

2015

# Sans Foi, Ni Loi. Appearances of Conjugalité and Lawless Love

Régine Tremblay

*University of British Columbia, Peter A. Allard School of Law, tremblay@allard.ubc.ca*

Follow this and additional works at: [http://commons.allard.ubc.ca/fac\\_pubs](http://commons.allard.ubc.ca/fac_pubs)



Part of the [Civil Law Commons](#), [Family Law Commons](#), and the [Religion Law Commons](#)

---

## Citation Details

Régine Tremblay, "Sans Foi, Ni Loi. Appearances of Conjugalité and Lawless Love" in Anne-Sophie Hulin, Robert Leckey & Lionel Smith, eds, *Les apparences en droit civil* (Cowansville: Yvon Blais, 2015) 155-191.

This Book Chapter is brought to you for free and open access by the Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

# ***Sans foi ni loi:* Appearances of Conjugal and Lawless Love**

**Régine TREMBLAY\***

Abstract / Résumé . . . . .	157
Part 1. <i>Sans foi ni loi</i> : Appearances and Conjugal . . . . .	162
Part 2. <i>Sans foi</i> : Church and Mores. . . . .	164
Part 3. <i>Ni loi</i> : Moments of Law . . . . .	171
Part 4. Lawless Love: Confusions . . . . .	181
Conclusion . . . . .	189

---

\* S.J.D. Candidate, University of Toronto, Scholar at the Paul-André Crépeau Centre for Private and Comparative Law, Holder of a Social Sciences and Humanities Research Council Doctoral Fellowship. Thanks to Lionel Smith, Robert Leckey, Alexandra Popovici, Bertrand Stoffel, Andrew Ruban and the participants who attended the lecture and generously shared sensitive insights. Thanks also to Brenda Cossman and Angela Fernandez who commented an earlier version of this paper and to the external reviewer. Translations are by the author. Any errors remain my own.



## ABSTRACT

*De facto* unions and appearance naturally go well together. They expose the passage from one conjugal mode to many: the appearance as the *mise au jour*. *De facto* unions also speak to the importance of appearing married to obtain privileges in law: sharing the appearances of a formal union. This chapter deals with paradigm shifts in the legal regulation of adult intimate relationships. These shifts open the floor for questions about the relevance of regulating adult intimate relationships today, or at the very least, about the abiding tendency to conceive this kind of relationship as the cornerstone of Canadian family law. The chapter is concerned with differences between *de facto* and *de jure* relationships in Quebec civil law, from a historical perspective. It argues that the differentiated treatment in the *Civil Code of Québec* reflects pressures exogenous to law: from religious mores to the promotion of neoliberal values.

## RÉSUMÉ

Les apparences et l'union de fait vont naturellement bien ensemble. D'une part, l'idée d'*apparaître* en droit est cruciale pour ce type de conjugalité puisqu'elle expose le passage d'une conjugalité unique à plusieurs possibilités pour la conjugalité. D'autre part, l'idée de *paraître*, c'est-à-dire de partager les caractéristiques du mariage, est essentielle pour se voir reconnaître par le droit. Ce chapitre traite des changements de paradigmes dans l'encadrement juridique des relations intimes entre adultes. Ces derniers interrogent la pertinence d'encadrer les relations intimes entre adultes. À tout le moins, ils mettent en perspective l'idée que ce type de relations soit la pierre angulaire du droit de la famille canadien. Le chapitre explore, sous le couvert d'une perspective historique, les différences entre les unions de droit et de fait en droit civil québécois. L'auteure défend qu'hier comme aujourd'hui, la non-reconnaissance de ce type d'unions dans le *Code civil du Québec* repose davantage sur des considérations exogènes au droit, dont la morale religieuse et la promotion de valeurs néolibérales.



This chapter deals with paradigm shifts in the legal regulation of adult intimate relationships. It includes the shifts from a unique conjugality to the multiplication of conjugalities, from marriage until death do us part to multiple subsequent unions, and from mimicking marriage by necessity to mimicking marriage by choice. Such changes open the floor for questions about the relevance of regulating adult intimate relationships today, or at the very least, about the compulsion to conceive this kind of relationship as the cornerstone of Canadian family law. As such, it questions shifts in latent elements of the regulation of conjugality in law: from the fall of formalism to the rise of functionalism, and from religious coercion to the promotion of neoliberal values.<sup>1</sup>

*De facto* unions and appearance(s) naturally go well together. They expose the passage from one conjugal mode to many: the appearance as the *mise au jour*. *De facto* unions also speak to the importance of appearing married to obtain privileges in law: sharing the appearances of a formal union. In addition, outside of the *Civil Code of Québec* [“Civil Code”, “Code” or “C.C.Q.”], the anchor to regulate *de facto* spouses is in the appearances they offer to the world: they appear as a formal couple. Scholars from England,<sup>2</sup> from English provinces of Canada and from Quebec use the ideas of both becoming visible and looking like something, here looking like conjugal unions formally recognized as such by the State, when referring to unmarried partners. The examples of this transcend languages and

- 
1. Neoliberalism here is used descriptively. As Janine Brodie suggests, relying on various theorists of neoliberalism, “neoliberalism has been variously understood as a specific template or amalgam of policies, as a political ideology and political project, and as a distinct set of discourses, practices, and expertise that together form a rationale for governance. While the lines between these three perspectives are sometimes blurred, the policy template approach typically focuses, both positively and negatively, on the policies and institutions (subnational, national, and international) that in recent decades have advanced free trade, privatization, deregulation, and the reduction of the public sector” (notes omitted) Janine Brodie, “Globalization, Canadian Family Policy, and the Omissions of Neoliberalism” (2009-2010) 88 N.C.L. Rev. 1559 at 1566.
  2. Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (Cambridge, UK: Cambridge University Press, 2012) at 52 [Probert, *Changing Legal Regulation of Cohabitation*].

legal traditions. Rebecca Probert wrote about “the scope of passing as married (and having the appearance of marriage accepted as a reality by the legal system)”.<sup>3</sup> François Heleine on many occasions used *apparences*: “[f]ace au tiers, le ménage de fait a toutes les apparences d’une union légitime”;<sup>4</sup> “apparence de ménage créée par les concubins”;<sup>5</sup> “les concubins ne sont pas tenus de se créer une apparence de gens mariés”;<sup>6</sup> “[l]a conjugaison dans le concubinage de l’apparence de mariage et de la possession d’état de marié va justifier l’assimilation de cet état marital de fait au mariage”.<sup>7</sup> Mireille D. Castelli,<sup>8</sup> Jean Pineau,<sup>9</sup> Michelle Giroux<sup>10</sup> and others have also used *apparences* in this way.

An historical analysis of the legal regulation of *de facto* unions in Canadian family law from the mid-twentieth century until now is offered. The term ‘*de facto* union’ refers to people living in conjugal relationships without taking positive steps, like marriage or other kinds of registered partnerships, to see their unions formally recognized by the State in private law. ‘Lawless love’ is a metaphor to describe the uncertain state of the regulation of *de facto* unions. The aim is to demonstrate how the so-called non-regulation of *de facto* unions has been rooted in normative orders other than law: religious morality and neo-liberal values, to which various sanctions attach. The argument is anchored in Quebec civil law. This area is a fertile ground since *de facto* cohabitants are still strangers for most of Que-

3. *Ibid.*

4. Quebec, Office de révision du Code civil, *Rapport concernant les droits et les obligations qui naissent de la vie maritale hors mariage*, by François Heleine (Montreal: O.R.C.C., 1971) at 1 [Heleine, *Rapport vie maritale hors mariage*].

5. *Ibid.* at 4.

6. *Ibid.* at 7.

7. François Heleine, “Le concubinage, institution à la merci des politiques législatives des différents départements ministériels” (1980) 40 R. du B. 624 at 631.

8. Mireille D. Castelli, “Observations sur la première partie du Rapport de l’O.R.C.C sur la famille” (1975) 16:3 C. de D. 645 at 664: “Mais n’aurait-on pu alors arriver au même résultat en se basant sur ‘l’apparence’ (si apparence il y avait)? Si c’est au contraire pour faciliter la vie des concubins et leur accorder plus de crédit la disposition est on ne peut plus critiquable, tout comme est scandaleuse et anormale l’obligation alimentaire prévue entre époux de fait” [Castelli, “Observations”].

9. Jean Pineau, *La famille: Droit applicable au lendemain de la “Loi 89”* (Montreal: Les Presses de l’Université de Montréal, 1983) at 11: “est un mariage apparent, supposant une vie commune qui crée des rapports que l’on ne peut pas toujours ignorer”.

10. Michelle Giroux & Anouk Laurent, “Portrait critique de l’union de fait en droit québécois” (1989) 20 R.G.D. 129 at 138: “Ce type d’union implique des conséquences juridiques dans des circonstances spécifiques et à certaines conditions parce qu’elle présente les apparences de l’union légitime”.

bec's private law. Indeed, in the *Civil Code of Québec*, *de facto* spouses are not understood as spouses or something equivalent towards one another. In this context, their relationships have almost no legal effects (for spouses amongst themselves). Yet, outside of the Code they are very often perceived and treated as spouses. While being technically outlaws to civil law, *de facto* unions nonetheless produce various effects in Quebec. In short, this chapter explores, on the one hand, the appearance (becoming visible) of various conjugalities in law, and on the other hand, how the appearances of *de jure* unions (looking like), a union with major legal effects, confuse the people living in *de facto* unions.

*De facto* unions give rise to a variety of opinions; the idea here is to present some less explored opinions that have been asserted through times, through the prism of pressures other than law that influence the discipline.<sup>11</sup> The chapter is also concerned with differences between *de facto* and *de jure* relationships. Why should the law focus on formal differences, which exist between the two, rather than on the nature of the relationship, which would lead to the law's treating them in the same way? Part one provides some background on the use of the word 'appearance' in the context of *de facto* unions, and some explanations of the expression "*sans foi ni loi*". Part two shows that differences used to be justified for religious reasons. It traces a portrait of the importance of the Catholic Church in intimate relationships in Quebec. Part three exposes that even though the religious order has dropped away, there are still big differences that many people justify in a different way, namely based on arguments founded on freedom of choice and autonomy, and a different set of economic sanctions is now attached. But it is not clear that these arguments make sense given the inherent complexity of 'choice'. At the very least, if these values are so important, they should apply to everybody in equivalent factual situations. Part four suggests that people are misled by the fact that different parts of the law approach the question differently: for many purposes, the two kinds of relationship are assimilated. A misinformed choice is not one to which large consequences should be attached. The variable legal consequences of

---

11. To be clear, it is not exhaustive; "[d]e facto union has generated a whole lot of comments, defending all possible opinions, from a radical opposition to any acknowledgement to the desire to see these unions sanctioned by law" (Quebec, Office de révision du Code civil, *Résumé des commentaires reçus concernant le rapport sur la famille. Première partie*, by the Comité du droit des personnes et de la famille, Denyse Fortin and Denyse Archambault (Montreal: O.R.C.C., October 1975) at p. 2 [Office de révision du Code civil, *Résumé des commentaires*]).



*de facto* unions in Quebec are surveyed and this last part asks whether or not this kind of union should be treated differently.

### Part 1. *Sans foi ni loi*: Appearances and Conjuality

When advising the Civil Code Revision Office in 1966, Louis Baudouin, an eminent jurist and professor in Quebec's legal history, characterized people living in *de facto* unions as *sans foi ni loi*. Indeed, he wrote "the rise of this social problem cannot be ignored [...] if it is good to protect honest people, it is still more necessary that the legislature not go so far as to encourage those who are *sans foi ni loi*".<sup>12</sup> *Sans foi ni loi* is a pejorative phrase referring to people without morals or principles. It describes someone who fears neither God, nor men and their laws. *De facto* spouses did not follow the morality of the time, and incidentally did not follow the law of the time. As will be demonstrated later, the line between law and religion was extremely thin. Back then, various expressions were used to refer to *de facto* unions, such as concubinage and consortium. Concubinage and consortium both had negative connotations. The former is a derivative of concubine from *con-* ('with') and *cubare* ('to lie'). Don't be fooled by the appearance: *cubare* refers to lying in bed and not lying to others! As for consortium, it derives from consort, which means to "associate with (someone), typically with the disapproval of others".<sup>13</sup> The very words used to describe cohabitation and *de facto* unions conveyed their stigmas. Another expression that took various meanings at different times was 'living in sin' which "by the mid twentieth century [...] was almost exclusively used to denote sharing a home unmarried".<sup>14</sup> At the time, what we now refer to as cohabitation was out of line with the only normative model of conjugal union. The indication that *de facto* couples were transgressing legal and moral norms is palpable in the belief that they were in sin. These former expressions indicate the extent to which cohabitation was poorly perceived amongst elites at least.

12. Louis Baudouin, *Mémoire présenté à la Commission de la Réforme du Code civil sur les réformes à entreprendre en ce qui concerne la filiation naturelle simple, la filiation adultérine et incestueuse* (Montreal: 10 December 1966): "[c]ette montée sociale du problème ne peut plus être ignorée [...] s'il est bon de protéger les honnêtes gens, encore faut-il que le législateur n'aille pas jusqu'à encourager ceux qui sont *sans foi ni loi*". [Baudouin, *Mémoire filiation*] [emphasis added].

13. *The Oxford English Dictionary*, online, s.v. "consort".

14. Probert, *Changing Legal Regulation of Cohabitation*, *supra* note 2 at 136.

Before turning to the appearance of conjugalities, a few words on conjugality are required. It is beyond the scope of this article to evaluate whether or not conjugality is relevant, or if it represents a “good standard” for identifying adult intimate relationships.<sup>15</sup> In Quebec private law, “*vie commune*” and “living together” are expressions used to refer to the unclear content and specificity of adult intimate relationships,<sup>16</sup> or to conjugality. Conjugality as a notion is undefined, elusive and flexible. Identifying clear limits to the concept of conjugality would be ill-advised, especially in the context of family law, since “family is increasingly defined by functions and practices – what people *do* in their personal relationships – rather than by the formal status of relationships”.<sup>17</sup> Conjugality has been defined as follows:

Conjugality – living together in a spousal relationship – is not defined in exclusively sexual terms, though a sexual relationship is almost always an important element of conjugality. Conjugality is established by a combination of the sharing of economic, social and emotional lives. The Supreme Court of Canada has held that the characteristics of a ‘conjugal’ relationship include ‘shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple.’ A couple does not necessarily have to satisfy all of these elements to be living in a conjugal relationship.<sup>18</sup>

As such, depending on the period, conjugality can be understood to be either a standard of being in intimate adult relationships, or a manner of being in them. The nature of conjugality now is different from what it was fifty years ago. In addition, “conjugality is a locus of considerable social and political anxiety”.<sup>19</sup> Appearances are just as important in conjugality as they are in the context of *de facto* unions.

- 
15. On the question of conjugality, its meaning and relevance see Brenda Cossman & Bruce Ryder, “What Is Marriage-Like Like? The Irrelevance of Conjugality” (2001) 18:2 Can. J. Fam. L. 269 [Cossman & Ryder, “What Is Marriage-Like Like?”].
  16. See Nicholas Kasirer, “What is *vie commune*? Qu’est-ce que *living together*?” in J.E.C. Brierley *et al.*, eds., *Mélanges Paul-André Crépeau* (Cowansville, QC: Yvon Blais, 1997) at 487.
  17. While referring to the sociological context, I think this quote can very easily be applied in law. Cossman & Ryder, “What Is Marriage-Like Like”, *supra* note 15 at 270-271 [emphasis in original].
  18. Nicholas Bala, “The History & Future of Marriage in Canada” (2005) 4:1 J.L. & Equality 20 at 41 [Bala, “History & Future of Marriage”].
  19. Heather Brook, *Conjugal Rites: Marriage and Marriage-Like Relationships before the Law* (New York: Palgrave Macmillan, 2007) at 10 [Brook, *Conjugal Rites*].

*De facto* unions here are studied in the context of cohabitation. Defining cohabitation is complex. For present purposes, it refers to couples who did not partake in legal marriage procedures, and who live together as if they were a married couple, usually under the same roof.<sup>20</sup> The existence of common children is not a decisive factor. Cohabitation can refer to both heterosexual and non-heterosexual couples. However, historical evidence of non-heterosexual cohabiting couples has proven to be difficult to obtain. Further, it has generally been difficult to evaluate the prevalence of cohabitation in the past. This is partly because of the variety of designations of this arrangement,<sup>21</sup> and also because of the relative absence of available data on *de facto* unions in Canada before 1981, the first year such data was included in the census.<sup>22</sup> Extensive studies on cohabitation in England demonstrate how, while a lot of individuals assume that cohabitation has always existed, cohabitation as we understand it now was extremely rare before the mid-twentieth century.<sup>23</sup> In this background, it is not surprising that unmarried cohabitation has been lawless in Quebec's private law for decades. Why was unmarried cohabitation lawless in Quebec for so long? The next part argues that it is mostly a question of pressures exogenous to law. These external pressures aimed at channelling adult intimate behaviors were at first rooted in morality and religious sanctions.

## Part 2. *Sans foi*: Church and Mores

Quebec's context is specific. The 'secularization' of the State only began in the second half of the twentieth century. Given the place that religion used to occupy in daily life,<sup>24</sup> it has played an

---

20. The roof requirement is interesting as it is virtually absent from the equation in the marriage context. While article 392 C.C.Q. contains the idea of "living together", scholars from Quebec unanimously recognize that sharing a house is not a criterion. However, the formalities surrounding marriage bring tangible evidence of a relationship, while the functionality of cohabitation makes it sometimes difficult to identify.

21. Probert, *The Changing Legal Regulation of Cohabitation*, *supra* note 2 at 7ff and 136. For example, 'cohabiting' and 'living together' did not necessarily mean sharing a home unmarried.

22. Statistics Canada, *Fifty years of families in Canada: 1961 to 2011. Families, households and marital status* (Census of Population) (Ottawa: Census in Brief, 2011) at 1.

23. Probert, *Changing Legal Regulation of Cohabitation*, *supra* note 2 at 18.

24. Katherine Arnup, "Close Personal Relationships between Adults: 100 Years of Marriage in Canada" (Paper prepared for the Law Commission of Canada, March 21, 2001) at 7 [Arnup, "Close Personal Relationships between Adults"].

important role in the regulation of couples. The only religious possibility for conjugal life was the marriage between a man and a woman, to the exclusion of all others. One of the purposes of marriage in this context was reproduction; thus, sexuality which did not align with this objective was punishable, blamable, and morally reprehensible. The Catholic Church had a tremendous influence on the family. In 1966, according to Louis Baudouin, “the identification of religion and of family is such that religion is often conceived as the very foundation of family values”.<sup>25</sup> Religion was stronger than formal law in many ways: “it is mainly the Church that, in Quebec, rendered the family the mechanism for society’s regulation and reproduction”.<sup>26</sup>

On paper, the importance of religion in legal family matters should have been minimal after 1920. The Privy Council in *Despatie v. Tremblay* made it clear: the boundary between faith and law is impermeable, and rules of faith and conscience have no civil effect. The facts of the case involved impediments to marriage. In 1904, two Catholics got married. Six years later, they realized that they were fourth degree cousins, meaning that they shared the same great-great-grandparents. While such a marriage was possible in law, it was against their religious faith. More precisely, the question was whether the impediment to marriage in canon law could produce civil effects given article 127 of the *Civil Code of Lower Canada* [“C.C.L.C.”]. Article 127 C.C.L.C. read as follows:

Les autres empêchements, admis d’après les différentes croyances religieuses, comme résultant de la parenté ou de l’affinité ou d’autres causes, restent soumis aux règles suivies jusqu’ici dans les diverses églises et sociétés religieuses.

The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.

25. Baudouin, *Mémoire filiation*, supra note 12 at 2.

26. Anita Caron, “L’institution familiale: un enjeu toujours majeur pour l’Église québécoise” in Renée B. Dandurand, ed., *Couples et parents des années quatre-vingt* (Quebec, I.Q.R.C., 1987) 137 at 138. Previously cited in Brigitte Lefebvre’s excellent paper “L’évolution de la notion de conjoint en droit québécois” in Pierre-Claude Lafond & Brigitte Lefebvre, eds., *L’union civile: nouveaux modèles de conjugalité et de parentalité au 21<sup>e</sup> siècle* (Cowansville, QC: Yvon Blais, 2003) 3 [Lefebvre, “L’évolution de la notion de conjoint en droit québécois”].

<p>Il en est de même quant au droit de dispenser de ces empêchements, lequel appartiendra tel que ci-devant, à ceux qui en ont joui par le passé.</p>	<p>The right, likewise, of granting dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it.</p>
---	---

The religious authority to which the parties first turned declared the marriage null. This conclusion was homologated by the Superior Court. This decision was first overturned on appeal and the parties were instructed to demonstrate that the marriage was null in civil law. Following this demonstration, the Superior Court and the Court of Appeal, more precisely the *Cour de révision*, confirmed the first decision of the ecclesiastical authority: the marriage was null. However, the Privy Council in London overturned the decision, clarifying the boundary between religious principles and legal rules: “The law did not interfere in any way with the jurisdiction of any ecclesiastical courts of the Roman Catholic religion over the members of that communion so far as questions of conscience were concerned. But it gave to them no civil operation”.<sup>27</sup> Accordingly, decisions of ecclesiastical courts are only binding on the conscience and the religious impediment in *Despatie v. Tremblay* was not a reason for civil nullity.

While the division between legal and religious rules was clear from a theoretical perspective following this decision, it was not from a social or theological perspective. The fact that all courts in Quebec reached the opposite decision may be indicative of the different visions in Quebec and in the United Kingdom. Further, in legal scholarship and in case law, religious principles remained ubiquitous after *Despatie v. Tremblay*.<sup>28</sup> The idea that canon law was interrelated with private law,<sup>29</sup> more precisely that rules and principles from canon law were integrated into private law, was documented in scholarship and even bore the name *civilizatio*. Scholars, despite the non-legally binding nature of Catholic mores, gave them tremendous

27. *Despatie v. Tremblay* (1921), 58 D.L.R. 29 at 38, 47 B.R. 305 [*Despatie v. Tremblay*] [emphasis added].

28. Ernest Caparros, “La « civilizatio » du droit canonique : une problématique du droit québécois” (1977) 18:3 C. de D. 711 at 726-727 [Caparros, “La « civilizatio » du droit canonique”]; Anne-Marie Bilodeau, “Quelques aspects de l’influence religieuse sur le droit de la personne et de la famille au Québec” (1984) 15:3 R.G.D. 573 [Bilodeau, “Quelques aspects de l’influence religieuse sur le droit”]; Baudouin, *Mémoire filiation*, *supra* note 12.

29. See, for example, the two examples given by Robert Leckey, prohibited degrees of relationship and the introduction of federal divorce legislation, in “Profane Matrimony” (2006) 21:2 C.J.L.S. 1.

importance. Law and religion were conflated in many ways in the *Civil Code of Lower Canada*.

Marriage in Canada was one of the Church's primary tools to control the population's behaviour. Historical research has explored how "it was a sacred institution that supported the whole social fabric and was essential to peace, order and good government in Canada".<sup>30</sup> The court in *Hyde v. Hyde* said that marriage "as understood in Christendom, may ... be defined as the voluntary union for life of one man and one woman to the exclusion of all others".<sup>31</sup> This definition has been used in law for decades. Unsurprisingly, in Quebec, "where a single religion claimed the adherence of an entire population, the Catholic Church emerged as the primary normative agency".<sup>32</sup> The population was homogenous in terms of beliefs, faith and origins.<sup>33</sup> Given the allegiance to the same God, the grip of the Church on the family was easily formed and maintained.<sup>34</sup> Inhabitants of small villages were under enormous social pressures to follow religious principles. Historical research has also shown that "[n]umerous penalties, including ostracism by the church and community, awaited those who strayed".<sup>35</sup> Religion's grip is exemplified through the importance of marriage and the religious nature of its rules.

Marriage under the *Civil Code of Lower Canada* was a religious rite and a contract. Religious pressures were strong enough to have a scholar write that in 1969 someone reading Quebec's legal scholarship could easily believe that *de facto* union – a conjugality different than marriage and rooted in sin – did not exist at all...<sup>36</sup> Technically, the reign of the C.C.L.C. spanned from 1866 to 1994, but major changes were made in family matters as of 1980. Various examples of these changes are available, in addition to the aforementioned *Despatie v. Tremblay* case concerning impediments to marriage. Under the C.C.L.C. the age of consent to marriage was the same as in

30. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) at 4.

31. *Hyde v. Hyde* (1866), L.R. 1 P.D. 130 at 133.

32. Arnup, "Close Personal Relationships between Adults", *supra* note 24 at 3 and 8, citing Andrée Lévesque, *Making and Breaking the Rules: Women in Quebec, 1919-1939* (Toronto: McClelland and Stewart, 1994) at 13.

33. Lefebvre, "L'évolution de la notion de conjoint en droit québécois", *supra* note 26 at 9.

34. *Ibid.*

35. Arnup, "Close Personal Relationships between Adults", *supra* note 24 at 3.

36. Heleine, *Rapport vie maritale hors mariage*, *supra* note 4 at 1.

canon law.<sup>37</sup> It has now been changed and clarified in both canon law and civil law. The Parliament of Canada has the power to legislate about the age of consent to marriage and it has exercised it so that canon law and the provincial legislature have been effectively modified.<sup>38</sup> Additionally, this equation between law and religion is, for some commentators, the very reason for the division of constitutional powers in family matters in Canada.<sup>39</sup> While marriage and divorce are heads of powers of the Parliament of Canada,<sup>40</sup> the solemnization of marriage, as well as property and civil rights, are the exclusive jurisdiction of provincial legislatures.<sup>41</sup>

The indissolubility of marriage that was stipulated in article 185 of the C.C.L.C., in force from 1866 to 1969, faithfully reflected the doctrine of the Catholic Church found in Romans 7:1-3. Indeed, the concomitance between religious and civil law is obvious under this article:

Le mariage ne se dissout que par la mort naturelle de l'un des conjoints; tant qu'ils vivent l'un et l'autre, il est indissoluble.	Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble.
--	---

Many Quebec scholars underlined the similar content of the two texts.<sup>42</sup>

Religion was ubiquitous and marriage was its power tool. Religious actors were entrusted with the function of 'civil' officers. Indeed, one of the most powerful examples of the incorporation of law and religion was the role of the priest in Quebec. The priests were, amongst other things, the officers of civil status. The idea of 'civil

37. Bilodeau, "Quelques aspects de l'influence religieuse sur le droit", *supra* note 28 at 583.

38. *Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, ss. 4-7.

39. François Chevrete & Herbert Marx, *Droit constitutionnel: Notes et Jurisprudence* (Montreal: Presses de l'Université de Montréal, 1982) at 656, Gérald A. Beaudoin, "De la répartition des compétences législatives au Canada en matière de mariage et de divorce" (1973) 4 R.G.D. 66 at 67.

40. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(26).

41. *Ibid.*, ss. 92(12) and 92(13).

42. Bilodeau, "Quelques aspects de l'influence religieuse sur le droit", *supra* note 28; Benoît Moore, "Culture et droit de la famille : de l'institution à l'autonomie individuelle" (2009) 54 McGill L.J. 257 [Moore, "Culture"]; Hélène Belleau, *Quand l'amour et l'État rendent aveugle: le mythe du mariage automatique* (Quebec: Presses de l'Université du Québec, 2012) [Belleau, *Quand l'amour et l'État*].

status' refers to a person's status in the eyes of the civil law, including whether they are alive or dead, in a recognized relationship or not. A *statut* is a legal invention still dear to the civil law. *Statut* comes from the latin *stare*, which means to stand. A *statut* is a "body of rules governing the juridical condition of a person".<sup>43</sup> In fact, it creates a juridical condition for a person or a category of persons. This juridical condition entails rights, duties, obligations or privileges only to those benefiting from the said *statut*. From 1866 to 1968, articles 42, 44, 128 and 129 of the C.C.L.C., while modified a few times, were written so that almost only priests could keep registers of the marriages that were celebrated in the province and, incidentally, grant *statuts*. This specificity of Quebec's law is striking when compared with France, and cannot be explained by Quebec's distinct legal tradition within Canada. In France, civil status was secularized just after the French Revolution. As such, as of 1792, the registers of civil status were the responsibility of designated civil officers.<sup>44</sup> The situation was far different in Quebec. Priests were responsible for the solemnization of every ritual of life (and law), for maintaining demographic statistics and for the registers of civil status.<sup>45</sup> This means that the only way to modify your civil status was to abide by the principles of the Church. Having a civil status meant being baptized in the Church, being married in the Church, and so on. From a common law perspective, it was as if the priest, amongst his other roles, was the Registrar General. The priest was even a matrimonial counsellor and offered mandatory wedding preparation services in Quebec. This situation prevailed until 1968, the year in which civil marriage became possible. Therefore, before 1960,

the only conjugality possible in Quebec private law, occurs around the religious marriage, the only institution having social and legal recognition. The law is intimately tied to the diktats of the religious powers. The Church is thus the only space where marriages are celebrated. [...] which preserves the power of the Church.<sup>46</sup>

43. P.A. Crépeau *et al.*, eds., *Private Law Dictionary*, 2<sup>nd</sup> ed. (Montreal: Quebec Research Centre of Private and Comparative Law, 1991) *s.v.* "statut".

44. J.B. Glaire *et al.*, *Encyclopédie catholique : répertoire universel et raisonné des sciences, des lettres, des arts et des métiers*, v. 11 (Paris: P. Desbarres, 1840-48) at 372.

45. Bilodeau, "Quelques aspects de l'influence religieuse sur le droit", *supra* note 28 at 579.

46. Lefebvre, "L'évolution de la notion de conjoint en droit québécois", *supra* note 26 at 9.



Stigmas were related to the fact that *de facto* spouses were living outside of the morality of the time, outside of the religious principles that were ubiquitous in private law. They were discriminated against. For example, in terms of wills and estates (called successions in Quebec law) a *de facto* spouse could not inherit *ab intestat*. Further, the children of *de facto* spouses were not heirs either. Members of such conjugal arrangements were not only strangers to one another in law, they were even prevented from performing certain juridical acts. It was impossible for them to make gifts to one another.<sup>47</sup> In addition, they were labelled pejoratively, in the Code and in life, as illegitimate unions, illegitimate spouses or illegitimate children.<sup>48</sup> An important sanction was the standing of the children resulting from *de facto* unions. The conception of the child at law has shifted in time. At a time where the child was conceived as the property of the head of the household, the fact that his non-marital children were of lesser status than children from marriages was a direct sanction.<sup>49</sup> To emphasize that only marriage was a good option for conjugality, law ignored or punished *de facto* spouses and their offspring.

To a certain extent, religious mores were connected to the public regulation of sexual behaviours. “[O]ne could think that it was an unacknowledged question of morality which prevented the legislator from recognizing *de facto* spouses in law. It was also a method of legitimizing only one form of union – that of marriage”.<sup>50</sup> The only possibility for sexuality was sex in the married bed in the missionary position;<sup>51</sup> anything different was either a felony or a blameable act. Legal scholars of the time were well aware of this vicious interaction between law and religion. A law professor, cited in a report to the Civil Code Revision Office, wrote in 1957:

It is indeed superfluous to describe here the extent to which Christianity confines sexual relations to the institution of marriage. Since for all practical purposes, it would not be possible for another morality to exist other than Christian morality, there

47. See art. 768 C.C.L.C. (repealed in 1981).

48. See title preceding article 237 C.C.L.C. (changed to ‘natural children’ in 1970) and former arts. 240 and 241 C.C.L.C.

49. See arts. 237ff C.C.L.C.

50. Jocelyne Jarry, *Les conjoints de fait au Québec : vers un encadrement légal* (Cowansville, QC: Yvon Blais, 2008) at 145 [Jarry, *Conjoints*].

51. Lori Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parent Act, 1921-1969* (Toronto: University of Toronto Press, 2007) at 52ff and Terry Chapman, *Sex Crimes in Western Canada, 1890-1920* (Ph.D. Thesis, History, McMaster University, 1984) [unpublished].

would be a conflict between religion and the law as soon as the latter accepted to admit unions outside of marriage.<sup>52</sup>

*De facto* spouses were living – whether it was a choice or a necessity was irrelevant – a life contrary to public order, contrary to public religious order.<sup>53</sup>

Quebec's Quiet Revolution in the sixties – the principal aim of which was the secularization of society – led to the transformation of the family, both in terms of its content and in terms of its regulation. The State started replacing the Church in family lives, but most importantly in family law. The fall of the importance of the Church affected its power over the family, and reforms were initiated. This important decrease of the Church's influence allowed for the appearance of various forms of conjugalities. It led to a drop in marriage rates, and more generally, to the decline of conjugality as the foundational tie of family regulation. The next part traces the key legislative points in the evolution of the regulation of *de facto* unions in Quebec law. The reception of the changes that were made has not been smooth and critics were vehement. The appearance of *de facto* unions in the public sphere and in an impressive number of social laws (insurance, pensions, taxation, labour, education, procedure, election law, and more) has not had the effect of making them part of 'The Family'<sup>54</sup> in the Civil Code. The next part studies the evolution of the regulation of *de facto* unions at law.

### Part 3. *Ni loi*: Moments of Law

This part is about the changes concerning *de facto* unions that were made in Canadian private law, mostly in Quebec private law, after the Quiet Revolution. In this context, appearance refers to the idea that people living outside of the marriage paradigm became visible and that the possibilities for conjugality multiplied: conjugalities. The counterpart of this statement, however, is paradoxical. Indeed, it

52. M. Duval, *Travaux Capitants*, 1957, V. II at 112 as cited in Quebec, Office de révision du Code civil, *Les droits des concubins*, by the Comité du droit des personnes et de la famille, Daniel Dhavernas (Montreal: O.R.C.C., 1969) at 26-27 [Dhavernas, *Les droits des concubins*].

53. It is interesting to highlight that *l'Assemblée des évêques*, while being opposed to *de facto* union becoming a social institution, agreed with the necessity to see the effects of concubinage regulated. See Office de révision du Code civil, *Résumé des commentaires*, *supra* note 11 at 113.

54. In the *Civil Code of Québec*, the most part of family regulation is captured in a Book entitled 'The Family' (arts. 365-612).

seems that while the possibilities for adult intimate relationships have multiplied, their acknowledgement by the law depends on their similarity with the law's conception of marriage, in some case one could even say "good" marriage. The primary focus in this part is to expose the apparition of various conjugalities, through the legislative changes that were made to include *de facto* unions as a legitimate alternative to marriage. The evolution is not necessarily chronological, since changes are divided as to their nature, i.e. inside or outside the Civil Code.

In Quebec, the first legislative recognition of *de facto* unions outside the Code dates back to 1965. The *Act Respecting the Québec Pension Plan* was modified then so that an unmarried widow, who had been living with her spouse for at least seven years, could have a right to a pension.<sup>55</sup> In the wake of this, many social laws were modified to include *de facto* unions. In 1968, the introduction of civil marriage through Bill 77 represented the beginning of major changes in Quebec private law.<sup>56</sup> While it did not concern *de facto* unions, Bill 77 allowed couples without – or with a different – religious affiliation to register their unions and to have the same rights and duties as religiously married couples. Even though this amendment was conservative, inasmuch as it was not about recognizing *de facto* unions, in expanding the reach of marriage it nonetheless allowed for a new possibility of conjugality. Marriage was still a prerequisite for formally-recognized intimate adult relationships, but it could exist outside of Christendom. From that point on, marriage could be celebrated by someone other than a priest. This 'civilization' of marriage represented a first disassociation between religion and the family, even if *de facto* unions were still excluded from the legal sphere.

The federal *Divorce Act* of 1968 was the first divorce law in the province of Quebec and is also a change outside of the Civil Code.<sup>57</sup> Before that, one needed to make a request for Parliament to grant a divorce by way of a private member's bill. The facilitation of divorce represented a new step towards the secularization of the family. Indeed, "the division that we think exists [...] becomes blurred with the popularization of divorce and its penetration into societal attitudes".<sup>58</sup> As explained earlier, the religious conception of Catholic

55. CQLR, c. R-9 and Lefebvre, "L'évolution de la notion de conjoint en droit québécois", *supra* note 26 at 9.

56. *An Act respecting civil marriage*, S.Q. 1968, c. 82.

57. *Divorce Act*, S.C. 1968-69, c. 24.

58. Dhavernas, *Les droits des concubins*, *supra* note 52 at 30.

marriage was – and still is – clear: marriage is indissoluble, only the death of one spouse may end it. The increasing availability of divorce triggered a process towards the desacralization of adult intimate relationships. Not only was it now possible to be civilly married, but the State also made it possible to have multiple subsequent marriages, notwithstanding religious precepts. By the end of the sixties, the indissoluble and religious features of marriage were considered to no longer belong in the legal sphere. Yet, scholars remained deeply attached to religious values. This is particularly striking when it comes to changes in the, usually, sacrosanct Civil Code.

When it comes to changes inside the Civil Code, 1955 is a key date. In 1955, the Legislature of the Province of Quebec decided that the *Civil Code of Lower Canada* needed to be revised.<sup>59</sup> The Legislature gave the mandate to the Civil Code Revision Office (“C.C.R.O.”) to draft a new Civil Code that would “reflect the social, moral and economic realities of today’s Quebec; it had to be a body of law that was alive and contemporary, and which would be responsive to the concerns, attentive to the needs and in harmony with the requirements of a changing society in search of a new equilibrium”.<sup>60</sup> The work started in the 1960s and lasted for decades. It ultimately led to the coming into force of the *Civil Code of Québec* in 1994. The C.C.R.O. proposed highly contentious suggestions for the regulation of *de facto* unions inside of the Code.

The Committee on the Law of Persons and Family Law – piloted by the Honourable Claire L’Heureux-Dubé – made important suggestions about *de facto* unions to the C.C.R.O. To begin, the Committee suggested including *de facto* unions in the new Code. This first proposition was to include a definition of ‘*de facto* consorts’ in the Code. The definition read as follows:

Définition d’époux de fait

Article 102:

Sont des époux de fait deux personnes de sexe différent qui, sans être mariées l’une avec l’autre vivent

De facto consorts: definition

Article 102:

Any two persons of opposite sex, not married to each other, who live together openly as husband

59. Paul-André Crépeau Centre for Private and Comparative Law, The Archives of the Civil Code Revision Office, online: <<http://digital.library.mcgill.ca/ccro/mandate.php>>.

60. *Ibid.*

ensemble ouvertement comme mari and wife in a continuous and stable  
 et femme, d'une façon continue et manner, are de facto consorts.  
 stable.

In addition to formally including *de facto* unions in the Civil Code, the Committee proposed four important changes in the regulation of this factual situation. First, it suggested that, in adult intimate relationships, interdependency be not associated with a legal status (i.e. being married), but rather be recognized by the nature of the relationship of partners (i.e. whether they lived together). As such, when adults elect to form a 'stable' and 'continuous' union, they should, when possible, have a duty to support each other. The Committee was thus advocating in favour of a functional understanding of adult intimate relationships. Its other propositions were to apply the presumption of paternity to *de facto* male spouses, to extend heirship to *de facto* spouses, and to oblige them to contribute towards the expenses of the household in proportion to their respective means. While most of these suggestions were ultimately made by the C.C.R.O. in its final report to the legislature, the legislature decided that they should not be part of the new Civil Code.

The reactions of respected scholars of the time betray the negative opinion of some jurists on the matter. For example, Mireille Castelli wrote in 1975:

We will not start impugning motives or morality [of *de facto* spouses]. But what we find to be profoundly abnormal and immoral is that after having rejected marriage, they expect to benefit from certain advantages (in other words, advantages without the disadvantages). It is good *that people take responsibility for their decisions, and that we do not always soften the consequences of their decisions*.<sup>61</sup>

Later in the same article, she added that "*de facto* spouses seem quite wrong to complain. It was at the moment they decided not to get married that they should have weighed the consequences of their actions".<sup>62</sup> While clearly opposed to the proposed modifications, she commented quite neutrally in comparison to others.

For Ernest Caparros, professor of law at Université Laval, "the worst enemies of the family are exaggerated individualism and

61. Castelli, "Observations", *supra* note 8 at 664 [emphasis added].

62. *Ibid.* at 665 [emphasis in original].

exaggerated socialism”.<sup>63</sup> To him, all the evils of family law could be summed up in three words: divorce, abortion and... concubinage. His remarks on the propositions of the C.C.R.O. were scathing:

The report proposes a juridical recognition of what it calls – in a discreet euphemism – the *de facto* union.

The fact that concubinage is more common or more public does not authorize the legislator to legitimize it.

One must take into account the realities, but only so far as they deserve.

[P]ainful situations can arise between *de facto* spouses if the legislator does not intervene! Indeed, but these will be the responsibility of the concubines themselves.

These [...] examples [...] can suffice to stress that the Committee does not always seek the well-being of the family of the future. It proposes, also, incidentally, provisions which can *become tools of the self-destruction of the family*.

The *Association des parents catholiques du Québec* (“*Association*”) was also shocked. In its opinion, the propositions of the C.C.R.O. relied on new values, “born, in large part, from the rejection of all morality, traditions, and of all authority”.<sup>64</sup> According to the *Association*, the values promoted by the Committee on the Law of Persons and Family Law were reflecting, among other vices, egoism, individualism, raging materialism, unstoppable liberalism, disrespect of basic human rights and agnosticism.<sup>65</sup> The Committee was trying to “make certain marginalized, devastating and loose situations be accepted as natural, legitimate and valuable”.<sup>66</sup> The attitude of the Committee towards family values would lead to anarchy and dehumanisation. It regretted the propositions and interpreted them as threatening the stability, the autonomy and the privacy of the family.<sup>67</sup> The *Association* believed that people thinking and promoting

63. Ernerst Caparros, “Le droit familial de l’avenir : Un rapport de l’Office de révision du Code civil qui laisse la famille sans avenir”, *Le Devoir* (7 January 1975) [emphasis added].

64. Association des parents catholiques du Québec, *Mémoire de l’Association des parents catholiques du Québec sur le rapport sur la famille du comité des droits de la personne et de la famille de l’Office de révision du Code civil*, Civil Code Revision Office, at 1.

65. *Ibid.* at 2.

66. *Ibid.* at 2.

67. *Ibid.* at 3.

such values and ideas, let alone people *living* in this situation, were deviant.

Some critics were not relying on moral imperatives.<sup>68</sup> The discourse of choice and autonomy/freedom was and still is central in the debate. The *Conseil du statut de la femme* (“C.S.F.”), which now defends the opposite position,<sup>69</sup> suggested in November 1975 that choice and autonomy in adult intimate relationship should be valued and that the State should not intervene.<sup>70</sup> The C.S.F. still saw in the propositions of the C.C.R.O., and in the possible intervention of the State resulting of these propositions, an idea that a *de facto* union was a ‘culpable’ union and that it was still posited as against good morals.<sup>71</sup> The C.S.F. noted that some propositions were written as to still disadvantage *de facto* over *de jure* unions.<sup>72</sup> It was nonetheless in favor of extending certain elements to *de facto* spouses (for example, the presumption of paternity that still only applies to *de jure* unions in 2014). Later, in the *Mémoire présenté à la Commission parlementaire sur la réforme du droit de la famille*, the C.S.F. recommended, amongst other things, to respect the choice of persons who decided not to marry.<sup>73</sup> These opinions have been given in a specific context for women and feminism that is beyond the purpose of this paper and should be contextualized.

Commentators were not all opposed to regulating *de facto* unions. The *Organismes familiaux associés du Québec* welcomed the propositions and suggested a minimal three-year period for a relationship to be recognized as a *de facto* union and a minimum age

68. For a survey of different, albeit opposed, sources to the inclusion of *de facto* unions in the Civil Code see Alain Roy, “L’évolution de la politique législative de l’union de fait au Québec” (Paper presented to the XX<sup>e</sup> Conférence des juristes de l’État, Québec, 9 April 2013), *Conférence des juristes de l’État 2013* (Cowansville, QC: Yvon Blais, 2013) 83 at 90ff [Roy, “L’évolution”]. According to him, it is false to pretend that the Legislature ignored *de facto* spouses. Rather, the Legislature made the positive choice to promote freedom and autonomy.

69. Conseil du statut de la femme, *Avis. Pour une véritable protection juridique des conjointes de fait* (Québec: Conseil du statut de la femme, 2014), online: Conseil du statut de la femme <<http://www.csf.gouv.qc.ca/article/6497/memoire-sur-le-projet-de-loi-c-36resume/>> [Conseil du statut de la femme, *Pour une véritable protection*].

70. Québec, Conseil du statut de la femme, *Recommandations du Conseil du statut de la femme à l’Office de révision du Code civil sur le rapport de la famille (première partie)*, November 1975, at 20 [Conseil du statut de la femme, *Recommandations*].

71. *Ibid.* at 21.

72. *Ibid.* at 20.

73. Québec, Conseil du statut de la femme, *Mémoire présenté à la Commission parlementaire sur la réforme du droit de la famille* (Québec: Conseil du statut de la femme, 1979) at 25.

requirement of 21 years.<sup>74</sup> In an opinion published in *Le Devoir*, Paul Carbonneau, a notary, was also optimistic about the proposed changes. He wrote “it seems to me today more praiseworthy to try to remedy some of the problems arising from a *de facto* union, and from its consequences on the family, than to refuse to consider it because the *de facto* spouses and their children are not a family in the traditional sense”.<sup>75</sup> In the end, *de facto* unions were not integrated in the Civil Code.

Despite the strong resistance to change when *de facto* unions were concerned, as time passed, changes kept taking place. Some of the changes affected only marriage, but somehow allowed *de facto* unions to evolve. Some key modifications to the *Civil Code of Lower Canada* directly improved the legal status of *de facto* spouses. For example, under article 768 C.C.L.C., “[g]ifts *inter vivos* made in favor of the person with whom the donor has lived in concubinage, or of the incestuous or adulterine children of such a donor, are limited to maintenance”. This prohibition was abrogated in 1981. “In the eyes of commentators, the disappearance of these provisions marked the end of an era and the beginning of another. In eliminating the last limit in the Code to the contractual freedom of *de facto* spouses, the legislature gave them the benefit of appealing to the law to regulate their relationship”.<sup>76</sup> Further, “[i]t was a turning point for the progressive recognition by the law, that individuals can, through contract, regulate some dimension of their conjugality in private law”.<sup>77</sup> Other examples concerned the lease. As of 1979, the “concubinary of the lessee, if he had been living with the lessee for at least six months, has in regard of the lessor the rights and obligations resulting from the lease if he continues to occupy the dwelling and gives the lessor a notice to that effect within two months after the cessation of cohabitation”.<sup>78</sup> Other modifications were also made about retaking possession of a dwelling.<sup>79</sup>

74. Quebec, Organismes familiaux associés du Québec, *Avis des organismes familiaux associés du Québec sur le rapport de la famille de l'Office de révision du Code Civil*, 2 April 1975 at 9.

75. Paul Carbonneau, “Le rapport de l'Office de révision du Code civil sur la famille”, *Le Devoir* (9 January 1975).

76. See Roy, “L'évolution”, *supra* note 68 at 88-89. The idea of access to law as a benefit is an interesting conceptualization of the role of law in intimate adult relationships.

77. Dominique Goubau, Ghislain Otis & David Robitaille, “La spécificité patrimoniale de l'union de fait : le libre choix et ses « dommages collatéraux »” (2003) 44 C. de D. 3 at 14 [Goubau, “Spécificité”].

78. S.Q. 1979, c. 48, s. 111.

79. See art. 1659 C.C.L.C.



Further modifications indirectly enhanced the situation of *de facto* consorts. Family law in Quebec went through an important reform in the eighties. As of 1980, distinctions between natural and legitimate children almost completely vanished from the Code.<sup>80</sup> One of the strongest ways to punish concubines was to deny legal recognition to their children. Following 1980, changes in the regulation of *de facto* unions in public law, private law and case law started burgeoning. In 1993, *de facto* spouses began to be considered as a unit for taxation purposes, both at the provincial and federal levels.<sup>81</sup> Afterwards, the Supreme Court of Canada made two important decisions about adult intimate relationships that impacted the jurist's imagination about the nature of conjugality in both common law and civil law, and ultimately opened the door to increasing rights and privileges for *de facto* spouses. In 1995, the Court decided that marital status was an analogous ground for discrimination for the purpose of section 15 of the *Canadian Charter of Rights and Freedoms*<sup>82</sup> and acknowledged the same for sexual orientation,<sup>83</sup> thus confirming that discriminating between married and unmarried spouses was not constitutionally possible notwithstanding the sexual orientation of the spouses. In *Miron* and *Egan*, the issue were towards third parties. A few years later, in *M. v. H.*,<sup>84</sup> the definition of 'spouse' for support purposes in Ontario was broadened and the Supreme Court decided that 'spouse' included same-sex spouses. However, this time the statute was not concerned with third parties, but with the obligations spouses owed to one another. These changes in the definition of a spouse in law incidentally transformed the understanding of the characterization of a 'good' spouse or of a 'legitimate' union.

In this wind of change, important modifications were made by the Quebec legislature, but one must bear in mind that in the *Civil Code of Québec*, the symbol of Quebec's private law, *de facto* unions is

---

80. Some changes were first made with *An Act to amend the Civil Code respecting natural children*, S.Q. 1970, c. 62, but equality of status was not achieved until the *Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39. While the distinction between natural and legitimate child does not exist anymore, children of married parents still enjoy greater rights in some situations, see arts. 525 and 538.3 C.C.Q. An important effect of the 1970 act was a right to support for children of unmarried parents, see art. 240 C.C.L.C.

81. Lefebvre, "L'évolution de la notion de conjoint en droit québécois", *supra* note 26 at 19.

82. *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

83. *Egan v. Canada*, [1995] 2 S.C.R. 513.

84. *M. v. H.*, [1999] 2 S.C.R. 3.

not creative of a particular legal status and spouses, for the most part, are still today almost strangers towards one another. These modifications allowed for the appearance of conjugalities, for the multiplication of patterns for adult intimate relationships. As a consequence, not only did they de-stigmatize *de facto* unions, but they also dislodged marriage from its role as the only possibility for valid conjugality. In 1999, *An Act to amend various legislative provisions concerning de facto spouses*<sup>85</sup> came into force. The legislature stated the bill's purpose as follows: "this bill amends the Acts and regulations that contain a definition of the concept of *de facto* spouse to allow *de facto* unions to be recognized without regard to the sex of the persons concerned".<sup>86</sup> As such, the bill allowed for the inclusion of *de facto* spouses and same-sex *de facto* spouses. Shortly after came Bill 84, *An Act instituting civil unions and establishing new rules of filiation*.<sup>87</sup> The purpose of this bill was to create "an institution, the civil union, for couples of the opposite or the same sex who wish to make a public commitment to live together as a couple and to uphold the rights and obligations stemming from such status".<sup>88</sup> Following these important legislative measures and the significant transformation of the nature of adult intimate relationships, the legislature decided to specify the meaning of spouse via section 61.1<sup>89</sup> of the *Interpretation Act*:<sup>90</sup>

The word "spouse" means a married or civil union spouse.

The word "spouse" includes a *de facto* spouse unless the context indicates otherwise. 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. If, 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.

In a short time, Canadian private law had witnessed the appearance and proliferation of conjugalities. In Quebec, the introduction of the civil union put the final nail in the coffin of marriage's

85. S.Q. 1999, c. 14.

86. *Ibid.* "Explanatory notes".

87. *Interpretation Act*, CQLR, c. I-16 [*Interpretation Act*].

88. *Ibid.* "Explanatory notes".

89. S.Q. 2002, c. 6, s. 143.

90. *Interpretation Act*, *supra* note 87, s. 61.1.

monopoly.<sup>91</sup> It also significantly reduced the grip of religious principles as legal norms for dictating the possibility of adult intimate relationships. Indeed, when same-sex unions became legally possible, the “conflict between religion and law” described in 1957 by Professor Duval<sup>92</sup> had already been taking place – and religion had mostly lost to law. In 2005, the federal *Civil Marriage Act* defined marriage “for civil purposes, [a]s the lawful union of two persons to the exclusion of all others”.<sup>93</sup> This new definition confirmed the disassociation of the spheres of influence of religion and law when it comes to adult intimate relationships. Of course, religious principles are still prevalent in a vast majority of marriages, but marriage produces civil effects that are independent of religious principles.

Marriage has been dislodged from its unique and superior status.<sup>94</sup> The ideological divide between *de jure* unions and *de facto* unions has been attenuated. Indeed, when it becomes possible for marriage bonds to dissolve, for marriage to be completely secular, when stigmas surrounding sexuality outside marriage and same-sex unions are abolished and can produce civil effects, the institution of marriage is renewed and marriage’s content has changed. Its features started to be akin to other forms of union and the characteristics of marriages and *de facto* unions – transforming institutions – started converging. Benoît Moore highlights that if “the *de facto* union remains heterogeneous, it remains so less and less, a large number of *de facto* unions representing a strong functional similarity with marriage. Inversely, marriage also converges with the *de facto* union, especially since it is less homogeneous and stable than before”.<sup>95</sup> Another factor that contributed to the fading away of the principal criticisms of *de facto* unions was the increasing instability of marriage occasioned by easier access to divorce. While both institutions started at the complete opposite ends of the spectrum, it seems

---

91. Civil union was introduced in 2002: *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6, s. 74. It created a new form of State-approved conjugality. While open to both non-heterosexual and heterosexual partners, its principal aim was to provide an alternative to marriage for same-sex partners.

92. M. Duval, *Travaux Capitants*, 1957 V. II p. 112, cited in Dhavernas, *Le droit des concubins*, *supra* note 52.

93. *Civil Marriage Act*, S.C. 2005, c. 33, s. 2.

94. Katherine M. Franke, “Longing for *Loving*” (2008) 76:6 *Fordham L. Rev.* 2685.

95. Benoît Moore, “Auprès de ma blonde ...” in Brigitte Lefebvre & Antoine Leduc, eds., *Mélanges Pierre Ciotola* (Montreal: Thémis, 2012) 359 at 361 [Moore, “Auprès de ma blonde”] and “Variations chromatiques : l’union de fait entre noir et blanc” in *Mélanges Adrian Popovici – Les couleurs du droit* (Montreal: Thémis, 2010) at 101.

that they have met somewhere along the way with the passage of time.

Although marriage and *de facto* relationships have converged in life, there are still important differences in law, especially in the *Civil Code of Québec*. With the legal and social changes surrounding the family, new sets of values and mores have been put forward. As was the case with religious mores, some argue that these values deserve absolute protection. In a neo-liberalist fashion, the Code encourages people – only some kind of people in family law, i.e. *de facto* spouses – “to see themselves as individualized and active subjects responsible for enhancing their own well-being”.<sup>96</sup> The Code is channelling adult intimate behaviors. It was first rooted in morality and religious sanctions and now it is in an under-problematized “choice argument”. In light of these questions, the next part problematizes the notion of choice and puts in perspective this idea that ‘choice’ is central to the issue of regulating conjugality.

#### Part 4. Lawless Love: Confusions

From religious pressure to a problematic ‘freedom of choice’ argument anchored in a neoliberal ideology, *de facto* conjugality has been a “locus of political anxiety”<sup>97</sup> for decades in Quebec. It is important to pay careful attention to the context before ranking choice and autonomy as superior values in the discourse, and before picturing *de facto* spouses as, as mentioned earlier, “active agents responsible for their own well-being”.<sup>98</sup> Although the religious normative order has receded, differences that continue to exist between *de jure* and *de facto* spouses are arguably founded on a neoliberal ideology, relying on freedom of choice, individuality, minimal government, autonomy, and more, and enforced by economic penalties instead of social or religious ones. The impact of this ideology is often underestimated. Insufficient consideration has been paid to the fact that it seems to apply only to certain kinds of conjugality.

Differences and similarities of treatment between *de jure* and *de facto* unions are criticized at different levels. Differences of treatment are unjustifiable since the nature and functions of the relationships

96. Wendy Larner, “Neo-liberalism: Policy, Ideology, Governmentality” (2000) 63 *Studies in Political Economy* 5 at 13 [Larner, “Neo-liberalism”].

97. The expression is from Heather Brook, see Brook, *Conjugal Rites*, *supra* note 19.

98. Larner, *supra* note 96 at 13.

are largely the same. Yet, in the current state of things, similarities need to be problematized as well because they create confusion. The similarities are misleading people in their so-called choice. Differences are undesirable and have an active role, while similarities, even if desirable, have a passive role. Yet, they both expose how ‘choice’ sometimes does not mean much.

The absence of legal regulation or the differentiated treatment, for the most part, is in the Civil Code. The Civil Code stands in a particular category in the civilian mind. A Code “reflects the vision that a society has of itself, and of what it wants to be. It covers the life of every citizen, from birth to death. It is the loom on which the social fabric is woven”.<sup>99</sup> It is more than a mere law; it affects the legal identity of the province. The Code is a symbol,<sup>100</sup> it represents Quebec’s *droit commun* or *jus commune*.<sup>101</sup> It has been described as an *œuvre de commandement* and a social contract: “the legislator intended that the Civil Code of Québec should reflect the social contract of our liberal, democratic society”.<sup>102</sup> The Code is more than normative and as Sylvio Normand has suggested, “the Civil Code is one of those legislative texts whose importance surpasses the particular norms that it contains. It holds a symbolic charge that, although weakened, continues to characterize the law of Quebec”.<sup>103</sup> Yet, an important part of what family life is now – *de facto* union – is out of family law in the Code. The absence of regulation of *de facto* spouses in the Book of the Code entitled “The Family” sends Quebecers a message that is much more complex than the respect of so-called choice, autonomy and liberty.<sup>104</sup> The Civil Code “really has the spirit of a constitution, because it embodies the ideas around which society is constituted”.<sup>105</sup> When

- 
99. Gil Rémillard, “Le nouveau Code civil : un véritable contrat social” in Serge Lortie et al., eds., *Du Code civil du Québec : contribution à l’histoire immédiate d’une recodification réussie* (Montreal: Thémis, 2005) 283 at 283 [Lortie, *Du Code civil*].
100. Sylvie Parent, “Le Barreau du Québec et la Réforme du Code civil” in Lortie, *Du Code civil*, supra note 99 at 433.
101. Marie José Longtin, “La Réforme du Code civil : la gestion d’un projet” in Lortie, *Du Code civil*, supra note 99 at 188.
102. Quebec, Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. 1 (Quebec: Publications du Québec, 1993) at IX.
103. Sylvio Normand, “Le Code civil et l’identité” in Lortie, *Du Code civil*, supra note 99 at 619.
104. On the necessity of revising “the orthodox view of the Civil Code of Québec’s book on the family as an exhaustive enumeration of legal family relations”, albeit in a different context, one should read Robert Leckey, “Family Outside the Book on the Family” (2009) 88 Can. Bar Rev. 541.
105. Jean Carbonnier, “Le Code civil” in Pierre Nora, ed., *Les lieux de mémoire, III. La Nation, 2. Le territoire, l’État, le patrimoine* (Paris: Gallimard, 1986) at 309.

the decision is made to leave someone out of the constitution and the social contract, it is doubtful whether or not one can pretend that it is *their* choice. The economic penalties *de facto* unions face because of incoherence between the Code and other laws, statutes and regulations are indicia of the shift in the other normative order affecting this type of conjugality. These unions were once left out because of moral imperatives; they are now left out through a double standard about who needs to be an active agent and who does not.

There are several differences in the legal treatment between the two types of conjugality. Besides the fact that marriage creates a legal status and is efficient (it has fixed starting and ending dates and it is registered) the major differences between married and unmarried partners today in Book 2 can be seen in five elements: the family residence (art. 401 C.C.Q.), the family patrimony (art. 415 C.C.Q.), the compensatory allowance (art. 427 C.C.Q.), the partnership of acquests (default matrimonial regime, arts. 431ff C.C.Q.) and the obligation of support (art. 585 C.C.Q.). In addition to this list, there is no obligation for *de facto* spouses to contribute the expenses of the household, as it is the case for *de jure* spouses (arts. 396 and 521.6 C.C.Q.). These only apply to *de jure* unions. The Supreme Court of Canada recently confirmed that this state of affairs was not unconstitutional for the purposes of the *Charter*.<sup>106</sup> Although the Court was divided in its decision, two points are certain. First, the situation of *de facto* spouses is not, in itself, unconstitutional. And second, it is flawed and it is not the Court's task to fix it.

Before this landmark decision in *Eric v. Lola*, thorough qualitative research exposed that only 23% of *de facto* spouses in the province knew that it was impossible to claim spousal support on the breakdown of the union.<sup>107</sup> Put differently, a striking 77% of *de facto* spouses did not know their basic rights. The data has not been considered relevant by the Supreme Court, but only time will tell whether or not this should have been considered with greater interest.<sup>108</sup>

106. *Quebec (Attorney General) v. A.*, 2013 SCC 5.

107. Belleau, *Quand l'amour et l'État*, *supra* note 42 at 76 [footnotes omitted].

108. Whether it was relevant or not might depend solely on the way it has been pleaded and evidenced. According to Alain Roy, "tout semble s'être ici joué sur une simple question de preuve. Lola n'a pas produit de preuve sociologique probante pour appuyer ses prétentions. Certes, des expertises ont été déposées par ses procureurs [...]. Toutefois, ces expertises sont de nature qualitative et non pas quantitative. La différence est fondamentale. [...] Que serait-il advenu si le sondage réalisé en 2008 par la firme *Ipsos Descarie* à la demande de la Chambre des notaires avait été admis en preuve? Réalisé auprès de

It would be interesting to see whether the numbers will change in the next few years. However, twenty years of public-awareness campaigns on this issue, as well as high-profile cases, have made little progress in raising the general understanding of the state of the law in Quebec. The current regime creates a confusion in which Quebecers are led to believe that there is no difference in treatment.

To be clear, the similarities are not bad in and of themselves. They rely on logic of non-discrimination in the 'public' sphere. The State acknowledges the variety of conjugal models.<sup>109</sup> Confusion derives from the fact that in the vast majority of laws and regulations that the average Quebecer knows or is faced with, little to no distinction is drawn between married and unmarried spouses. Both on the federal and the provincial levels, unmarried spouses generally enjoy the same status as married spouses. As such, for purposes of income tax, pension plans, insurance, labour laws and social laws, *de facto* spouses will be considered on the same footing as married partners. In as many as thirty-eight crucial statutes, *de facto* spouses and married partners are considered to be legally equivalent. Yet, "[i]n Quebec, given its civilian traditions, rights will generally only arise if the parties have registered their relationship, though even in that province for such federal purposes as income tax, 'common law spousal status' arises after one year's cohabitation even without registration, and the courts will recognize contributions to the acquisition of assets".<sup>110</sup> The result is that the citizen, when faced with the legal system, will assume that there is no major difference between being married or not; he or she is almost<sup>111</sup> always treated similarly. It is easy to believe so when you receive mixed signals. Yet, on breakdown to use a concrete example, he or she will learn the hard way that there are important differences between *de jure* and *de facto* unions. According to Benoît Moore,

*De facto* spouses, for the most part, do not understand the real juridical effects of their situation. The assimilation by "everyday" law (tax, insurance, pensions) of *de facto* spouses to married spouses has created, in the collective conscience, the false im-

---

805 répondants, ce sondage, d'ordre quantitatif, semble confirmer les prétentions de Lola...". He later acknowledges that it is impossible to speculate on the weight that would have been given to the survey. Alain Roy, "Affaire *Éric c. Lola* : une fin aux allures de commencement" (2013) 1 C.P. du N. 259 at 273-274 [Roy, "Affaire *Éric c. Lola*"].

109. Goubeau, "Spécificité", *supra* note 77 at 5-6.

110. Bala, "History & Future of Marriage", *supra* note 18 at 27.

111. A notable example remains in s. 4(3) of *Canada Evidence Act*, R.S.C. 1985, c. C-5.

pression that there is a perfect assimilation of these two types of unions.<sup>112</sup>

This idea that, in the public opinion, both types of unions are completely equivalent refers to the phenomenon of automatic marriage (*phénomène du mariage automatique*). It is a commonly held social belief that *de facto* spouses enjoy the same rights as married partners. For Hélène Belleau in her recent book *Quand l'amour et l'État rendent aveugle*, the myth of automatic marriage means that

It became very clear that the majority of individuals interviewed knew very little, if anything of the rights and obligations surrounding marriage, but many of them thought that *de facto* spouses, after several years of living together or after the birth of a child, benefited from the same juridical framework as married couples.<sup>113</sup>

Hélène Belleau's qualitative empirical studies confirm a vast majority of persons assert that they perceive no difference at all in terms of the nature of the relation between these two forms of relationships.<sup>114</sup> While outside of the Code *de facto* spouses are regulated through their appearances, in the Code appearances of marriage do not entail any rights, duties or privileges. The similarities, while not bad in themselves, are problematic because "[the] undifferentiated treatment of couples [...] has progressively created a false impression of the disappearance of the *de facto* union, and of a lack of differentiation between marriage and *de facto* unions".<sup>115</sup>

In addition to confusing people, the interaction with other mechanisms of social law is under-evaluated.<sup>116</sup> Some similarities rely on false assumptions and have economic consequences for *de facto* spouses. Taxation offers a good example where the citizen could be unpleasantly surprised, even without the breakdown of the union. The stakeholder may be unaware of the fiscal costs of living in a *de facto* union, in particular if his or her spouse does not contribute to the expenses of the household. The monetary impact, as Stéphanie Grammond demonstrated, can be enormous, especially on low-income individuals. Her example goes as follow: for a mother of two

112. Moore, "Auprès de ma blonde", *supra* note 95 at 361-362.

113. Belleau, *Quand l'amour et l'État rendent aveugle*, *supra* note 42 at 73.

114. *Ibid.* at 102ff.

115. Moore, "Auprès de ma blonde", *supra* note 95 at 361-362.

116. See generally, Robert Leckey, "Strange Bedfellows" (2014) 64:5 U.T.L.J. 641 [Leckey, "Strange Bedfellows"].



earning \$35,000 a year, becoming a *de facto* spouse could have a fiscal cost as high as \$9,000 a year depending on the income of her *de facto* spouse. If the mother of two had a low income – i.e. \$20,000 or less a year – the fiscal cost could amount to \$15,000.<sup>117</sup> This retribution of wealth regime is great, but relies on a possibly wrong assumption. The regime assumes that the new spouse contributes and has a real economic implication towards the family as a whole. While we can hope it is the case, the new *de facto* spouse has no obligation at all to do so. The idea of a joint economic venture is an imperative of *de jure* unions. It is not for other types of unions. Stéphanie Grammond only drew a picture of extreme situations where the fiscal cost is high – she is a journalist after all – but these same economic penalties could be demonstrated in others contexts.<sup>118</sup>

Law creates and sustains confusions. A complicated interplay between the similarities and differences of *de jure* and *de facto* unions feeds the confusion between rights, duties and obligations of *de jure* spouses and *de facto* spouses. Therefore, the freedom of choice argument is highly problematic. The State has an active role in the confusion. It is unjust to attach important legal effects to misinformed choice. Of course, there are other views on this issue. For some, *de facto* spouses made a choice, which they are free to make.<sup>119</sup> They have individual autonomy and the State should not interfere.<sup>120</sup> However, the State does in fact interfere... In a context where the State maintains confusion with ambiguous laws, can one truly talk of choice?<sup>121</sup>

117. Stéphanie Grammond, “La calculatrice de l’amour”, *La Presse* (28 February 2013), online: La Presse <<http://affaires.lapresse.ca/opinions/chroniques/stephanie-grammond/201302/14/01-4621462-la-calculatrice-de-lamour.php>>.

118. See Roy, “Affaire *Éric c. Lola*”, *supra* note 108 at 300-301: “À l’heure actuelle, l’État postule de l’indépendance économique des conjoints de fait en droit privé, tout en leur appliquant une logique d’interdépendance économique en droit fiscal et social. Un conjoint peut donc se voir imputer par le fisc une portion de revenu de l’autre, alors qu’il n’en aura jamais vu la couleur. Comme le suggère Dominique Barsalou dans un ouvrage à paraître, le temps n’est-il pas venu de corriger ces incohérences qui participent à la confusion ambiante au sujet du statut juridique des conjoints de faits?” Please note that the paragraph ends suggesting that people should be able to opt out from both public and private law. The quotation is used only to exemplify other contexts for economic penalties.

119. For a typical example, see the very first page of Mireille D.-Castelli & Dominique Goubeau, *Le droit de la famille au Québec*, 5th ed. (Ste-Foy: Presses de l’Université Laval, 2005).

120. See, for example, Claudia P. Prémont & Michèle Bernier, “Un engagement distinct qui engendre des conséquences distinctes” in *Développements récents sur l’union de fait* (Cowansville, QC: Yvon Blais, 2000) 1.

121. Belleau, *Quand l’amour et l’État rendent aveugle*, *supra* note 42 at 76.

*De jure* unions come with various imperative mechanisms aimed at protecting vulnerable parties when necessary. These mechanisms are imposed, they are not chosen. The idea of “choice” for *de facto* spouses echoes a discourse that has been completely discarded for *de jure* spouses. When issues surrounding marriage started to emerge in the courts, the law developed so as to even out power imbalances between spouses. Indeed, at a time when people could freely choose their marriage contracts, courts realized that it was not much of a choice, and that important power imbalances affected this contract. Courts and the legislature boldly put forward mechanisms to balance out the economic interests of *de jure* spouses.<sup>122</sup> “[T]he legislative record establishes that the obligatory character of the family patrimony followed acknowledgement that the freedom of contract in matrimonial matters had failed”.<sup>123</sup> Much is asked of *de facto* partners, but one must not forget that “[t]he fact that two parties may wish to avoid the legal consequences of marriage does not mean that they did intend to exploit each other economically, and even if they did, there is no reason for the law to countenance such behaviour between cohabitantes when it will not permit it between strangers”.<sup>124</sup> The Code does not merely promote freedom of choice and contract: the Code limits them when it is necessary. This being said, *de facto* spouses are deprived of most legal recourses aimed at easing *de jure* couples’ separations in civil law, even those not justified by the marriage or civil union contract *per se*.

Some legal tools are available to *de facto* unions. They can draft *de facto* union contracts. According to a quantitative survey of the *Chambre des notaires*, only 19% of people living in *de facto* unions do so.<sup>125</sup> In Belleau’s qualitative research,<sup>126</sup> nobody had such a contract.<sup>127</sup> Unjust enrichment is another option.<sup>128</sup> In conjugal con-

122. In Quebec, the *Loi modifiant le Code civil du Québec et d’autres dispositions législatives afin de favoriser l’égalité économique des époux*, L.Q. 1989, c. 55. From a common law perspective the years following *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 were inspiring in terms of reform. See also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, *Pettkus v. Becker*, [1980] 2 S.C.R. 834 and the Ontario Law Reform Commission.

123. Leckey, “Strange Bedfellows”, *supra* note 116 at 651 [emphasis added].

124. Philip Girard, “Concubines and Cohabitees: A Comparative Look at ‘Living Together’” (1982-83) 28 McGill L.J. 977 at 1011 [Girard, “Concubines”].

125. *Chambre des notaires du Québec, Vivre en union de fait*, online: <<http://uniondefait.ca/conjointsdefait-sondage2007.php>>.

126. She nonetheless carried out thorough interviews with more than sixty couples in Montreal, Quebec, Trois-Rivieres and peripheral cities.

127. Belleau, *Quand l’amour et l’État rendent aveugle*, *supra* note 42 at 119.

128. Christine Morin, “L’enrichissement injustifié entre conjoints de fait : vers une meilleure prise en compte des situations vécues” in *Droit de la famille En bref*,

texts, it has been compared to a compensatory allowance,<sup>129</sup> which is only one of the elements *de facto* spouses are deprived of compared to *de jure* spouses. Conceptually, unjust enrichment is an exceptional recourse that has been described as available for the “marginiaux du droit”.<sup>130</sup> While used today, “courts have historically expressed hesitancy at deploying general private law to remedy economic fallout of *de facto* unions”.<sup>131</sup> The contract of undeclared partnership is another possibility.<sup>132</sup> Scholars have expressed the difficulties associated with the action *pro socio* in intimate contexts.<sup>133</sup> It is debatable whether the legal costs associated with these proceedings are worth their potential benefits. Whether *de facto* spouses are willing to discuss about contracts foreseeing the end of love is also far from certain.

The difference between *de facto* and *de jure* couples remains unclear to this day.<sup>134</sup> If freedom of choice is that important, maybe it should not apply only to certain kinds of conjugality. While *de facto* unions were once stigmatized in Quebec civil law for imperatives of moral responsibility, it appears that they are now left behind for imperatives related to choice and penalized through various economic sanctions (e.g. fiscal cost, no support obligation, no property separation mechanism, and more). *De facto* spouses should not be the only ones to be responsible for their intimate ‘choices’. Issues surrounding *de facto* unions might only be a symptom of the real problem of the regulation of adult intimate relationships: the legal framework attached to marriage.<sup>135</sup> Family law has various functions. When citizens withdraw – for whatever reasons (religious, social, ideological, legal) – of the legal system and yet still claim its benefits or advantages, it suggests that law’s task is not fulfilled.

n° 9 (*La référence*, January 2013); Robert Leckey, “Unjust Enrichment and *De Facto* Spouses” (2012) 114 R. du N. 475 [Leckey, “Unjust Enrichment”].

129. Leckey, “Unjust Enrichment”, *supra* note 128 at 487.

130. Didier Lluellas and Benoît Moore, *Droit des obligations*, 2<sup>nd</sup> ed. (Montreal: Thémis, 2012) at 741, citing Philippe Malaurie and Laurent Aynès, *Droit civil : les obligations* (Paris: Cujas, 1996) at 543.

131. Leckey, “Unjust Enrichment”, *supra* note 128 at 477.

132. Leckey, “Unjust Enrichment”, *supra* note 128 at 499-500 and, generally, Christine Morin, “La société tacite : quand les affaires se conjuguent avec l’amour” (2008) 110 R. du N. 825 [Morin, “La société tacite”].

133. Morin, “La société tacite”, *supra* note 132.

134. The *Conseil du statut de la femme* defended in an opinion that the situation of *de facto* unions in civil law was discriminatory and that the day-to-day life of couples, whether married or not, was similar. *Conseil du statut de la femme, Pour une véritable protection*, *supra* note 69.

135. The problem with the rules of marriage is far beyond the scope of this article. However, for a few solutions to the problem of regulating *de facto* unions, see the propositions made by Roy, “Affaire *Éric c. Lola*”, *supra* note 108 at 296ff.

## Conclusion

The title of this chapter could have read *Appearance of Conjugalities and Lawless Love* or *Appearances of Conjugalities and Lawless Love*. While these titles are profoundly intertwined, they neither refer to the same legal evolution, nor to the same general ideas. The first version – *Appearance of Conjugalities and Lawless Love* – refers to appearance as the *mise au jour*, as the idea of becoming visible. To a certain extent, it is about adult intimate relationships emerging as conceptually possible in the moral and legal spheres. In this context, *conjugalities* distances itself from a more or less unitary notion, and becomes plural and multifaceted. These ideas speak to the advent of multiple patterns for adult intimate relationships both in law and in life. In the second form – *Appearances of Conjugalities and Lawless Love* – “appearances” conveys an idea of mimicking, looking like, or to seem like, something or someone else. Conjugalities in such settings is unitary, and normative: it is that thing that we are trying to emulate for different reasons. It brings up how various conjugal unions share the same characteristics and similarly-lived experiences, or how, to be recognized as such, intimate adult relationships must fit a pattern. This way of sharing intimacy and of being interdependent represents an ideal that even most formal types of union cannot achieve. Notwithstanding the different meanings of appearance(s) and conjugalities(ies), these titles reflect major shifts in adult intimate relationships in the Canadian context. Not unlike a couple, while both titles would individually be complete, there is something more to it when they are combined.

The overview of the history of the treatment of *de facto* unions offered a fertile ground to point out that the regulation, or absence of regulation, of conjugal relationships often relies on imperatives other than law, here religious values and the promotion of neo-liberal values. Indeed, the importance of morality, especially religious morality, has been central to family law. As Benoît Moore beautifully summarizes:

Religion used to ensure cohesion and homogeneity. For family matters, it imposed, directly or indirectly, a unitary conception of the family based on marriage, a religious sacrament and a civil institution that was indissoluble. The family stood apart from individual choice and constituted the central institution of society, with the husband as its absolute sovereign. The dissipation of religious authority, as much by the weakening of its power as

by the multiplication of faiths, has been a crucial element in the reorientation of family law. The fundamental values of equality and individual autonomy have taken over and become the foundations of this family revolution.<sup>136</sup>

With the fall of religious morality in law, and especially in family law, another normative order arises. Neoliberal values have now replaced religion.

Adult intimate relationships in Quebec are, from a legal perspective, at the crossroads. What will happen next in terms of public policy and legal reform will likely influence the future of family law. The intention was not to propose elements for reform; some suggestions might nonetheless be of interest. In the seventies, Daniel Dhavernas already emphasized to the C.C.R.O. that it was a mistake to evaluate and define marriage according to its form (and the *statut* it creates), as opposed to its content and fundamental realities.<sup>137</sup> In the same context, François Heleine asked “should civil law not be inspired by the attempts to rid the law of guilt, since it gains nothing from judging?”<sup>138</sup> Following the Supreme Court of Canada’s decision *Eric v. Lola*, the provincial government has formed a committee in Quebec, under the direction of Alain Roy, to report first on whether the time is right for the reform of family law, and, if so, for the direction that such reform should take. One can hope that the past finds a new echo for the Committee. In a short preliminary opinion, answering the first question in the affirmative, the Committee adopted a version of Dhavernas’ proposal: interdependency in conjugal matters lies in the presence of a child.<sup>139</sup> While one can be in favour of or against such a proposition, it at least has the merit of starting a real conversation about the regulation of adult intimate relationships.

The real conversation will need to be larger than the regulation of *de facto* unions. The debate on the nature of marriage continues to rage on today. In the province of Quebec, the current regime in which married partners benefit (or suffer, it depends whom you ask) from public order or mandatory rules, applies only to *de jure* couples. Basic

---

136. Moore, “Culture”, *supra* note 42 at 272.

137. Dhavernas, *Les droits des concubins*, *supra* note 52 at 29.

138. Heleine, “Rapport vie maritale hors mariage”, *supra* note 4 at 3.

139. Comité consultatif sur le droit de la famille, *Rapport sur l’opportunité d’une réforme globale du droit de la famille québécois* (Quebec, 12 September 2013), online: <[http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/rapp\\_prelim\\_CCDF.pdf](http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/rapp_prelim_CCDF.pdf)>.

elements, such as the obligation of support, are not available to *de facto* unions. The indignation of people in relation to the regulation of *de facto* unions may be symptomatic of the inadequacy of the rules regulating *de jure* unions. These rules also need to be reviewed.<sup>140</sup> Indeed, it is important to be mindful that “marriage [is only] one of a number of regulatory frameworks – as part of a broader field of conjugality in which rules, norms and practices of intimacy and interdependence might vary without connoting a hierarchy of relationships at whose apex, inevitably, (bona fide) marriage sits”.<sup>141</sup> The supremacy of marriage might have expired and great attention must be given to other kinds of adult intimate relationships.

---

140. Some scholars spoke of the “over-regulation of marriage”, “sur-réglementation du mariage”: Dominique Goubau, “Le Code civil du Québec et les concubins : un mariage discret” (1995) 74 Can. Bar Rev. 474 at 479.

141. Brook, *Conjugal Rites*, *supra* note 19 at 11.

