



Conjugal Interdependence in Quebec: From Legal Rules to Social Representations About Spousal Support and Property Division on Conjugal Breakdown¹

Hélène Belleau and Pascale Cornut St-Pierre

Abstract

In the present article, we examine the extent to which legal norms related to family matters are in line with the diverse social representations of current conjugal life, more particularly as concerns the economic interdependence of the couple during or subsequent to their union. Two Quebec legal measures compel attention: the division of the family patrimony and the obligation of support payable to the former partner. The present analysis is based on an empirical study involving couples living together in Quebec. Whereas current legal discourse concerning unmarried cohabitation appears focused on spousal support, our survey has brought out two elements that could challenge the current legal approach. When it comes to social representations, we find that the awarding of support to the partner is highly controversial. The majority of our respondents also believe that the family patrimony should be shared equally, whether or not the couple is married, and more especially when there are children, the property of the household being deemed to be the fruit of a joint and family-oriented effort.

Keywords: couple, spousal support, legal norms, social representations, conjugal breakdown, property division

Résumé

Les changements récents dans les relations conjugales, tels l'accroissement des couples vivant en union libre, l'instabilité des unions et les recompositions familiales successives, poussent les auteures à s'interroger sur l'adéquation du droit à ces réalités contemporaines. Cet article examine comment les normes juridiques en matière familiale s'articulent aux diverses représentations sociales de la vie conjugale contemporaine, particulièrement en ce qui concerne l'interdépendance économique des conjoints, pendant et au terme de l'union. Deux mesures du droit québécois retiennent en particulier l'attention, à savoir le partage du patrimoine familial et la pension alimentaire à l'ex-conjoint.

Cette analyse s'appuie sur une étude empirique réalisée auprès de personnes vivant en couple au Québec. Tandis que le droit semble davantage enclin à trouver

¹ This research was supported by the Social Sciences and Humanities Research Council of Canada. We are indebted to Alain Roy and Robert Leckey for comments on earlier versions and to Geoffrey Vitale for the translation.

des solutions aux ruptures hors mariage du c ot e de l'obligation alimentaire, notre enqu ete r ev el e deux  el ements susceptibles de remettre en question l'approche juridique actuelle. Dans les repr esentations sociales, d'une part, l'octroi d'une pension alimentaire au conjoint s'av ere tr es controvers ee, car elle contribue au maintien d'une interd ependance au-del a de l'union et suppose que les conjoints qualifient leur union de relation in egalitaire. Une majorit e de r epondants, d'autre part, consid ere que le patrimoine familial devrait  tre partag e   parts  gales que les conjoints soient mari es ou non, particuli erement en pr esence d'enfants, les biens qui le composent  tant per us comme le fruit d'un effort commun destin e   la famille.

Mots cl es : couple, pension alimentaire, partage des biens, normes sociales, rupture conjugale, repr esentations sociales

1. Introduction

Living as a couple, creating a family: the meaning assigned to these key moments in the journey through life has changed significantly over the decades. Along with changes in behaviour patterns and lifestyles, there has been an updating of family law, as it attempts to introduce new social ideas into the legal system, specifically with regard to male-female relationships or to the acceptability of family configurations outside marriage.

For those interested in these changes, the relationship between the law per se and social representations is complex. Social representations refer to a form of knowledge that has been socially built up and shared by members of a society. By social representations, we mean a way of thinking, of giving meaning to the realities that surround us, and of making these realities our own. The study of contemporary social representations of conjugal life is of interest to legal specialists because it sheds light on how individuals interact with the law when it comes to their personal relationships. Law may be open to arguments from surrounding discourses, but it operates according to its own internal rationality. With this in mind, Guy Rocher referred to the "translation" undergone by social representations when they are allowed into the legal institution: from that point on, they are detached from daily life, and they take on a new existence whose future will be influenced by legal rationality and the practices of those who deal with such events—the legal professionals. Referring to the parallel changes that affect social representations both within and outside the legal environment, Rocher wrote:

A gap, wider or narrower but nevertheless real, then grows between those social representations that one finds in the non-judicial general culture and the various groups within a given society, social representations that I would label "popular," as against those that the legal system has built up for its own purposes and in line with its own mindset [. . .]²

² Guy Rocher, "Les repr esentations sociales: perspectives dialectiques" (2002) 41:1 *Social Science Information* 83 at 92 (translation).

The growing frequency of unmarried cohabitation,³ together with the instability of the various forms of unions—leading sometimes to a series of blended families—makes us wonder about the ability of the legal system to deal with the contemporary realities of the couples. The purpose of the present article is thus to examine how legal norms with respect to family matters link to the diverse social representations of current conjugal life. We will focus on those norms that concern the economic interdependence of spouses during and after their spousal relationship. Is there congruence or incongruence between, on the one hand, the perceptions that underlie certain legal rules that come into play when there is a marital or non-marital breakdown and, on the other hand, the social perceptions held by individuals with regard both to such rules and to themselves and their relationships?

Our study will focus on Quebec couples, since the social representations of marriage and interspousal financial transactions have strong cultural overtones. The analysis will be limited to two contrasting measures under the civil law respecting marriage: the obligation of support and the family patrimony.⁴ Do today's Quebec couples believe in the sharing of the family patrimony and in spousal or child support? And, more especially, what norms and values underlie the positions they adopt in this regard? In a recent case involving a couple ("Lola" and "Eric")⁵ who had lived together in an unmarried relationship for several years, the various interveners differed in their attitudes toward the division of the family patrimony and with respect to spousal support. The Quebec Court of Appeal opted for the inclusion of *de facto* partners within those provisions of the *Civil Code* that allowed for the assignment of support to a needy spouse, but it nevertheless upheld the family patrimony as being an attribute of marriage alone. The Supreme Court of Canada reversed that ruling and, in a split decision, upheld the constitutionality of those provisions of the *Civil Code* that excluded *de facto* partners from all protections granted to married spouses (we return to that judgment in our conclusion). Leaving aside the limitations specific to legal reasoning along with the pathways opened up by jurisprudence,⁶ does this solution reflect current social representations?

The following analysis adopts a sociological approach to law. Its originality stems from the fact that it is based on a body of interviews that allow us to take into account the way in which individuals understand legal rules, what they think

³ In Quebec, unmarried cohabitants are known as *de facto* spouses.

⁴ For lack of space, we are deliberately ignoring other measures that concern married couples under Quebec law, specifically the protection of the family residence, the compensatory allowance, and the partnership of acquests, though their detailed examination would have been relevant here. See Conseil du statut de la femme, *Le partage des biens familiaux en cas de divorce* (Québec: Government of Québec, 1986) at 30 et seq; Anne Revillard, "Protection humiliante ou source de droits? Prestation compensatoire, pensions alimentaires et luttes féministes" (2011) 2 *Jurisprudence: Revue critique* 217 at 224–25.

⁵ *Quebec (AG) v A*, 2013 SCC 5, rev'g *Droit de la famille-102866*, 2010 QCCA 1978, [2010] RJQ 2259.

⁶ The Court, in fact, needed to draw a conclusion concerning a constitutional claim that the protection provided to married spouses under the *Civil Code of Québec* discriminated against *de facto* spouses, thus infringing on the right to equality as guaranteed by s 15 of the *Canadian Charter of Rights and Freedoms*.

of them, and, more generally, their awareness of law and its role in society.⁷ This new viewpoint regarding social representations of conjugality and of the relevant law is intended to provide a better understanding of the issues attached to the debate as to whether it would be appropriate or not to provide a legal framework for couples living in a *de facto* union in Quebec.

The analysis is more specifically based on an empirical study carried out within the framework of a research project entitled “Analyse empirique des repr esentations du contrat chez les couples” (*An Empirical Analysis of Representations of Contract*), under the direction of Alain Roy and H el ene Belleau. In 2008, forty-two individual qualitative interviews were held, each lasting between one and a half and two hours. All the respondents were French-speaking and had been living as couples for more than three years or had a child. At the time of the survey, they were aged between twenty-five and fifty-two and were residents of Quebec, for the most part of the Montreal region. The sample consisted of married (19) and unmarried (23) spouses, individuals who had one or more children (24), and individuals without children (18). The same number of men and women were interviewed, and they were divided according to their level of schooling: secondary level (12), college (16), and university (14).⁸

Given the major changes in spousal economic dynamics, where individual financial independence is not only valued as an ideal but also, increasingly, acted on, and taking into account the social representations of marriage at a time when one no longer automatically gets married as one did previously in Quebec, our study points to two major questions regarding the current legal approach to conjugality. In the first place, is it justifiable to treat the couple as engaged in a joint economic endeavour during their union and, more especially, following its breakdown? Additionally, is it still justifiable to attach a legal value to marriage itself and to treat common-law or *de facto* spouses differently from married spouses?

2. The Economic Bonds Within Couples: The Legal Rules Governing Social Representations

2.1 *The Conjugal Contract: Marriage or Child?*

Under Quebec family law, the conjugal relationship is viewed almost exclusively through the prism of marriage—firstly, due to a desire not to encourage *de facto* unions, and then, to uphold freedom of choice for couples who wish to remain outside the legal framework of marriage.⁹ Thus, while family law still restricts its notion of the conjugal relationship to marriage (extended in Quebec, since 2002,

⁷ H el ene Belleau & Pascale Cornut St-Pierre, “Pour que droit et familles fassent bon m enage:  tude sur la conscience du droit en mati ere conjugale” (2012) 25:1 *Nouvelles Pratiques Sociales* (forthcoming publication).

⁸ The limitations of this survey include the size of the sample, which does not allow us to draw conclusions as to the possible differences among respondents based on gender, age, social classes, etc.

⁹ Alain Roy, “L’ volution de la politique l gislative de l’union de fait au Qu ebec” in H el ene Belleau & Agn es Martial, eds, *Aimer et compter? Droits et pratiques des solidarit es conjugales dans les nouvelles trajectoires familiales* (Qu ebec: Presses de l’Universit e du Qu ebec, 2011) 113.

to include civil union¹⁰), social representations of conjugality and family appear to have freed themselves to a large extent from the restrictions of this institution.¹¹ With the exception of some respondents who still attach to marriage a symbolic importance that is worthy of legal protection, in general the fact of cohabitation, its duration, and, above all, the presence of children—rather than the relationship's formal status—seem to be the true markers of the committed conjugal relationship and the consequent economic interdependence.

Indeed, for the majority of our respondents, the presence of children was the clearest indicator of the couple's joint commitment and should, consequently, constitute the legally relevant criterion. Thus, the birth of a child clearly overrides the celebration of marriage as the symbol of a couple's common life plan.

Whereas there may be doubt about the intentions of couples who are not married and have no children—have they agreed to share their property, their income?—the existence of a child allows us to make certain assumptions regarding these intentions by supposing, to borrow a colourful image from one respondent, Bruno, that they have a genuine “two-legged contract”:

I would say that, when there are children, the very fact of having them should automatically ensure that they are protected, and the moment your *de facto* relationship produces a child, such protection should be implicit, a contract has just been signed. The kid's there, two legs, and all. I think that having a family patrimony is a legitimate way of protecting the child.
(Bruno, married religiously)

Apart from the presence of a child, the length of the union appears to be a fundamental element of conjugality in the respondents' social representations. Indeed, the idea that the conjugal relationship should last a certain amount of time, with or without marriage, before any economic solidarity is established, is a central factor in the respondents' arguments. Many of them underline the importance of the time the union has lasted as a prerequisite to the application of family law provisions, as if suggesting that enforcing property sharing or economic solidarity becomes more legitimate the longer the union lasts. Antoine, for example, believes that after a certain number of years of cohabitation, there should be no difference between the legal situation of married couples and that of people in *de facto* unions. He does not understand why the laws are so different when it comes to one or the other of these relationship forms, since it is the State itself that has determined he is a *de facto* spouse, regarding him as a married spouse in his income tax return.

After so many years of cohabitation, I would argue that it should be the same thing as when you're married. I don't see why it would be different. You know, whether you're married or not, if you've been living with the same person for, say, ten years, well I don't see why you need different laws.

¹⁰ Civil union allows persons of the same sex or different sexes to make a public reciprocal commitment similar to that made by couples when marrying. When it was enacted, marriage was restricted to different-sex partners. The form and legal consequences of a civil union are very similar to those of a marriage. See arts 521.1 to 521.19 CCQ.

¹¹ Hélène Belleau, *Quand l'amour et l'État rendent aveugles: le mythe du mariage automatique* (Québec: Presses de l'Université du Québec, 2011).

After all, the State itself puts you down as a *de facto* or common-law spouse; which means basically that it's pretty much the same as being married. It seems to me, then, that the laws should also apply to us. That seems logical to me. (Antoine, *de facto* spouse)

Antoine's comments underline the fact that on the fringe of family law (a law that, in Quebec, has resisted recognizing anyone other than the married couple), a new legal category has appeared, that of *de facto* spouses, which is found mainly in social and tax legislation, a category that the government, in its dealings with citizens, essentially assimilates to married couples.¹² As we will see later, this partial legal recognition of *de facto* spouses, the Quebec equivalent of common-law partners, seems to have taken place in a manner that is counterintuitive as regards the majority of today's couples.

Basically, today's couples bear witness to their commitment via their joint undertakings (the most significant of which is often having children), and by the duration of their cohabitation, their behaviour, and their awareness of themselves as a family. In sticking exclusively to marriage (and to civil union) as regards its recognition of conjugal relationships, Quebec family law appears to be seriously out of step with contemporary social representations.

2.2 *Is the Family Limited to the Binary Relations Which Constitute It Formally?*

The family, as construed by law, is founded on two legal institutions: marriage and filiation. Whereas these two institutions were traditionally linked, childbirth within marriage being the conditional basis of a legitimate filiation, since the 1980 reform, Quebec law has made them distinctly separate. This legal dissociation of conjugal and filial bonds was introduced in order to ensure that parental spousal status would no longer impact children's rights, thus guaranteeing the equality of all children. Consequently, family law recognizes the relationship between a parent and child, on the one hand, and, on the other, the relationship between people who are married or in a civil union. However, to put it bluntly, it does not recognize the triadic nature of family relationships (father/mother/child) or its implications, nor does it acknowledge the relationship between the two parents of that child if they are not married.

In a context in which conjugal breakdowns and subsequent family reconstruction have become a day-to-day reality, the dissociation created under law between conjugal and filial relationships does, to some extent, spill over into social representations. Whereas a loving relationship between adults is seen as a voluntary one that may, therefore, be ended by one or the other of the partners, the relationship with the child allows for no such termination and cannot be broken.¹³ As a consequence, those interviewed believe strongly that children should not suffer any

¹² Brigitte Lefebvre, "L' evolution de la notion de conjoint en droit qu eb ecois" in Pierre-Claude Lafond and Brigitte Lefebvre, eds, *L'union civile: Nouveaux mod eles de conjugalit e et de parentalit e au 21^e si ecle* (Cowansville:  ditions Yvon Blais, 2003) 3.

¹³ See Ir ene Th ery, *Couple, filiation et parent e aujourd'hui: Le droit face aux mutations de la famille et de la vie priv ee* (Paris:  ditions Odile Jacob, 1998).

backlash due to a breakdown between their parents, a breakdown which the children did not choose and over which they have no power. Our respondents were unanimous in their belief that support should be awarded for the child whether or not a marriage was part of the context.

In this specific regard, as concerns the equality and protection of all children, the legal rules appear to align with contemporary social representations. Nevertheless, it was unmistakable, when listening to respondents and when consulting statistical data, how rarely the arrival of children fails to affect conjugal dynamics. On the contrary, the presence of children usually leads to decisions that have considerable impact on individual lifestyles, a consequence of which those in a spousal relationship are fully aware.

These interviews make it clear that the arrival of children—just like the passing of time in certain relationships—often creates a conjugal interdependence that has nothing to do with the couple's choice with respect to the legal status of their union—that is, whether married or not. Apart from its impact on the careers of those involved, this child-based interdependence also affects conjugal breakdowns, for example, by retaining a spouse in a relationship that he or she would otherwise wish to end or by bringing about major concessions regarding the separation in order not to compromise the child's relationship with the other parent (“buying peace”).¹⁴

Within this logical framework, one may notice that those interviewed often had trouble differentiating the legal measures intended for the children from those intended for the spouse; even when they did not confuse them, many of them still offered combined justifications, usually with respect to the protection and care of the children. For example, when talking about support payments, respondents often made close links between those intended for the child and those intended for the spouse.

The idea of dividing up property at the time of the breakdown, whether the spouses were married or not, was also seen by some as a measure that would ensure the protection of the children, as illustrated by Solange and Frédéric:

The moment you have children, things change. You know, it becomes important to protect yourself and mainly to protect the child. That's because when you protect your property, you're also protecting the kid's future. You know, if the other one leaves and you're not married, and you end up with nothing, the child ends up with nothing too. (Solange, *de facto* spouse)

These triadic relationships, where the child leaves an imprint on the couple's dynamics, have been thoroughly documented in recent sociological studies and in statistics. The arrival of children often means a drop in the working time of one of the spouses, generally the woman, along with an increase in the working time of the other.¹⁵ The time devoted to the family and to housework also indicates the

¹⁴ Ingrid Voléry, “Le ‘couple relationnel’ à l’épreuve des partages financiers: séparation conjugale, entretien de l’enfant et inégalités sexuées” in Hélène Belleau & Agnès Martial, eds, *Aimer et compter? Droits et pratiques des solidarités conjugales dans les nouvelles trajectoires familiales* (Québec: Presses de l’Université du Québec, 2011) 203.

¹⁵ Conseil du Statut de la femme, *Portrait statistique. Égalité femmes/hommes. Ou en sommes-nous au Québec* (Québec, 2010) 22.

impact of the presence of children on family dynamics in Quebec.¹⁶ Such dynamics cannot be attributed solely to interspousal negotiations; rather, they are also activated by structural effects that go well beyond the boundaries of private lives.¹⁷

In summary, the dissociation established by laws between adult conjugality and filiation, while it may mirror the belief that a certain priority should be granted to the child's interests, also appears to obscure the bonds that often intensify between the spouses when the child arrives. In other words, the presence of children does impact the interspousal relationship, something that Quebec law does not recognize outside marriage.

In the two following sections, we address how law envisions the family patrimony and the obligation of support, along with the social representations of spouses, whether married or not, regarding those measures.

3. Marriage: From an Economic Enterprise to Interspousal Solidarity

Given the dissociation between conjugal commitment and marriage that appears to have become a major factor in social representations, it is interesting to study how the legal system mirrors cohabitation and then compare its representations with those put forward by people living as couples.

An analysis of the legal impact of marriage reveals that there are two distinct logical elements entangled in this concept of marital cohabitation, which is perceived as a voluntary act and as a joint life undertaking: cohabitation would, on the one hand, give rise to a joint economic enterprise, shared by both spouses, while at the same time creating between them an economic solidarity that would be essential in time of need.

3.1 A Joint Economic Enterprise

Several provisions of the *Civil Code* include representations of marital cohabitation as a joint economic enterprise.¹⁸ Matrimonial regimes make it clear that they are in favour of pooling the couple's property for the duration of their union: unless there is a marriage contract containing other stipulations, the legal regime known as the partnership of acquests stipulates that the value of the property acquired during the union shall be split equally at the time of its dissolution.¹⁹ Even the regime of conventional separation of property, under whose terms each spouse retains exclusive ownership of his or her goods, presumes co-ownership by both spouses of any property for which the exclusive right of ownership cannot be established.²⁰

¹⁶ Ibid., 24.

¹⁷ Charlott Nyman & Lars Evertsson, "Difficult es li es   la n gociation dans la recherche sur la famille: un regard sur l'organisation financi re des couples su dois" (2005) 2 *Enfances, Familles, G n rations* 18.

¹⁸ Art 396, for example, lays down that each spouse will contribute to the household according to their respective means; and art 397 supposes that the responsibility for the expenses incurred for the current needs of the family are binding on both spouses, independently of who actually contracted them.

¹⁹ Save for the property possessed "individually" by each spouse; for the composition of the partnership of acquests, see arts 448 et seq CCQ.

²⁰ With respect to "Separation as to Property," see arts 485 et seq CCQ; regarding commingling of goods, note should be taken especially of art 487 CCQ.

But the most significant measure with respect to this representation of marital cohabitation as a joint economic enterprise is the establishment of the family patrimony. The latter's value is to be equally shared following the dissolution of the union, irrespective of which spouse holds title to the property.²¹ Unlike classic matrimonial regimes, the family patrimony is a measure of public order from which the spouses may not withdraw in advance. Whereas the law generally represents ownership as a strictly individual right, marriage entails the establishment of the family patrimony, the composition of which reflects the idea of a family that shares one or more dwellings and prepares itself for a joint future and, particularly, for a shared retirement.²² The Supreme Court, in *M.T. v. J.-Y.T.*, also explicitly recognized that the objective of the family patrimony was "to create an economic union between the spouses," since the latter, during their marriage, had a "fundamental obligation to contribute to forming and maintaining the family patrimony."²³ Through legal rules, chief among them the regime of the family patrimony, living together as spouses constructs a family enterprise to which each spouse contributes, thus creating an equal right to its benefits.

3.2 An Obligation of Conjugal Solidarity

Moving away from the representation of cohabitation as a joint economic enterprise, we see that the *Civil Code of Québec* also presents living together as a form of conjugal solidarity, one that implicitly underscores a duty to provide help to a spouse in financial difficulty. The primary instrument of this representation of conjugal solidarity is the obligation of support. The Code stipulates that spouses (including spouses in a civil union together with parents and children) owe one another a reciprocal obligation of support, to be determined by respective needs and capacity.²⁴ Within the context of a divorce, spousal support may be payable by one former spouse to the other under the *Divorce Act*, the terms of which include a compensatory strand not featured in the *Civil Code*.²⁵ Despite this compensatory

²¹ With respect to family patrimony, see arts 414 et seq CCQ. Even though the term "patrimony" conjures the image of property rights with regard to family goods, in reality, the regime of the family patrimony merely gives rise to a personal claim (debt) between the spouses, rather than to a real right (proprietary interest).

²² Art 415 CCQ describes the composition of the family patrimony as follows: "the family patrimony is composed of the following property owned by one or the other of the spouses: the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan." The valuation date for the property making up the family patrimony signals the importance to the legislative drafters of conjugal cohabitation: whilst the default rule makes the valuation date the earlier of two events—the death of one spouse or the institution of formal proceedings (for separation from bed and board, for divorce, or for nullity of the marriage)—the court may on application by a spouse decide that the valuation date is the date when the spouses ceased living together (art 417 CCQ).

²³ *MT v J-YT*, 2008 SCC 50 at para 25.

²⁴ Arts 585 and 587 CCQ. These articles normally apply to married or civil union spouses who are separated *de facto* or *de jure*; should they be divorced, the provisions of the *Divorce Act* will be applied.

²⁵ *Divorce Act*, RSC 1985, c 3 (2d Supp.) s 15.2(6)(a): the spousal support order is intended, among other things, to "recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown." Note, too, that, while the *Civil Code* provides that support is ordinarily to be payable as a pension and only exceptionally as a lump sum (art 589 CCQ), the *Divorce Act* considers payment by lump sum on an equal footing with periodic sums (s 15.2(1)).

factor, under whose terms support may be considered as a fair way of redressing a situation that has become economically unbalanced during marriage, the granting of support continues to be perceived as the sign of a lack of autonomy in the spouse who receives it. The *Divorce Act* spousal support order is also designed, “in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.”²⁶ Unlike the family patrimony, in which the law establishes presumed equal sharing (art. 416 CCQ), the granting of spousal support is a discretionary measure, to be negotiated by the spouses or determined case by case in the course of the judicial assessment.

3.3 From Spousal Economic Equality to Spousal Interdependence

Thus, within the legal representations of marital cohabitation, whereas solidarity is thought to result in a form of relief in the case of necessity, the notion of the joint economic enterprise refers in all cases to the partners’ life together, providing for the possibility that they will have accumulated assets. As family law evolved, the value of spousal equality was explicitly linked with the latter notion, unlike the alimentary pension that, to some observers, may suggest a lack of autonomy on the part of the beneficiary. Indeed, the family patrimony, a more recent development than the other measures mentioned previously, was aimed at establishing economic equality between the spouses, as is shown by the title of the law that added its provisions to the *Civil Code*: the *Act to Promote Economic Equality Between Spouses*.²⁷ This legislation, which was intended to promote spousal economic equality, represents an attempt to reach beyond formal legal equality between spouses, a form of equality shown to have coexisted with major substantive, economic inequalities. Looking at measures such as the family patrimony and the compensatory allowance, one can see that, under Quebec family law, the ideal of equality is clearly attached to measures governing the sharing of property between spouses within a framework of people living together as partners in a joint economic enterprise.

The notion of living together would appear to be the basic legal concept as regards conjugal life, the concept that links the moral obligations surrounding the couple’s life and their legal consequences.²⁸ However, as we shall see, there is nothing in the popular representations that suffices to limit this notion of cohabitation to

²⁶ *Divorce Act*, s 15.2(6)(d). At the end of the 1980s, subsequent to the Supreme Court *Pelech* trilogy (*Richardson v Richardson*, [1987] 1 SCR 857; *Pelech v Pelech*, [1987] 1 SCR 801; *Caron v Caron*, [1987] 1 SCR 892), a wave of divorce-related jurisprudence strongly stressed the requirement for financial independence, arguing in favour of a clean break, with the economic ties between former spouses being speedily severed. However, the *Moge* decision (*Moge v Moge*, [1992] 3 SCR 813) made it clear that the objective of achieving economic independence was merely one of several, and that the achievement of financial autonomy was sometimes impossible, especially in the case of traditional marriages where the spouse had not worked outside the home. Quite recently, *Abella and Rothstein JJ* affirmed, in *LMP v LS*, [2011] 3 SCR 775 at para 27: “Neither does the *Divorce Act* impose a duty upon ex-spouses to become self-sufficient.”

²⁷ *An Act to Amend the Civil Code and Other Legislation to Promote Economic Equality Between Spouses*, LQ 1989, c 55.

²⁸ To illustrate the importance of the concept of cohabitation, we might mention the *Divorce Act* which, when dealing with the question of spousal support, indicates that one should take into account “the length of time the spouses cohabited,” rather than the duration of the marriage. *Divorce Act*, *supra* note 30, s 15.2(4)(a).

that of married couples. Even those laws that recognize *de facto* spouses make use of the notion of “living together” to define them, as can be seen, for example, in the Quebec *Interpretation Act*:

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.²⁹

Starting with this concept of cohabitation, the State, via its social and tax laws, indirectly forces *de facto* spouses into economic solidarity, specifically by taking into account the spouses’ aggregate income when calculating the benefits for which an individual might be eligible. When it is a question of extending to *de facto* couples the rights and obligations attached by family law to married spouses, legal discourse seems to favour extending only those rules associated with conjugal solidarity—the obligation of support—without offering such couples those regimes associated with the view of the household as a joint economic enterprise. And yet we may observe that people living together, whether married or not, generally appear to consider more favourably a sharing of property in the case of a relationship breakdown than they do the payment over time of spousal support to the former partner.

In the final part of this paper, we will analyze the social representations attached to the family patrimony and to spousal support, and we will attempt to provide an explanation for the obvious gap between the solutions currently favoured by lawyers and the intuitive notions of justice held by citizens. Such a gap between popular representations of conjugality and those suggested from within the law is a matter for considerable concern. Indeed, at least when laws are properly adapted to their historical and social context, the legal system often aligns with lay people’s practical intuitions, even though they may be unaware of it.³⁰

The lawyerly propensity for favouring measures for *de facto* spouses that are connected with family solidarity may stem from the deeply anchored focus on the importance of property as concerning individual entitlements to be protected. However, the obligation of support is controversial for spouses, since it carries the implication that their relationship is unequal, assigning to one spouse the status of a dependent person who is making a claim against the other spouse for the latter to share property that is his or hers. This idea is hard to accept in a modern society that emphasizes the equality and autonomy of both spouses, even where that equality is purely formal and economic inequalities remain.³¹

4. Social Representations of Economic Ties Between Spouses on Relationship Breakdown

4.1 Social Representations of the Family Patrimony

An analysis of the interviews with respondents introduced an unexpected feature into our survey: only one-third of those interviewed said that they opposed the

²⁹ *Interpretation Act*, RSQ c I-16, s 61.1 at para 2.

³⁰ Jean Carbonnier, *Droit civil: introduction. Les personnes, la famille, l'enfant, le couple*, vol. 1 (Paris: Presses Universitaires de France, Collection Quadrige, 2004) at 233.

³¹ Lynn Jamieson, “Intimacy transformed? A Critical Look at the ‘Pure Relationship’” (1999) 33:3 *Sociology* 477.

idea of extending the regime of the family patrimony to *de facto* spouses. The majority of those opposed considered such a move to be unacceptable interference by the State in the private lives of couples, while the remainder insisted on the importance of maintaining the distinction between marriage and *de facto* unions and based their arguments on religious or symbolic grounds.

Our survey also indicated that more than one-half of the respondents believe that, following a breakdown, the family patrimony should be shared equally between the spouses, whether married or not. Underlying this favourable attitude as regards the egalitarian division of assets making up the family patrimony there would appear to be a logic based on three factors: the length of the union, the idea that the assets have been amassed by both spouses and that such goods and property were indeed intended for the family.

B eatrice talked about the length of the union when she explained her first breakup with her current spouse, in the early days of their marriage. At the time, although she was indeed married, she did not feel that it was proper to claim half of her spouse's pension fund, since their union had not lasted long and her professional situation was quite favourable. However, with respect to a longer-lasting relationship, she did stress the importance of the number of years spent together:

When we separated, [. . .] I had a legal right to half Mathieu's pension fund, but I did not want it. In the first place, I was 30 years old and capable of working. I had no need of his money, I was independent, capable of working, in good health, etc. But just supposing you get divorced when you're 50, 55, 60, and you've spent 40 years of your life with that man, working with him, and then you get divorced . . . In my case I don't have half his pension fund, so if he gets remarried the following year, and then dies, it's someone else who's going to get [his pension fund]. No way! (B eatrice, married religiously)

The other two aspects brought out by those interviewed—the familial vocation of the property and its joint accumulation by married spouses—were also identified during the analysis of the discussions concerning the adoption of the family patrimony law. In fact, one-half of the respondents believe that property is accumulated by both spouses, irrespective of their individual contributions as measured in economic terms. Non-monetary contributions, especially those related to domestic and educational tasks, are part of this quantitative equation. Mark's comments, for example, on the material accumulation achieved, are tightly linked to the concept of triadic relationships; this is something that the legal system tends to ignore, but which demonstrates clearly that the arrival of a child seriously modifies the conjugal relationship and the economic dynamics within a household:

Whichever partner decides to take care of the children at home, whether the man or the woman, that person will be the one with the lower salary. [. . .] The one who pays for the major appliances will be the one with the higher salary. When they split up, it's the latter who keeps everything, even though they have both contributed to the household. And I'm talking about whatever part of it you're looking at . . . I mean, bringing up children is an unpaid job, but one of you has to do it . . . (Marc, *de facto* spouse)

In other words, the family patrimony is seen by most respondents as a protective measure, whether for those women who have curtailed their careers, or for the children who could suffer from the consequences of an unhappy breakdown. There are also those who see the family patrimony as a tool for setting up equitable guidelines for the breakdown itself and for marking out the individual claims of the spouses. As for the possibility of extending the family patrimony to *de facto* spouses, the major hesitation did not appear to concern the obligation to share the value of the property between the couple. Instead, hesitation concerned determining when it should be imposed on them (recall that for married spouses, marriage itself entails establishment of the family patrimony)—after one year, after several years, or after the birth of a child?

4.2 Social Representations of Spousal Support

Spousal support, by contrast, seems to be controversial. A number of elements of the respondents' discourse are in tension. The arguments were interlaced with social representations of what might be deemed an "adequate" conjugal breakdown and with concerns for justice conceived in different ways, variously emphasizing equality, equity, and ideals of autonomy and independence.

i) The Breakdown Indicates the End of the Daily Relationship

Contemporary social representations generally see the end of love as an indication that the daily relationship between spouses is over, and that this breakdown covers every aspect of the relationship (economic, sexual, social, etc.). Julie puts it simply: "When you're divorced, you're divorced." The desire to maintain the relationship as regards one or other of the above aspects suggests that one of the partners is dependent on the other (economically or emotionally), a situation that appears to be at odds with contemporary aspirations.

The problem is that the person who gets the pension is always stuck with the former partner. In a relationship that never, never ends. And when he or she starts looking for a new life, the other one is always there, taking up energy, taking up space. I don't think that's a good thing. You are going to start your life over, that's okay, the two of you are separated, the two of you get on with your own lives. (Maxime, *de facto* union)

Maxime's comments underline not only the discomfort associated with maintaining a financial relationship, but also today's social acceptance of marital breakdowns and subsequent unions. The breakdown indicates a change in the status of the former spouses by publicizing the fact that they are now available on the "conjugal market." Highlighted here are not only the new possibilities for former spouses to form new couples, but also a reassessment of each one's trajectory, from an individual rather than from a conjugal point of view. The notion of a clean break that allows both members of the couple to redefine themselves as individuals calls into question forms of sharing that go beyond the breakup.

ii) A Due Regard for Justice . . . But on a Short-Term Basis

A number of the respondents mentioned the matter of subsequent relationships. What happens when one of the ex-spouses enters a new relationship? While a

great number of the respondents speak of each partner's contribution during their years together in terms of equivalence, the logic prevailing beyond the union is one not of equality, but of equity. One needs to differentiate the principles of equality and equity when it comes to conjugal financial dynamics.³² The logic of equality refers to equal spousal access to family resources. This means that the financial or other contributions of either partner do not require specific identification or accountability during the relationship. The logic of equity, in contrast, is based on a relationship of reciprocity that requires a more specific accounting for what each spouse has contributed. This latter approach is often brought up following a marital breakdown, on the grounds that it is a way of maintaining the autonomy of the former spouses and the non-dependence of one of the partners as regards the other. Based on the logic of equity, spousal support for a limited time becomes a conceivable solution for many.

Indeed, many of our respondents believe that transitional spousal support should sometimes be paid to one of the spouses over a limited period of one to three years, in order to allow him or her to regain autonomy. However, the idea of lifelong support, with the intention of equalizing incomes, is more often perceived very negatively by reason of its built-in risk of abuse. The respondents believe that it might be used as an instrument of vengeance against the former spouse, or that it may promote an unjustified economic dependence of one spouse on the other. Since the breakdown means the end of the relationship, some respondents go further and suggest that it is rather up to the State than to the former spouse to take care of the problems that accompany conjugal breakdowns.

iii) Maintaining One's Autonomy and Independence

Our respondents' comments are reminders of how important it is for women to remain independent. Because of this, a number of respondents are categorically opposed to the idea of spousal support for those who have no children. It should also be noted that the notion of choice is often brought up by women when discussing spousal support. One spouse's decision to quit his or her job or to reduce working hours in order to spend time at home is sometimes perceived as a personal choice (which is not the responsibility of the other spouse) or, more often, as a choice made jointly by the couple. Or, finally, it might be seen as a personal choice that represents an advantage for the whole family and, therefore, is the responsibility of the whole family. However, most of the people we met believe that they would refuse support from their spouse, in order to maintain their independence with respect to that spouse when the relationship is over.

To conclude, spousal support, even where it seems to be appropriate, is in conflict with the representations and values held by today's adults, who particularly reject the connotations of dependence and linkage that persist even after the spousal breakdown. We may notice, more specifically, that the conjugal logic of solidarity and reciprocity do not survive the breakdown and are replaced rather by new objectives—namely, an equitable breakdown and new beginnings.

³² Carole B Burgoyne & Alan Lewis, "Distributive Justice in Marriage: Equality or Equity" (1994) 4 *Journal of Community & Applied Social Psychology* 101.

Conclusion

This short analysis brings out the significant gap between the legal system and the social representations of conjugal life as perceived by citizens. This gap is related both to the meaning given to the idea of marriage (and to the relevance or non-relevance of binding it with legal ties) and the manner in which the values of equality, solidarity, and autonomy should be reified following a conjugal breakdown. When one looks at the possibilities of legally ensuring justice and equity following the breakdown of a *de facto* union, one sees that the internal logic of the legal system appears to opt for the granting of spousal support, whereas people who are living as a couple are more spontaneously inclined to the sharing of goods and property acquired during their joint relationship.³³

Faced with the discrepancies between legal rules and social representations, our courts sometimes tend to recognize the rights of former spouses on a case-by-case basis without, however, giving couples in *de facto* unions any official status.³⁴ In fact, our analyses regarding legal consciousness indicate that instrumental recourse to law, especially as regards the drafting of cohabitation contracts, affects only a very small proportion of those interviewed, and that a large number of the respondents expect that the law will lay down general rules with a view to recognizing the equality of spouses and families.³⁵ A case-by-case legal approach may also have negative impacts on family life.³⁶

Some believe that the solution would be greater recognition of the various forms of union that could be given official status, especially when children are involved. A general law, if applicable by default to all concerned, would not deny couples who wish to do so the possibility of drafting agreements that reflect their specific family situations (such as reconstituted households, whether simple or composite).

As of this article's writing, this question has been examined by the highest court in the country, in a case referred to as that of "Lola and Eric."³⁷ In a deeply split decision, five judges out of nine have deemed the way in which *de facto* spouses in Quebec are treated to be discriminatory and in violation of the right to equality as defined by the *Canadian Charter of Rights and Freedoms* (s. 15). Three of the judges considered such discrimination to be acceptable within the framework of a free and democratic society (s. 1) as regards the division of property, while only one of them, Chief Justice McLachlin, concluded that the discrimination was also justifiable as concerns the obligation of support. Given that four other judges found no discrimination whatsoever, a majority of the Court thus

³³ It is interesting to draw a parallel with the hostile reaction by a number of Quebec jurists to the enactment of the family patrimony. See Christine Morin, *L'émergence des limites à la liberté de tester en droit québécois: étude socio-juridique de la production du droit* (Cowansville: Yvon Blais, 2009) at 389.

³⁴ Robert Leckey, "Unjust Enrichment and *De facto* Spouses" 114 R du N [forthcoming in 2012], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170401.

³⁵ Belleau & Cornut St-Pierre, *supra* note 7.

³⁶ Katharine K Baker, "Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights" (2010) 71:1 Ohio St LJ 127 at 185–86.

³⁷ *Supra* note 6.

confirmed the constitutional acceptability of the measures under attack, their decision coming down in favour of Eric and the status quo of Quebec law. We believe that it would be appropriate to explore the path of legislative reform, since this would permit the introduction, within a judicially logical framework, of a number of external but necessary constituents.

Hélène Belleau
Professor
INRS Urbanisation Culture et Société
Montreal
Quebec
Canada

Pascale Cornut St-Pierre
PhD student
École de droit de Sciences Po
Paris
France