20. Community of property and separation of property in Belgium: a gradual harmonisation in the name of fairness?

Geoffrey Willems

INTRODUCTION

The rules governing Belgian family property law have their origins in the French Civil Code of 1804. They remained almost unchanged until the middle of the twentieth century. Then a first important reform took place, in 1976,[1] to enshrine the fundamental principle of equality between spouses as regards their property. More recently, in 2018,[2] the Belgian law on matrimonial property was reformed with a view to putting an end to certain long-standing controversies relating to the interpretation of the law and to protect spouses against the sometimes economically unfair consequences of marriage and divorce.

The basic principle remains, however, that spouses may or may not choose a specific matrimonial property regime through a 'matrimonial agreement' (*contrat de mariage*). If they do not enter such contract, their property relationships will be regulated by the default regime of community of property.[3] By establishing a contract, they may opt for a 'personalised' version of the community of property system, but matrimonial agreements are mostly used by spouses opting for a separation of property system.

Under both systems, spouses are subject to a set of imperative rules composing the 'primary matrimonial regime' (*régime matrimonial primaire*), which will not be addressed here as it does not impact, as such, the distribution of family property upon dissolution of marriage, but is instead designed to provide for a minimum level of economic solidarity as well as for a minimum level of economic autonomy during marriage.[4]

It must be pointed out that Belgian civil law is currently undergoing a re-codification process. Several parts of the Civil Code have already been reorganised and renumbered (these will be referred to as articles of the (new) *Civil Code*), while other parts have not yet been revised (referred to as the articles of the *Old Civil Code*). Fortunately, the parts of the Code relating to 'couples property relationships' (*relations patrimoniales des couples*) (Book 2) and 'inheritance, gifts and wills' (*successions, donations et testaments*) (Book 4) have already

1 Loi du 14 juillet 1976 relative aux droits et devoirs respectifs des époux et aux régimes matrimoniaux, *Moniteur belge*, 18 September 1976, p. 11697.

2 Loi du 22 juillet 2018 modifiant le Code civil et diverses autres dispositions en matière de droit des régimes matrimoniaux et modifiant la loi du 31 juillet 2017 modifiant le Code civil en ce qui concerne les successions et les libéralités et modifiant diverses autres dispositions en cette matière, *Moniteur belge*, 27 July 2018, p. 59435.

3 Art. 2.3.16. et seq. Civil Code.

4 For example, each spouse has the right to choose his/her profession (Art. 216 Old Civil Code), but both spouses have a legal duty to contribute to the expenses of the marriage (Art. 221 Old Civil Code).

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been reformed. However, provisions relating to marriage and divorce and provisions forming the ‘primary matrimonial regime’ have not yet been re-codified and, as a consequence, when mentioning them, we will have no choice but to refer to the ‘old’ provisions, still in force pending the completion of this process.

The following pages first present the rules relating to the community of property regime, then those governing the separation of property regimes. They will highlight the strengths and weaknesses of each scheme while also underlining a trend towards a gradual narrowing of the differences between what will be termed ‘communitarian’ and ‘separatist’ spouses.[5] Thirdly and lastly, we will discuss the economic effects of death, which have recently become almost identical regardless of the spouses’ matrimonial regime (which is a significant indicator of the argued convergence between the two systems).

1 COMMUNITY OF PROPERTY

Most Belgian spouses do not enter into a marriage contract and are consequently subject to the legal community of property regime. It is comprehensively regulated by the Civil Code and emphasises the dimension of solidarity in marriage.[6]

The regime distinguishes three sets of assets and debts: each spouse’s personal property and the common property.[7] Personal assets are precisely identified by the Civil Code (Section 1.1) and any asset that does not qualify as personal is to be considered as common (Section 1.2). The status of debts follows the same pattern and may accordingly entail significant economic risks (Section 1.3). Upon divorce, the wealth produced during marriage is shared equally (Section 1.4), with a specific system correcting undue transfers between personal and common properties (Section 1.5), two important mechanisms – preferential attribution and matrimonial concealment – apply to the concrete distribution of assets (Section 1.6). Finally, it is important to note that the dimension of solidarity characterising the community system may be accentuated through contractual mechanisms extending the common property (Section 1.7).

1.1 The Precise Identification of Personal Property

The Civil Code identifies several categories of assets that shall be considered as personal property of each spouse based on their ‘origin’ or ‘nature’ or because they are somehow ‘related’ to personal assets.

First, property belonging to each of the spouses on the day of the marriage or acquired during the regime, by donation or inheritance, remain their own property (*biens propres par origine*).[8] This means, for example, that if one of the spouses is the owner of a property before marriage, he/she will remain the sole owner of it after marriage. Similarly, if the spouses

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5 We appreciate that, in French as in English, these terms may have problematic political overtones. However, they are commonly used by Belgian legal doctrine to designate spouses that are subjected to the legal regime (*époux communautaristes*) and those who are subjected to the contractual separation of property regime (*époux separatistes*).

6 Hélène Casman, ‘Panorama des évolutions du régime légal’ in Matthieu Van Molle (ed.), *La réforme des régimes matrimoniaux en pratique* (Anthemis 2019) 16.

7 Art. 2.3.16. Civil Code.

8 Art. 2.3.17. Civil Code.

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acquired the property jointly before their marriage, each of them will remain sole owner of his/her share mentioned in the deed of sale: the property will, as a rule, not be considered as a part of the common property.[9] Then, during the marriage, if a spouse receives a donation or inherits from his/her parent, he/she will keep the donated or inherited assets in his/her personal property.

Second, several type of assets shall be considered as personal property because they are intrinsically linked to the spouse's personality (*biens propres par nature*). This second category notably includes clothing and other personal items (jewels, watches, etc.).[10] Issues arise when these goods are acquired with common money and are of great value. In some cases, courts will consider them as constituting an investment belonging to the community despite their personal nature. For example, based on the wealth of the spouses and the length of marriage, a collection of handbags may be considered as a personal asset or as part of the common property.[11]

Personal assets 'by nature' also include professional assets such as equipment used by a spouse for his/her profession or business[12] and the clientele built up in the course of his/her profession or business.[13] This qualification also extends to literary, artistic and industrial property rights[14] and rights arising from the status of partner in a company.[15] Putting an end to long-standing controversies, the 2018 reform made clear that while these assets belong to the personal property of each spouse, their economic value must be considered common.[16] Thus, the Civil Code now expressly distinguishes the legal title (*titre*) on these assets, which is personal as each spouse must be able to manage them autonomously, from their economic value (*finance*), which, being produced by the spouses during their marriage, belongs to the community.[17]

The right to pensions, annuities or other allowances[18] and the right to compensation for a personal physical or moral injury[19] are also considered personal assets 'by nature'. Here again, however, the 2018 reform establishes a clear title/value distinction: while the right to a pension is personal, benefits or allowances paid during the marriage shall be considered as common property as they replace the spouses' income, which is a common asset. The same principle applies, obviously, to any compensation received to cover a spouse's loss of wage or economic capacity due to personal injury.

Finally, some goods and rights are considered to be personal assets because they are somehow related to a spouse's personal property (*biens propres par relation*). This third category notably includes assets that may be considered as the 'accessories' of personal assets.[20] For example, a building constructed on land personally owned by one of the spouses will be

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9 Yves-Henri Leleu, *Droit patrimonial des couples* (Larcier 2021) 98.
10 Art. 2.3.19., § 1, 1°, Civil Code.
11 Leleu (n 9) 126–7.
12 Art. 2.3.19., § 1, 6°, Civil Code.
13 Art. 2.3.19., § 1, 7°, Civil Code.
14 Art. 2.3.19., § 1, 2°, Civil Code.
15 Art. 2.3.19., § 1, 5°, Civil Code.
16 Art. 2.3.22., § 1, 6° and 7°, Civil Code.
17 Casman (n 6) 27, 32 and 35.
18 Art. 2.3.19., § 1, 3°, Civil Code.
19 Art. 2.3.19., § 1, 4°, Civil Code.
20 Art. 2.3.18., 1°, Civil Code.

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his/her personal property,[21] and similarly, a new item in a collection personally owned by one of the spouses (e.g. stamps, old books or works of arts) will be his/her personal property.[22] It also includes assets that have 'replaced' a personal asset in the spouse's personal property.[23] Thus, the proceeds of sale of a building personally owned by a spouse becomes the spouse's personal property and, similarly, the compensation paid by an insurance company following damage to a particular spouse's personal asset is considered as their personal property.[24] Finally, the qualification of personal property also applies when a spouse acquires an additional share in a property of which he is already a co-owner:[25] the rationale of the rule is to avoid a situation of joint-ownership between a spouse and the common property.[26]

An important point regarding this specific category of personal assets 'by relation' is that if common funds have been used for their acquisition (e.g. the building constructed on personal property is financed by the spouses' incomes and/or savings), the common property will be entitled to a 'reward' (*récompense*) enforceable against the sole owner spouse.[27]

1.2 The Residual Application of Common Property

The Civil Code also identifies several types of assets that shall be considered as common property of the spouses, but the most distinctive feature of the regime is that any asset that does not qualify as personal will be considered as common property.

The main common asset specifically identified by the Civil Code is the professional income of each spouse.[28] The notion is understood broadly and includes, for example, self-employment income or any type of income related to a public or private office. It also covers any type of financial gain that comes as a substitute for professional income as bonuses, benefits in kind or severance pay.[29] The common qualification even extends to the income produced by each spouse's personal property.[30] This means that rents produced by personal buildings, interest generated by personal money, dividends arising from personal shares are to be considered as common property of the spouses. According to some, this is not necessarily justified from a theoretical point of view as these incomes are not the result of the economic efforts and contributions of the spouses.[31]

Then, the Civil Code expressly provides that donations and legacies made to both spouses shall belong to the common property.[32] In this respect, courts generally require an express indication by the donor (in most cases parents) that he/she intends to donate to both spouses:

21 Leleu (n 9) 100–2.
22 ibid.
23 Art. 2.3.18., 4°, Civil Code.
24 Leleu (n 9) 105–7.
25 Art. 2.3.18., 3°, Civil Code.
26 Leleu (n 9) 105.
27 On the 'rewards' system, see below Section 1.5.
28 Art. 2.3.22., § 1, 1°, Civil Code.
29 Art. 2.3.22., § 1, 4°, Civil Code.
30 Art. 2.3.22., § 1, 2°, Civil Code.
31 Leleu (n 9) 165.
32 Art. 2.3.22., § 1, 3°, Civil Code.

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the fact that the money is transferred to a joint bank account or the fact the money is used for work on a common property is increasingly considered to be of limited relevance.[33]

Thirdly, the Code states that, based on the title/finance distinction described above, the economic value of professional equipment acquired by a spouse during marriage, clientele built up by a spouse during marriage, and partner rights arising from shares registered in the name of one of the spouses are to be considered as common.[34] It is worth mentioning here that if the spouses work together, the equipment and clientele logically belong in full to the common property (and not only their economic value). Similarly, as we have seen, pension benefits and compensation benefits paid during the marriage – unlike the right to pension and the right to compensation itself – belong to the common property.

Finally, Article 2.3.22., § 3, of the Civil Code provides that 'all property which is not proven to be the property of one of the spouses by virtue of a provision of the law is also common property'. Based on this provision, the spouses' home, car(s) and savings are – as a rule – considered as common irrespective of the deeds of sale, invoices and title to bank accounts. Anything bought with the spouses' income and savings generated by the spouses' income, are in other words, considered to be 'acquests' (*acquêts*), which ought to be divided by half upon dissolution of the regime.[35] In this 'residual common qualification' (*qualification commune résiduaire*) lays the very essence of the default community regime: goods and money belong to the common property, unless they can be proven to be one of the spouses' personal property.[36]

1.3 The Significant Risks Involved by Community of Debts

The status of debts in the community of property system tends to 'reflect' the status of assets. Accordingly, each spouse retains the liability for debts incurred prior to the marriage and the debts that burden inheritances and donations received during the course of the marriage.[37] Debts incurred by a spouse for the exclusive benefit of his/her personal property are also considered personal,[38] just like debts related to a guarantee provided by the spouse insofar as such guarantee is not in favour of the common property.[39] The same applies to debts resulting from acts contrary to the rules of the matrimonial regime[40] or resulting from damage caused or a criminal offence committed by the spouse.[41] On the contrary, debts contracted by both spouses are common,[42] as are debts related to gifts and legacies made to both spouses.[43] The same applies to debts incurred by one of the spouses for household needs, the education of children[44] or for the benefit of the common property.[45] Moreover, just as incomes produced

33 Leleu (n 9) 166–7.
34 Art. 2.3.22., § 1, 5°, 6° and 7°, Civil Code.
35 Art. 2.3.19., § 1, 5°, Civil Code.
36 Leleu (n 9) 157.
37 Art. 2.3.23. Civil Code.
38 Art. 2.3.23., 1°, Civil Code.
39 Art. 2.3.23., 2°, Civil Code.
40 Art. 2.3.24., 3°, Civil Code.
41 Art. 2.3.23., 4°, Civil Code.
42 Art. 2.3.25., § 1, 1°, Civil Code.
43 Art. 2.3.25., § 1, 4°, Civil Code.
44 Art. 2.3.25., § 1, 2°, Civil Code.
45 Art. 2.3.25., § 1, 3°, Civil Code.

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by personal properties are common, the interest related to personal debts is to be considered as a common debt.[46] Finally, any debt which is not proven to be personal will be classified as common, based on the residual application of the community.[47]

It is important to note that professional debts shall be considered as common debts, since the profession is carried out for the benefit of the common property, which receives the spouses' professional income. Accordingly, the payment of a spouse's professional debts may be pursued out of the common property (and therefore out of the income and savings produced by the other spouse). This risk related to professional debts is perceived as one of the major disadvantages of the community of property system.[48] During the preparation of the 2018 reform, it was even considered, for this very reason, to replace community of property by separation of property 'with participation in acquests'[49] as the Belgian default legal regime. Finally, however, community of property has been maintained as the solidarity for debts (*solidarité passive*) is consistent with the solidarity for assets (*solidarité active*) and as 'for the vast majority of citizens, the advantages of this system outweigh its disadvantages'.[50]

1.4 The Equal Sharing of Marriage Benefits upon Divorce

Upon divorce, spouses must proceed with the liquidation and division of their matrimonial property regime. If they agree on the sharing of assets and debts, they can proceed to an amicable sharing (*partage amiable*).[51] Otherwise, they have to go through the judicial sharing procedure conducted by a court-appointed notary (*partage judiciaire*).[52]

Each spouse has to establish the extent of his/her personal property by proving that particular assets must be considered as their own based on their origin, nature or relation with an asset whose personal nature has already been established. All the other assets are considered to have 'fallen' in the common property and must accordingly be shared equally (savings, acquisitions, economic value of professional assets, etc.).[53] Thus, as a rule, all the wealth produced by either spouse during marriage – including acquisitions, savings and the economic value or professional assets – will be split in half, irrespective of names appearing on deeds, contracts, invoices and bank records and regardless of the division of tasks between the partners and their respective possibility (or lack thereof) of receiving substantial incomes and to make savings and/or investments.

It follows that community of property allows the financially less productive spouse to receive a share of the wealth produced during the marriage, which in most cases rightly reflects the fact that his/her free domestic work often enables the financially more productive spouse to accumulate this wealth. In this sense, it may be considered that the sharing of assets generally corresponds to the socio-economic reality of marriage, in which each spouse plays an equivalent, albeit different, role, so that it seems justified that, upon divorce, each spouse should benefit equally from the economic value built up during their life together.

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46 Art. 2.3.25., § 1, 5°, Civil Code.
47 Art. 2.3.25., § 2, 5°, Civil Code.
48 Alain-Charles Van Gysel and Jim Sauvage, *Le couple* (2nd edn, Anthemis 2022) 408.
49 See below Section 2.7.
50 Casman (n 6) 15–16.
51 Arts 1205 and 1206 Judicial Code.
52 Art. 1207 Judicial Code.
53 Art. 2.3.50. Civil Code.

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From a gender perspective, it is mostly considered that the community regime provides appropriate protection for women since they still devote more time than men to domestic tasks to the detriment of their careers.[54] However, in counterpoint to this idea, some argue that by 'encouraging' family organisation patterns based on an asymmetric division of paid and domestic tasks, community of property would somehow favour the persistence of gendered roles and gender stereotypes.[55]

Finally, it cannot be overlooked that the communalising of income and savings may also in certain circumstances produce inequitable outcomes. For example, in a case where both spouses have similar potential or income and one of them saves or invests while the other squanders his or her resources on consumption that does not increase the community, the equal sharing of the wealth produced during the marriage may seem inadequate. It may also happen that the spouses made independently and knowingly very different choices: one of them favoured a remunerative career while the other favoured less profitable social, political, artistic or spiritual activities. It can also be the case that the spouses entered the marriage with very different assets: one of them had to have a job to earn a living, while the other had a large fortune from the outset and did not have to work. In this kind of situation, the division by half of all the acquests may – in fact – prove very unfair.[56]

1.5 The Correction of Undue Transfers by the System of Revaluated Rewards

Under the community of property default regime, an elaborate system of 'rewards' (*récompenses*) can restore the balance if undue transfers between properties occurred during the marriage. Accordingly, when personal funds are invested in a common property (e.g. personal funds have been invested in the family home)[57] or when common money is used for the benefit of a spouse's personal property (e.g. common funds have been used to pay a personal debt),[58] the impoverished property has a claim for reward against the enriched property.

It must be mentioned that this 'rewards' system entitles the impoverished property to recover not only the sums transferred but also the added value resulting from their investment in the enriched property.[59] The most common example in this regard may be the situation where a spouse invested a donation received from his/her parents in the common family home: at the dissolution of the matrimonial property regime, the reward will not be limited to the amount invested, rather this amount will have to be revalued in proportion to the increase in value of the house.

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[54] See Alain-Charles Van Gysel, 'Introduction – Le couple et son patrimoine: une histoire éternellement recommencée' in Van Molle (n 6) 8.

[55] Chloé Harmel, 'Régime matrimoniaux, du Code Napoléon à la réforme de 2018: l'égalité par la protection ou l'émancipation de la femme mariée' in Diane Bernard and Chloé Harmel (eds), *Droits des femmes – Code commenté* (Larcier 2020) 143–5.

[56] Jean-François Taymans, 'Quel avenir pour notre droit patrimonial du couple?' in Nathalie Dandoy, Jehanne Sosson, Fabienne Tainmont, and Geoffrey Willems (eds), *Individu, Famille et Etat: Réflexions sur le sens du droit de la personne, de la famille et de son patrimoine* (Larcier 2022) 378.

[57] Art. 2.3.45. Civil Code.

[58] Art. 2.3.44. Civil Code.

[59] Art. 2.3.46. Civil Code.

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1.6 The Initial Exclusivity of Preferential Attribution and Matrimonial Concealment

Once rewards accounts have been settled, ex-spouses still have to share the common property. Each of them receives certain assets in kind (*partage en nature*), whereas – if necessary – other assets may be sold and their sale price distributed proportionally to spouses.[60] In this respect, it is worth mentioning two specific sharing mechanisms that, until very recently, applied only to community of property spouses.

The first mechanism is 'preferential attribution' (*attribution préférentielle*) and allows disagreeing spouses to submit the issue of who will retain sole property of the former family home to the family court. To decide this sensitive matter, the court will consider the arguments adduced by each spouse, their financial capacity and – if relevant – their ability to buy out the other's share. In case of proven domestic abuse, the family judge should always offer the victim the possibility of becoming the sole owner of the house.[61]

The second mechanism is 'matrimonial concealment' (*recel matrimonial*) and sanctions are imposed on spouses who deliberately conceal (an) asset(s) that should have been included in the sharing. As a rule, such spouses will be deprived of their rights to the concealed asset(s) and sole ownership will be awarded to the other spouse.[62]

1.7 The Possibility of Contractually Extending the Common Property

While the community of property system in its basic form already underlines the dimension of solidarity in the matrimonial relationship, spouses may choose to contractually strengthen the communalising of their assets.

On the one hand, they can decide to have their property relationships subjected to the so-called 'universal community of property' regime (*communauté universelle*). Under this regime, the common property includes 'all [the spouses'] present and future property with the exception of that which is personal in nature and the rights exclusively attached to the person'. Logically, the community also includes all the debts of the spouses even if they were contracted prior to marriage or if they are linked to an inheritance or a donation.[63] This regime may be considered risky and disproportionately favourable to the spouse who contributes the least. Once quite popular in some regions, it has now fallen out of use.

On the other hand, spouses can take the much more modest common step of contractually transferring an asset or assets from their personal property to the common property through a 'contribution to the community' (*apport en communauté*).[64] Such transfer may be useful, for example, when spouses invest common money for the full renovation of a building owned by one spouse (e.g. an inherited holiday house). This would normally imply a reward in favour of the common property, but if the building is transferred to the common property, things are clearer, simpler and fairer: the commonly financed building will be a common property that shall be shared equally in case of divorce.

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[60] Leleu (n 9) 311.
[61] Art. 2.3.14. Civil Code.
[62] Art. 2.3.15. Civil Code.
[63] Art. 2.3.54. Civil Code.
[64] Art. 2.3.53. Civil Code.

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2 SEPARATION OF PROPERTY

Most Belgian spouses choosing to draw up a marriage contract opt for the separation of property regime. The Civil Code contains only a few provisions on this supposedly simple regime which aims at maintaining the autonomy of each spouse during the marriage.[65]

The regime is based on the premise that the spouses' assets remain entirely separate (Section 2.1), which does not exclude them from acquiring property together (Section 2.2).[66] As already mentioned, debts are also kept separate which provide safety to those marrying someone engaged in a business activity (Section 2.3). Upon divorce, each spouse retains the wealth that he or she has accumulated (Section 2.4) and claims related to undue transfers must be formulated on the basis of general civil law theories (Section 2.5). Since 2018, the preferential attribution and matrimonial concealment mechanisms also apply to spouses married under the separation of property regime (Section 2.6). Finally, it must be underlined that, while the effects of separation of property in its 'pure' form may be harsh, they may be softened through relatively efficient contractual remedies (Section 2.7).

2.1 The Principle of Separation of Property

The applicable rules are obviously much simpler under the separation of property regime than under the community of property system. A single provision states that each spouse retains all powers of administration, use and disposition on his/her property[67] and that incomes and savings remain separate.[68] An important clarification, however, is that, according to the 'primary matrimonial regime', all spouses, including those married under separation of property must use their income primarily to cover the expenses of the marriage (*charges du mariage*):[69] only the 'surplus' is subject to the rules of separation of property.[70]

2.2 The Possibility of Acquiring Joint Property

Obviously, spouses married under the separation of property regime may acquire real estate and movable assets together. For example, they may receive a joint donation or a joint legacy, but – mostly – they buy things together. As regards movable property only, the Civil Code provides that assets whose personal ownership by one of the spouses is not established are to be considered as co-owned.[71] Joint property is normally owned by the spouses in the proportions indicated in the title and, in the absence of any indication, it will be owned 50/50. In any case, co-owned assets are subject to the ordinary rules governing joint-ownership (*indivision*), featured in the new Book Three of the Civil Code.[72]

65 Van Gysel and Sauvage (n 48) 408.
66 Art. 2.3.61. et seq. Civil Code.
67 Art. 2.3.61., al. 1, Civil Code.
68 Art. 2.3.61., al. 2, Civil Code.
69 Art. 221 Old Civil Code.
70 Leleu (n 9) 442.
71 Art. 2.3.61. Civil Code.
72 Art. 3.68. et seq. Civil Code.

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2.3 The Convenient Guarantee Provided by Separation of Debts

As in the community of property system, the status of debts in the separation of property regime mirrors the status of assets. This means that, as a rule, each spouse is solely liable for the debts he or she incurs. Nevertheless, the rules of the primary matrimonial regime provide that both spouses are liable for debts incurred for household needs.[73] Likewise, spouses can obviously contract debts together, just as they can acquire property together. An important consequence of the principle of separation of debts is that the professional creditors of one spouse cannot seize the income and savings of the other spouse: as already mentioned, this is one of the main reasons why people turn to this matrimonial regime.

2.4 The Absence of Sharing Mechanism upon Divorce

In case of divorce, spouses who opted for separation of property must, just as spouses married under the community regime, proceed to the liquidation and sharing of their property regime either amicably or judicially. Each spouse may reclaim his/her personal property: as regards real estate, the deed of acquisition establishes ownership; as regards movable assets, property may be established through contracts and other relevant documents. Joint assets are shared according to the property title and if not specified split equally. As there is no mutualisation of incomes, acquisitions and savings, each spouse remains the exclusive beneficiary of any real estate he or she acquired in his or her name, cars and other movable property for which he or she has a nominal invoice, and sums deposited in his or her bank accounts even if the unpaid work of the other spouse indirectly enabled the accumulation of this wealth.

As already mentioned, it is widely considered that this principle, based on the questionable idea that spouses remain fully autonomous agents capable of making wise economic choices during the marriage, does not reflect the close economic association that characterises family life. More specifically, the scheme is often detrimental to spouses who agree to devote a significant proportion of their time to household tasks and childcare and are therefore unable to fully develop their professional potential.

It is also largely acknowledged that this situation is especially prejudicial to women as they remain the main providers of free domestic work and childcare and are more inclined to accept sacrificing their professional opportunities, even if some argue that this gendered pattern is not as widespread as it used to be and should continue to fade gradually.[74]

Professor Yves-Henri Leleu is the author of the most sustained and elaborate critique of ‘pure and simple’ separation of property. He argues that spouses do not always appreciate the consequences of choices they make in getting married or are not on an equal footing in negotiating their marriage contract, and highlights the risk of ‘prejudice linked to living together’ (*préjudice lié à la vie commune*) faced by the financially less productive spouse. He accordingly proposes to use the civil law theory of unjust enrichment (*enrichissement sans cause*) to rebalance the situation at the time of divorce. In his view, when one spouse has enabled the other to develop his or her career through domestic work, there is indeed a correlated enrichment and impoverishment which can give rise to a restitutionary claim. The amount of this

73 Art. 222 Old Civil Code.
74 Taymans (n 56) 377–8.

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undue enrichment claim could be calculated – he suggests – by comparing the spouses' respective acquisitions and savings and offering the domestic worker one-third of the difference.[75]

This proposition, however, is (currently) not followed by family courts as illustrated by a recent decision issued by the Brussels family court.[76] In this case, the wife claimed compensation on the basis of unjust enrichment for 23 years of domestic tasks and childcare and the loss of her career and associated pension benefits. The Court refused, considering that she had not sufficiently established her husband's enrichment and her own impoverishment. It also underlined that, while separation of property may be unjust, it is not the task of courts to apply remedies that were not expressly provided for by the law or in the marriage contract. Finally, it mentioned that, under Belgian law, unfair situations arising from divorce must be addressed through the allocation of post-divorce maintenance which may to a certain extent be based on 'equity' considerations and not through the neatly separated process of liquidating the matrimonial regime which 'only' concerns the division of assets and does not normally involve any kind of 'fairness' assessment.[77]

Professor Leleu criticised this decision, arguing that it is too restrictive in its application of the unjust enrichment theory.[78] In his view, ordinary civil law remedies should be used (more) generously and flexibly when it comes to family relationships. Recently, he described this process of adapting basic principles to the specifics of family as amounting to 'familiarising' (*familialiser*) ordinary civil law.[79] While this concept, transposed from English legal research,[80] is only beginning to be discussed in the Belgian context, Leleu convincingly observes that a familiarised version of unjust enrichment is already applied by courts as regards compensation of undue financial transfers that occurred during marriage, and that this approach should logically be extended to the compensation of unpaid domestic work and loss of economic potential. Other authors think that this would amount to a forced communalising of acquests neglecting the spouses' contractual choices by imposing on them features of the legal community system which they expressly refused.

2.5 The Correction of Undue Transfers Based on the Unjust Enrichment Theory

As the above-described system of 'rewards' is, as such, reserved for couples married under the community regime, courts progressively accepted applying unjust enrichment in a creative way to provide spouses married under the separation regime with a very similar solution when undue financial transfers occurred during marriage. This means, for example, that if a spouse paid in full for a building acquired in both spouses' names or invested personal money in a building of which the other is the exclusive owner, he or she will be entitled to an unjust enrichment restitution claim. In Professor Leleu's view, this is currently the most striking example of a familialised application of general civil law, allowing to correct the shortcomings of the separation system by bringing it closer to the community regime.[81]

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75 Leleu (n 9) 482–3.
76 Trib. fam. Bruxelles, 14 March 2019, Revue du notariat belge, 2021, p. 258.
77 Leleu (n 9) 537–8.
78 ibid.
79 ibid 26–9.
80 See Andrew Hayward, '"Family Property" and the Process of "Familialisation" of Property Law' (2012) *Child and Family Law Quarterly* 284.
81 Leleu (n 9) 27.

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At first, however, Belgian courts were quite reluctant to use the unjust enrichment theory in the context of marital breakdown, for several reasons. Firstly, it was regularly considered that the mere fact of living together was exclusive of restitution claims based on unjust enrichment because the enrichment and correlative impoverishment were not 'unjust' (*sans cause*) as they may be perceived as justified by the couple relationship itself. This position was unsatisfying as the marital/affective bond seems insufficient to justify transfers of wealth either from an economic or moral point of view[82] and as it led to an automatic refusal of any claim based on unjust enrichment between ex-partners.[83] Fortunately, this reasoning was disapproved in 2016 by the Court of Cassation, which decided that the couple relationship was not in itself a 'cause' justifying the enrichment of one partner at the expense of the other.[84]

Secondly, a clause included in most separation of property contracts provided that 'the spouses will be presumed to have settled the accounts they may owe each other from day to day' and was understood as excluding financial claims between divorcing spouses except if they had effectively established written accounts.[85] As, in practice, spouses do not draw up written accounts even when married in separation of property and whatever the provisions of their marriage contract, this requirement amounted in practice to excluding any unjust enrichment claim between ex-spouses.[86] This approach was also rejected by the Court of Cassation in two judgments of 2019 and 2020:[87] spouses married under the separation of property regime may make claims even if their contract contains this clause.

Finally, it was alleged that the 'voluntary' nature of the transfer, i.e. the fact that the disputed payment had been made 'voluntarily and with full knowledge of the facts' was sufficient to prevent any restitution claim. Here again, the Court of Cassation refused this analysis and considered that the voluntary nature of the disputed movement of assets may only impede the application of unjust enrichment if it is proven that the impoverished spouse had the 'will to effect a definitive transfer' in favour of the other spouse which 'may be apparent, in particular, from the intention to gratify the enriched party, from a speculative purpose or from the fact that the impoverished party acted exclusively or principally in his own interest'.[88]

Following the Court of Cassation's decisions, the case law is much more inclined to compensate undue transfers on the basis of unjust enrichment.[89] The main remaining obstacle to

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82 Lorette Rousseau and Vinciane Rosenau, 'Transferts de patrimoine entre cohabitants: enrichissement sans cause, libéralité, créance?' (2018) *Recueil général de l'enregistrement et du notariat* 489.

83 Vinciane Rosenau, 'Les créances fondées sur l'enrichissement sans cause: les tendances et la jurisprudence récente' in Jehanne Sosson and Pierre Van den Eynde (eds), *La liquidation des régimes matrimoniaux. Aspects théoriques et pratiques* (Larcier 2017) 152.

84 Cass., 22 January 2016, Revue de jurisprudence de Liège, Mons et Bruxelles, 2017, p. 306.

85 Daniel Sterckx, 'De la présomption de règlement de comptes entre époux séparés de biens. Deux arrêts de cassation sur un thème rebattu' (2021) *Journal des tribunaux* 155.

86 François Deguel and Valentina Makow, 'L'enrichissement sans cause et les comptes entre époux séparés de biens: en marche vers un raisonnement jurisprudentiel abouti' (2020) *Revue trimestrielle de droit familial* 368.

87 Cass. (nl.), 14 November 2019, Tijdschrift Estate Planning, 2019, p. 706; Cass. (fr.), 16 November 2020, Journal des tribunaux, 2021, p. 153.

88 Cass. (1re ch.), 9 June 2017, Revue générale de droit civil, 2017, p. 502, note François Deguel ; Cass., 4 June 2020, Journal des tribunaux, 2020, p. 558, note Yves-Henri Leleu.

89 Liège, 15 January 2018, *Revue générale de droit civil*, 2019, note Valentina Makow; Mons, 8 April 2020, *Revue trimestrielle de droit familial*, 2020, p. 421; Gand, 9 February 2017, *Tijdschrift familierecht.*, 2018, p. 55, note Nan Torfs; Anvers, 22 March 2017, *Rechtskundig weekblad*, 2017–2018, p. 1423.

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unjust enrichment claims is the duty to contribute to 'the expenses of the marriage' (*charges du mariage*) imposed on all spouses by the primary regime.[90] Considering this duty, a property transfer may only give rise to a claim either if it is unrelated to household expenses or if it exceeds the normal contribution of each partner to those expenses. In this regard, the current trend in case law favours a casuistic and holistic assessment of how the marriage was organised, distinguishing between normal and unusual expenses[91] and taking into account both the origin of the funds (pre-marital capital, inheritance, savings during marriage) and the nature of the property in which they have been invested (owned by one party, undivided, family home etc.).[92] Based on this case-by-case in-depth analysis, the family judge will be able to determine whether the disputed payment exceeds the participation that may reasonably be expected from the impoverished spouse and, if so, award compensation.

It should be noted, finally, that the extent of compensation based on unjust enrichment is normally limited to the amount unduly transferred regardless of any increase in value of the property in which the investment was made.[93] This is obviously an important difference with the legal system of rewards organised for spouses married under the community regime. In 2008, the Court of Appeal of Liège was the first to depart from the traditional approach, deciding that a wife who had paid 70 per cent of the price of the undivided property was entitled not only to the amount she invested but to 70 per cent of the current value of the property.[94] This decision prompted heated debates which lasted until the Court of Cassation itself took a position in favour of re-evaluation of unjust enrichment claims in 2012.[95] A new debate ensued on the precise method to be used for revaluing the claims, some defending a more generous 'financial method' covering the full 'loss of earnings', others advocating a narrower 'monetary method' limiting the restitution to the 'nominal amount' of the investment and a 'complementary allowance' covering inflation and interests.[96] Anyway, in a very recent decision issued on 4 February 2022, the Court of Cassation seems to have changed its mind about the very principle of revaluating the claims. It recalled that 'the person who benefits from the enrichment must restore to the impoverished person the lesser of the two values of the enrichment and the impoverishment' and decided accordingly that the restitution should be limited to the amount invested.[97]

While the utilisation of unjust enrichment to 're-create' a 'rewards-like' system in favour of spouses married under the separation of property regime certainly amounts to a familialisation of ordinary civil law bringing matrimonial property systems closer to each other, the recent shift in the case law of the Court of Cassation certainly marks a step backwards, by reserving

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[90] Art. 221 Old Civil Code (see also above, Introduction).

[91] François Deguel and Valentina Makow, 'L'enrichissement sans cause et les comptes entre époux séparés de biens: en marche vers un raisonnement jurisprudentiel abouti' (2020) *Rev. trim. dr. fam*. 378.

[92] Yves-Henri Leleu and Julie Laruelle, 'Examen de jurisprudence (2006–2017) – Régimes matrimoniaux' (2018) *Revue critique de jurisprudence belge* 493.

[93] Nathalie Baugniet, 'Les créances entre époux sous le régime de séparation de biens' (2010) *Revue trimestrielle de droit familial* 382.

[94] Liège, 22 October 2008, Revue trimestrielle de droit familial, 2010, p. 336.

[95] Cass., 27 September 2012, Revue trimestrielle de droit familial, 2013, p. 512.

[96] Deguel and Makow (n 91) 380–1.

[97] Cass., 4 February 2022, Revue trimestrielle de droit familial, 2022, p. 309, note Jean-Louis Renchon.

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the possibility of obtaining a revaluated amount instead of the nominal amount invested to spouses married under the legal regime.

2.6 The Recent Extension of Preferential Attribution and Matrimonial Concealment

There remain, however, quite significant signs indicating a trend towards convergence. The recent legislative choice to extend sharing mechanisms formerly exclusively attached to the legal regime to all married couples is undoubtedly one of them. Indeed, as some authors rightly questioned the limitation of the scope of preferential attribution and matrimonial concealment to spouses married under the community regime, the 2018 reform made both mechanisms also applicable under the separation of property regime.[98] This is a significant improvement. Before the reform, divorcing spouses who were not able to agree on who would retain ownership of the family home had no other option than to organise a ‘public sale’ (*vente publique*) during which, not only the spouses, but anyone interested would try to offer the highest bid. Even worse, a spouse who deliberately concealed joint assets that should have been shared with the other spouse at the dissolution of marriage did not face any specific sanction which obviously encouraged dishonest behaviours.[99]

2.7 The Possibility of Contractually Mitigating the Separation of Property

As separation of property in its ‘pure and simple’ form (*separation de biens pure et simple*) tends to neglect the inherent dimension of solidarity characterising marriage, the 2018 reform offered spouses new possibilities of contractually mitigating the separation of assets.

First, the reform provides an exhaustive explanation of the regime of separation of property ‘with participation in acquests’ (*séparation de biens avec participation aux acquêts*) that spouses can choose instead of the standard separation regime. Under this regime, spouses keep their property separate but, upon divorce, the spouse who has been able to acquire the most assets or build up the largest savings must share his/her enrichment with the other. Some think that the participation in acquests regime, favoured in Scandinavian countries, is an ‘ideal matrimonial regime’[100] as it combines the independence typical of separatist regimes and some form of solidarity at the critical time of separation.[101]

Before the reform, the regime was not mentioned by law but was proposed by some academics as an acceptable contractual adjustment to the pure and simple regime. It was rarely proposed by notaries, however, mostly due to concerns about its purported complexity.[102]

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98 Art. 2.3.15. Civil Code.

99 François Deguel, ‘L’extension des outils communautaires en régime de séparation de biens’ in Yves-Henri Leleu (ed.), *La réforme du droit des régimes matrimoniaux* (Larcier 2018) 157.

100 Nathalie Baugniet, ‘La séparation de biens avec participation aux acquêts: rêve d’un régime matrimonial idéal’ in Étienne Beguin and Jean-Louis Renchon (eds), *Liber Amicorum Jean-François Taymans* (Larcier 2012) 1–8.

101 Thomas Van Haelteren, ‘La séparation de biens avec créance de participation aux acquêts’ in Van Molle (n 6) 143.

102 Fabienne Tainmont, ‘Le régime de séparation de biens revu par la loi du 22 juillet 2018’ (2012) *Journal des tribunaux* 129.

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Now, the Code expressly provides a method for establishing the 'participation claim'[103] and requires notaries to inform couples about the benefits of introducing a 'participation clause'.[104]

Here is a simplified example of the operation of the participation clause. Spouse A had a personal property of 100,000 euros at the time of marriage and has a personal property of 300,000 euros at the time of divorce. Spouse B had no personal property at the time of marriage and 'only' managed to save 50,000 euros during the marriage. Based on the participation mechanism, spouse A will have to pay 75,000 euros to spouse B upon divorce, which corresponds to half of the difference between the spouses' respective enrichment.

Another, more limited, way of compensating for the potentially inequitable effects of 'pure and simple' separation is to insert a 'judicial correction in equity' clause (*clause de correction judiciaire en équité*) in the spouses' matrimonial agreement. Indeed, since the 2018 reform, the family court may order 'compensation' when owing to 'adverse and unexpected circumstances' the application of the rules of the pure and simple separation regime would lead to 'manifestly unfair consequences'.[105] Such discretionary power conferred on the judge, overtly inspired by Anglo-Saxon family law, is unusual under Belgian law, which usually favours contractual freedom and legal certainty.[106] During the legislative process, the Council of State expressed reluctance towards the new mechanism, emphasising that equity-based discretion may be adapted in common law contexts but was not necessarily appropriate in civil law systems.

In any case, it must be stressed that the correction in equity only applies to spouses who decide to add the clause in their matrimonial agreement: the idea of an 'opt-out' system has been discussed, but was ultimately rejected.[107] However, notaries are legally obliged to discuss the matter with future spouses so that at least there should be awareness of this new possibility.[108] It should also be noted that the amount of the compensation is limited to one-third of the value of the cumulative assets and savings of the spouses minus the value of the personal assets and savings of the spouse claiming compensation.[109]

Based on the same simple example as above, the application of the 'judicial correction in equity' would lead to a very different outcome.

Let's imagine that spouses had the same level of employment at the time of marriage, but spouse B started working part-time at the birth of a second child, allowing spouse A to continue to invest in his or her career. As a consequence, upon divorce, A has 200,000 euros worth of assets and savings whereas B has 'only' 50,000 euros worth of assets and savings. It may reasonably be argued that, considering the couple's specific circumstances, applying pure and simple separation rules would be unfair.

The calculation of the maximum compensation could be made as follows. As the spouse's cumulative gains amount to 250,000 euros, one-third of these gains amounts to 83,333 euros. To calculate spouse B's maximum correction claim, you still have to subtract 50,000 euros corresponding to his/her personal assets and savings. Thus, the judge could order spouse A to

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103 Art. 2.3.65. et seq. Civil Code.
104 Art. 2.3.64., § 3, Civil Code.
105 Art. 2.3.81. Civil Code.
106 Tainmont (n 102) 129.
107 Art. 2.3.81., § 2, al. 1, Civil Code.
108 Art. 2.3.81., § 2, al. 2, Civil Code.
109 Art. 2.3.81. Civil Code.

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pay spouse B a compensation limited to a maximum of 33,333 euros. This is far less than what could be expected on the basis of the participation mechanism described above.

Thus, while Belgian courts do not want to go too far in the jurisprudential extension of the solidarity characterising the community regime to spouses married under the separation regime, the legislator has taken care to offer them broad possibilities of providing for a deferred (participation in acquests) or minimal (correction in equity) communalising of the wealth produced during their marriage. This is certainly a good thing, but it does not address the issue for those who will not include these clauses in their contract. In particular, one can certainly think that a requirement of minimum equity should be imposed on all by law, regardless of the marriage contract they adopted.

3 DISTRIBUTION OF PROPERTY UPON DEATH: THE RIGHTS OF THE SURVIVING SPOUSE

Upon the death of a spouse, the first step is to share the matrimonial regime, exactly as in the case of divorce. The survivor is thus entitled to take back his/her proven personal property, to receive his/her share of the common or undivided property and to make claims either under the regime of 'rewards' or based on the unjust enrichment theory. The deceased's estate – represented by his/her heirs – is obviously entitled to exactly the same rights and claims.

The second step is to share the deceased's estate resulting from the sharing of the matrimonial regime according to inheritance law. Indeed, since 1896, the surviving spouse is considered as a legal heir and is accordingly entitled to share the estate with the deceased's other family members. The surviving spouse's inheritance rights have been strongly reinforced in 1981[110] and in 2018 and, as a consequence, they may now be perceived as the 'natural' or 'main' heir under Belgian inheritance law.

3.1 Intestate Succession

In the absence of a will, the rights of the surviving spouse are provided for in law and depend on the closeness of the other heirs left by the deceased. First, if the deceased has descendants (children or grandchildren), the survivor 'only' has a right of usufruct (*usufruit*)[111] over his/her spouse's entire estate, with bare ownership (*nue-propriété*) belonging to children.[112]

If the deceased has no descendants but leaves ascendants (parents or grandparents) and/or close collaterals (siblings, nephews or nieces), the survivor receives full property of the part of the deceased in the spouses' joint properties.[113] Before 2018, this only applied to the common property under the community of property regime, but that reform extended this benefit to joint properties acquired by spouses under the separation of property regime. The surviving

[110] Loi du 14 mai 1981 modifiant les droits successoraux du conjoint survivant, *Moniteur belge*, 27 May 1981, p. 6908.

[111] In Belgian civil law, the usufruct is 'the temporary right to the use and enjoyment, in a prudent and reasonable manner, of property belonging to the bare owner, in accordance with the purpose of that property and with the obligation to return it at the end of his right' (Art. 3.138. Civil Code).

[112] Art. 4.17., § 1, Civil Code.

[113] Art. 4.17., § 2, Civil Code.

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spouse will also enjoy a usufruct right on the 'rest' of the estate, i.e. the personal property of his/her deceased partner (bare property belonging to the other heirs).

Finally, if the deceased has no close relatives other than his/her widow(er), the latter will receive full property of the whole estate (as the 2018 reform abolished inheritance rights of uncles, aunts and cousins, with the aim of favouring surviving spouses).[114]

3.2 Testamentary Succession

If there is a will, the estate will normally be shared accordingly, provided that testamentary provisions respect the survivor's 'reserved portion' (*réserve*). Indeed, the deceased's widow(er) must at the very least be granted the usufruct on the half of the estate[115] including the usufruct on the family home and its furniture.[116]

3.3 Contractual Extension or Limitation of the Surviving Spouse's Rights

Spouses have different possibilities of contractually modifying the division of the family property in case of death by deviating from the rules presented above.

On the one hand, they can increase the rights of the survivor by providing that – at the first step of sharing the matrimonial regime between spouses – the common or undivided property will not be divided in half and the survivor will receive a larger share or even receive the whole common or undivided property.[117] Where such a 'matrimonial benefit' (*avantage matrimonial*) is used, the deceased's estate is diminished, which is obviously detrimental to the other heirs: their inheritance rights will only apply to his/her personal property. The principle of these benefits has therefore been criticised by some authors, who see a possibility of negatively impacting the entitlements of children of the deceased. Before 2018, the possibility of using such benefits was limited to spouses married under the legal regime, but the reform extended it to separatist regimes.

Conversely, spouses may diminish the rights of the survivor by providing that – at the second step of dividing the deceased's estate between all the heirs – he/she will renounce all rights on his/her spouse's estate.[118] He/she will remain entitled to his/her normal rights in the sharing of the matrimonial regime but will not be able to make any claim at the later stage of inheritance. If such 'Valkeniers pact' (*pacte Valkeniers*) is concluded, the deceased's estate is entirely transmitted to his/her other heirs. This solution is often used in situations of late remarriages, where children from a first marriage might otherwise suspect that the new spouse is primarily interested in the family's assets or, at least, consider the new spouse as a threat to their inheritance expectations. Before 2018, however, spouses could not go as far as renouncing their usufruct right on the family home, but the reform removed this limit to contractual freedom.

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[114] Art. 4.17., § 3, Civil Code.
[115] Art. 4.147., § 1, Civil Code.
[116] Art. 4.147., § 2, Civil Code.
[117] Art. 2.3.56., al. 1, Civil Code.
[118] Art. 2.3.2. and 4.147. Civil Code.

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CONCLUSION

Available statistical information reveals that 32,779 marriages have been celebrated in Belgium in 2020. This is 11,491 fewer than in 2019, this sharp decline being mainly due to the Covid-19 pandemic.[119] It is nonetheless relevant to note that during the same 2020 year 10,287 matrimonial agreements were concluded. Thus, among 32,779 new married couples, 69 per cent have not concluded a marriage contract (22,492 couples) and 31 per cent have concluded such a contract (10,287 couples). Furthermore, it appears that, among the couples that have concluded a marriage contract, about 30 per cent opted for the default legal regime (with some contractual improvements) or for another type of community of property regime, while about 70 per cent opted for a separation of property regime.[120] This leads mathematically to the conclusion that among new spouses:

- about 80 per cent are married under some form of community of property system; and
- about 20 per cent are married under some form of separation of property system.

The developments above show that each matrimonial system gives rise to specific legal issues.

As regards community systems, the main questions concern the personal or common classification of the assets. In this respect, the main achievement of the 2018 reform is the clarification and systematisation of the title/finance distinction: while each spouse may freely manage his/her professional assets, clientele, intellectual property and shareholder rights or right to pension or compensation for damages, the financial value of these assets is to be considered as common.

As regards separatist systems, the main issues relate to the unfair consequences arising in situations where one of the spouses can develop his/her professional and economic potential thanks to the other spouse's domestic work without having to share the resulting savings and acquisitions with him/her at the end of the relationship. One of the main aims of the 2018 reform was then to provide equitable solutions for such situations through the promotion of participation in acquests and judicial correction in equity.

However, a significant problem persists due to the optional nature of these mechanisms correcting the inequitable effects of property separation in its pure form. So, the most salient current debate in Belgian family property law relates to the opportunity of imposing a certain degree of solidarity to all spouses including those who still choose for full separation of property. As we have seen, while courts have accepted to apply unjust enrichment in a familiarised way to address the specific issue of undue transfers, they do not yet accept to use this theory as a tool for imposing a certain degree of sharing in unfair situations arising from the couples' choices and organisation.

Thus, considering the insufficiency of purely optional solutions and the reluctance of the case law to impose a minimum degree of fairness, some argue in favour of a new legislative change that would institute a 'legal participation in acquests for all'. Accordingly, all spouses would have a legal right to benefit from the increase of the partner's assets during their life together. It would be possible, however, to exclude this general sharing principle, if both part-

119 https://statbel.fgov.be/fr/nouvelles/11000-mariages-de-moins-en-2020 accessed 29 August 2023.

120 https://www.notaire.be/nouveautes/detail/barometre-de-la-famille-21-de-contrats-de-mariage-en-moins-en-2020 accessed 29 August 2023.

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ners want to, through an opt-out mechanism. This proposed harmonisation, importantly, is not limited to married couples: in its promoters' opinion, it should extend – with some possible variations – to registered partners (*cohabitants légaux*) and de facto partners (*cohabitants de fait*) who are basically in the same situation and may only rely, to date, on the highly uncertain remedies offered by the case law. In any case, in the proposed approach, judges would be invested with a significant power to depart from the legal solution (equal sharing as a rule or pure separation for those who would opt out) on the basis of a global, casuistic, equity-based assessment of the separated partners' situation.[121]

Undoubtedly, as regards spouses, such harmonisation of family property regimes would be consistent with the already observable even if still limited convergence of community of property and separation of property illustrated by the creation and consolidation of a rewards-like system on the basis of unjust enrichment, the extension of preferential attribution and matrimonial concealment and the uniformisation of the rights of the surviving spouse (intestate rights and matrimonial benefits). However, it is highly uncertain that these academic suggestions – expressly inspired by Anglo-Saxon solutions – will give rise to legislative changes in the near future as they may be perceived as difficult to reconcile with two major principles of continental civil law: the priority given to contractual freedom and the limitation of equity-based judicial discretion.[122] In this sense, the Belgian legal debate about family property is also a discussion of the advantages and disadvantages of common law and civil law legal traditions when applied to increasingly diverse or polymorphic family relationships.

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[121] Leleu (n 9) 29–32. See also Renalde Barbaix and Alain Verbeke, *Beginselen relatievermogensrecht* (Intersentia 2012) 240–2. See also Jean Fonteyn, 'Quand le droit patrimonial de la famille cause l'iniquité' in Fabienne Tainmont and Jean-Louis Van Boxstael (eds), *Tapas de droit notarial* (Larcier 2022) 48.

[122] Taymans (n 56) 383–90.

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