangements and married women's property legislation, was styled as incompatible not just with the old ways but also with Quebec's "French" legal tradition. Calls for the integrity of the civil law became, in the mouths of some, a sort of juridical fundamentalism. In 1927, Rolande Désilets denounced what she saw as "anglo-saxon" ideas which would introduce "chez nous un esprit d'indépendance qui nous rapproche de la mentalité étrangère, à laquelle nous devons rester historiquement réfractaires, pour la sauvegarde de notre caractère ethnique, de notre langue, de notre foi religieuse, [et] de notre bonheur domestique et national."⁸⁷

The Dorion Commission attacked those who criticised Quebec's rules on the status of married women as "les dénigreur systématiques de tout ce qui caractérise essentiellement le groupe ethnique le plus important de cette province."⁸⁸ For the commissioners, an alliance with French law for reforming women's powers in marriage was the only way to proceed in order to protect "la femme canadienne française" since other "foreign" sources would be "l'ivraie qui ravagera notre bon grain."⁸⁹ The suspicion of non-French legal ideas did not always take on such ethnocentric expression; but as long as French law remained, as it did through to the 1960s, the prime model for reform, calls for the specificity of civil law would retain a hint of this political colour.⁹⁰

Those controlling the apparatus for law reform were so preoccupied down to 1964 with their enterprise of "plagiat modeste"⁹¹ that the signs of the specificity of Quebec law tended to be shunted into the background. Yet hiding under the dominant attitude was a longstanding minority position that Quebec matrimonial law was a distinctive part of a legal system in its own right. There were, of course, many differences between the 1866 consolidation and both the old French Law and the Napoleonic Code which were to serve as its foundations. The prominence of the *senatus consultus Velleianum* from Roman law, abolished in old France and unknown to the

⁸⁷ "Notre seule politique" (1927) 8 *La Bonne Fermière* 39. The author was cited with approval by the Dorion Commission, *supra* note 2 at 246n.

⁸⁸ *Premier rapport*, *supra* note 2 at 234. This idea is developed in J. Stoddart, *supra* note 35 *passim*.

⁸⁹ *Ibid*, note 2 at 234-5. See also 269, 271-2, 275-6, 318, 324, 328, 340, 348ff., 353, and 364. These ideas are most easily associated with Judge Dorion himself but they seemed to have been shared by his reputedly "progressive" colleague, notary Victor Morin: see, e.g., Morin, "Le rôle du notaire dans le droit civil" *Livre souvenir 1936*, *supra* note 76, 599 at 607 for a warning against "empiètements de toute nature qui s'infiltrèrent insidieusement dans notre rouage juridique."

⁹⁰ See, e.g., Roger Comtois' excellent review of various pleas for reform in the 1960s, "Pourquoi la société d'acquêts?" (1967) 27 *Revue de Barreau* 602, in which he stated that the prevalence of separate property arrangements elsewhere in North America was no reason to "sacrifier notre personnalité, nos mœurs et nos coutumes juridiques. S'il en était ainsi, je me demande quelle raison on aurait de continuer à garder une civilisation et une culture qui, en Amérique, ne se retrouvent pas ailleurs qu'au Canada français" (at 612).

⁹¹ Réjane Laberge-Colas, "L'incapacité de la femme mariée" (1963) 23 *Revue de Barreau* 575 at 588.

modern French *Code*, could be taken as a measure of difference,⁹² as were various rules included, according to a secretary of the Codification Commission, “to improve our law as a system, and adapt it more perfectly to our present state of society.”⁹³ The slowed apotheosis of the Quebec Code as the central embodiment of private law no doubt inhibited the emergence of a Quebec legal system⁹⁴ and, in matrimonial law, it would be well into the twentieth century before the sense took hold that the law applicable in Quebec had to reflect a local reality rather than a time honoured tradition. Yet there were calls, here and there, for Quebec to enact laws reflecting its own conception of the family — “les multiples éléments de race et moeurs,”⁹⁵ as one commentator put it — rather than mimicking the mother country. By the late 1940s, as Quebec *doctrine* began to come of age, pleas became more regular for Quebec to assert itself against France, to proclaim what one leading writer called a juridical “autochtonéité.”⁹⁶ By the 1950s these calls became more regular, particularly among jurists working in Quebec universities,⁹⁷ but those controlling the machinery of law reform remained impervious to calls for a national law in marriage. Even the paternalist counsel of French scholars *en visite* was not enough to break the pattern of servility that governed changes to Quebec law down to the 1960s.⁹⁸

Caught up with maintaining the old ways and following the French example down to the legislative letter, most jurists failed to see — or chose not to see — the rising number of spouses deserting the prototype for marriage originating in the French legal tradition. When a survey of notarial practice revealed that 73% of couples married in 1962 had abandoned community of property in favour of the relative autonomy and formal equality offered by the separate property régime, this appeared to the legislature as a surprise — a “fait brutal” — that would finally upset the old legislative reflex of copying French law.⁹⁹

92 See art. 1301 C.C.L.C. which provided that a wife could not bind herself “with or for her husband,” repealed by S.Q. 1969, c. 77. The much litigated prohibition, enacted by L.C. 1841, c. 30, is said to have been put in place to protect women upon the establishment of Quebec’s first comprehensive system for registration of deeds. See Auguste Sené, *De la résurrection du sénatus-consulte velléien au Bas-Canada* (Paris: Girard et Brière, 1907) at 105.

93 McCord, *supra* note 10 at II. One example was the authority of priests in outlying places, such as the Gaspé, to receive marriage contracts in notarial form (art. 1264, para. 2 C.C.L.C.).

94 See André Morel, “L’émergence du nouvel ordre juridique instauré par le Code civil du Bas Canada (1866-1890)” in *Le nouveau Code civil: interprétation et application* (Montreal: Éd. Thémis, 1993) 49.

95 Walter Baker, “Incapacité de la femme mariée” (1895) 1 *Revue Légale*, n.s. 154 at 159 cited this as a possible explanation of one difference between the law of Quebec and France.

96 Gérard Trudel, *Traité de droit civil du Québec*, t. 1 (Montreal: Wilson & Lafleur, 1942) at 9 said that the inconvenience of Quebec’s close relationship with French law “a été de faire oublier le caractère essentiel du droit quand il devient loi: l’autochtonéité.”

97 See esp., Walter S. Johnson, “The Law Cannot Stand Still” (1955) 2 *McGill Law Journal* 11 at 17-20; Carignan and Mayrand, *supra* note 83 at 803; and Louis Baudouin, “Les réformes de l’incapacité de la femme mariée” (1952) 12 *Revue de Barreau* 214.

98 See, e.g., Robert Le Balle, “L’évolution de la condition respective du mari et de la femme dans le mariage” in *Capitani 1952*, *supra* note 45 at 32 who warned his Quebec audience “ne vous hâtez pas de transposer purement et simplement nos institutions françaises dans les vôtres” (at 39).

99 The re he survey reported by Comtois, *supra* note 11 at 317ff. pointed to loss of favour

This popular reaction, whatever its precise explanation, was indeed remarkable: a sign that spouses were prepared to abandon tradition even when, through the changes of 1931 and 1964, positive law remained closely allied with the French model. In fact it might even be suggested that the combined effect of legal conservatism and legal colonialism forced spouses to make the law unto themselves in marriage contracts by opting for separation of property. While English law's conception of marriage was actively excluded by an official position bent on keeping in line with French law, Quebec's spouses seemed increasingly inclined to do otherwise. It has therefore justly been observed: "C'est par un cheminement contractuel qu'au Québec la séparation de biens à l'anglaise a fait reculer la communauté coutumière."¹⁰⁰

The realisation, late in coming, that a carefully preserved French model was not what Quebec spouses themselves wanted brought the need for fundamental redirection of the sources of matrimonial law into focus. It was a sign that the model for marriage linked to separation of property, while on the margins of the ideal for marriage in the French and Catholic traditions, should inform Quebec law more directly. Copying French law in 1964 was to be legal colonialism's last triumph. The repeal of incapacity along the lines of the *Code Napoléon*, as Commissioner Nadeau acknowledged in an introductory *apologia* to his report, would only be but a first step in a complete rethinking of matrimonial law. This rethinking would be the occasion upon which law reformers would look beyond the French example to find ideas that could express Quebecers increasingly distinctive sense of how finances should be organised in marriage in a newly dominant legal nationalist discourse. Réjane Laberge-Colas spoke for what was quickly becoming, in the 1960s, a majoritarian view: solutions in family law had to be conceived in an "optique québécoise, avec des données québécoises et des modalités capables de répondre aux besoins de notre milieu."¹⁰¹ The pride of having a French heritage in family law, wrote a provincial court judge, "n'écarter pas l'ambition légitime d'y faire refléter un peu de notre vrai visage."¹⁰² An increasingly prevalent sense was that "notre vrai visage" was not necessarily that of the French legal tradition's community of property, but rather the separate but equal marriage modelled after what was current in the rest of Canada. In an unholy alliance emerging in the mid-1960s, the Quebec Bar and a leading women's caucus both argued for separation of property as a new régime, with a mandatory reserve of property to protect married women.¹⁰³

for the community of property, that was, for the Civil Code Revision Office, "a blunt fact ... that has to be taken into account" in preparing what would eventually become the partnership of acquests: "Explanatory Notes," *supra* note 57 at III.

¹⁰⁰ Jean Carbonnier, *Sociologie juridique* (Paris: Lib. Armand Colin, 1972) at 170 where the French philosopher cites this Quebec example to describe the phenomenon of "acculturation juridique" resulting from private acts.

¹⁰¹ *Supra* note 91 at 579.

¹⁰² René Théberge, "Prestige, fierté et justice" [1963] *Revue Légale* 513 at 542.

¹⁰³ See Fédération des femmes du Québec, [Réjane Laberge-Colas, president] *Mémoire soumis au Comité des régimes matrimoniaux de l'Office de révision du Code civil* (Montreal: 1966) [unpublished] and J. Forest, "Barreau de la Province du Québec: Sommaire de quelques extraits du procès-verbal de l'Assemblée du Conseil général du Barreau tenue à Arvida, les 27, 28 et 29 octobre 1966"

The sense that law reformers should consider ideas originating elsewhere than in France took very concrete shape in the major reform that brought the partnership of acquests. Bill 10, drafted under the watchful eye of a Quebec university professor educated in both France and England and having an established reputation as a comparative lawyer, announced an openness to difference that would radically reorient the sources of matrimonial law reform.¹⁰⁴ The reform of 1970 was an open celebration of pluralism and a quiet shelving of the monojural approach to reforming family law. Just as traditionalism was displaced in 1970 as the controlling ideology for matrimonial law, so too did the French model get pushed aside with the partnership of acquests, the victim of rising sentiments of legal nationalism and legal pluralism as newly controlling ideals for law reform. Once and for all, Quebec matrimonial law came out from under the exclusive influence of its French inheritance with a reform that, ironically, granted the same favour to the married woman as against her husband. From this angle, the partnership of acquests may best be thought of as drawing on several foreign models, without renouncing its debt to the cadre provided by the *ancien droit* and modern French law. Community régimes from Belgium, The Netherlands, Portugal, Brazil, Spain, Argentina, and Chile were analysed, alongside that of France. Each was rejected as incompatible with the local conception of marriage.¹⁰⁵ It was acknowledged that Quebec spouses seemed "more and more attached" to the advantages of separate property arrangements, explicitly connected to the "English-speaking world," and that this should be reflected in a new legal régime.¹⁰⁶ The partnership of acquests would borrow ideas from France, to be sure, but also from Sweden, Denmark and West Germany, as well as the Ontario Law Reform Commission.¹⁰⁷ The final product was unique by virtue of the *mixité* mandated by Quebecers' particular conception of marriage: it drew on the separateness of English law, during marriage, and returned to the civilian communitarian ideal at dissolution. As a leading comparative scholar, far from France or Quebec, noted not long after its adoption, the partnership of acquests was a sign that Quebec had secured a place among those legal systems enacting and exchanging the most modern of ideas.¹⁰⁸ Quebec family law was no longer that of the *filles de France*, and of their wives, but instead a part of a legal order at the brink of affirming its autonomous character and seeking to house itself in a new national civil code. It is

(1967) 27 *Revue de Barreau* 53 at 62-3.

¹⁰⁴ McGill Professor Paul-André Crépeau replaced André Nadeau as head of the Civil Code Revision Office in 1965 and brought his enthusiasm for comparative law to the reform of matrimonial law: see, e.g., Crépeau, "Les principes fondamentaux de la réforme des régimes matrimoniaux" in *Lois nouvelles II* (Montreal: P.U.M., 1970) 9, *passim*.

¹⁰⁵ "Explanatory Notes" *supra* note 57 at III-IV.

¹⁰⁶ *Ibid.* at IV and VI.

¹⁰⁷ *Ibid.* at V and VI.

¹⁰⁸ See Otto Kahn-Freund, "The Uses and Misuses of Comparative Law" (1974) 37 *Modern Law Review* 1 at 14-5: "Is it not ... significant how new ideas on the property relation between spouses are spreading from country to country, including countries as different in their legal traditions as the Scandinavian countries, Western Germany and England, and, in a different form, the Netherlands, France and the Province of Quebec?"

fair to say that the Quebec Code, as it passed the celebrations of its centenary, had begun to articulate both its contemporaneity and its distinctiveness in respect of the married woman.¹⁰⁹

Looking backwards from 1970, the earlier reforms may have held in them the germ for openness that would take hold in the 1960s. While the reform of 1931 was above all an act of faithful adherence to the French legal tradition, the French law chosen was no longer that of the *ancien droit* but modern French law. This was, of course, not much more than a changed frame of reference; but by copying the 1907 French law, Quebec did move, just barely, into the twentieth century. Similarly, 1964 was first and foremost a devotional reform. Nadeau himself acknowledged that plagiarising from France in itself was not enough to renew the law of matrimonial property. 1964 was legal colonialism's last gasp and a complete realignment in the theory of sources for law was now unstoppable.

II. Affirmation of Substantive Equality in the Rising Spirit of Legal Nationalism, 1970-1991

The reform of 1970 represented the crossing of a Rubicon: no longer would the attachment to a story-book tradition slow the development of law's view of the economic power of married women, nor would the single reference point of French law limit the imagination of law reformers. The discourse associated with an openness to modernity and acceptance of a plurality of models for reform was firmly in ascendance. As a consequence, the Civil Code, as *contenant de droit national*, would lose over the coming years some of that quality which had moved one commentator to call it a "Gibraltar canadien-français."¹¹⁰ A flurry of amendments followed the adoption of the partnership of acquests reorienting matrimonial law further, both as to substance and sources. The least that can be said of the period between 1970 and the 'new' codification of 1991 is that the *immobilisme* which had once inhibited law-making had become, like much of the old law abandoned, a relic of the forgotten past.

The year 1970 marked not just the end of point a movement towards formal equality, but also the beginning of a trend where reformers, thinking of husbands and wives as independent economic actors, also sought to promote an equality of condition between them. Reforms of 1980, 1989 and 1990 also brought rules designed "to favour the economic equality between spouses and to underline the character of marriage as a partnership."¹¹¹ But henceforth this favour would be achieved by imposing a "primary régime" for sharing on all Quebec marriages, notwithstanding choices made by the spouses themselves. Not surprisingly, this

¹⁰⁹ Indicative of this phenomenon, by both chosen topic and contents, was Volume I of the centenary commemorative publication: Jacques Boucher and André Morel, *Le droit dans la vie familiale: Livre du centenaire du Code civil*, vol. I (Montreal: P.U.M., 1970).

¹¹⁰ Louis Baudouin, "La réception du droit étranger en droit privé québécois" in Baudouin *et al.*, *supra* note 81, 3 at 65.

¹¹¹ Explicitly characterised as such in respect of the later reforms: see "Explanatory Notes," *An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. 1989, c. 55.

retreat from the long-standing principle of freedom of contract in marriage gave new life, in legal circles, to the familiar ideological split between retiring and crusading approaches to reform. But traditionalism, now in a new and more thoughtful guise, did not have the grip it formerly had on the reform process. After 1970, a sense that matrimonial law was out of step with the reality it was designed to reflect came to dominate. Carried along by a triumphant mood of modernism and a great wave of reform, the law's married woman lurched rather suddenly from formal towards substantive equality, at the expense for some of tradition (A).

Again in this period, disagreements over law's conception of marriage went hand in hand with parallel disagreements relating to the appropriate sources for reform. Those arguing for respect of tradition often framed their objections to proposals by describing them as out of step with "civilian" thinking and, in some cases, based on an indefensible reliance on "foreign" legal sources. On the other hand, 1970 was a spark that moved others, in the ensuing years, to extend their welcome beyond French law to a wide range of unorthodox models for reform, pointing often to devices designed to promote the equality of married women in jurisdictions outside the usual frames of reference. This openness came to dominate over the next twenty years and equality in marriage, informed by "comparative law," became a core principle in the development of an autonomous legal order and in a book of a new Civil Code that bespoke respect, but not enslavement, to tradition (B).

A. The Spirited Emergence of a Matrimonial Public Order

Despite its florid promises, the legislature had shied away from imposing equality on spouses in 1969. The bold talk may in fact have masked a disinclination to upset the spouses' private decisions as to how to organise their financial lives. The clearest sign of equivocation was the continued presence in the Code of community of property, albeit as a conventional régime, in which women were granted increased but still subordinate powers.¹¹² But if the Civil Code seemed shy to give it plain expression, equality in marriage had entered Quebec's legal consciousness by the 1970s and soon came to rest upon the highest planes.¹¹³ There was some nostalgia for the time when the husband was the uncontested legal head of the family,¹¹⁴ but these were isolated expressions which had little impact on development of the law.

¹¹² The status of husband as head of the household remained intact despite additions to the wife's powers over both community and private property: see former arts 1292, 1297 and 1298 C.C.L.C., as amended by S.Q. 1969, c. 77. That the community remained in the Code is an example of the phenomenon, described by Jean Carbonnier for a Quebec readership, that two legal generations can coexist at a given point in history: "Quelques remarques sur l'esprit de la loi française du 13 juillet 1965 portant réforme des régimes matrimoniaux" (1968) 14 McGill Law Journal 590 at 597.

¹¹³ The principle of spousal equality was expressed as a fundamental value in the *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6, (R.S.Q., c. C-12, s. 47).

¹¹⁴ Some still said that it was necessary to designate one person as the head of the household for decision-making efficiency. The old argument that the laws of nature required this to be the husband were generally no longer advanced: e.g., Marcel Guy, "De l'accession de la femme au gouvernement de la famille" in *Livre du centenaire*, *supra* note 109, 199 at 214 and Douglas Tees, "The Partnership of Acquests as the Proposed Legal Matrimonial Property Régime of the Province of Quebec" (1968)

Yet as the “facilités de l'égalité mathématique”¹¹⁵ took hold, it became evident that equality as a policy objective had to account for the different roles husbands and wives generally played in family life and the work force. Formal equality was, on its own, an unlikely agent for real change in the economic relationship between women and men in marriage. Equality of condition, an old theme, had not of course been jettisoned by the 1970 reform; it was at its very core: marriage was still said to bring with it the sharing—albeit deferred—of certain patrimonial interests, thereby justifying a shared-property régime for the *droit commun*.¹¹⁶ But even this initiative proved to fall short of its hoped for effect and, as a result, prepared the terrain for an ideological shift towards state interventionism in family finances. Calls for substantive equality—expressed variously as *égalité parfaite*, *égalité de fait*, *égalité complète* or otherwise—became a common rallying cry for those seeking to make “just” the matrimonial *statut* of Quebec spouses. This second era was characterised by a return to the idea that marriage brought with it a necessary meshing of patrimonial interests but now in a new anti-libertarian spirit. In 1980, 1989 and 1990, obligatory incidents of marriage were enacted relating to the family residence, expenses of the marriage, a compensatory allowance and a family patrimony, all designed to impose a measure of substantive equality upon the spouses during and at the end of marriage. While the reform of 1970 had been largely one of innovation, the legislature's enthusiasm for formal equality had been tempered by a renewed commitment to economic freedom as a foundational concept in matrimonial property law. This constituted, for those advocating the reform of the system through the 1970s and 1980s, its tragic flaw. *Laissez-faire* traditionalism found expression in two important ways. First, under the new legal régime, article 1266o left spouses virtually unfettered in the administration, enjoyment and disposal of their private property and acquests until the dissolution of the régime. Second, the partnership of acquests was not to be forced on spouses but instead was designed, like its forebearer, as an optional “matrimonial convention.” Said the reformers, “[t]he law unquestionably leaves the future consorts free to draw their marriage contract according to their preferences and interests—a freedom that certainly requires no discussion.”¹¹⁷ If anything, 1970 extended freedom of contract by partially laying aside the principle of the immutability of the matrimonial *statut*.¹¹⁸

Disagreement over the continued presence of freedom of contract in marriage prompted a divide to reappear among jurists in the years that followed, along precisely the same ideological fault line as in the past. The voices raised against

14 McGill Law Journal 113.

115 Alain-François Bisson, “Conclusion comparative” in *La femme mariée, évolution récente de sa condition en droit et en fait, Travaux du 9ième colloque international de droit comparé* (Ottawa: Éd. Université d'Ottawa, 1972) 293 at 298.

116 “The union created by marriage necessarily gives rise to a certain mingling of the material interests of husband and wife”: “Explanatory Notes,” *supra* note 57 at I.

117 “Explanatory Notes,” *supra* note 57 at III.

118 Former arts. 1260 and 1265 C.C.L.C., which had once imposed the initial choice on spouses until death did they part, were amended by S.Q. 1969, c. 77 to facilitate post-nuptial marriage contracts.

change now mounted their defence of the old ways, upon expressions of confidence in private justice as a defining and perennial feature of marriage.¹¹⁹ There remained after 1970 a strong current of opinion that the optional devices for sharing inherent to the traditional law—the legal régime, gifts in the marriage contract, the conventional appointment of an heir—would suffice to assure a just distribution of property rights and powers in marriage. Within the formalistic confines of the notarial deed in which the *pacte de famille* had to be expressed, it was argued, contractual freedom had in fact always been wider in matrimonial law than elsewhere, and for good reason.¹²⁰ When confronted with some of the new imperative rules of matrimonial law, notably the compensatory allowance and the family patrimony, it was said that the affront to tradition was too great. The reforms were denounced as completely undermining the choices spouses were free to make at the outset of marriage and, as such, posed a threat to the integrity of marriage itself.

But others, in now growing numbers, felt that the old law and its underlying philosophy had to be cast aside to realize the familiar objective of substantive equality in a new socio-economic setting. Proponents of this view expressed a loss of faith in devices such as gifts in the marriage contract and the optional matrimonial régime as a means of assuring equality in marriage. Change became a matter of urgency given a widening perception that the traditional law was out of step with modern life. The Civil Code Revision Office became the principal forum for the debate during this period and the locus for the emerging consensus for change.¹²¹ For its president, the “fossé entre le Code et la réalité” was so marked that it was “susceptible de transformer un Code civil en un musée d’antiquités et un système juridique en une oeuvre de folklore.”¹²² Traditionalism, now in a libertarian posture, bent under an interventionist agenda for reform and would be reduced over these twenty years to a relatively quiet, if tenacious, dissent.

The first initiative, which would limit spousal rights and powers over the family residence and its contents as an obligatory incident of marriage, was proposed by the Civil Code Revision Office in 1971,¹²³ one short year after that same body had stated that economic freedom in marriage was a principle that “needed no discussion” in Quebec law. There had been some calls for a special protection for the matrimonial

¹¹⁹ Until 1964, the principal limit to contractual freedom had been the inequality established by marital authority itself: spouses could not avoid, by private agreement, the “authority of the husband over the persons of the wife and the children” (see art. 1259 C.C.L.C., repealed by S.Q.1964, c. 66).

¹²⁰ Art. 1257 C.C.L.C. (repealed S.Q. 1980, c. 39) had provided that undertakings void in other acts *inter vivos*, such as gifts of future property, were lawful in marriage contracts on the unstated grounds that the marriage contract was made to found a new family (or, as is traditionally said, as a *pacte de famille*).

¹²¹ After having taken responsibility for the 1964 and 1969 initiatives, the C.C.R.O. pursued the reform of family law as part of its project to recast Quebec’s common law in a new code. On the history of the C.C.R.O., see Paul-A. Crépeau, “La révision du Code civil” (1977) *Cours de Perfectionnement de Notariat* 335. The collected papers of the C.C.R.O. (hereinafter the “C.C.R.O. Archives”) are housed at the Quebec Centre for Private and Comparative Law, McGill University, Montreal.

¹²² Paul-A. Crépeau, “Les enjeux de la révision du Code civil” in A. Poupart, ed., *Les enjeux de la révision du Code civil* (Montreal: P.U.M., 1979) 11 at 15.

¹²³ *Report on the Family Residence* (Montreal: C.C.R.O., 1971).

home in a parliamentary commission at the time of adoption of the partnership of acquests.¹²⁴ But these appeared to fall on deaf ears, as did a long-standing injunction for special protection based on the promotion of family values.¹²⁵ As the law stood prior to the proposals for reform, the family residence seemed particularly resistant to the forces of modernity. *Qui prend mari prend pays*, said a maxim of old French law, and the Civil Code said little else in respect of the choice of the matrimonial law until reforms relating to the family residence were enacted.¹²⁶ As to the administration of this special asset, traditional matrimonial law left spouses free to deal with this and the rest of their property, subject only to the chosen matrimonial régime.

Mandatory rules proposed in 1971 were designed to force spouses to live together as equals, by giving each of them powers to block transactions affecting the family residence and its contents, notwithstanding the terms of their marriage contract. As might be expected, the proposal was greeted with suspicion by those who saw freedom of contract as a pillar of the established order. Jean Pineau, a law professor at the Université de Montréal, wrote a strongly-worded attack upon the mandatory rules, which he saw as “inacceptables compte tenu du respect que j’ai du droit de propriété ainsi que du principe de la liberté des conventions matrimoniales ... mais sans doute s’agit-il là, dira-t-on, d’une attitude archaïque et désuète.”¹²⁷ For these adepts of tradition the rules threatened to “bouleverser l’économie générale du Code civil” by upsetting the free choices that were inherent to marriage.¹²⁸ Provisions allowing the court to attribute property rights in furniture to a spouse were denounced as “l’expropriation de meubles sans indemnité.”¹²⁹ Others attacked the proposals as too interventionist, focusing criticism on the power of the courts to settle disputes over the residence which was said to create a “ménage-à-trois” among wife, husband and judge that was incompatible with marriage.¹³⁰ This was even the occasion for a

¹²⁴ These included pleas from Thérèse Casgrain and Claire L’Heureux-Dubé focusing on the economic vulnerability of women in respect of homes owned by their husbands. See Quebec, *Debates of the National Assembly*, 4th Sess., 28th Leg., Commission de l’administration de la Justice (1969) at 2130ff., cited by Caparros, *supra* note 75 at para. 309.

¹²⁵ This is the dominant theme in the influential work of Ernest Caparros who repeatedly called for a primary régime for matrimonial law given “cet oubli chronique de la famille comme institution autonome”: E. Caparros and R. Morisset, “Réflexions sur le Rapport du Comité des régimes matrimoniaux” (1967) 8 *Cahiers de Droit* 143 at 159.

¹²⁶ See former art. 175 C.C.L.C., discussed *supra*, and repealed by S.Q. 1980, c. 39.

¹²⁷ Letter from Pineau to Hon. Albert Mayrand, then chair of the C.C.R.O. Committee on Family Law, (19 April 1971), C.C.R.O. Archives, D/L/15 at p 3-4. See also Pineau, “L’élaboration d’une politique générale en matière matrimoniale” (1971) 74 *Revue du Notariat* 3, for a full attack on public order rules which would, in the author’s view, stimulate cohabitation outside marriage (at 27).

¹²⁸ Jean-Paul L’Allier (Quebec Minister of Communications), “Mémoire sur le Rapport sur la résidence familiale” (4 May 1971), C.C.R.O. Archives, D/L/16 at 1. L’Allier contended that the proposals were unduly inspired by the “mouvement féministe et la pression des médias” (at 3).

¹²⁹ Jean-Paul Duquette, “Protéger juridiquement la famille: mais comment?” (May 1971), C.C.R.O. Archives D/L/29 at 6. Duquette, a lawyer, asked rhetorically: “N’est-ce pas la famille qui doit être protégée contre ce genre de protection législative...?” (at 2).

¹³⁰ See, e.g., Louise Des Trois-Maisons, “Commentaires sur le Rapport concernant la protection de la résidence familiale” (June 1971), C.C.R.O. Archives, D/L/22; Gérald Beaupré, “Papa, maman,

last call for a renewal, in some form, for a preëminence of the husband, although this was very much a minority position.¹³¹ The first full study of the family residence went so far as to suggest that it revealed “la conception de faiblesse qu’a de la femme québécoise le législateur [dans la mesure où elle] freine l’accession des époux vers une véritable égalité”.¹³²

But by 1971 the dominant view, at least in respect of the family residence, was that economic freedom represented a potentially de-stabilising force in married life. Formal equality held no guarantee for the economically vulnerable partner unless the spouses chose a régime which included some protection for the family residence. For the reformers the next step in the process was plain: “Equality before the law necessarily ... implies ... that each [spouse] be required to sacrifice part of his legal autonomy”, and this part pertained to the family home.¹³³ The one concession to economic freedom, much disputed, was protection for third parties transacting with one of the spouses, in respect of the residence or its contents without the consent of the other.¹³⁴

Even though the legislature did not enact this first element of the primary régime until 1980, the *Report on the Family Residence* of 1971 announced a new matrimonial public order which would establish obligatory rules for sharing in marriage. The Revision Office initiative opened the door to an important ideological shift which culminated in the adoption through the 1980s of measures that would radically limit the spouses’ economic freedom in the name of equality of condition. In 1974, the Committee on the Law on Persons and on the Family tabled a more interventionist report designed to “concrétiser, dans les textes juridiques, l’égalité des époux”¹³⁵ as the cornerstone of a completely modernised family law. The proposed law was to be resolutely anti-libertarian, responding to pressures to inhibit further freedom of contract in marriage.¹³⁶ Predictably, voices were again raised that the state’s involve-

le Juge et moi” (April 1971), C.C.R.O. Archives, D/L/28.

¹³¹ See letter from French law professor Henri Mazeaud to Crépeau in which Mazeaud expressed his regret that the proposal “ne laisse aucune prééminence au mari [et] porte tout de suite le conflit devant le juge”: (28 April 1971), C.C.R.O. Archives, D/L/14.

¹³² Pierre Béliveau, “Les prérogatives des époux relativement au choix et à la protection de la résidence familiale dans la perspective de la préservation de leur égalité juridique” (LL.M. thesis, Université de Montréal, November 1971) at 94.

¹³³ *Supra* note 123 at 10

¹³⁴ In a brilliantly argued memorial, French law professor Jean Carbonnier signalled some of the dangers inherent in an overzealous protection of third parties through the cumbersome declaration of family residence: letter to Crépeau (11 May 1971), C.C.R.O. Archives, D/L/19. Carbonnier’s fears proved to be well-founded.

¹³⁵ Claire L’Heureux-Dubé (chair), “Letter of Presentation”, *Report on the Family: Part One* (Montreal: C.C.R.O., 1974). See also *Report on the Family (Part Two)* (C.C.R.O.: Montreal: 1975) and the *Report on the Quebec Civil Code: Draft Civil Code*, vol. I (Quebec City: Ed. off., 1977), esp. Book two thereof. L’Heureux-Dubé, now a Supreme Court of Canada judge, was joined on this Committee by some of Quebec’s most influential jurists working in this field, including law professors Albert Bohémier, John E.C. Brierley, Jean-Guy Cardinal, Maximilien Caron, Ethel Groffier-Atala, François Héleine, Luce Patenaude, and Jean Pineau; judges Réjane Laberge-Colas and Albert Mayrand; lawyer Francis Fox and notaries Pierre Desrosiers, Denyse Fortin and Roland Millette.

¹³⁶ See, e.g., letter of G. Gagnon, Service social de l’ouest québécois, to Crépeau (10 April 1971),

ment in family matters upset the sanctity of marriage. For the Association des parents catholiques du Québec, reform of the law of marriage threatened to destroy the family because the break with tradition was so drastic: "on ne peut aller contre la loi naturelle sans, à brève ou longue échéance, conduire à la catastrophe".¹³⁷ The Association denounced the values upon which the reforms were predicated as "matérialisme déchaîné," and "agnosticisme" which, "sous le couvert d'un pluralisme douteux, veut faire accepter comme naturelles, légitimes et valables des situations qui sont marginales, déviantes et licencieuses."¹³⁸ The Chamber of Notaries warned that obligatory effects of marriage would thwart commercial activity and thus work to the detriment of the family.¹³⁹ Still others reaffirmed faith in the optional practice of gifts by the husband to the wife in the marriage contract as the most appropriate way to counter inequalities provoked by separate property régimes.¹⁴⁰ There were some signs that the complaints of libertarians were making a mark,¹⁴¹ but these small concessions would be a last hurrah for traditionalism.

Others, not surprisingly, felt the proposals did not go far enough to protect women in marriage. Law professors Edith Deleury and Michèle Rivet spoke out against the softening of imperative rules regarding joint responsibility for expenses of the marriage, accurately foreseeing what would be one of the central problems in the law once enacted. They chided reformers for shyness in considering economic activity within the home as a basis for dividing assets, especially for the spouse who was "le gardien et le gérant du foyer."¹⁴² The Ligue des droits de l'Homme welcomed the rules designed to encourage legal equality between the spouses, but demanded an "égalité sociale" to accompany this to ensure that traditional roles of men and women in the family be meaningfully transformed.¹⁴³ The Conseil du statut de la femme, calling for state-run daycare and employment equity, argued that legal equality was only a step towards a necessary "égalité socio-économique que l'État

C.C.R.O. Archives, D/L/12; and Legal Aid Bureau of Montreal, "La résidence familiale" (circa 1971), D/L/17, both highlighting the particular vulnerability of women separate as to property.

¹³⁷ (1975), C.C.R.O. Archives, D/L/87 at 4. Others saw the proposals as an affront to the family which would force women out of the home and into the workplace: see Ligue catholique féminine diocésaine de Québec, (June 1975) C.C.R.O. Archives, D/L/100.

¹³⁸ *Ibid.* at 2. Much of the anger was directed at the (eventually shelved) proposal for recognition of heterosexual cohabitation as a legal relationship resembling marriage.

¹³⁹ (12 Sept. 1975), C.C.R.O. Archives, D/L/107 where it was predicted that the proposed rules "nuiraient aux opérations commerciales et à l'intérêt de la famille."

¹⁴⁰ See, e.g., Michel Légaré, "Réflexion sur les régimes matrimoniaux" (1975) 77 *Revue du Notariat* 575 for a plea, by a notary, in favour of the good counsel of these public officers as a means of protection for married women.

¹⁴¹ See, e.g., the temporary retreat from obligatory contribution to expenses of the marriage in *Report* (1974), *supra* note 135, art. 46 and commentary 157-8.

¹⁴² E. Deleury and M. Rivet, "La première tranche de la réforme du droit de la famille par l'O.R.C.C." (23 April 1975) C.C.R.O. Archives, D/L/86 at 7-8.

¹⁴³ See "Rapport du comité d'étude de la Ligue des droits de l'Homme sur le document de l'Office de révision du Code civil traitant des droits de la personne et de la famille" (17 March 1975), C.C.R.O. Archives, D/L/97 at 4ff. It was furthered argued that the protection be extended to homosexual cohabitants.

ne peut donc camoufler derrière un écran de lois assurant une égalité théorique entre hommes et femmes.”¹⁴⁴

In 1980, the legislature embraced the now widespread pleas for modernisation in the foundational book of the *Civil Code of Québec*.¹⁴⁵ Interventionism now took legislative shape as obligatory incidents of marriage, so that in the words of one of the Revision Office’s principal actors, Albert Mayrand, “[l]e Code civil du Québec a injecté dans notre droit de la famille une forte dose d’équité destinée à combattre les abus envers un conjoint défavorisé.”¹⁴⁶ Debates in the National Assembly made plain the ascendancy both of the anti-libertarian school and of its principal beneficiary, the married woman.¹⁴⁷ The traditionalist perspective had become a minority and maverick position: some members did argue that the effect of the imperative rules might be to encourage people not to marry at all, but they were heartily shouted down.¹⁴⁸ The prevailing view was unquestionably that of modernists who, in words attributed to then Parti Québécois Minister Lise Payette, were inclined to see the new Code as a “cadeau fait aux femmes”. Substantive equality was enshrined, at least in spirit, by a bold move away from freedom of contract that had come to *droit commun* in ten short years.

Voluntarism had by no means been obliterated in the new Code, but instead was designed to coexist with the primary régime.¹⁴⁹ Not surprisingly, the coexistence was quick to prove unstable and offered new ground for old debates over the coming years. There is no doubt that the ambit for choice had considerably “shrunk.”¹⁵⁰

¹⁴⁴ “Recommandations du Conseil du statut de la femme à l’Office de révision du Code civil sur le Rapport de la famille (première partie)” (1 May 1975), C.C.R.O. Archives, D/L/114 at 3. It is worth noting that the Conseil was made an organ of the Quebec government by S.Q.1973, c. 7, signalling in bald terms the political openness to the law reform proposed by the women’s movement.

¹⁴⁵ *An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39, provided, in the preamble, that it was “expedient” to proceed first with the reform of the family law and explicitly cited the work of the C.C.R.O. as a “basis” upon which the new Code was prepared.

¹⁴⁶ “Égalité en droit familial québécois” (1985) 19 *Revue juridique Thémis* 249. Mayrand noted that the rules were primarily designed to assist women and remarked wryly that resistance by husbands to this kind of initiative was natural “car les enfants gâtés perçoivent l’égalité comme une injustice à leur endroit” (at 273).

¹⁴⁷ See, the remarks of the Minister of Justice Marc-André Bédard who noted, in respect of the family residence and its contents, the “insuffisant” protection accorded to the economically weaker spouse, especially considering “la liberté accordée aux époux de choisir un régime plutôt que l’autre”: Quebec, Assemblée nationale, Commission permanente de la justice, “Étude du projet de loi no 89” in *Journal des débats* (11 December 1980) at B-278.

¹⁴⁸ See the remarks of Claude Forget, M.N.A., “la solution qui apparaîtra la plus raisonnable ..., c’est de s’abstenir tout simplement de toute forme de mariage, sauf le mariage de fait, bien sûr”: *ibid.* at B-280.

¹⁴⁹ Government lawyer Marie-Josée Longtin wrote that, alongside equality in marriage, “la liberté d’aménager les relations de famille” was one of the philosophical themes of the reform: “Les lignes de force de la Loi 89 instituant un nouveau Code civil et portant réforme au droit de la famille” (1981) 22 *Cahiers de Droit* 297 at 301.

¹⁵⁰ “[I] se rétrécit comme une peau de chagrin”, according to the elegant phrase of J. Pineau and D. Burman, *Effets du mariage et régimes matrimoniaux* (Montreal: Éd. Thémis, 1984), avant-propos.

Moreover the newly invented compensatory allowance threatened to limit what remained of the marriage contract's vocation in the name of economic equality.¹⁵¹ But while there was general agreement that the spirit of the allowance was "equitable," to deal with unjust enrichment between the spouses, no clear sense emerged as to the precise perimeters of its relation to the underlying matrimonial régime, particularly when the spouses chose to be separate as to property. Libertarians, more vocal in the judiciary than in the law reform community, argued that the allowance could not completely upset separation as to property, because the *Civil Code of Quebec* continued to recognise that such a choice remained available. The Court of Appeal set the tone in the first case it heard on the matter by deciding that the allowance did not represent "une forme déguisée de partage au mépris des principes de la liberté conventionnelle et de l'autonomie administrative," holding that, generally speaking a wife's work in the home was not a direct contribution to enrichment of the patrimony of the husband.¹⁵² Not surprisingly, traditionalists hailed the judiciary's narrow reading of the compensatory allowance as the only interpretation that respected the coherence of the civilian system of matrimonial régimes in which "le principe de liberté de choix est érigé en dogme."¹⁵³ The allowance was simply an application in the marriage context of the civil law concept of unjust enrichment. It did not give the courts an "arbitrary" power to run roughshod over the marriage contract and the chosen matrimonial régime. Sharing in marriage was not invented in 1980, according to this position, but was inherent in the tradition's preference for "communitarian" régimes in which marriage was truly a joint venture, by choice of the spouses.

But among those who had been of the view, in 1980 and before, that the traditional law was behind the times, the narrow interpretation of the compensatory allowance was a further sign that substantive equality suffered at the hands of contractual freedom. Furthermore, there was a growing sense that the judiciary could not be counted on to redress an injustice that it did not fully perceive.¹⁵⁴ Modernists began further calls for amending the already freshly printed Civil Code to enhance the economic power of women during and at the dissolution of marriage. "L'égalité de fait, *in concerto*, reste à faire,"¹⁵⁵ wrote Michelle Boivin in 1986, and in the coming

¹⁵¹ At the dissolution of marriage the court was empowered "to order either spouse to pay to the other, as consideration for the latter's contribution, in goods or services, to the enrichment of the patrimony of the former, an allowance ... taking into account, in particular, the advantages of the matrimonial régime and marriage contract": former art. 559 C.C.Q., consolidated in slightly different form at arts. 429 to 430 C.C., S.Q. 1991, c. 64.

¹⁵² *Droit de la famille* — 67, [1985] C. A. 135 at 145 *per* Nichols J.A. He decided that courts would be wrong to see in the new remedy a "bouleversement fondamental du droit matrimonial" (at 146).

¹⁵³ J. Pineau and D. Burman, "La prestation compensatoire à la lumière de l'arrêt de la Cour d'appel dans l'affaire Poirier c. Globensky" (1985) 19 *Revue juridique Thémis* 281 at 287. They contended that the modernist approach to the compensatory allowance led to the crumbling of "tout l'édifice des régimes matrimoniaux" (at 285).

¹⁵⁴ This was the pessimistic conclusion of lawyer Pierrette Rayle, "La prestation compensatoire et la Cour d'appel cinq ans plus tard" (1988) 48 *Revue de Barreau* 225, esp. at 242-4.

¹⁵⁵ "L'évolution des droits de la femme au Québec: un survol historique" (1986) 2 *Canadian Jour-*

two years pressure was brought on the provincial government, by modernists, to jump start equality in marriage through a stepped-up primary régime.¹⁵⁶

Traditionalists, it would seem, had allies in the judiciary but none whatsoever in the legislative branch of government.¹⁵⁷ Spurred on a strong anti-libertarian lobby, the Quebec government formed an interministerial "Comité sur les droits économiques des conjoints" in 1987 and, in 1988, presented a paper for public discussion which made plain its preference to intervene further in family finances to promote substantive equality.¹⁵⁸ The disagreement between libertarians and interventionists became a *débat de société*, with the most vocal and listened-to participants calling for forced sharing of property in marriage. The Fédération des femmes du Québec¹⁵⁹ and the Fédération des Associations de familles monoparentales du Québec¹⁶⁰ lobbied to impose a division of assets to combat women's poverty that was exacerbated, in their view, by freedom of contract. Most of those intervening before the parliamentary commission agreed that private justice was no longer a means of assuring equality, and supported a compromise position whereby the value of a limited mass of family assets would be divided at the end of marriage, leaving the spouses free to arrange the rest of their finances as each saw fit.¹⁶¹ A few traditionalists spoke out against the reform and, when they did, they invoked *laissez-faire* ideology as a foundation for what marriage should be. The Chamber of Notaries used strong language to oppose the imperative nature of the proposed rules which it saw as the antithesis of marriage.¹⁶² The president of the Chamber used language stronger still, denouncing the family patrimony as an affront to marriage and to the integrity of the notarial profession.¹⁶³

nal of Women and Law 53 at 67.

¹⁵⁶ See Quebec, Conseil de statut de la femme, "Le partage des biens en cas de divorce" (Quebec: Nov. 1986)[unpublished]

¹⁵⁷ The Minister for the Status of Women would blame the judiciary for having worsened the economic situation of married women through its reading of the compensatory allowance: Quebec, Assemblée nationale, *Journal des débats* (8 June 1989) at 6483.

¹⁵⁸ See Herbert Marx (Minister of Justice) and Monique Gagnon-Tremblay (Minister for the Status of Women), *Les droits économiques des conjoints* (Quebec City, 1988) [unpublished] esp. 6-8.

¹⁵⁹ "Mémoire préparé pour la consultation générale sur le document intitulé: 'Les droits économiques des conjoints' et présenté à la Commission des institutions de l'Assemblée nationale" (Montreal: 1988) [unpublished] esp. 13-7 where an obligatory partnership of acquests was mooted as a serious option to the family patrimony.

¹⁶⁰ "Mémoire concernant le droit économique des conjoints" (Montreal: 1988) [unpublished] esp. at 10ff. where an argument was presented to augment the content of the family patrimony.

¹⁶¹ See, e.g., Barreau du Québec, "Mémoire sur la proposition gouvernementale relative aux droits économiques des conjoints" (Montreal: 1988, unpublished), which accepted the interventionist proposals with "enthusiasm" (at 2); and the Fédération de la famille du Québec which offered cautious support, pleased that there was some room left for private ordering between the spouses: "Mémoire" (Quebec City: 1988) [unpublished] at 1.

¹⁶² "Mémoire portant sur 'Les droits économiques des conjoints'" (Montreal: 1988) [unpublished] esp. at 23 where it was argued that the limit on freedom of contract "entraînerait inévitablement une diminution du nombre de mariages au profit de l'union de fait."

¹⁶³ Jean Lambert, "De l'humiliation à l'affront" (1989) 2 *Notaires d'aujourd'hui* No° 1 13 who denounced the "présomption d'incompétence du notariat et son prolongement dans l'avenir par le

When finally enacted, in 1989, the family patrimony embodied the new interventionist ideology of family law. The State imposed, for all marriages, the "partition" of the net value of a defined mass of property acquired during the marriage. But in a sense the old value of economic freedom was not completely deserted. During the marriage, administration of the family patrimony was to be left virtually unencumbered. Not all property was subject to division, and rules for calculation of the net value limited the amount to that portion notionally associated with the marriage as partnership. The libertarian lobby won a transitional measure allowing spouses already married to opt out of the rules for a limited time. Roundly cheered by modernists who had given up on private justice in marriage, the family patrimony nevertheless met with a hardened resistance from traditionalists, who felt that it was an anti-democratic institution¹⁶⁴ that would "eviscerate"¹⁶⁵ the marriage contract. The war-like language hardly changed the fact that tradition had plainly lost the battle to the forces of change.

Viewed retrospectively from the *Civil Code of Québec* enacted in 1991, the libertarian conception of property relations between the spouses seems to have been completely eclipsed by those arguing that substantive equality mandated state intervention in family finances.¹⁶⁶ What explained the relative openness with which the modernist discourse was greeted during this period? In some measure, no doubt, it reflected a genuine shift in the underlying philosophy of family law towards state action; but part of the success of the reform came, too, from the ability to jockey between two incompatible conceptions of family. Beyond efforts to find compromise, the Revision Office and its governmental equivalents in later years were, to differing extents, mindful of the advantages of expressing new ideas without abandoning a sense of history. There was a link to the past as between the primary régime and communitarian spirit of the former law, and the reformers made much of it. Both the traditional law and the new Code stimulated equality of condition between the spouses through a *de jure* recognition that the work of one spouse in the home should be reflected in the sharing of assets owned or controlled by the spouse working outside the home. In the new Code, substantive equality was being reaffirmed and the techniques offered in the various proposals for reform, while radically out of step with tradition in that they were imposed on all marriages, did in fact return to the tradition as a source for the principal building blocks for reform. This made the pill of obligatory substantive equality easier to swallow, among those with a more libertarian conception of marriage.

If there was a rejection of the traditional notion that freedom of contract was a sacred trust, it was scrupulously packaged to appease conservative elements in the legal community. Devices of the primary régime were consistently styled as promot-

terme apporté à la tradition séculaire du consensualisme pré-nuptial": cited by Pierre Ciotola, "Le patrimoine familial et diverses mesures destinées à favoriser l'égalité économique des époux" (1989) 2 *Cours de Perfectionnement du Notariat* 1 at para. 29n.

¹⁶⁴ Burman and Pineau, *supra* note 58 at 9.

¹⁶⁵ Ciotola, *supra* note 163 at para. 29.

¹⁶⁶ The primary régime, enacted in stages between 1980 and 1990, has been consolidated at arts 391 to 430 C.C., by S.Q. 1991, c. 64.

ing the “family” rather than the economic condition of women, with or without children. Despite its name, the “family residence” was designed to protect the economically vulnerable spouse, no doubt the wife in the minds of law reformers.¹⁶⁷ But it was enacted and indeed digested as a measure designed to protect the family, rather than a spouse.¹⁶⁸ The same might be said of the family patrimony which was, of course, in truth a “patrimoine conjugal” providing no comfort for families existing outside of marriage.¹⁶⁹ As such, it sat easier with those prepared to accept intervention in support of family values rather than in support of women’s rights.

Name tags aside, family law had changed radically in order to ensure some measure of substantive equality in marriage. The emergent matrimonial public order reflected this triple influence: anti-libertarianism, a measure of continuity in respect of devices chosen to build the primary régime, and a perhaps disingenuous insistence on protection of the family as a veil for improving the juridical position of economically vulnerable married women. But the ideological shift also required a move away from the usual sources of matrimonial law. It was through an openness to what was happening elsewhere in the world that Quebec jurists acted to make obligatory certain effects of marriage.

B. The Confident Emergence of a National Code

The twenty hurried years spanning the advent of the primary régime built on the changed direction for matrimonial law announced by the 1970 reform. Servility to France as an exclusive source of legislative ideas, so basic to initiatives of the past, had been definitively eclipsed by an openness to the farthest-flung legal sources, even from as far off as the Ontario provincial legislature. The sense that initiatives from outside the French legal tradition were relevant to matrimonial law reform definitively broke the patterns of legal colonialism and prompted Quebec law to consolidate its sense of self.

The unusual mix of sources at the root of the proposals for reform through the 1970s and the 1980s would not, as was feared by some, transform Quebec law into a legal *salmigondis*.¹⁷⁰ The prevailing sentiment was that Quebec matrimonial law would emerge both coherent and distinctive, its mixed-up derivations internalised by a mature legal order and articulated in original texts as part of an autonomous, national law. “A un moment donné de l’histoire,” Jean Carbonnier has written on

¹⁶⁷ See Alain-François Bisson, “Brèves réflexions sur l’avant-projet de loi relatif à la protection de la résidence (si peu) familiale” (1971) 31 *Revue de Barreau* 449.

¹⁶⁸ See the influential characterisation of the primary régime along these lines in the work of Ernest Caparros: “Le régime primaire dans le nouveau Code civil du Québec: remarques critiques” (1981) 22 *Cahiers de Droit* 325 at 327 and *Les régimes matrimoniaux au Québec*, 3rd ed. (Montreal: Wilson & Lafleur, 1988) at para. 60.

¹⁶⁹ Jacques Beaulne said the new institution was in reality a “patrimoine conjugal” destiné davantage à promouvoir l’égalité entre conjoints qu’à assurer comme tel la protection de la famille”: “Le droit au patrimoine familial et le droit à la succession: droits irréconciliables?” (1989) 20 *Revue Générale de Droit* 669 at 673.

¹⁷⁰ Quebec’s common law had been so described prior to the 1866 codification: Amury Girod, *Notes diverses sur le Bas-Canada* (1835) cited by André Morel, *Histoire du droit [:] sources et formation du droit*, 11th ed. (Montreal: Université de Montréal mimeograph, 1991) at 171.

legal nationalism, "chaque droit, dans sa singularité historique, s'oppose à tous les autres droits. Avec des traits d'une nature comparable ..., il concourt à composer une culture, et selon l'idéologie moderne à constituer une nation."¹⁷¹ Whether this moment had come at the expense of history or because of it, there was little doubt, at the threshold of a new codification, that the moment had arrived. This new perspective on sources affirmed substantive equality for married women in a rising spirit of legal nationalism, culminating in the consolidation of an indigenous law of matrimonial property in the 1991 *Civil Code of Québec*.

While the precise origins of the obligatory effects of marriage are in some cases obscure, the new rules reflect curiosity as to law reform initiatives undertaken in legal systems beyond the France-Quebec axis. From 1970 onwards, an official policy of legal pluralism was adopted in law reform circles, elevating "comparative law" to the status of a first-order source for ideas.¹⁷² The technique for the family residence, while building on a long-standing regulation inherent to certain matrimonial régimes, was cast in imperative rules after the Revision Office had canvassed schemes from Ontario, Saskatchewan, British Columbia and England, as well as more familiar civilian ports of call.¹⁷³ The Ontario Law Reform Commission was an acknowledged source which, given an historical shyness to consider the common law as persuasive authority in Quebec, was no less exotic an inquiry than references made to the law of Poland, Rumania and the German Democratic Republic.¹⁷⁴ When in 1980 the minister of justice brought forward draft legislation for the primary régime, he took pains to explain that French solutions might not be workable when based on "éléments [qui] ne sont pas d'ici." But Ontario may well provide, he said, a very useful model. "Ce n'est pas parce que c'est un système de common law," said the minister, in the face of years of ambivalence about Anglo-American legal ideas, "qu'on ne peut pas [y] trouver des similitudes".¹⁷⁵ It was impossible not to ally, to some extent, the compensatory allowance with a fresh Canadian common law experience with the constructive trust and, while the minister took pains to invoke the local concept of unjust enrichment as the allowance's source, it is also fair to say that its elaboration was heavily coloured by trans-systemic preoccupations.¹⁷⁶ As for the family patrimony adopted in 1989, the ministers responsible for drafting the

¹⁷¹ *Sociologie juridique*, *supra* note 100 at 164.

¹⁷² See, for the Civil Code Revision Office, "The Family: Introduction" *Report on the Québec Civil Code* (Quebec City: Éd. off., 1978), vol. II, t. 1, at 110, where comparative law and sociological research were said to be methodological touchstones. Thus the imposition of "identical rights and obligations for the consorts" was justified, in part, because "this trend is found elsewhere in modern legislation": vol. I at 137.

¹⁷³ *Ibid.* at 142 (note 120) and 146 (note 127).

¹⁷⁴ *Ibid.* at 137 (for the O.L.R.C.). It was in respect of the rule precluding the change of name in marriage that European law was cited: *ibid.* at 33 note 111.

¹⁷⁵ Quebec, Assemblée nationale, Commission permanente de la justice, "Étude du projet de loi No° 89" in *Journal des débats* (11 December 1980) at B-298, B-299.

¹⁷⁶ According to Ernest Caparros, *Les régimes matrimoniaux au Québec*, *supra* note 167, paras. 67-68, it would seem that "le spectre de l'affaire *Murdoch* [*Murdoch v. Murdoch*, [1975] 1 SCR 423] ait ... hanté le législateur québécois." See, by the same author, *supra*, note 168 at 334 where he explained the allowance was "sans conteste, une greffe de common law dans le Code civil."

legislation made no bones of the fact that some of their best ideas came from Ontario and its family law reform legislation.¹⁷⁷ The new family law had complicated and exotic legal bloodlines.

Many Quebec lawyers remained ambivalent about setting their legal order apart from others in the civilian family, and the elaboration of a legal régime “[de] type québécois”¹⁷⁸ in 1969 had not been a flag-pole around which all Quebec jurists rallied. True enough, the juridical originality at the core of that reform did reflect some consensus that Quebec law had reached a degree of specificity as against law originating in France or elsewhere. But this was not necessarily celebrated in all circles: a profound disagreement persisted as to whether matrimonial law could assert itself as against both French law and local ideas derived therefrom and still retain its inherently civilian character. The same traditionalists who would decry the demise of freedom of contract in marriage from 1970 to 1991 would, over this period, lament the passing of a time when a “French” legal tradition explained the whole of matrimonial law. On the other hand, many modernists who argued successfully for a primary régime did so with a heady, at times almost euphoric, excitement for ideas coming from the juridical beyond. Different as these approaches to sources were, both embodied forms of legal nationalism, albeit with different ideological preoccupations. Each was rooted in a sense that Quebec matrimonial law had become part of a veritable national legal system.

Libertarians who opposed the obligatory effects of marriage invariably did so by expressing suspicion as to the origins of the primary régime. In addition to denouncing state interventionism, these jurists balked at the use of legal sources perceived to be foreign to Quebec’s legal heritage. Vigilance was necessary. Exotic conceptions of the relations between wife and husband were an assault not just to the integrity of marriage, but also to the integrity of the civil law tradition. While no longer overtly colonialist, this rhetoric nostalgically recalled a time when Quebec could turn safely towards France, and sources within that tradition, to protect it from cross-pollination with the English common law tradition. This instinct, now less automatic and expressed in higher-minded terms than had once been the case, continued to influence the reform of matrimonial law after 1970. But French law was now not the only possible source for reform for the traditionalists; indeed it might only be second best to locally developed ideas and techniques for matrimonial law. Henceforth the Quebec legal system could turn back on itself as a source of new law. Local experience, if properly insulated from the Anglo-American outside, was seen as a rich repository of safe ideas, necessarily derived from a French civilian way of thinking. This new traditionalism was thus a form of legal nationalism: a renewal of law’s *nationalisme de survivance*, propping up what was perceived to be a distinctive legal order under fire.

¹⁷⁷ “On ne peut...ignorer l’influence que ces législations peuvent avoir, à titre de référence, dans le débat actuel”: *supra*, note 158 at 7.

¹⁷⁸ This is the expression used by French scholar Gérard Cornu to describe the partnership of acquests as distinctive as against French, German and other “types”: *Les régimes matrimoniaux*, *supra* note 55 at 82.

What would become of "notre droit civil" in the face of these proposals infiltrating from outside? Nourished by venerable and instinctive suspicions and mindful that copying French law was now out of favour, traditionalists fixed upon the existing local law to find alternative answers for reform. The bold and faithless who looked for techniques to promote substantive equality in Anglo-Canadian law were quickly reminded of "made in Quebec" devices for sharing property which should be the first source for reform. Protecting the family residence, for example, was an old idea and past legislative treatment of the matrimonial home was depicted as the preferred technical source for modern law reform, if such reform was in fact needed.¹⁷⁹ Quebec law had no lessons to learn about equality of condition from other legal systems. It had been the central feature of community of property long before 1866. If Ontarians were "blissfully unaware" of the advantages of a community régime before the 1970s, why turn there for ideas now: "le système de common law n'ayant pas le monopole du souci de l'équité."¹⁸⁰ Traditionalists condemned the short memories of those who seemed unaware of the local law's rich history of protection for the economically vulnerable spouse:¹⁸¹ hadn't community of property been "«lâchement» assassinée"¹⁸² in 1980 by a legislature without a firm sense of its own past? No doubt in anticipation of this kind of argument, the Revision Office underscored precedents for its primary régime in existing law.¹⁸³ This would, in part, placate those who feared new ideas from outside but also served as an acknowledgment that local law was sufficiently well developed to have its own history, distinct even from that French law that had contributed so much to Quebec law's past.

The old rhetoric of *survivance* echoed through this period, especially when a proposal of "common law" origin proved difficult to reconcile with the local conceptual vocabulary for matrimonial law. When a "foreign" idea had been introduced, traditionalists argued strongly that it had to be bent to fit the existing system

179 While the choice of the family residence remained that of the husband, the rules on the administration of community property under the legal régime were adjusted to limit the husband's power regarding immovable property of the community (S.Q.1930-31, c. 101) and household furniture (S.Q.1964, c. 66) without his wife's consent: former arts 1292, para. 2 and 1297, para. 3 C.C.L.C. Expenses of the marriage also received special treatment long before it became the subject matter of the primary régime.

180 Danielle Burman, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux: d'une justice bien pensée à un semblant de justice — un juste sujet de s'alarmer" (1988) 22 *Revue juridique Thémis* 149 at 170. She wrote that common lawyers, "superbement, ignoraient" the advantages of the civil law's community of property, citing an historical predilection for separate property arrangements and a supposed common law sense that "le mariage ne devait pas entraîner l'union des biens" (at 174).

181 E.g., Danielle Burman, "Compte rendu" (1991) 70 *Canadian Bar Review* 441, in which an author who had suggested that Quebec was behind the United States and Canadian common law provinces regarding sharing in marriage, was called to order and reminded of the communitarian tradition in Quebec matrimonial law.

182 Roger Comtois, "Rétrospective 1961-1986: Vingt-cinq ans déjà" [1986] *Cours de Perfectionnement du Notariat* 9 at 9. In a similar vein, Burman, *supra* note 180 at 151 said, ironically, that the 1980 reform had "la communauté mise à l'index."

183 See, for the family residence, *Report 1971, supra* note 123 at 2 and, for other elements of the primary régime, *Report on the Québec Civil Code* (1978), *supra* note 171 at 114.

of civilian matrimonial régimes. Perhaps the most striking example was the manner in which the 1980 innovation of the compensatory allowance was received. Fearful that the initiative was too closely wrapped in a common lawyer's conception of the financial effects of marriage, some argued that, to take root in the Quebec civilian system, the allowance had to be ruthlessly acclimatised to the local legal environment.¹⁸⁴ Interpretations by courts should be based on the civilian notion of unjust enrichment, said these jurists, rather than some undisciplined effort to graft the constructive trust onto the Quebec matrimonial régime.¹⁸⁵ The allowance had to be "civilisée" — the pun was generally not intended — so that it could be molded into a Quebec institution.¹⁸⁶ This was not just a surrogate argument for the libertarian conception of marriage that the primary régime promised to undo (although it was that in part), but it represented a genuine and meaningful concern for protecting the "identity" of the legal system.¹⁸⁷

The stance was not colonialist, with eyes riveted on France, as traditionalism had been in the past. True, a "French" (or "latin" or "*civiliste*") way of thinking was often invoked, but it was also pointed out that even France was not necessarily right with "our" world in all cases.¹⁸⁸ The posture was defensive, but it expressed a legal sense-of-self since Quebec law's existence and self-determination was an operating assumption. When faced with the prospect of real change, a conservative instinct forced Quebec law back into itself as an alternative to charging ahead into the juridical unknown. The system, perceived to be under threat from the outside, should look to its own past as a reservoir of ideas for its future. Again Jean Carbonnier observed that this phenomenon of law turning back on itself was a "psychosocial" response characteristic of some forms of legal nationalism: "Le droit est senti comme un des secrets de la tribu," he has written, perhaps too colourfully for our purposes, and "les descendants s'exposeraient à des malheurs s'ils laissent des étrangers pénétrer dans cet héritage."¹⁸⁹

Never was this position stated as baldly and as unsuccessfully as in the period surrounding adoption of the family patrimony in 1989. Again the legislature, which drew unabashedly on Ontario sources for the initial proposal of this juridical invention for sharing, was called to order by traditionalists. The 1989 rules were

¹⁸⁴ These arguments are reviewed in Burman, *supra* note 180 at p 170ff. and R. Comtois, "La prestation compensatoire: une mesure d'équité" (1983) 85 *Revue du Notariat* 367.

¹⁸⁵ Pineau and Burman, *supra* note 153 at 284-8.

¹⁸⁶ E.g., Pineau and Burman, *supra* note 150, "si l'idée est incontestablement un produit d'importation, ... le produit fini est purement québécois, le contenu de la notion ayant été manufacturé au Québec" (at 90).

¹⁸⁷ Ernest Caparros, a long-standing advocate of the primary régime, has argued that its institutions should be understood based on a "raisonnement de civiliste": see "Chronique bibliographique" (1990) 21 *Revue Générale de Droit* 767. With reference to the compensatory allowance, see Caparros, *supra* note 168 at 332ff.

¹⁸⁸ Burman, *supra* note 180 at 169 explained the difference between the Quebec and French rules on the family residence by setting apart a French conception of marriage — "fondamentalement communautaire" — and that of Quebecers who "persistent à rejeter cette idée et à demeurer fidèles à l'esprit d'indépendance."

¹⁸⁹ *Sociologie juridique*, *supra* note 100 at 165.

denounced as “plagiarism”—O happy method of the past!—of a bad Ontario law, and as lacking all civilian culture for having been cast at cross-purposes with civilian technique and history.¹⁹⁰ How much wiser it would have been, said these critics, to have renovated the existing matrimonial régimes. The Chamber of Notaries found the proposal “juridiquement inacceptable,” in large part because of its connection with the Ontario family law statutory régime: “Le patrimoine familial est une notion de Common law qui s’harmonise difficilement avec notre tradition juridique.”¹⁹¹ In fact the outcry was so considerable, from those seeing the family patrimony as foreign to local law, that the Code was quickly amended to better reflect the logic of the system into which it was introduced.¹⁹² Once formally introduced into the Code, traditionalists called for an interpretation “conforme à l’esprit civiliste,”¹⁹³ to limit the effects of the common law transplant on the civilian design of matrimonial régimes.

Competing with this traditional view was a more buoyant sense that Quebec law had reached a degree of maturity which made looking to France inappropriate given differences between the Quebec and French legal cultures.¹⁹⁴ Allied with the position of those who sought to limit freedom of contract in favour of a matrimonial public order was a different brand of legal nationalism. Matrimonial law was to be rethought in connection with the rethinking of the whole corpus of private law in a new Civil Code; and, for some, a shared experience for married women in North America justified recourse to Anglo-American law and other sources seen in the past as incompatible with the civil law tradition. Alongside the legal *nationalisme de survivance* was a legal *nationalisme d’épanouissement*. Quebec matrimonial law, as part of an autonomous legal order, was seen as sufficiently well-developed to live and exchange ideas in the global village of law and could participate, with others, in a trans-systemic recognition of economic equality for women in marriage. This view of sources eventually came to dominate, in somewhat muted form, and confidently propelled the married woman and Quebec law forward towards adoption of the *Civil Code of Québec* in 1991.

If traditionalists had more memory than imagination, modernists had more imagination than memory.¹⁹⁵ The clash of these world views became a central debate

190 Burman and Pineau were again the most vocal critics: “on est abasourdi qu’il [the legislature] se laisse entraîner à plagier une loi ontarienne qui, donnant tellement peu de satisfaction, fut bien vite abrogée”: *supra* note 58 at 3.

191 Chambre des notaires du Québec, “Mémoire portant sur *Les droits économiques des conjoints*” (Montreal: 1988, unpublished) at 3 and 11.

192 The amendment realigned the rules for calculation of the value of the patrimony to better respect traditional themes in matrimonial law, notably that successional property and property owned before marriage be shielded from division: S.Q. 1990, c. 18.

193 Ciotola argued forcefully that this was necessarily so as not to damage “l’intégrité et l’homogénéité de notre droit civil”: *supra* note 163 at para. 12.

194 Brierley, *supra* note 56 at 796 commented on sources at the time of the partnership of acquests in the following terms: “[Quebec law] has remained faithful to its French model and has looked until now for its reforms to France, just as, naturally, the common law provinces have looked to other parts of the English speaking world. This tendency need not continue; it may, in fact, for the future, be quite unsound.”

in the development of Quebec private law while the massive process of re-codification was ongoing.¹⁹⁶ In its extreme form, the *nationalisme d'épanouissement* adopted by pluralists traded suspicions with those who remained pre-occupied with keeping Quebec within the civilian family. For these jurists, Quebec's legal heritage itself became the unsettling feature of the legal landscape, and suspicion fixed on those too shy to look outside for modern ideas. Increased economic power for women in marriage, rooted in trans-systemic shared experiences, was henceforth to be part of the "droit commun législatif du vingtième siècle,"¹⁹⁷ and ideas for achieving substantive equality in marriage could thus legitimately be brought to Quebec law from outside.¹⁹⁸ Legal geography was no longer a meaningful constraint when women's economic lives, at least in the western political economy, seemed unaffected by the niceties of legal traditions and technicalities known to lawyers and law books. Comparison was especially opportune for the new pluralists within Canada. Quebec law might engage in a true exchange with common law Canada in respect of matrimonial property, not the usual one-way street according to which, as in partnerships of the past, Quebec was recipient and not donor. There was no reason to deprive the married woman of the inventions that advanced the economic equality of women in Ontario, for example, on the mere basis of pride and territoriality associated with the civil law tradition.¹⁹⁹ Matrimonial law had profited from the cross-pollination before²⁰⁰ and new ideas, such as the constructive trust or the division of designated matrimonial assets, might provide useful transplants²⁰¹ or

¹⁹⁵ Ferdinand Roy once commented, not altogether disparagingly, that law in "French Canada" demonstrated "plus de mémoire que d'imagination": "Des contrats" in *Livre souvenir*, 1936, *supra* note 76, 261 at 261.

¹⁹⁶ The Quebec Society for Comparative Law would devote a colloquium to the debate as it surrounded the compensatory allowance: see Claire L'Heureux-Dubé, "L'arrêt 'Poirier c. Globensky' sous les feux du droit comparé" (1985) 87 *Revue du Notariat* 435.

¹⁹⁷ Before a Quebec audience in 1952, French jurist Marc Ancel spoke of the advent of increased legal powers for the married woman as part of a twentieth century international legal order, *supra* note 77 at 61-2.

¹⁹⁸ Michèle Rivet stated the view as follows: "L'organisation patrimoniale de la famille semble d'une province à l'autre (ou d'un pays à l'autre) répondre aux mêmes impératifs et évoluer dans la même direction": "La popularité des différents régimes matrimoniaux depuis la réforme de 1970" (1974) 15 *Cahiers de Droit* 613 at 650.

¹⁹⁹ See, e.g., arguments presented by the Conseil du statut de la femme in support of invoking Ontario law as basis for a family patrimony: "Le partage des biens familiaux en cas de divorce" (Quebec: Nov. 1986, unpub.) at 19ff. as well as those advanced by the Quebec Bar, "Mémoire sur la proposition gouvernementale relative aux droits économiques des conjoints" (Montreal: Sept. 1988)[unpublished] at 5, 10, 18.

²⁰⁰ See D. Guay-Archambault, "Regards sur le nouveau droit de la famille au Canada anglais et au Québec" (1981) 22 *Cahiers de Droit* 723 who cited the Ontario influence as the source of Quebec spouses' practice of opting for separation as to property as part of a complete argument suggesting a common experience between the Quebec married woman and "sa soeur anglaise." An argument that Ontario family law reform was influenced by the partnership of acquests was presented by Peter Jacobson, "Recent Proposals for Reform of Family Property in the Common Law Provinces" (1975) 21 *McGill Law Journal* 556 at 574.

²⁰¹ See, e.g., the position taken by the government on the use of Ontario legislation as a model for

persuasive authorities for dealing with problems before Quebec courts.²⁰² Comparing Quebec and common law “matrimonial régimes” was not only possible,²⁰³ but salutary, and a groundswell of calls came to incite judges and legislators to look to Ontario for inspiration, all but drowning out the dire warnings of *métissage*. The high-water mark of this form of legal nationalism came with an impatient demand for a veritable “uniformisation” of the laws of Quebec and common law Canada for the benefit of the married woman.²⁰⁴

While few jurists took this extreme position, it is unquestionable that a measure of openness was brought to the sources of matrimonial law, and that the defensive traditionalist position was now a minority view. Success of the new approach to sources was due, in part, to a genuine sense that women’s experience in legal systems outside of Quebec, including legal traditions outside the civil law, was useful for the making and reading of local law. Part of the success may be attributed, however, to the careful sense of respect for tradition in the leading modernist circles. The best example of this is the Civil Code Revision Office’s approach to the first of the new reforms. While the Office was largely responsible for comparative method coming to the forefront of matrimonial law reform, efforts were also deployed not to upset the civilian apple-cart too radically. Care was taken, from the point of view of style, to ensure that the *Draft Civil Code* was compatible with the bilingual civilian elegance to which Quebecers had become accustomed since 1866. The president of the Office promised that foreign sources would be “made civilian,” such that recodification would be an “oeuvre de refrancisation,”²⁰⁵ reflecting no doubt a personal intellectual commitment to civilian thinking.²⁰⁶ Indeed it would be the later reforms, particularly the family patrimony, that would raise the greatest ire in traditionalist circles, at a time when the Revision Office’s “civilian hand” was no longer involved. So loud have protestations been around the 1989 reform that one

the family patrimony: Assemblée nationale, *Journal des débats* (8 June 1989) at 6490.

²⁰² See, e.g., Robert Lesage “La compensation de l’appauvrissement indû” (1984) 87 *Revue du Notariat* 5 at 15-16; Sylvie Massé, “L’interprétation jurisprudentielle de la prestation compensatoire depuis le 1^{er} décembre 1982” (1984) 87 *Revue du Notariat* 145 at 150ff.; André Cossette, “Le régime de la séparation de biens est-il disparu avec la naissance de la prestation compensatoire?” (1985) 87 *Revue du Notariat* 456 at 468.

²⁰³ See, e.g., Sylvie Massé “Les régimes matrimoniaux au Canada: analyse comparative des législations provinciales” (1985-86) 88 *Revue du Notariat* 103, 223, esp. at 272ff.; Jacques Beaulne, “Critères de qualification des acquêts et des *family assets* en droit québécois et ontarien” (1984) 15 *Revue Générales de Droit* 537 and “Regards sur les systèmes de partage en droit québécois et ontarien” (1985) 16 *R.G.D.* 591.

²⁰⁴ See André Cossette, “L’absence de régime matrimonial de biens dans un pays de droit civil ou la rencontre de deux cultures juridiques” (1984) 87 *Revue du Notariat* 107 at 119.

²⁰⁵ Paul-A. Crépeau, “La renaissance du droit civil canadien” in *Livre du centenaire*, *supra* note 109 xiii at xxiv.

²⁰⁶ Crépeau once wrote that the civil law constitutes, “ne l’oublions jamais, autant que les vieilles et nobles pierres de nos églises et nos manoirs, l’un des plus beaux monuments, l’un des bijoux de notre patrimoine culturel”: “Les lendemains de la réforme du Code civil” (1981) 59 *Canadian Bar Review* 625 at 637.

wonders if the consensus in favour of bold borrowing from non-civilian sources had not been disturbed.

In twenty short years, the tentative re-orientation as to sources expressed by the partnership of acquests had become, for better or worse, part of the accepted discourse for matrimonial law. But the pluralism that continues to inform family law today, according to the new majority view, should be kept sensible by a respectful deference to the history and the conceptual vocabulary of civilian matrimonial régimes.²⁰⁷ "Foreign" ideas, such as those connected with the compensatory allowance and family patrimony, are deserving of consideration insofar as they speak to shared social problems; but their usefulness as legal transplants depends on whether they can be made to fit formally and stylistically into Quebec's existing legal order. There is, to bend a turn of phrase borrowed from a modern comparative lawyer, an acceptance of foreign law "under benefit of inventory."²⁰⁸ The accessibility and proliferation of French legal writing no doubt has contributed to a continued importance of French legal ideas and, because France serves as a doctrinal conduit for foreign law, for comparative law viewed through French eyes as well. But French law no longer enjoys exalted status among the sources of matrimonial law, and there is a cautious sense that common law Canada is in a parallel social position which renders it a happy source for Quebec legal ideas.

Openness has not, however, mixed up the legal system itself. It was no accident that the matrimonial public order elaborated through the 1970s and 1980s was decanted into a new *Civil Code of Québec* in 1991. The confidence with which law reformers have brought new ideas for family property into positive law has coincided with a sense of a coming of age of the Quebec legal order. There is, as an off-shoot of the newly dominant openness to difference, a sense that the Quebec legal order is capable of ingesting foreign ideas relating to financial relations between spouses without the national legal order losing its grip on the matters of policy which underlay the law of marriage. Quebec law is capable of a controlled legal acculturation²⁰⁹ of ideas as apparently atraditional as the constructive trust or designated matrimonial assets. These and other transplants may take, or not, but their success will henceforth depend on their usefulness as devices for regulating Quebec spouses' financial lives. Imported rules must be made to fit the cadence of codal expression, but this is the main and perhaps only test of compatibility with the civilian tradition. Quebec's matrimonial public order is not so much distinctive as newly *bien dans sa peau*. This skin is a *Civil Code of Québec* that is newer still, enacted in a self-conscious yet serene celebration of a coming of age. The new Code is now held out as a symbol

²⁰⁷ This point is made even by those taking an active comparative stance in examining Quebec law: see, Philip Girard, "Concubines and Cohabitees: A Comparative Look at Living Together" (1983) 28 McGill Law Journal 977 at 1014 and, in respect of the family patrimony, Beaulne, *supra* note 169 at 678.

²⁰⁸ Eric Agostini, *Droit comparé* (Paris: P.U.F., 1988) at 167 has written on the "accueil du droit romain sous bénéfice d'inventaire" in certain European legal systems.

²⁰⁹ One of the most effective explanations of the complex process by which foreign law acclimates to a recipient legal order is found in Henri Lévy-Bruhl, *Sociologie du droit*, 4th ed. (Paris: P.U.F., 1971), esp. at 118.

that Quebec law has, to return to Carbonnier's phrase, reached that moment where, "dans sa singularité historique, [il] s'oppose à tous les autres droits." A measure of a meaningful equality for the Quebec legal order has been achieved as against other national legal systems from which its matrimonial law is, in part, derived.

* * *

This study confirms, if confirmation was at all necessary, that the picture of the changing economic powers of women, appearing through law's lens, is *trompe-l'oeil* as social history of the Quebec family.²¹⁰ If each reform is indeed a composite of dual images of the married woman in ascendance and the mother country in retreat, then the convergence of these images amounts to, at best, a trick three-dimensional picture of women's economic place in marriage at any given point in Quebec history. Yet the stereoscopic effect produced by wedding the history of law reform to that of comparative law, as others have demonstrated,²¹¹ does entitle the legal historian to draw conclusions that might otherwise go unnoticed.

Connecting the emancipation of the married woman with the emancipation of Quebec matrimonial law reflects a common history of legal ideas so marked as to justify this single study of the dual images and the effort to reduce the angle of parallax between them. The last of these twin pictures, whereby an openness to change in the theory of sources moved Quebec law to affirm, or reaffirm, a measure of equality of condition between the spouses through the 1980s. This takes on special significance with enactment of the *Civil Code of Québec* in 1991. This openness has no doubt accentuated the mixed-up character of Quebec matrimonial law but, ironically, it has also enhanced and amplified the law's perceived status as a coherent, national law. Twenty years of polyjural agitation is too short a measure to determine the full impact of this changed orientation on the Quebec legal order, but the confidence with which Quebecers persist in looking outside for ideas to improve the law of marriage seems to confirm the perception, voiced by Alain-François Bisson, that "le droit civil québécois est un droit arrivé à maturité."²¹² Pluralism, as expressed in the *Civil Code of Québec*, is heard as a single voice or, perhaps, a single chorus of voices. Despite the mix, the perception is that Quebec law is a national legal system—"«moniste»"²¹³—which turns to comparative law according to its own

²¹⁰ And yet law reform has provided an occasion to take stock of women's history in Quebec: see Micheline [Dumont-] Johnson, "History of the Status of Women in the Province of Quebec" in *Cultural Tradition and Political History of Women in Canada* (Study 8) Royal Commission on the Status of Women in Canada (Ottawa: Information Canada, 1971) esp. at 14ff. See the comments by the same author on how difficult it is to discover women's history through law and law's institutions given the limited role of women in Quebec public life: "Peut-on faire l'histoire de la femme?" (1975) 29 *Revue d'histoire de l'Amérique française* 421 at 423ff.

²¹¹ See, e.g., Alan Watson, *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974) esp. at 90ff. and *Sources of Law, Legal Change and Ambiguity* (Philadelphia: University of Pennsylvania Press, 1984) esp. chapter 7.

²¹² "Dualité de systèmes et codification civiliste" in *Conférences sur le nouveau Code civil du Québec* (Cowansville: Éd. Yvon Blais, 1992) 39 at 40.

²¹³ *Ibid.* See also Carbonnier, *supra* note 100 at 145 who used the same term to describe the perception of national law as "un tout homogène, un bloc sans fissure."

ends and methods, "pour que le droit comparé soit un apport au système juridique et non pas un élément de déstabilisation."²¹⁴

The 1991 *Civil Code of Québec* has become the icon of this newly confident legal order, the incarnation of Quebec's legal nationalism and, perhaps, of a nationalism wider still.²¹⁵ Importantly, it is the icon's shape that jurists seem most ready to seize upon. The new Code is very much a *contenant de droit national* or, perhaps more precisely, a *contenant national de droit*. Its distinctive, civilian character resides in the technique of codification rather more than in what the Code itself houses. Inside the Code, at least in the law relating to matrimonial property, legal principles are included based on their appropriateness for Quebec marriage as an idea, rather than because of their system or tradition of origin.

Attitudes of openness and confidence inherent to this national legal system have radically altered many jurists' approach to introduction of foreign conceptions of marriage. Fears of an *effet de Louisiane* no longer animate most reactions to legal transplants. It is no doubt too early to evaluate precisely how the "foreign" elements of the matrimonial public order will be received in Quebec's legal system but there are early signs that mixed bloodlines of the partnership of acquests have not hindered its coming to rest at the heart of matrimonial law.²¹⁶ A given reform might be an "adaptation grossière et entortillée de l'expérience défunte d'une province voisine" but, at the same time, it may also constitute "une idée dont le droit civil peut certes s'accommoder."²¹⁷ The family patrimony could take hold while other transplants, like the *patrimoine de famille*,²¹⁸ might be rejected, but henceforth compatibility is perceived to turn on a compatibility with the needs of women and men in marriage.

The experience of matrimonial law on its own does not, of course, provide the sole basis for a general theory of the nationalisation of Quebec law. The civil codes represent, in Quebec, a special locus of historical activity; and important facets of family finances have always been regulated outside the codes, if at all.²¹⁹ Moreover, it is likely that legal nationalism has been felt differently in sectors of private law within the Code, such as the law of property generally speaking, that are founded

²¹⁴ Glenn, *supra*, note 67 at 345. In "Le droit comparé et l'interprétation du Code civil du Québec" *supra* note 94, 175 at 196-222 Glenn has drawn a list of "sources étrangères" of the new Code which includes federal law, provincial law, English law and modern French law, among others.

²¹⁵ See J.E.C. Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New *Civil Code of Quebec*" (1992) 42 *University of Toronto Law Journal* 484 esp. at 496.

²¹⁶ See André Cossette, "Statistiques en matière de mariage" (1991) 93 *Revue du Notariat* 536, attesting to the drop in marriages separate as to property compared to those subject to the legal régime since the mid-1970s.

²¹⁷ Bisson, *supra* note 212 at 50 said this in respect of the family patrimony.

²¹⁸ *An Act for the Protection of Settlers*, S.Q. 1882, c. 12, s. 2, which protected a "homestead" (*patrimoine de famille*) from seizure by creditors, and which Caparros, *supra* note 168 at para. 51 has described as a transplant from American law relevant to understanding the family residence in Quebec.

²¹⁹ Statutory treatment of the financial consequences of heterosexual or homosexual cohabitation outside of marriage most certainly reflects an historical development both as to principle and to sources that is unlike that of codal law. For a hint of this see the critique of Louise Harel, M.N.A., that these relationships were not considered in the most recent reforms: Quebec, *Assemblée nationale, Journal des débats* (6 June 1989) at 6496ff.

upon a different balance of legal sources and that have had a different exposure to the vagaries of the law reform process. On the other hand, when Gérard Trudel characterised the phenomenon of "autochtonéité"²²⁰ in 1942, he did so in respect of the whole of Quebec's common law. The itinerary for the nationalisation of other parts of private law, particularly those connected with profound local sense of who Quebecers are and how they behave, has yet to be fully explored.²²¹

Not only might future studies fix upon how trends of legal colonialism and legal nationalism were experienced elsewhere in Quebec law, it might well be asked whether the process for emergence of a national legal order has evolved similarly elsewhere in the twentieth century. It has been argued, for example, that colonialist attitudes towards English law and a gentle struggle for a sense-of-self formed part of nineteenth century Ontario legal culture.²²² The manner in which Quebec's French legal inheritance has faded in influence may well provide a model for understanding how common law Canadian provinces distanced themselves from their juridical mother country and emerged, like Quebec, as autonomous legal orders.²²³

²²⁰ *Supra* note 96. The multiple volume *Traité de droit civil du Québec* (Montreal: Wilson & Lafleur, 1948-58) commenced by Trudel might be viewed, in itself, as the embodiment of a nascent *autochtonéité* for law.

²²¹ One such sector might be the law of secured transactions which, coincidentally, has been described as having a "caractère autochtone" as against French law: L. Bouchard, "La clause dite de dation en paiement" (1964) 6 *Cahiers de Droit* 33 at 33, cited in the context of modern law reform in R.A. Macdonald "Faut-il appeler un chat un chat" in E. Caparros, ed., *Mélanges Germain Brière* (Montreal: Wilson & Lafleur, 1993) 527 at note 561n.

²²² G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law and History Review* 219. Baker hinted at a possible connection between the Ontario and Quebec experience in "Civil Law — The French Colonial Tradition" in Jacob E. Cooke, ed., *Encyclopedia of the North American Colonies*, vol. I (New York: Scribner's, 1993) 443.

²²³ The authors express thanks to John E.C. Brierley, DeLloyd Guth, Roderick A. Macdonald and Wes Pue for their helpful comments.