

COHABITATION LAW IN QUEBEC: CONFUSING, INCOHERENT, AND UNJUST

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INTRODUCTION

This article addresses the legal situation of unmarried cohabitants in the Canadian province of Quebec, where they are known as “*de facto* spouses.”¹ The Parliament of Canada and the provincial legislatures share jurisdiction in relation to family matters, including cohabitants.² In this context, Quebec is triply distinct. First, among the 10 provinces and three territories, it is the sole jurisdiction where the civil law, inherited from France, furnishes the general private law.³ Second, it is the province with the highest rate of unmarried cohabitation.⁴ Third, unlike those

1. This term replaced “concubinary”: An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c 6, arts 31, 35 (Can.).

2. Parliament regulates the family directly in virtue of its exclusive authority over marriage and divorce, as well as the criminal law; it regulates cohabitants incidentally to its treatment of subjects within its exclusive competence. The provinces enjoy responsibility for family law—including the property relations between married spouses—in virtue of their exclusive authority over the solemnization of marriage; property, and civil rights in the province; and matters of a merely local or private nature in the province. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), ss 91(26), 91(27), 92(12), 92(13), 92(16), reprinted in R.S.C. 1985, app. II, no 5 (Can.). See also Robert Leckey & Carol Rogerson, *Marriage, Family, and Federal Concerns*, in THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION 575, 576 (Peter Oliver et al. eds., 2017).

3. See generally Vernon Valentine Palmer, *Quebec and Her Sisters in the Third Legal Family*, 54 MCGILL L.J. 321 (2009) (discussing the unique nature of Quebec’s legal system and adherence to French civil law).

4. Quebec’s share of cohabitants, relative to all couples, has climbed from one and one-third the national average in 1981 (8.3% versus 6.4%) to nearly double it in 2021 (42.7% versus 22.7%). STATISTICS CANADA, STATE OF THE UNION: CANADA LEADS THE G7 WITH NEARLY ONE-QUARTER OF COUPLES LIVING COMMON LAW, DRIVEN BY QUEBEC, THE DAILY, P. 21 (13 July 2022). <https://www150.statcan.gc.ca/n1/en/daily-quotidien/220713/dq220713b-eng.pdf?st=SmapblBJ>. While in all other Canadian jurisdictions marriage is associated with higher fertility than cohabitation, common-law couples in Quebec were more likely to have children living at home (49%) than their married counterparts (45%), as has been the case since 2011. *Id.*, at 12. The 2016 Census had reported that, of all couple families in Quebec with children five years of age or younger, 60.5% were headed by *de facto* spouses. *Census Family Structure (7B) and Presence and Ages of Children (15) for Census Families in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 and 2011 Censuses - 100% Data*, STATISTICS CANADA, [https://www12.statcan.gc.ca/census-recensement/2016/td/eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=113434&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2016&THEME=117&VID=0&VNAMEE=&VNAMEF=\(last visited Mar. 5, 2021\)](https://www12.statcan.gc.ca/census-recensement/2016/td/eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=113434&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2016&THEME=117&VID=0&VNAMEE=&VNAMEF=(last visited Mar. 5, 2021)). Cohabitation arises unevenly across the province’s population, being “concentrated among the native French-speaking,” arguably for reasons “hav[ing] to

of the territories and other provinces,⁵ its legislature has ascribed to *de facto* spouses none of the reciprocal rights and obligations that formalizing a relationship by marriage or by civil union entails under the private law.⁶ The justification voiced for this policy of laissez-faire is freedom of choice and the impropriety of subjecting *de facto* spouses to obligations without their consent. In the provincial government's words, the aim in not applying marital regimes to them is "to preserve the liberty of each to opt for a conjugal lifestyle which, unlike marriage or civil union, leaves place for the spouses' autonomy to organize their mutual relations as appears good to them, without any interference by the State."⁷

do with historical, social, legal, and cultural factors rather than with education or economic factors." Benoit Laplante & Ana Laura Fostik, *Disentangling the Quebec Fertility Paradox: The Recent Evolution of Fertility within Marriage and Consensual Union in Quebec and Ontario*, 42 CAN. STUD. IN POPULATION 81, 83 (2015) [references omitted]. Strikingly, "consensual [or *de facto*] union is no more common than in the rest of Canada" among "the groups that make up the Quebec population besides the French-speaking majority—i.e., the native English-speaking, internal migrants from elsewhere in Canada and immigrants." *Id.* at 83–84; see also Benoit Laplante, *Normative Groups: The Rise of the Formation of the First Union Through Cohabitation in Quebec, a Comparative Approach*, 33 POPULATION RSCH. & POL'Y REV. 257, 258–59 (2014).

5. See generally Nicholas Bala, *Common Law Marriage in Common Law Canada: Legislatures and Courts Recognize "Marriage-Like" Relationships*, 44 HOUSTON J. INT'L L. (2022) (describing Quebec as a "distinct society" that, unlike the other Canadian jurisdictions, has not recognized rights or obligations for unmarried partners under family law).

6. Civil Code of Québec, S.Q. 1991, c 6, art 521.1 (Can.) (creating the civil union in 2002, open to same-sex as well as different-sex couples, which substantially reproduces the rights and duties of marriage)

7. Mémoire de l'appelant, le Procureur général du Québec at para. 5 [author's translation], Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61 (Can.); see also *id.* at paras. 118, 185, 195. Distinguished scholars of family law repeat the idea that, by withholding family law's protections from *de facto* spouses, the legislature "respects their will and their freedom." JEAN PINEAU & MARIE PRATTE, *LA FAMILLE* 536, at para. 374 (2006) [author's translation]; see also, e.g., MIREILLE D.-CASTELLI & DOMINIQUE GOUBAU, *LE DROIT DE LA FAMILLE AU QUÉBEC* 1 (5th ed., 2005). There is occasionally suggestions that Quebec's cohabitation policy exemplifies its cultural and philosophical distinctness within the Canadian federation. See, e.g., Claudia P. Prémont & Michèle Bernier, *Un engagement distinct qui engendre des conséquences distinctes*, in DÉVELOPPEMENTS RÉCENTS SUR L'UNION DE FAIT (Barreau du Québec Service de la Formation continue ed., 2000). While these justifications make no reference to religiously rooted reasons for favouring marriage, some will doubt that the province's legal culture has exorcised them. See, e.g., Robert Leckey, *Cohabitation and Comparative Method*, 72 MOD. L. REV. 48, 60

The argument developed here is that the law applicable to cohabitants in Quebec is confusing, incoherent, and sometimes unjust. While some scholarship evaluates family law by a standard characterizable as political or external to the legal system—such as what would be good for vulnerable women⁸—this article relies on three standards internal to the legal system. One is clarity and coherence, including the idea that legal norms be reconcilable with their official justification. Another is a basic norm of fairness, which precludes imposing disadvantages without their corollary advantages. A final standard, specific to the civilian tradition, is respect for the ambition, legislatively consecrated, that the Civil Code of Québec (“Civil Code”) be “the foundation of all other laws, although other laws may complement the Code or make exceptions to it.”⁹ The article substantiates its claims via authoritative primary sources, chiefly, the Civil Code, federal and provincial statutes, and case law that develops the general private law.

Part II of this article tests the recurring assertion that *de facto* spouses are legal strangers, left to bargain with one another at arm’s length and protect themselves under the general private law. Contrary to this assertion, *de facto* spouses are recognized as family for some purposes, thereby calling into question the

(2009); Régine Tremblay, *Sans foi ni loi: Appearances of conjugality and lawless love*, in *LES APPARENCES EN DROIT CIVIL* (Anne-Sophie Hulin et al. eds., 2015). However significant the difference in legal traditions in the Canadian landscape, caution is in order before assuming that it “explains” the policy differences between Quebec and the other jurisdictions. See, e.g., Elise Goossens, *One Trend, a Patchwork of Laws: An Exploration of Why Cohabitation Law Is So Different Throughout the Western World*, 35 INT’L J. L. POL’Y & FAM. 19 (2021) (stating, in a comparative study, that “the particularities of the civil law and common law traditions have had very little to do with the current cohabitation law landscape”).

8. See, e.g., Suzanne Zaccour, *All Families Are Equal, But Do Some Matter More than Others? How Gender, Poverty, and Domestic Violence Put Quebec’s Family Law Reform to the Test*, 32 CAN. J. FAM. L. 425, 426–27 (2019) (suggesting that family law should focus on difficult cases, particularly “women with little legal knowledge or economic power, and women in violent relationships”).

9. Civil Code of Québec, S.Q. 1991, c 64, Preliminary provision, para. 2. The concern that the civil law was developing in statutes other than the 1866 Civil Code of Lower Canada was a key motivator for the decades-long recodification that resulted in the Civil Code of Québec, S.Q. 1991, c 64, which entered into force on 1 January 1994. Paul-André Crépeau, *Une certaine conception de la recodification*, in *DU CODE CIVIL DU QUÉBEC* 28–29 (Jean-Guy Belley ed., 2005).

opposition between them and “*de jure* spouses.”¹⁰ In addition, the Civil Code’s reliance on an external definition of “*de facto* spouse” betrays the ambitions for its foundational vocation. Part III recounts *de facto* spouses’ inclusion, by varying criteria, in a range of public or social statutes. Presumptions in these statutes that *de facto* spouses share resources cause injustice, since they are not backed by the reciprocal obligation of support applicable to *de jure* spouses. Moreover, a policy justified by freedom and non-interference that includes irrebuttable presumptions about how partners will order their finances is incoherent. The way in which individuals “flicker”¹¹ into legal view as *de facto* spouses for limited purposes, and by varying criteria, recounted in Parts II and III, makes Quebec’s law unclear and confusing. The state of the law is messier than one of uniform but distinct treatments of *de facto* spouses under private law and public law and, thus, harder to communicate. Part IV reports judges’ sense—evidenced in constitutional and civil law—that injustice arises from the restrictive scope of the province’s matrimonial regimes. Efforts to adapt the general private law to *de facto* spouses’ situation undermine the Civil Code’s taxonomic coherence, blurring the line between family law and obligations. The potential interaction between *de facto* spouses’ contractual freedom and such adaptations to unjust enrichment merits attention. Part V summarizes calls for reform across decades, which signify awareness of the problems identified in the preceding parts.

Beyond its argument, this article makes three contributions. It provides the most comprehensive survey of Quebec’s

10. PAUL-ANDRÉ CRÉPEAU CENTRE FOR PRIVATE AND COMPARATIVE LAW, PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS: FAMILY 44 (2nd ed., 2016) (observing that since then, “the Civil Code evokes the notion of the *de jure* spouse by opposing married and civil union spouses to *de facto* spouses.”). See *infra* Section II.B (providing examples within the law where *de facto* spouses’ familial character is recognized).

11. See Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARVARD J. OF THE LEGAL LEFT 1, 26 (2010) (“Unless the regime is constructed to put some entity effectively at the highest decree of imperative control—if it is legally plural in any way—the legal status of a single marriage is not a steady beam shining in all directions across space and through time: instead, it flickers.”) (emphasis in original).

cohabitation law in English.¹² Joining Nicholas Bala's excellent article in this issue, it completes the Canadian portrait, with Quebec's policy of *laissez-faire* contrasting sharply with the other approaches. Last, this article's focus on the interaction between *de facto* union's treatment under private and public law may prompt further attention to such interactions in other jurisdictions.

II. LEGAL STRANGERS IN THE PRIVATE LAW?

This part exposes and tests the hardline, conservative view that concubines or *de facto* spouses "are legal strangers one to another," subject not to family law but to the general private law.¹³ As in France, family law in Quebec has traditionally included the proposition that cohabitants form a couple at best, not a family: cohabitation produces not a civil "status" but a factual "situation," since "marriage alone has a juridical life."¹⁴ Granted, the Civil Code uses the adjective "family" (in French, *familial*) for measures that are restricted to formally recognized spouses.¹⁵ But even within the confines of the Civil Code, the view that *de facto* spouses do not form a family is unsustainable. Contrary to common statements, the private law does not consistently treat *de facto* spouses as separate, self-interested individuals. The partial recognition of *de facto* spouses' familial character foreseeably generates confusion and calls into question the justification for withholding other matrimonial rights and obligations from them.

Who counts as a *de facto* spouse? This threshold question directs attention to legislative disrespect for the Civil Code's foundational role. Although the Civil Code details the paths to acquire marital and parental status, and the consequent rights

12. For a comprehensive overview of Quebec's cohabitation law in French, see BRIGITTE LEFEBVRE, *Union de fait*, in JURISCLASSEUR QUÉBEC: PERSONNES ET FAMILLE (Pierre-Claude Lafond ed., 2012) [loose-leaf].

13. D.-CASTELLI & GOUBAU, *supra* note 7, at 175 (author's translation).

14. Jean Pineau, *L'ordre public dans les relations de famille*, 40 LES CAHIERS DE DROIT 323, 328 (1999); D.-CASTELLI & GOUBAU, *supra* note 7, at 173.

15. See, e.g., Civil Code of Québec, S.Q. 1991, c 64, art 414 (Can.).

and obligations,¹⁶ it does not define *de facto* spouse. Instead, occurrences of that term in the Civil Code refer implicitly to the Interpretation Act, which states: “Two persons of opposite sex or the same sex who live together and represent themselves publicly as a couple are *de facto* spouses regardless, except where otherwise provided, of how long they have been living together.”¹⁷ It adds that, “in the absence of a legal criterion for the recognition of a *de facto* union, a controversy arises as to whether persons are living together, that fact is presumed when they have been cohabiting for at least one year or from the time they together become the parents of a child.”¹⁸ Beyond the plain infidelity to avowed aspirations that the Civil Code establish the private law’s key concepts, this “maladroit” addition to the Interpretation Act fails to unify provincial law since many other statutes define “*de facto* spouse” or expand “spouse” beyond *de jure* spouses for their purposes.¹⁹

While on some views, the differential treatment between *de facto* and *de jure* spouses presented in Section II.A may be intrinsically unjust—a failure, say, to accord equal treatment to functionally similar relationships—the rules surveyed in this section are generally consistent with the view of *de facto* spouses as legal strangers. Explicit contemplation of *de facto* spouses’ joint parenting is an obvious exception. In any event, rules presented in Section II.B recognize *de facto* spouses’ special familial connection, showing that the premise by which *de facto* spouses bargain and protect themselves as self-interested individuals does not consistently guide legislative policy under the private law. An aperçu of *de facto* spouses’ position under the general private law, in Section II.C, will complete the portrait of the legislatively shaped private law, laying groundwork for the

16. See generally, Civil Code of Québec, S.Q. 1991, c 64, art 365ff. (Can.) (outlining the detailed regimes relating to married spouses); *id.* at art 521.1ff. (regulating spouses by civil union); *id.* at art 523ff. (regulating parents and children); *id.* at art 585ff. (outlining the obligation of support owed by married or civil union spouses); *id.* at art 597ff. (regulating parental authority).

17. Interpretation Act, CQLR c I-16, s 61.1, para. 2, added by An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c 6, s 143 (Can.).

18. Interpretation Act, C.Q.L.R. c I-16, s 61.1, para. 2 (Can.).

19. PINEAU & PRATTE, *supra* note 7, at 545–46, para. 378 (author’s translation) (expressing doubts about the definition’s legitimacy, utility, and efficacy).

judicial adaptations in favour of *de facto* spouses that will follow in Section IV.B.

A. *The Book on the Family*

The second of the Civil Code's 10 books is dedicated to "The Family."²⁰ Subsection II.A.1 recounts that the legislative drafters have granted to *de facto* spouses none of the rights and obligations of *de jure* spouses set out in that book.²¹ Identifying those rights and obligations, and significant limits on *de jure* spouses' contractual freedom, will draw out the import of this policy choice. Subsection II.A.2 demonstrates that although the legislative drafters have taken some notice of *de facto* spouses, parents' marital status can still disadvantage the children of unmarried parents.²²

1. Relations between Partners

De jure spouses "owe each other respect, fidelity, succour and assistance" and are "bound to share a community of life."²³ They have joint responsibility for the expenses of the marriage, to which they must contribute in proportion to their respective means.²⁴ They owe one another an obligation of support.²⁵ *De jure* union triggers a regime on the family residence, according this space a degree of protection from creditors during the union.²⁶ This regime includes the possibility of a judicially granted right for a spouse with custody of children to occupy the family residence, even where the other spouse is its sole owner.²⁷

Three regimes are more squarely financial. First, partly as the upshot of feminist lobbying, obligatory effects of marriage

20. Civil Code of Québec, S.Q. 1991, Book Two (Can.).

21. See *infra* at 7–10.cbe

22. See *infra* at 10–12.

23. See Civil Code of Québec, S.Q. 1991, c 64, art 392 (Can.); *id.* at art 521.6 (Can.) (imposing rights and obligations on spouses by civil union and stating broadly that the "effects of the civil union" in numerous respects "are the same as the effects of marriage, with the necessary modifications").

24. *Id.* at art 396.

25. *Id.* at art 585.

26. *Id.* at art 401ff.

27. *Id.* at art 410, para. 2.

have included, since 1989, the regime of the “family patrimony.”²⁸ Under this regime, irrespective of which spouse holds title, both share the net increase in value, during the marriage, of the family’s residences and their furnishings, motor vehicles used by the family, and retirement plans.²⁹ Second, there is the possibility of a “compensatory allowance” ordered by the court to remedy one spouse’s enrichment of the other’s patrimony, on the end of cooperation in an enterprise or when the marriage ends.³⁰ Third, for assets outside the family patrimony, the default or “legal” matrimonial regime is a deferred sharing of gains known as the partnership of acquests.³¹

Since contractual freedom is central in the discourse that purports to justify Quebec’s policy on *de facto* union, it is critical to emphasize the substantive and procedural constraints on contracting out and renouncing entitlements by those who consent to become *de jure* spouses. These constraints show the legislative drafters to be sensitive to the potential for exploitation in the marital setting.

Before or during *de jure* union, most rights and obligations noted in the preceding paragraphs are immune to contracting out,³² characterized in the civil law as being “of public order.”³³ It has dismayed some traditionalists that the family patrimony cannot be renounced by prenuptial agreement or marriage contract,³⁴ nor can spouses waive the right eventually to claim a compensatory allowance. For assets outside the family patrimony, *de jure* spouses may, however, opt out of the partnership of acquests by a properly formalized marriage

28. Alain Roy, *Le contrat de mariage en droit québécois: un destin marqué du sceau du paradoxe*, 51 MCGILL L.J. 665, 667 (2006).

29. Civil Code of Québec, S.Q. 1991, c 64, art 415 (Can.).

30. *Id.* at art 427.

31. *Id.* at art 432; BRIGITTE LEFEBVRE, LES RÉGIMES MATRIMONIAUX: CONTRAT DE MARIAGE, SÉPARATION DE BIENS, SOCIÉTÉ D’ACQUÊTS 3 (Yvon Blais ed., 2011).

32. *Id.* at art 391.

33. BRIERLEY & MACDONALD, QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW 105 (John E. C. Brierley & Roderick A. Macdonald eds., 1993).

34. See, e.g., Ernest Caparros, *Patrimoine familial: une qualification difficile*, 25 REVUE GÉNÉRALE DE DROIT 251, 256–57 (1994) (entitling a discussion as “putting liberty in chains” [author’s translation]); see also Danielle Burman, *Le déclin de la liberté de choix au nom de l’égalité*, 24 REVUE JURIDIQUE THEMIS 461, 468–69 (1990).

contract.³⁵ Such use of marriage contracts differs from their historical role in bourgeois society of assuring the financial security of a wife after her husband's eventual death.³⁶ Quebec civil law having no general doctrine of unconscionability, and there being no special rules, a validly concluded marriage contract is largely unreviewable.³⁷ Crucially, a compensatory allowance may be ordered even where spouses choose separate property.³⁸ Indeed, this discretionary device was created precisely to "remedy the[] vulnerability" of women who, exercising their freedom of contract, had married under the regime of separation of property.³⁹ The Supreme Court of Canada has recognized the "close relationship between the action for unjust enrichment and the action for a compensatory allowance."⁴⁰ Even when the marriage ends, formalities are required when renouncing one's share of the family patrimony and of the other spouse's

35. See Civil Code of Québec, S.Q. 1991, c 64, art 440 (Can.) (stating that on pain of absolute nullity, marriage contracts "shall be established by a notarial act *en minute*").

36. Brierley and Macdonald, *supra* note 33, at p. 318, para. 313.

37. Compare Family Law Act, R.S.O. 1990, c F.3, s 56(4)(a) (Can.) (stating that domestic contract may be set aside for a party's failure to disclosure to the other significant assets or debts when the contract was made) and *id.* at s 56(4)(c) (Can.) (stating that domestic contract may be set aside "in accordance with the law of contract," including the doctrine of unconscionability); Hartshorne v. Hartshorne, [2004] 1 S.C.R. 550, para. 75 (Can.). See also Alain Roy, *supra* note 28, at 685 (suggesting that the legislature should authorize courts to set aside marriage contracts on grounds of lesion or hardship (*imprévision*)); MIRIAM GRASSBY, *Nouveau regard sur les contrats de mariage au Québec à la lumière de l'arrêt Hartshorne*, in DÉVELOPPEMENTS RÉCENTS EN DROIT FAMILIAL 47 (Service de la formation continue Barreau du Québec ed., 2008) (arguing that error, which can under existing law vitiate consent, might be interpreted to provide greater relief from marriage contracts disadvantageous to a party).

38. Civil Code of Québec, S.Q. 1991, c 64, art 427 (Can.) (stipulating that the court, when considering whether to award a compensatory allowance, must take account of "the advantages of the matrimonial regime and of the marriage contract"). See e.g. Lacroix v. Valois, [1990] 2 S.C.R. 1259; M. (M.E.) v. L. (P.), [1992] 1 S.C.R. 183.

39. Quebec (Attorney General) v. A, 2013 SCC 5, at para. 70.

40. Lacroix v. Valois, [1990] 2 S.C.R. 1259, 1279 (Can.).

acquests.⁴¹ Furthermore, such renunciations are subject to potential annulment on bases wider than ordinary contracts.⁴²

On some views, the public-order character of some effects of marriage, including the family patrimony, does not significantly limit *de jure* spouses' freedom of contract.⁴³ The reason would be that individuals choose to adhere to the institution of marriage. The extent to which those who marry experience doing so as an informed choice may be an empirical question best left to the sociologists.⁴⁴ Indisputably, though, the formalities and special grounds for review that bear on renunciations of entitlements when a marriage is ending testify to the legislative drafters' awareness of the potential for exploitation in dealings between former intimates.

41. See Civil Code of Québec, S.Q. 1991, c 64, art 423 (Can.) (stating that renunciation of rights in the family patrimony may be made only by notarial act *en minute* or recorded in a judicial declaration); *id.* at art 469 (stating that renunciation of acquests may be made only by notarial act *en minute* or recorded in a judicial declaration); *id.* at art 2814(6) (including notarial acts in the exhaustive list of authentic acts); *id.* at art 2819 (stipulating that, once signed by all parties and therefor authentic, a notarial act "makes proof against all persons of the juridical act which it sets forth and of those declarations of the parties which directly relate to the act"); see also Brierley & Macdonald, *supra* note 33, at 691, para. 825.

42. See, e.g. Civil Code of Québec, S.Q. 1991, c 64, art 424 (Can.) (adding lesion as a basis for setting aside a renunciation of partition of the family patrimony effected by notarial act); *id.* at art 472 (adding lesion as a basis for setting aside a renunciation of acquests effected by notarial act); *id.*, at art 1405 (confining lesion, a ground for vitiating consent to a juridical act, to cases of minors and protected persons of full age, unless otherwise provided expressly by law); see also QUEBEC RESEARCH CENTRE OF PRIVATE AND COMPARATIVE LAW, PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS: OBLIGATIONS 179 (2003) (defining lesion as "[d]amage suffered by a party to a juridical act thqt results from the formation of the act."); *id.* at 162 (defining a juridical act as a "[m]anifestation of intention of one or more persons in a manner and form designed to produce effects in law.").

43. See e.g. Quebec (Attorney General) v. A, 2013 SCC 5, at para. 80; for LeBel J.'s account of Quebec matrimonial law to foreground autonomy and choice, as it does, it must detect an ongoing and robust freedom of choice on the part of married spouses.

44. See Hélène Belleau & Pascale Cornut St-Pierre, *La question du « choix » dans la décision de se marier ou non au Québec*, 66 LIEN SOCIAL ET POLITIQUES 65, 75–76 (discussing multiple factors and motivations leading couples to marry).

2. Parents and Children

Filiation is the “[l]egal bond that establishes the relationship between a child and a parent, father or mother.”⁴⁵ The primary means of proving filiation by blood, the act of birth, appears to be equally available to *de jure* and *de facto* spouses.⁴⁶ As for other paths to filiation, the Civil Code treats *de facto* union of at least three years as equivalent to marriage in making possible intrafamilial adoption.⁴⁷ An unqualified reference to “spouses” extends to *de facto* spouses the possibility of hatching a “parental project involving assisted procreation.”⁴⁸

Nevertheless, until 2022, it was easier to establish filiation when the parents were married or in a civil union.⁴⁹ Although marriage and filiation are substantially uncoupled, the Civil Code long implied that *de jure* spouses had committed to forming a family in a way that *de facto* spouses had not. Notably, while married or unmarried persons could declare themselves the parent of a child, until 2022 only married persons or ones in a civil union could also declare their partner as the parent.⁵⁰ Until the reforms of that year, the ancient presumption of paternity operated only in respect of the *de jure* spouse of a child’s mother.⁵¹ In the context of assisted procreation, a presumption of parentage attaches to the spouse of a child’s birth parent—even where that

45. PAUL-ANDRÉ CRÉPEAU CENTRE FOR PRIVATE AND COMPARATIVE LAW, *supra* note 10, at 58.

46. Civil Code of Québec, S.Q. 1991, c 64, art 523 (Can.) (stating that the filiation is proved by “the act of birth, regardless of the circumstances of the child’s birth”).

47. *See id.* at art 555 (adoption by “special” consent, in favor of a specified adopter, rather than “general” consent).

48. *Id.* at art 538.

49. An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, S.Q. 2022, c 22.

50. Civil Code of Québec, S.Q. 1991, c 64, art 114, para. 1 (Can.), as amended by An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, S.Q. 2022, c 22, s 33.

51. *Id.* at art 525, para. 1, as amended by An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, S.Q. 2022, c 22, s 80.

spouse is a second woman.⁵² But until 2022, that presumption reached only the *de jure* spouse of a birth parent; until that time, no bond of filiation could be established in respect of a *de facto* spouse who consented to a parental project involving assisted procreation but declined to declare themselves a parent after the child's birth.⁵³ For such cases, the Civil Code contemplated, at most, civil liability towards the mother and child, not an enduring filial status.⁵⁴ The regime on assisted procreation, which discourages surrogacy, makes it harder for male couples than others to become parents without recourse to adoption, but the difficulty does not depend on marital status.⁵⁵

Although the Civil Code affirms that “[a]ll children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth,”⁵⁶ their parents’ differential treatment can disadvantage the children of *de facto* spouses relative to those of *de jure* spouses. To be sure, once parentage is established, parents owe child support and exercise parental authority without regard for marital status.⁵⁷ Recall, however, that the possibility of a right to use of the family residence—ancillary to custody of a child—is an incident of marriage, not of parentage.⁵⁸ A former *de facto* spouse with custody of a child has no enacted basis to seek such an order,⁵⁹

52. Civil Code of Québec, S.Q. 1991, c 64, art 538.3 (Can.), as amended by An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, S.Q. 2022, c 22, s 83

53. *Id.* at art 540.

54. *Id.*, former art 540, repealed by An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, S.Q. 2022, c 22, s 85.

55. *See id.* at art 541 (stating that any surrogacy agreement is null).

56. *Id.* at art 522.

57. *Id.* at arts 585, 599.

58. Civil Code of Québec, S.Q. 1991, c 64, art 410, para. 2 (Can.). *See also* Stéphanie Charest, *L’attribution d’un droit d’usage exclusif de la “résidence familiale” à un conjoint non marié ayant la garde des enfants au Québec: Comparaison avec les provinces de common law*, 116 REVUE DU NOTARIAT 277, 284, 317 (2014) (arguing that restricting this measure to the children of *de jure* spouses may be vulnerable to constitutional challenge as discriminatory).

59. *See* Robert Leckey, *Family Outside the Book on the Family*, 88 CAN. BAR REV. 545, 558–61 (2009) (discussing temporary orders, of which the legal authorization is uncertain).

although *de jure* spouses' right to do so must reflect a legislative assumption that the order benefits children.⁶⁰ So, presumably, does the property sharing triggered by marriage breakdown. Since children do not choose their parents' marital status, it is problematic that the ostensible justification for the "collateral damage"⁶¹ visited on the children of unmarried parents is the adults' freedom of choice. Indeed, by the standards guiding this article, it may be unfair and incoherent.⁶²

B. *Partial Recognition Elsewhere*

Outside the book on the family, the Civil Code takes a more nuanced approach to *de facto* spouses. While reserving some advantages for *de jure* spouses, it grants others to all spouses. Furthermore, procedural measures treat both categories together. In short, the legislative drafters have not consistently treated *de facto* spouses as legal strangers under the private law.

Consistent with their exclusion from the division of matrimonial property and the obligation of spousal support, *de facto* spouses are neither present in the scheme for the legal devolution or distribution of intestate successions,⁶³ nor included within the regime on the partition of successions, which includes rules specific to the family residence.⁶⁴ Not figuring among the legal heirs, a surviving *de facto* spouse has no claim to be designated liquidator of the succession where the deceased died

60. *Id.*

61. Dominique Goubau et al., *La spécificité patrimoniale de l'union de fait: le libre choix et ses "dommages collatéraux"*, 44 CAHIERS DE DROIT 3, 51 (2003).

62. Under a widened gaze that adds federal law to provincial law, it comes into view that children in a blended family where the adults are *de facto* spouses may experience disadvantages relative to such children where the adults are married or, more precisely, divorced. See Divorce Act, R.S.C. 1985, c 3 (2nd Supp.), 15.1(1) (Can.) (contemplating a potential obligation of support on the part of the former married spouse of a child's parent); cf. VA v. SF, [2001] R.J.Q. 36, para. 21 (Can. Que.) (opining that, while Quebec is subject to federal divorce law, clear evidence is required for triggering application of a federal rule that derogates from the provincial regime by which child support is owed only by a legally recognized parent).

63. See *id.* at art 653 *a contrario* (providing that an intestate succession devolves "to the surviving married or civil union spouse and relatives of the deceased").

64. *Id.* at art 840ff.

intestate or failed to specify one.⁶⁵ Nor can they be a “creditor of support” able to claim support from the succession.⁶⁶ Furthermore, the regime on life insurance includes measures specific to *de jure* spouses.⁶⁷

Nonetheless, at odds with the image of *de facto* spouses as legal strangers subject only to the general private law, the legislative drafters have recognized the spousal or familial character of their shared life, directly and indirectly. They have done so regarding consent to care,⁶⁸ as well as maintenance of the occupancy of rented premises after the lessee’s death.⁶⁹ Requiring landlords to treat *de jure* and *de facto* spouses in the same way tellingly recognizes that, for some purposes, the dwellings of *de facto* spouses assume a distinctively familial character tantamount to that of their married counterparts. The Civil Code provides that, when two or more heirs wish for their share of the succession to include the deceased’s immovable, there is a preference in favour of the heir who lived there with the deceased.⁷⁰ This rule may well benefit a bereaved *de facto* spouse, perhaps over the deceased’s children “from a first bed”⁷¹ (although the preference is subject to the rights of any surviving *de jure* spouse). For its part, procedural law requires that, before

65. *Id.* at art 785.

66. *Id.* at art 684.

67. *See id.* at art 2444 (stipulating the unseizability of benefits established in favour of ascendants, descendants, and a *de jure* spouse); *id.* at art 2449 (imposing a presumption of irrevocability applicable only to policyholder’s designation, in a writing other than a will, of the *de jure* spouse).

68. *See id.* at art 15 (providing that, where a person of full age is incapable of giving consent to care and has not given advance medical directives or obtained a formal legal representative, consent may be given by the *de facto* spouse).

69. *Compare id.* at art 1938 (outlining an individual’s right to maintain occupancy where the individual lived with the lessee as a *de facto* spouse for at least six months prior to the lessee’s death) with *id.* at art 1974.1 (providing that a lessee may terminate a lease without the customary penalties on account of violent behavior by a current or former *de facto* spouse).

70. *Id.* at art 857 (stating that “[s]ubject to the rights of the surviving married or civil union spouse, if several heirs apply for the allotment by preference of the immovable that served as the residence of the deceased, preference goes to the person who was residing there.”).

71. *See id.*; PAUL-ANDRÉ CRÉPEAU CENTRE FOR PRIVATE AND COMPARATIVE LAW, *supra* note 10, at 22 (noting the expression “enfant d’un premier lit” is rendered less vividly in English as “child of a previous marriage.”).

litigating property matters, cohabitants—like *de jure* spouses—attend an information session on mediation.⁷² Moreover, economic claims between parents who are former *de facto* spouses may be joined to proceedings that bear on custody or support for their child.⁷³ By aligning disputes between separating *de facto* spouses with those between separating *de jure* spouses, both procedural measures recognize *de facto* unions as familial and thereby unlike disputes between individuals at arm's length.

The “unified treatment” of *de jure* and *de facto* spouses evident in the preceding paragraph telegraphs “legislative recognition of an inclusive notion of shared family life.”⁷⁴ This partial inclusion substantially undermines the justificatory force, whatever it may be, of the image of *de facto* spouses as legal strangers. It seems implausible that *de facto* spouses would count as family in a way that justifies including them in several rules of the enacted private law and no more.

C. “Neutrality” under the General Private Law

This section presents the starting point for *de facto* spouses’ relations under the general private law. The legislature having abrogated restrictions on *de facto* spouses’ use of the private law,⁷⁵ Quebec law ostensibly shows “neutrality” towards their unions.⁷⁶ Like any individuals, *de facto* spouses are subject to the general private law of property and obligations; they are free to use it in

72. Code of Civil Procedure, S.Q. 2014, c 1, art 417 (Can.).

73. *Id.* at art 412.

74. Robert Leckey, *Gimme Shelter*, 34 DALHOUSIE L.J. 197, 207 n.43 (2011).

75. Former art. 768 C.C.L.C. (declaring unenforceable an individual’s gift to his concubine that exceeded aliments—abrogated in 1980). See Dominique Goubau, *Le Code Civil du Québec et les concubins: un mariage discret*, 74 CANADIAN BAR REVIEW [CAN. B. REV.] 474, 477 (1995) (discussing how the entry into force, in 1994, of the Civil Code of Québec eliminated art 1056 of the Civil Code of Lower Canada, which had limited to their “consort” a recourse in extra-contractual liability following a person’s death, making such claims possible for death of the claimant’s *de facto* spouse).

76. See Alain Roy, *L’union de fait en droit français et belge: une politique législative aux antipodes du droit québécois*, in MÉLANGES ADRIAN POPOVICI. LES COULEURS DU DROIT 143, 146 (Générosa Bras Miranda & Benoît Moore eds., 2010) (contrasting Quebec’s ostensibly tolerant posture towards *de facto* union with a hostility discernible towards it in some other jurisdictions of the civil law).

acting on “their responsibility to protect themselves”⁷⁷ (although, as just noted, any resulting disputes may be familial in nature). They enjoy testamentary freedom⁷⁸ and may use property law, including the possibility of undivided co-ownership.⁷⁹ In this spirit, contracts by which *de facto* spouses undertake to share expenses, to pay support, or to share property are, in principle, enforceable.⁸⁰ While it is often assumed that cohabitation agreements favor the more economically vulnerable partner by creating obligations or sharing assets, such instruments may also diminish or waive eventual entitlements under the general private law, a matter that returns below.⁸¹

Under the general regime of obligations, cohabitation agreements are subject to no formalities and need not be written (whatever the evidentiary challenges in alleging an oral or tacit agreement).⁸² Furthermore, while marriage produces a status and some effects that are opposable to third parties, such as creditors holding a security interest in a family residence, cohabitation contracts—like contracts generally—have effect only between the parties.⁸³ However wide *de facto* spouses’ contractual scope, cohabitation contracts seem not to be common: a survey has indicated that only 19 percent of couples living in a *de facto* union in Quebec had a written cohabitation contract.⁸⁴

77. PINEAU & PRATTE, *supra* note 7, at 536, para. 374 (author’s translation).

78. Civil Code of Québec, S.Q. 1991, c 64, art 703 (Can.).

79. *Id.* at art 1010, para. 2 C.C.Q.

80. Couture v. Gagnon, [2001] R.J.Q. 2047 (C.A.).

81. *See infra* Part IV.B.2.

82. Compare Civil Code of Québec, S.Q. 1991, c 64, art 1385, 1386 (Can.) and JEAN-LOUIS BAUDOUIN et al., LES OBLIGATIONS 453, para. 370 (7th ed. 2013) with Family Law Act, R.S.O. 1990, c F.3, s 51 (Can.) (defining “domestic contract”) and *id.* at s 55(1) (stipulating that a domestic contract is unenforceable unless made in writing, signed by the parties, and witnessed). As one kind of domestic contract, cohabitation agreements may be set aside for the same bases as may a marriage contract and a separation agreement (*id.* at s 56(4)).

83. Civil Code of Québec, S.Q. 1991, c 64, art 1440 (Can.).

84. *See id.* The survey may raise methodological concerns. The questions focused on written cohabitation agreements, although unwritten ones may be valid. Moreover, the survey did not capture *de facto* spouses’ use of property law—such as co-ownership of a residence—to order economic relations.

III. PUBLIC REGIMES

Public or social laws include *de facto* spouses much more than does Quebec's private law of the family—but they do so in ways that, collectively, produce confusion, incoherence, and, in some cases, injustice. The public measures in this part, combined with the private ones in Part II, do not align with the justifications expressed for them.

A. *Substantial Inclusion*

Many federal and provincial regimes on matters such as social assistance, income tax, and workers' compensation treat cohabitants the same as married couples—albeit with varying criteria for recognizing them.⁸⁵ Many federal regimes take cohabiting for at least one year as the threshold for being a “common-law partner.”⁸⁶ This term is broader in the federal tax regime, also encompassing someone with whom the taxpayer is parent of a child.⁸⁷ Criteria by which one counts as a “spouse” vary more in the provincial statute book. They include cohabiting for one year⁸⁸ or cohabiting for three years (reduced to one year if there is a common child).⁸⁹ Consequently, in a way that may generate confusion, “an individual may be recognized as a *de facto*

85. See, e.g., Modernization of Benefits and Obligations Act, S.C. 2000, c 12 (Can.) (extending to same-sex cohabitants federal statutes that previously applied only to different-sex cohabitants); An Act to Amend Various Legislative Provisions Concerning *de Facto* Spouses, S.Q. 1999, c 14 (Can.) (extending to same-sex cohabitants federal statutes that previously applied only to different-sex cohabitants). These amendments followed a decision by the Supreme Court of Canada that declared Ontario's policy of imposing a reciprocal obligation of spousal maintenance on different-sex but not same-sex cohabitants to be unjustifiably discriminatory: *M v. H*, [1999] S.C.R. 3 (Can.).

86. See, e.g., Canada Pension Plan, R.S.C. 1985, c C-8, s 2(1) (Can.); Government Employees Compensation Act, R.S.C. 1985, c G-5, s 2 (Can.); Merchant Seamen Compensation Act, R.S.C. 1985, c M-6, s 44(3) (Can.); Immigration and Refugee Protection Regulations, SOR/2002-227, s 1(1) (Can.).

87. Income Tax Act, R.S.C. 1985, c 1 (5th Supp.), s 248(1) (Can.).

88. See Taxation Act, C.Q.L.R. c I-3, s 2.2.1(a) (Can.); Individual and Family Assistance Act, C.Q.L.R., c A-13.1.1, s 22(3) (Can.).

89. See Act Respecting the Québec Pension Plan, C.Q.L.R., c R-9, s 91(b) (Can.); Supplemental Pension Plans Act, C.Q.L.R., c R-15.1, s 85(2) (Can.).

spouse under one statute and not under another,”⁹⁰ even within provincial social law.

Beyond the temporal or quantitative dimension, the relationship of two individuals must be qualitatively conjugal or marital to fall under these statutes. Case law has recognized “contextual factors” relevant to characterizing a couple’s life: existence of a shared life project; attachment, emotional support, and succour; pooling or sharing of revenue, assets, or expenses; cohabitation; sharing of common interests, social life, leisure activities, and outings; and duration, continuity, and stability of the relationship.⁹¹ Significantly, none of these factors is dominant or determinative. Consequently, a “modern notion of cohabitation need not signify the fact of having a common residence.”⁹²

B. *Justifications versus Policy*

A gap between the province’s official account of its policy vis-à-vis *de facto* spouses and its social laws produces injustice and incoherence. In defending the constitutional challenge to its cohabitation policy, the government held up its extension of such statutes to *de facto* spouses as evidence that it did not discriminate against them:

The fact that the Quebec legislature has for a long time ascribed to *de facto* spouses the same social and fiscal rights and advantages as are given to married spouses in their relations with third parties demonstrates well that ... the autonomist approach of the Quebec legislature in the Civil Code of Québec does not represent a perspective of negation of benefits based on stereotypes or on prejudices to the effect that *de facto* spouses would be less worthy of

90. PAUL-ANDRÉ CRÉPEAU CENTRE FOR PRIVATE AND COMPARATIVE LAW, *supra* note 10, at 43.

91. Comité de retraite du régime de retraite du personnel de l’Université Laval v. Marois, 2016 QCCS 5890, 33 C.C.P.B. (2d) 128, para. 68 (Can. Que.).

92. *Id.*, at para. 7 (author’s translation).

respect or that their relationship does not deserve the same respect and the same consideration.⁹³

This passage obfuscates three critical points.

First, by referring only to “rights and advantages,” it ignores the disadvantages of inclusion in social laws. *De facto* spouses’ inclusion in these laws produces variable effects, by context and by economic situation. It is true that comparatively privileged couples may benefit from features such as the possibility of contributing to a spousal Registered Retirement Savings Plan (akin to a 401k in the United States) and the potential for tax-deferred rollover of property. But in instances of “deprivative recognition,”⁹⁴ these social laws also impose disadvantages. For example, the Quebec government reduces means-tested benefits by reference to household income, presumably on the assumption that *de facto* spouses pool resources (and may enjoy a domestic economy of scale).⁹⁵ Moreover, if the government overpays benefits to one partner, both are in principle jointly and severally liable for repayment.⁹⁶ Significantly, social schemes presume that *de facto* spouses pool resources, although the private law does not obligate them to do so. In contrast, *de jure* spouses subject to the same presumption under social laws are obligated to support one another, under the Civil Code’s book on the family.⁹⁷ This asymmetrical treatment—seeing individuals as *de facto* spouses for social laws but not for the corollary family obligations in the Civil Code—is unfair.

It is no defense to say that statutory definitions, which determine social laws’ scope of application, capture only

93. See *Mémoire de l’appelant, le Procureur général du Québec* at para. 8 [author’s translation] *Quebec (Attorney General) v. A*, 2013 SCC 5.

94. See generally Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014).

95. See, e.g., Act Respecting Financial Assistance for Education Expenses, C.Q.L.R., c A-13.3, ss 2, 3, 5, 14(1), 34 (Can.) (determining student eligibility for student loans based on the combined income of the student and spouse). Scholars have characterized some such treatment as “punitive.” Véronique Fortin, Catherine Chesnay & Elisabeth Greissle, *Le traitement punitif des prestataires de l’aide sociale: L’exemple de la « vie maritale*, 32 NOUVELLES PRATIQUES SOCIALES 166 (2021).

96. Individual and Family Assistance Act, C.Q.L.R., c 15, s 89 (Can.).

97. See *Falkiner v. Ontario*, (2002) 59 O.R. 3d 481 (Can. Ont.) (finding discrimination where the welfare scheme’s clawing back of benefits in virtue of cohabitation reached more widely than the obligation of support imposed on cohabitants by family legislation).

relationships in which the partners share resources. The flexible application of judicially developed contextual factors—recall that none is determinative—may recognize unions without extensive sharing. Moreover, even where partners have shared resources, there is a legally relevant difference between the fact of sharing and the civil obligation to do so. Within a couple that shared resources when initially recognized as a *de facto* union, the comparatively privileged partner might reduce or cease sharing with the other. Such a change might well fall short of the demonstrated intention to separate that would transform the partners into former *de facto* spouses, treated as individuals.⁹⁸ The difference between the overall position of *de jure* and *de facto* spouses on the face of the statute book is significant. It is so even if, factually, *de jure* spouses do not always respect their obligation to share under family law.⁹⁹

Second, in contradiction to the avowed stance of non-interference and respect for autonomy, some social laws take account of *de facto* spouses with neither their consent nor the possibility of opting out. Individuals may dispute the facts leading to their characterization as *de facto* spouses, such as the duration of their cohabitation or its conjugal character, but once so recognized, they cannot displace the presumption that they share resources. Legislative drafters genuinely bent on promoting autonomy and choice with respect to relationship form might sharpen the distinction between marriage and cohabitation by treating all unmarried persons as individuals.¹⁰⁰ Less drastically,

98. *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65.

99. See Claire Young, *Pensions, Privatization, and Poverty: The Gendered Impact*, 23 CAN. J. WOMEN & L. 661, 678–79 (2011) (noting that income splitting reduces tax burden of wealthier spouse without requiring him to relinquish control and ownership of funds to the other); see also Sara Cantillon & Marie Moran, *Intra-household Inequality, Poverty and Well-being*, in WEALTH AND POVERTY IN CLOSE PERSONAL RELATIONSHIPS: MONEY MATTERS 21, 36–37 (Susan Millns & Simone Wong eds., 2017) (showing that intra-household inequality and differing financial arrangements affect psychological well-being).

100. Another way to promote autonomy and combat entrenched patriarchal and heterosexist patterns might be for governments to treat everyone as an individual, without reference to conjugal partners. Claire F.L. Young, *Taxing Times for Lesbians and Gay Men: Twenty Years Later*, in AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP 134, 144–147 (Robert Leckey ed., 2015).

Quebec's legislative drafters might make the presumptions of interdependence and sharing rebuttable. In a way currently impossible, *de facto* spouses might prove that they do not pool resources or stipulate that one partner's revenue and assets should not affect claims by the other.¹⁰¹ Or, from a default of nonrecognition, *de facto* spouses could have the option of declaring themselves interdependent, with its resultant costs and benefits.

Third, the statement about granting *de facto* spouses the same social and fiscal rights and advantages as *de jure* spouses is incorrect. While the Canada Pension Plan puts married and common-law spouses on equal footing, Quebec's public pension reproduces the Civil Code's "hierarchy" by which *de facto* spouses, if "no longer ignored," are "placed below married spouses."¹⁰² Thus, while the federal plan grants the non-earner spouse an entitlement on separation,¹⁰³ Quebec's legislative drafters make partition of earnings a device for winding down a *de facto* union only by consent of the earner spouse.¹⁰⁴ Moreover, while the federal scheme prioritizes the common-law partner as "survivor" over an estranged married spouse on the earner's death,¹⁰⁵ Quebec's scheme prioritizes an estranged married spouse over a *de facto* spouse unless the bond of marriage was attenuated by a judgment of legal separation.¹⁰⁶ Contrary to the province's assertions quoted above, the result may well be a "negation of benefits" that implies that the relationships of *de facto* spouses do "not deserve the same respect and the same consideration" as those of their *de jure* counterparts.

101. Robert Leckey, *Strange Bedfellows*, 64 U. TORONTO L.J. 641, 662 (2014).

102. Goubau, *supra* note 75, at 478 (author's translation).

103. See Canada Pension Plan, R.S.C. 1985, c C-8, s 55.1.(1)(c) (Can.) (granting right to former common-law partner to apply for division).

104. Act Respecting the Québec Pension Plan, C.Q.L.R., c R-9, ss 102.10.3(a), 102.10.4 (Can.).

105. Canada Pension Plan, R.S.C. 1985, c C-8, s 42(1) (Can.) (defining "survivor").

106. Act Respecting the Québec Pension Plan, C.Q.L.R., c R-9, s 91(b) (Can.); see also Supplemental Pension Plans Act, C.Q.L.R., c R-15.1, s 85(2) (Can.) (recognizing a *de facto* spouse only where the deceased was neither married nor in a civil union).

IV. JUDICIAL DISSATISFACTION

Judges have noticed the difficulties with Quebec's cohabitation policy depicted in the two preceding parts. Five of nine judges of the Supreme Court have found this policy to be discriminatory under the entrenched bill of rights (although, as discussed below, the challenge failed).¹⁰⁷ Moreover, by adapting the general private law to redress the injustice detected as arising from cohabitation, the judiciary has repudiated the view of *de facto* spouses as independent actors appropriately left to bargain with one another at arm's length. This part will demonstrate how the judiciary detects injustice in applicable legislative policy. It will also identify incoherence in the jurisprudence.

A. *Application of Fundamental Rights*

Cohabitation policy has repeatedly been tested against the guarantee of equality and freedom from discrimination entrenched in Section 15(1) of the Canadian Charter of Rights and Freedoms.¹⁰⁸ Analysis of Charter claims determines, first, whether the claimant has established that the challenged law or governmental action limits a guaranteed right or freedom and, second, under the limitation on rights in Section 1, whether the party defending the law (often the government) has established that the limit is reasonable, proportionate, and thus justifiable.¹⁰⁹

In the mid-1990s, the Supreme Court of Canada recognized marital status as a suspect ground "analogous" to those inscribed in Section 15(1), as it is often a matter beyond an individual's control or choice.¹¹⁰ Many observers, including lawyers and judges, took this development as meaning that legislative distinctions between married and unmarried couples would

107. *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 (Can.).

108. Constitution Act, 1982, s 15(1), *being* Schedule B to the Canada Act 1982, c 11, (U.K.).

109. *R. v. Oakes*, [1986] S.C.R. 103, 105–06 (Can.).

110. *Miron v. Trudel*, [1995] 2 S.C.R. 418, para. 153 (Can.). *See generally* Nicholas Bala & Robert Leckey, *Family Law and the Charter's First 30 Years: An Impact Delayed, Deep, and Declining but Lasting*, 32 CAN. FAM. L.Q. 21, 32–33 (2013) (summarizing the court's finding in *Miron* that marital status may not always be a choice).

amount to unjustifiable discrimination.¹¹¹ Contrary to some expectations, the Supreme Court of Canada later rejected challenges to restrictive family regimes brought under this suspect ground. Specifically, in 2002, it upheld the choice by the legislature of Nova Scotia to restrict its statute on matrimonial property to married spouses and registered domestic partners.¹¹² It later upheld Quebec's restrictive policy in *Quebec v. A.*¹¹³

That litigation arose from an encounter between a 17-year-old woman attending high school in her native country and an extraordinarily successful businessman who was 32 years old at the time.¹¹⁴ They cohabited for seven years and had three children. During the relationship, the man provided for all her needs but refused to marry her.¹¹⁵ Once separated, the woman challenged the constitutionality of restricting to *de jure* spouses the family patrimony, the compensatory allowance, the protections of the family residence, the partnership of acquests, and the obligation of support. The trial judgment rejected all claims.¹¹⁶ The Court of Appeal allowed A's appeal in part. It found unjustifiable discrimination in the legislature's failure to include *de facto* spouses in the reciprocal obligation of support that applies to *de jure* spouses and to parents and children.¹¹⁷

In four sets of reasons, a bare majority of the Supreme Court of Canada upheld the Civil Code's entire policy of laissez-faire towards *de facto* spouses.¹¹⁸ Four judges found no discrimination: Quebec had historically disadvantaged *de facto* spouses, but it no longer treated them prejudicially or stereotypically, instead respecting their autonomy and freedom of choice.¹¹⁹ Five judges found discrimination in *de facto* spouses' exclusion from all

111. *Ross v. Taylor*, 1998 ABCA 193, 216 A.R. 348; *Walsh v. Bona*, 2000 NSCA 53, 183 N.S.R. (2d) 74, rev'd, *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325 [hereinafter *Walsh*].

112. *Walsh* at paras. 64–65.

113. *Quebec (Attorney General) v. A.*, [2013] SCC 5, [2013] 1 S.C.R. 61.

114. *Id.* at para. 4.

115. *Id.* at para. 5.

116. *Droit de la famille*—091768, 2009 QCCS 3210, [2009] R.J.Q. 2070.

117. *Droit de la famille*—102866, 2010 QCCA 1978, [2010] R.J.Q. 2259.

118. *Quebec (Attorney General) v. A.*, [2013] 1 S.C.R. 61, at 63, 64.

119. *Id.*, at paras. 246–48, 267, 272 (LeBel J.).

challenged components of matrimonial law.¹²⁰ The judges split three ways as to the reasonableness of provincial policy under Section 1 of the Charter. For Justice Abella, all the discrimination was unjustifiable: *de facto* spouses' total exclusion did not impair their rights minimally, and the law's harms were disproportionate to its benefits.¹²¹ For her, a regime applying to *de facto* spouses but subject to opting out—unlike major elements of the regimes for *de jure* spouses—would be justifiable.¹²² Three others thought it justifiable to exclude *de facto* spouses from property division but not from the obligation of support.¹²³ Chief Justice McLachlin saw all instances of discrimination as the reasonable output of a legislature's promotion of autonomy and choice.¹²⁴ To sum up, the challenge failed because four judges found no discrimination, and a fifth, the swing vote, found justifiable discrimination.

While Quebec's policy of laissez-faire withstood challenge, there are three legally and politically salient takeaways. A majority of five justices characterized the policy as discriminatorily underinclusive.¹²⁵ Next, reasons endorsed by seven justices signaled that judges in the province should keep adapting the general private law for cohabitants, the subject of the next section.¹²⁶ Finally, it is incoherent that, in a case alleging discrimination by marital status, five judges—those who found no discrimination and the swing vote—relied on autonomy and choice without engaging with the Supreme Court's basis for recognizing marital status as a suspect ground, namely, its often unchosen character.¹²⁷

120. *Id.*, at paras. 356–57 (Abella J.).

121. *Id.*, at paras. 360, 377.

122. *Id.* at paras. 375–76.

123. *Id.* at para. 408 (Deschamps J.).

124. *Id.* at paras. 447, 449 (McLachlin, C.J.).

125. Robert Leckey, *Developments in Family Law: The 2012–2013 Term*, 64 SUP. CT. L. REV. (2d) 241, 246 (2014).

126. *Quebec v. A*, [2013] 1 S.C.R. 61., at para. 117 (LeBel, J.) (stating that *de facto* spouses can bring an unjust enrichment claim if they believe that they were wronged when the relationship ended); *see also id.* at paras. 401–02 (Deschamps, J.).

127. In 2021, another Charter challenge was filed in the Superior Court of Quebec, District of Montreal, by law firm Goldwater, Dubé. To preserve the parties' anonymity, neither their names nor the file number can be mentioned; counsel for the claimant have

B. *Tailoring the General Private Law*

While the legislature has abstained from subjecting *de facto* spouses to the economic protections of the private law of the family, judges have used general provisions in the Civil Code's book on obligations to redress the fallout of cohabitation. By developing special rules for the context of cohabitation, judges have arguably put strain on the abstractness and neutrality of the general regime of obligations and the overall coherence of the Civil Code.

1. Doctrinal Development

The undeclared contract of partnership occasionally provides a remedy to an estranged *de facto* spouse.¹²⁸ In a way that limits this path's utility, the claimant must prove the psychological element characteristic of a partnership.¹²⁹

The preferred doctrinal path for remedying potential injustices from cohabitation is unjust enrichment. The Supreme Court of Canada has adapted the common law of unjust enrichment and the remedial constructive trust for the situation of cohabitants.¹³⁰ Initially, to facilitate a former *de facto* spouse's claim, the Court of Appeal of Quebec adopted the Supreme Court's presumptions that the defendant's enrichment correlates to the

dubbed the parties "Nathalie" and "Pierre." The challenge returns to the allegations of unconstitutionality based on marital status from *Quebec v. A.*, adding the enumerated ground of sex from women's perspective. See Franca G. Mignacca, *Montreal Lawyer Renews Fight for Equal Rights for Unmarried Partners*, CBS NEWS (Mar. 31, 2021, 2:16 PM), <https://www.cbc.ca/news/canada/montreal/anne-france-goldwater-calls-civil-code-rules-unconstitutional-1.5934824>.

128. *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2 (Can.) (finding that a partnership existed between the parties when they purchased and operated a farm after two years of cohabitation).

129. Lefebvre, *supra* note 12, at para. 37. See also Christine Morin, *La société tacite: quand les affaires se conjuguent avec l'amour*, 110 REVUE DU NOTARIAT 825, 828–29 (2008) (Can.).

130. See, e.g., *Peter v. Beblow*, [1993] 1 S.C.R. 980 [hereinafter *Peter*] (Can.); *Kerr v. Baranow*, [2011] 1 S.C.R. 269 [hereinafter *Kerr*] (Can.); see also Mitchell McInnes, *Cohabitation, Trusts and Unjust Enrichment in the Supreme Court of Canada*, 127 L.Q. Rev. 339 (2011). Despite some anxieties about the purity of the legal traditions, it is a two-way road that connects the common law and civil law in the Supreme Court of Canada's jurisprudence on unjust enrichment. See ROBERT J. SHARPE & KENT ROACH, BRIAN DICKSON: A JUDGE'S JOURNEY 189 (2003).

plaintiff's impoverishment and that the enrichment is unjustified.¹³¹

Subsequently, Quebec courts have altered how they measure unjust enrichment, at least for a subset of *de facto* spouses. They appear to have departed from the "rule of the lesser amount," by which restitution is capped at the lesser of the creditor's loss or the debtor's gain.¹³² Judges in common-law Canada had already awarded restitution for unjust enrichment beyond the claimant's impoverishment; indeed, the proprietary remedy of the constructive trust, available in the common law when a monetary reward might be insufficient, may involve appreciation of trust property utterly disconnected to the claimant's outlay in time or money.¹³³ By 1993, the Supreme Court of Canada had, in an appeal from a common-law province, expressed approval for calculating restitution for unjust enrichment in the cohabitation context using the "value surviving."¹³⁴ Based on the value of an asset or assets held by the defendant at trial, the value surviving contrasts with the "value received" by the defendant, namely the market replacement rate for the claimant's services rendered. In 2011, the Supreme Court accepted the appropriateness of sharing with one partner the value of assets accumulated by the other when a cohabiting relationship was characterizable as a "joint family venture."¹³⁵ Crucially, the restitution ordered in that appeal was unrelated to any improvement by the claimant of an

131. *Peter*, *supra* note 130; DIDIER LLUELLES & BENOÎT MOORE, *DROIT DES OBLIGATIONS* 760, para. 1406.1 (3rd ed., 2018) (Can.).

132. LLUELLES & MOORE, *supra* note 131, at 769, para. 1418.

133. See Simone Degeling & Mehera San Roque, *Unjust Enrichment: A Feminist Critique of Enrichment*, 36 SYDNEY L. REV. 69, 77 (2014) (identifying "perfecting or carrying into effect the parties' expectations" as "arguably the real work" done in the Supreme Court of Canada's pathbreaking cohabitation case ostensibly decided under the doctrine of unjust enrichment).

134. *Peter*, *supra* note 130.

135. Kerr, *supra* note 130. The Court clustered the indicia of a joint family venture into four categories: mutual effort (such as pooling of effort, joint contributions, or contributions to a common pool; teamwork; the decision to have and raise children together; and length of the relationship); economic integration (such as integration of the couple's finances; economic interests; and economic well-being); actual intent (expressed or inferred, including in title to property); and priority of the family (detrimental reliance for sake of the family; contributions to the domestic and financial partnership; financial sacrifices made for the collective or family unit).

identifiable real asset.¹³⁶ It sufficed that the defendant had focused on his lucrative enterprise while the claimant had looked after the household and the children.¹³⁷ The Supreme Court seems to have replaced the “pre-relationship base line” customary to unjust enrichment as conventionally understood with “a base line of a fair sharing of the assets held in the joint family venture at the time of the court decision.”¹³⁸

While the Supreme Court’s idea of a “joint family venture” swiftly appeared in lower courts in Quebec—however unsure its footing or function¹³⁹—its reception at the Court of Appeal took two steps. In 2013, that tribunal incorporated into the civil law of Quebec the proposition that an order reflecting the value surviving may remedy the unjust enrichment arising from a “coentreprise familiale.”¹⁴⁰ Puzzling authors for whom the measure of the value surviving seemed “foreign” to the spirit of unjust enrichment in the civil law,¹⁴¹ the judge declared it consistent “in all respects” with the Civil Code’s prescriptions.¹⁴² In 2020, the Court of Appeal squarely addressed how the value surviving relates to the “rule of the lesser amount.”¹⁴³ The majority held that in a joint family venture, a reasonable expectation of sharing in the couple’s collective wealth may take root, such that frustrating that expectation causes impoverishment or loss.¹⁴⁴

136. *Id.*

137. *Id.* at paras. 5, 7.

138. DONOVAN W.M. WATERS et al., *WATERS’ LAW OF TRUSTS IN CANADA* 564 (5th ed. 2021).

139. See Robert Leckey, *L’enrichissement injustifié, l’union de fait et l’emprunt à la common law dans le droit mixte du Québec*, 59 *LES CAHIERS DE DROIT* 585, 601–02 (2018) (Can.) (discussing varying bases for citing *Kerr* and its joint family venture in Quebec lower-court judgments).

140. *Droit de la famille*—132495, 2013 QCCA 1586, [2013] R.J.Q. 1527, para. 60 (Can. Que.).

141. LLUELLES & MOORE, *supra* note 131, at 769, para. 1418 (author’s translation).

142. *Droit de la famille*—132495 at para. 60 (author’s translation).

143. *Droit de la famille*—201878, 2020 QCCA 1587, paras. 77–101.

144. *Id.* at para. 101 (holding that, where parties have developed a joint family venture, and an individual has impoverished herself by taking on domestic work to allow the other spouse to attend to their union’s financial aspects, the value assigned to the first partner’s impoverishment may well equal the enrichment to which her contribution corresponds).

Comparisons may be hazardous, given the fact-specific nature of claims in unjust enrichment, but, even when citing the Supreme Court of Canada's jurisprudence, Quebec courts seem less generous to claimants than their common-law counterparts. For example, the 2020 appeal upheld an order by the trial judge that granted the claimant \$2.4 million.¹⁴⁵ This figure represented 20% of the respondent's net worth—amounting to some \$25 million at the trial, accumulated during a 15-year relationship characterized as a joint family venture—minus his contributions to her assets.¹⁴⁶ In a province of the common law, the claimant might have received an award much closer to one-half of the wealth accumulated during the union.

Speaking broadly, the legislature's "decision to keep a consequential boundary between the married and the unmarried in family law has moved or rendered porous the boundary between family law and the general private law."¹⁴⁷ Coverage of adult couples in a textbook on family law now requires elements of partnership and unjust enrichment from the book on obligations.¹⁴⁸ A treatise on obligations may now dedicate discussion to *de facto* spouses.¹⁴⁹ Detecting a legislative failure on family-law policy, judges have developed family-specific applications of general rules elsewhere in the Code. In doing so—however laudably on some views—they diminish the Civil Code's taxonomic clarity.

2. Contract's Risks

The growing importance of unjust enrichment calls for situating it vis-à-vis cohabitants' contractual freedom. Recall that constraints on *de jure* spouses' juridical acts signal the legislative drafters' suspicions about autonomy and freedom in the marital

145. *Droit de la famille*—182048, 2018 QCCS 4195 at para. 212.

146. *Id.* at paras. 152–53.

147. Robert Leckey & Yann Favier, *Cohabitation's Boundaries and the Confines of Tradition*, 25 SOC. & LEGAL STUD. 525, 532 (2016).

148. PINEAU & PRATTE, *supra* note 7, at 566–79, para. 383.

149. BAUDOUIN et al., *supra* note 82, at 640–44, para. 551, 552; LLUELLES & MOORE, *supra* note 131, at 760–61, para. 1406.1, 1406.2.

setting,¹⁵⁰ while cohabitation policy relies on a robust commitment to autonomy.¹⁵¹

Might the power dynamics and informational deficiencies that justify protections for *de jure* spouses logically apply to their *de facto* counterparts? A contract that “regulates most patrimonial aspects of the parties’ shared life” may block an eventual claim in unjust enrichment,¹⁵² serving as a “justification for the enrichment or the impoverishment.”¹⁵³ Such an agreement’s potentially serious consequences may be at odds with the “absence of formalities for its formation.”¹⁵⁴ It may be that the legislative drafters should consider the serious possibility that the justifications for the protections applicable to *de jure* spouses as they make juridical acts militate for at least some analogous protection for *de facto* ones. For their part, judges have a role to play under existing law. Alert to the stakes and potential vulnerabilities, judges should delineate the intent and scope of cohabitation contracts prudently. In this way, *de facto* spouses’ agreement to keep their respective property separate—*de jure* spouses may opt out of the partnership of acquests by “a simple declaration to this effect in the marriage contract”¹⁵⁵—should not be assumed to frustrate all claims in unjust enrichment. Thus, a statement of intention regarding property should not transform

150. See *supra* Part II.A.1.

151. See generally Benoît Moore, *Variations chromatiques: l’union de fait entre noir et blanc*, in *Mélanges Adrian Popovici, Les couleurs du droit* (author’s translation) (2010) (observing the oddness of legislative reliance on a vision of autonomy that “everywhere in the law of contract is today seen as archaic and fantastic.”).

152. *H.G. v. J.C.*, 2011 QCCQ 4578, para. 61 (author’s translation) (Can. Que.); see also *St-Louis v. Martel*, 2006 QCCS 5155, para. 44 (Can. Que.); *Tanguay v. Zicat*, 2020 QCCS 3725, para. 44 (Can. Que.).

153. Civil Code of Québec, S.Q. 1991, c 64, art 1493 (Can.); BAUDOUIN et al., *supra* note 82, at 637, para. 547 (noting enrichment must be without a juridical reason, including a contractual one); *id.*, at 637–38, para. 548 (noting that an enrichment that finds its source in a contractual obligation cannot be unjustified); LLUELLES & MOORE, *supra* note 131, at 762, para. 1407 (noting direct enrichment arising from a contract will be justified); Brierley & Macdonald, *supra* note 33, at 466, para. 511 (“the enrichment must not be justifiable as resulting from the performance of an onerous obligation (legal, natural or contractual)”).

154. Laurence Saint-Pierre Harvey, *Prestation compensatoire et union de fait en droit québécois: étude critique du discours judiciaire*, 31 CAN. J. FAM. L. 127, 169 (2018) (author’s translation).

155. Civil Code of Québec, S.Q. 1991, c 64, art 485 (Can.).

one spouse's unremunerated work within the other's business into the performance of a contractual obligation sufficient to justify all consequent enrichment. Analogical extension being a key interpretive technique for the Civil Code,¹⁵⁶ judges deciding the effects of a cohabitation agreement on a *de facto* spouse's claim in unjust enrichment might find inspiration in unjust enrichment's vocation in the context of *de jure* union—via the compensatory allowance—of palliating harms occasioned by contracting out.

V. CALLS FOR REFORM

While Quebec's overall policy regarding the economic relations between *de facto* spouses has not changed for more than four decades, it would be wrong to take its foundations as solid. Though scholarly calls for reform are increasing,¹⁵⁷ and opinions in the Charter judgments point towards possible policies, this part focuses on calls for law reform from state-sanctioned and professional bodies. The repeated calls for reform reflect concern with the status quo, in line with the critiques in the preceding two parts.

Critically, the major reform of family law in 1980 represented the rejection of a recommendation, by the Civil Code Revision Office, of a support obligation during cohabitation and, exceptionally, afterwards.¹⁵⁸

In the wake of the Supreme Court of Canada's characterization of the status quo as justifiable discrimination against cohabitants in *Quebec (Attorney General) v. A*, the provincial government appointed a committee, chaired by Professor Alain Roy, to recommend reforms to family law.¹⁵⁹ The committee rejected the idea of assimilating *de facto* spouses into the rights and obligations of married spouses, as done by the

156. Brierley & Macdonald, *supra* note 33, at 146, para. 118.

157. See generally Robert Leckey, *Differences in a Minor Archive: Feminist Activists and Scholars on Cohabitation*, AM. J. COMP. L. (forthcoming).

158. CIVIL CODE REVISION OFFICE, REPORT ON THE CIVIL CODE : VOLUME I : DRAFT CIVIL CODE (1978); see, e.g., PINEAU & PRATTE, *supra* note 7, at 537, para. 375.

159. COMITÉ CONSULTATIF SUR LE DROIT DE LA FAMILLE, POUR UN DROIT DE LA FAMILLE ADAPTÉ AUX NOUVELLES RÉALITÉS CONJUGALES ET FAMILIALES 78 (Alain Roy chair, 2015) [hereinafter Roy Report].

legislatures of some other provinces. Nor did it take up any of the intermediate positions identified by judges in the litigation. Instead, the committee adopted autonomy and freedom as its guiding values in relation to the adult couple.¹⁶⁰ It thereby opposed ascribing reciprocal obligations to cohabitants without their consent (and, strikingly, called for eliminating the obligatory character of elements of the matrimonial measures applicable to *de jure* spouses).¹⁶¹ The committee recommended measures to palliate the economic imbalance caused by parenting a common child, irrespective of whether the parents ever cohabit or marry.¹⁶² It proposed nothing, though, to redress the economic effects of other circumstances of care or relationally caused dependency. The committee called for extending to cohabitants marriage law's compensatory allowance.¹⁶³ Doing so would presumably relieve judges from the pressure of unjust enrichment claims brought by cohabitants under the law of obligations. Such a reform would be consistent with the committee's principle of respecting adult autonomy and contractual freedom on the basis that this equitable remedial measure, unlike other mechanisms of family law, does not depend on mutual consent. The committee called for naming the contract of *de facto* union in the Civil Code, expressing the view that codifying the possibility of opting into elements of marriage law would "contribute, without a doubt, to demystifying and democratizing" this instrument.¹⁶⁴

These recommendations do not amount to a satisfactory response to the injustice and incoherence established in this article. The proposed focus on the common child might be an improvement. But it is severely underinclusive in the light of other situations that can engender asymmetrical familial investment and consequent vulnerability, such as blended

160. See ROY REPORT, *supra* note 159, at 78–79.

161. *Id.* at 140, 164.

162. *Id.* at 107 (recommending the creation of a parental compensatory allowance to share equitably between the parents the economic disadvantages of executing their parental role); cf. MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW (2015).

163. *Id.* at 80.

164. *Id.* at 102; cf. Leckey & Favier, *supra* note 157, at 536 (expressing precisely such doubts, even suggesting that the notion that adding cohabitation contracts to the Civil Code is an instance of civil lawyers' magical realism).

families (children from one or both partners but no common children) and eldercare.¹⁶⁵ Moreover, the proposals do nothing to address the unfairness arising from the asymmetrical treatment of *de facto* spouses by the province's public and private law. The proposal to extend marriage's compensatory allowance to *de facto* spouses merits further reflection. In applying the rules on the compensatory allowance, extraordinary contributions to the other partner's property are identified relative to married spouses' mandatory duty to contribute to the expenses of the marriage in proportion to their means. It is unclear how courts would apply the case law on the compensatory allowance to *de facto* spouses, to whom that duty would not extend.¹⁶⁶ Moreover, the character and force of the compensatory allowance might change if the Roy Report's parallel recommendation to lift the obligatory character of matrimonial rights and obligations were implemented. As noted above,¹⁶⁷ the compensatory allowance was conceived as a device to remedy injustice arising from marriage contracts. Its role would be uncertain if, taking up the Roy Report's advice, the legislative drafters consecrated individual autonomy as a central value.

VI. CONCLUSION

This article has contended that the legal situation of *de facto* spouses under Quebec law is confusing, incoherent, and unjust. Crucially, the claim is not that the province should follow several other provinces by assimilating cohabitants to married spouses.¹⁶⁸ There may be defensible halfway houses between assimilation and no recognition; reform proposals and opinions in constitutional litigation offer intermediate possibilities worth further study. But Quebec's cohabitation law fails to embody the freedom from state interference and respect for individual

165. See Zaccour, *supra* note 8, at 427–28 (providing a sustained critique of the Roy Report's recommendations); see also Benoît Moore, *La consécration de l'autonomie individuelle*, 40 FÉDÉRATION DES ASSOCIATIONS DE FAMILLES MONOPARENTALES ET RECOMPOSÉES DU QUÉBEC BULLETIN DE LIAISON 6, 11 (2015) (Can.) (observing situations that the proposed parental compensatory allowance would fail to capture).

166. Saint-Pierre Harvey, *supra* note 154, at 171–75.

167. See *supra* Part II.A.1.

168. See generally Bala, *supra* note 5, at 2.

autonomy that it purportedly prioritizes, especially given the lack of choice regarding a relationship's treatment under social laws. The provincial government might reduce the incoherence by changing its avowed aims and justificatory principles. But the confusion and injustice would persist. An alternative justification that, focused less on legal liberalism's cherished ideals of autonomy and consent to obligations, spelled out a preference for marriage might fail scrutiny under the Charter. Fostering choice by presenting a menu of distinct relationship forms, as some scholars suggest,¹⁶⁹ would still need to deal with the injustice of treating *de facto* spouses so differently from *de jure* spouses under the private law and almost the same under social laws. In other words, a meaningful option between forms would offer choice under social laws as well as under the Civil Code.

Will the political process address the situation of *de facto* spouses under provincial law? Quebec's relatively robust welfare state, with support for families and working parents uniquely generous in North America, might have extended the shelf life of the vision of cohabitants' households as beyond the solidarity and sharing enforced by marriage law.¹⁷⁰ But the status quo appears increasingly untenable, for reasons including the judiciary's growing unease with it. Following publication of the Roy Report, the government's "inaction" led the *Chambre des notaires du Québec* to set up a "Commission citoyenne sur le droit de la famille."¹⁷¹ Although the provincial government, elected in 2018,

169. See, e.g., William N. Eskridge, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012). See also Erez Aloni, *Compulsory Conjugal*, 53 CONN. L. REV. 55, 112–13 (2021) (discussing other policy possibilities).

170. See, e.g., Catherine Krull, *Perspectives and Initiatives: Placing Families First: The State of Family Policies in la Belle province*, 59 CAN. REV. OF SOC. POL'Y (2007); Glenn Stalker & Michael Ornstein, *Quebec, Daycare, and the Household Strategies of Couples with Young Children*, 39 CAN.PUB. POL'Y 241, 242–43, 257–58 (2013); Renée B. Dandurand, *La politique québécoise Les enfants au coeur de nos choix: Un pari audacieux néanmoins gagnant*, 35 ENFANCES FAMILLES GENERATIONS paras. 1–29 (2020).

171. Alain Roy, *Avant-propos*, in COMMISSION SUR LE DROIT DE LA FAMILLE, RAPPORT FINAL XX (2018); RAPPORT FINAL, *id.* at 1–2 (noting that the commission held ten days of hearings in six cities of Quebec, hearing from 150 individuals and organization and receiving more than 50 briefs or other documents).

signaled an intention to pilot reforms,¹⁷² its reforms to family law during its first term focused on redressing a violation of the fundamental rights of trans and non-binary people, with incidental changes to rules of filiation involving *de facto* spouses.¹⁷³ It is to be hoped that comprehensive reform relating to the economic relations between *de facto* spouses and within blended families will be forthcoming, given the widening gap between the individualist, autonomist vision of *de facto* spouses in much of the Civil Code and their recognition as family in so many other legal sources, as well as in social practice.

172. See, e.g., Pierre Saint-Arnaud, *La CAQ s'engage à entamer une réforme du droit familial*, LE DEVOIR (Nov. 21, 2018), <https://www.ledevoir.com/politique/quebec/541864/la-caq-s-engage-a-entamer-une-reforme-du-droit-familial>; Guillaume Bourgault-Côté, *Droit de la famille: Lebel veut des consultations*, LE DEVOIR, (Dec. 12, 2018), <https://www.ledevoir.com/societe/543384/droit-de-la-famille-lebel-veut-des-consultations>; Hugo Pilon-Larose, *Réforme du droit de la famille: un premier projet de loi d'ici l'automne*, LA PRESSE, (Apr. 27, 2021, 1 :28 PM), <https://www.lapresse.ca/actualites/politique/2021-04-27/reforme-du-droit-de-la-famille/un-premier-projet-de-loi-d-ici-l-automne.php>; *Réforme du droit la famille – Ministère de la justice*, Justice Quebec, https://www.justice.gouv.qc.ca/ministere/dossiers/famille_ (last visited Oct. 10, 2021) (showing that the provincial government held consultations on reform to family law in spring 2019).

173. An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, S.Q. 2022, c 22.

