The Struggle between Public and Private Ordering in Family Law. A Study of Marital Agreement Regimes in Existing Conjugal Relationships in the Republic of Colombia and the Canadian Provinces of Quebec and Ontario.

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1. Contents

2. Abstract.

Conjugal relationships have faced numerous changes in recent history. The struggle between private and public ordering has compelled changes in the personal and the economic spheres of conjugal relationships. This thesis explores this debate through a critical analysis of a proposal which would attenuate the immutability of marital agreements in Colombia. This critical analysis relies on feminist relational contract theory to survey the economic regulation of couples' relationships in the Canadian Provinces of Ontario and Quebec, as well as in Colombia. Two general arguments arise from this analysis. First, marriage and cohabitation are often long-term, interdependent relationships that change over time and require a legal framework enabling spouses to adapt their economic rights to their evolving circumstances. Second, conjugal relationships entail power imbalances that often affect vulnerable parties such as women and children, and these imbalances call for public order rules which protect the essential property of the family and which ensure fairness through remedy-based support at the breakdown of a relationship. The purpose of this thesis is to explore the experience of Quebec and Ontario – where spouses can conclude marital agreements at any time and are only subject to certain restrictions – in order to critically assess the effects of attenuating immutability of marital agreements in Colombia. The use of the expression "attenuates" suggests that any approach widening private contracting in conjugal relationships needs to be cautious of the impact of power imbalances in marital agreements concluded during conjugality. In light of these concerns, this thesis proposes a mutable marital agreement which is responsive to the changes that take place inside conjugal relationships, which imposes stricter imperative rules that take some property out of the scope of private ordering, and which privileges remedy-based spousal support.

3. Resumé

Les relations conjugales ont connu de nombreux changements dans l'histoire récente. Le conflit entre les sphères publique et privée a entraîné des changements en lien avec les aspects personnels et économiques des relations conjugales. Cette thèse explore ce débat à travers l'analyse critique d'une proposition de recherche visant à atténuer l'immutabilité des contrats de mariage en Colombie. Cette analyse critique s'appuie sur la théorie relationnelle et féministe du contrat afin d'étudier la réglementation économique des relations de couple dans les provinces canadiennes de l'Ontario et du Québec, ainsi qu'en Colombie. Deux arguments principaux résultent de cette analyse. En premier lieu, le mariage et la cohabitation sont habituellement des relations interdépendantes de longue durée, évoluant avec le temps et nécessitant un cadre juridique afin de permettre aux époux d'adapter leurs droits économiques à l'évolution de la situation. En deuxième lieu, les relations conjugales impliquent des déséquilibres de pouvoir affectant les parties les plus vulnérables, tels que les femmes et les enfants. Ces déséquilibres requièrent la mise en place de règles d'ordre public afin de protéger la propriété essentielle de la famille et d'assurer une forme de justice par l'octroi d'une pension alimentaire avec une caractère compensatoire à la fin de la relation. Cette thèse propose d'étudier la situation au Québec et en Ontario – où les époux peuvent conclure des contrats du mariage en tout temps et avec peu de restrictions – pour faire une analyse critique des conséquences de l'atténuation de l'immutabilité des contrats du mariage en Colombie. L'utilisation de l'expression « atténuation » suggère qu'une approche favorisant la contractualisation privée au sein des relations conjugales doit prendre en compte les déséquilibres de pouvoir pouvant affecter les contrats de mariage conclus durant le mariage ou la cohabitation. Compte tenu de ces enjeux, cette thèse propose un contrat de mariage modifiable répondant aux changements ayant lieu au sein des relations conjugales, tout en imposant des règles d'ordre public plus rigoureuses afin de retirer certaines propriétés de la sphère privée, et privilégiant une pension alimentaire pour époux avec une caractère compensatoire

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5. Introduction.

This thesis explores a proposal to attenuate the immutability of marital agreements in Colombian family law. In order to properly anticipate the consequences of this proposal, this thesis will consider the family property law regimes of Ontario and Quebec. The decision to include common and civil law traditions from Canada reflects the fact that both Quebec and Ontario permit marital agreements during conjugal relationships. This experience with marital agreements, drawn from two different jurisdictions and indeed two different legal traditions, informs this thesis' analysis about attenuating the immutability of marital agreements in Colombia. As the terminology may vary among the jurisdictions considered, the term "marital agreement" refers to contracts which are not separation agreements, where spouses or future spouses define the legal effects over property accrued during their conjugal relationships.

This thesis also uses the terms of immutability, attenuated immutability and mutability of marital agreements. These terms refer to the ability of spouses to modify marital agreements and the economic regime of their conjugal relationships once their relationships have already started. "Immutability" prohibits any amendment to the marital agreement. Meanwhile, "mutability" enables spouses to conclude new agreements modifying or eliminating their existing one, or creating new economic regimes altogether. This thesis advocates for the middle ground of attenuated immutability, which would eliminate the prohibition on executing or modifying marital agreements during the conjugal

relationship[1] while proposing strict safeguards to limit the abuse of those instruments and to protect vulnerable spouses.

Identifying the effects of attenuating the immutability of these agreements requires a critical assessment which considers the intimate context where they occur, the vulnerability of the subjects affected, and the degree to which a tension between private autonomy and state intervention persists. In this vein, we argue that analyzing the legal frameworks of Ontario and Quebec marital agreements through feminist relational contract theory facilitates a critical assessment of proposals to attenuate the immutability of marital agreements in Colombian law. This theoretical framework adequately includes the long-term and intimate nature of marital agreements, the gendered power imbalances of conjugal relations,[2] as well as concerns over private and public order governing conjugal property.

[1] The reason for preferring this approach reflects, in part, spouses' inability to foresee and predetermine, at one point in time, all of the circumstances of a long-term relationship like marriage or cohabitation. In line with relational contract theory that will be developed below in detail, these contracts shall include the "overall context of the whole relationship", see further in: Ian R Macneil, "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law" 72:6 Northwest Univ Law Rev 854 at 887–890. More importantly, the economic effects of conjugal relationships impact women more negatively than men, suggesting the need to opt for an attenuated approach that accounts for the vulnerable spouse when contracting a marital agreement and at the time of enforcement, see further in: Sharon Thompson, *Prenuptial agreements and the presumption of free choice : issues of power in theory and practice* (London : Bloomsbury, 2015) at 154–156.

[2] Thompson, *supra* note 1 at 154–156.

This assessment exposes the tensions between public and private ordering in the family. Public order and morality make these agreements different from simple commercial contracts. The family is an essential interest of the state. Therefore, the law may have a greater interest in determining what things individuals can and cannot contract. These limitations clash with the ideal of freedom of contract, which suggests that individuals should be free to decide if they join one another in a conjugal relationship and to define the scope of how this relationship will affect their property.

Colombian law renders marital agreements immutable after the conjugal relationship has begun but permits mutually-agreed dissolutions of the economic regime and certain contracts related to transferring property between spouses such as sales and gifts. This legal context, as well as the socio-economic realities faced by families in Colombia, has given rise to debates about whether or not to preserve immutability or to attenuate it with an updated point of view which accounts for the concerns of vulnerable spouses and third parties.

With regard to methodology, this thesis will undertake a doctrinal analysis of the legislation, judicial decisions and scholarship addressing conjugal property. Firstly, this thesis describes feminist relational contract theory, charts a historical background, and canvasses the debate between public and private ordering in family law. Secondly, it describes the default regimes regulating conjugal property and marital agreements in Quebec, Ontario and Colombia. Thirdly, this thesis explores the justifications for the doctrine of immutability in Ontario and Quebec. Finally, it assesses the advantages and disadvantages of a proposal aimed at attenuating the immutability of marital agreements in Colombia.

These considerations will highlight the importance of the family for the state.[3] Colombian constitutional law defines the family as the core of society.[4] Likewise, Canadian law acknowledges the family's paramount importance.[5] The family is the basic unit by which societies are built, which explains the variety of laws governing almost every aspect of family life. These norms include the rules governing the personal and economic effects of vertical relationships between parents and children, as well as horizontal relationships between adults.[6] This thesis will focus on the rules governing the effects on property in horizontal relationships.

Marital agreements deal primarily with property matters and, exceptionally in some jurisdictions, with some personal effects. This thesis analyses marital agreements' effects on spousal property, since Colombian law confines marital agreements to this specific question. Similarly, Quebec and Ontario permit spouses to regulate their rights over conjugal property at any time through marital agreements.

[3] Roberto Suarez Franco, *Derecho de Familia Tomo I*, 10th ed (Bogota: Editorial Temis SA, 2017) at 5; Jorge Parra Benítez, *Derecho de Familia Tomo I Parte Sustancial*, tercera ed ed (Bogota: Editorial Temis SA, 2019) at 24; Constitutional Court Sixth Revision Chamber, Bogota, August 31, *Yolanda Porras Corredor contra Pablo Emilio Leal Guerrero* (1994), Sentencia T-278 of 1994 (Colombia).

[4] Arts 2, 5, 15, 33, 42, 43, 44, 46, Colombian Political Constitution of 1991 (Colombia).

[5] *Miron v Trudel* [1995] 2 SCR 418, 124 DLR (4th) 693; Robert Leckey, "Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada" in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Antwerp: Springer, Cham, 2015) 93 at 96 [*Leckey, "Shifting Scrutiny"*].

[6] Robert Leckey, *Contextual subjects : family, state and relational theory* (Toronto: University of Toronto Press, 2008) at 33, 34.

Theoretically, this thesis analyzes these regimes through feminist relational contract theory, since a simplistic conception of contractual autonomy can result in abusive marital agreements. A mistaken concept of autonomy fails to account for changes in the conjugal relationship and gendered power imbalances affecting these arrangements.[7] Both civil and common law jurisdictions reject this pure neoliberal conception of contractual autonomy which conceives of individuals as free, self-interested and rational agents who can freely contract and realize their own interests.[8] Instead, they view state intervention as necessary to avoid contracts producing unfair or unjust results.[9]

The history of family law in Canada demonstrates how traditional contract law safeguards were unable to protect the weak from power imbalances and account for non-financial contributions to the conjugal union. This unfairness motivated the establishment of the family patrimony in Quebec, a public order regime that private arrangements cannot exclude or modify.[10] Meanwhile, in Ontario, judges hold certain discretion to set aside domestic contracts when spouses fail to understand their terms or fail to disclose significant assets, debts or liabilities when the contract was concluded.[11]

Therefore, a theory of contract which takes both context and gendered power imbalances into account is critical when assessing proposals to amend the rules on marital agreements. The experience and reasoning of other jurisdictions suggest that attenuating immutability requires a systematic view of the

[7] Thompson, *supra* note 1 at 137–139.

[8] Ian R Macneil, "Bureaucracy and Contracts of Adhesion" (1984) 22:1 Osgoode Hall LJ 5 at 5–8.

[9] *Ibid*.

[10] Alain Roy, Celine Le Bourdais & Evelyne Lapierre-Adamcyk, "La Famille d'Hier a Aujourd"hui" (2017) 119:3 R du N 425 at 449.

[11] Family Law Act, RSO 1990, c F.3, s 56.4 [*The Family Law Act*].

regime, a wider scope than that of pure contractual autonomy and enough discretion to the enforcing authorities to assess the results of marital agreements. These changes are always aimed at protecting a contextual, well-informed and power-balanced notion of consent and autonomy.

In section 6, we establish the theoretical framework, a brief history of family law and the struggle between private and public ordering. Setting out the historical development of conjugal property and marital agreements will help explain the influence of culture, religion and society in defining the scope of private autonomy and state intervention in marital relationships. It also explains how unmarried cohabitants and same-sex couples achieved economic rights in Canada and Colombia. This debate allows us to see how private and public ordering have defined family law.

Subsequently, section 7 describes the economic regimes of couples' relationships in Ontario, Quebec and Colombia, and demonstrates how public and private ordering have framed the regulatory framework. This description includes a presentation of the default regimes, the regulation of marital agreements, and the notions of mutability or immutability present in each system. Section 8 then explores the justifications for immutability in each of these jurisdictions, highlighting its advantages and flaws. This exploration includes Quebec's decision to reject the doctrine of immutability expounded by the Civil Code of Lower Canada, the reform of articles 1265 and 1266 in 1970 and the subsequent adoption of the Civil Code of Quebec. Additionally, section 8 will consider Ontario's overall view of postnuptial agreements, including the risk and benefits associated with domestic contracts taking place in the context of conjugality.

A critical analysis of the mutable economic regime for spouses in Canadian provinces will sharpen this thesis' appreciation for the advantages and disadvantages of mutability. Only then, drawing on feminist contractual theory and the experience of the surveyed jurisdictions, this thesis' final section will justify its preference for flexibility. We suggest that immutability prevents contracts from being a useful tool

for spouses to adapt their economic relations according to evolving circumstances. However, a balanced approach is needed. The attenuation of immutability proposed in this thesis represents a cautious approach which avoids the excesses of contractual freedom which may result in unfair outcomes and the abuse of gendered power imbalances.

6. Key ideas for the thesis

This thesis's first section describes its theoretical framework, the feminist relational contract theory proposed by Sharon Thompson.[12] This theoretical framework deals with two core concerns of this thesis regarding Colombian family law. First, it calls for an economic regime capable of adapting to the changing circumstances of long-term intimate relationships. Secondly, it identifies the need for carefully approaching spouses' contractual autonomy caused by the gendered power imbalances present in couples' relationships.[13]

Subsequently, this section offers a historical background of family law to identify the evolution of conjugality in each tradition,[14] tracing the scholarly discussions of the struggle between rigid

[12] Thompson, *supra* note 1 at 165–185.

[13] *Ibid* at 8–10.

[14] Walter Pintens, "Marital Agreements and Private Autonomy in France and Belgium" in Jens M Scherpe, ed, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart Publishing, 2012) 69 at 69; Barbara Ann Atwood, "Marital Contracts and the Meaning of Marriage" (2012) 54:12–

regulations against private autonomy.[15] Finally, this section describes the concepts of public and private ordering, historically important influences on the rules governing the property of spouses and their contractual relationships. This final part is where the debate regarding immutability occurs. It will allow this thesis to analyze the attenuation of immutability with an updated point of view drawn from scholarly and judicial discussions from other jurisdictions' experiences. These perspectives will also elucidate the varied effects of attenuation and suggest remedies which could be useful when implementing reforms in Colombian family law.

This section provides two main points for this thesis. The first is that family relations merit a rigorous analysis of contractual autonomy. Secondly, the aim of the debate between private and public ordering is to achieve a peaceful coexistence where public order protects the interest of marriage and cohabitation and private ordering allows individuals to fulfill their desires.

6.1. Theoretical Framework

This description of the theoretical framework aims to define a useful tool that, although originally developed for prenuptial agreements in the United Kingdom, can speak to both common and civil

08 Ariz L Rev 11 at 34, 35; Beatriz Añoveros Terradas, "Jurisdiction Clauses in International Premarital Agreements: A Comparison Between the US and the European System" (2018) 26:4 Eur R Priv L 537 at 540.

[15] Terradas, *supra* note 14 at 538.

law legal traditions. The theory remains relevant for other jurisdictions and legal traditions because it relates to core concerns in couples' relationships and contracts in general.

Of course, there are some distinct particularities of English common law, such as the discretionary power of courts over family property's distribution. However, Thompson's theory remains relevant for civil law jurisdictions as well, since modern conjugal relationships in western societies share certain characteristics. Assuming that monogamy is the norm, conjugal relationships tend to feature two individuals who have decided to join one another to build a life, investing common efforts and sacrifices over a prolonged period of their lives. During this period, external factors such as gender and wealth play determinant roles and can create imbalances.

Monogamous couples also commonly aim to have children, a project which imposes uneven sacrifices which are often gendered. Bearing that in mind, feminist relational contract theory accounts for long-term intimate relationships and considers the context in which contracts are negotiated and concluded through a gendered perspective which recognizes the imbalance of power often held by women.[16] This theory thus remains relevant to family contracting irrespective of which legal tradition is being considered.

Furthermore, the civil law tradition also accounts for amplifying context when regarding pre-contractual negotiation and adhesion contracts.[17] Thompson's theory builds on two main theoretical

[16] Thompson, *supra* note 1 at 165–185.

[17] Nattan Nisimblat, "La Negativa a Negociar: El Ejemplo de la Negociación Precontractual del Acuerdo Marital y Matrimonial entre Abogados" (2012) 124:1 Vniversitas 293 at 313; Carlos Rogel Vide, *Derecho de obligaciones y contratos.* (Madrid: Editorial Reus, 2013) at 103, 104.

frameworks: relational contract theory[18] and feminist contract theory. Each one is briefly described here to illustrate how it engages with autonomy and public order limitations for conjugal relationships.

The purpose of this methodology is to draw from these contract theories during the description of the issues addressed further on in this thesis. These issues include principally the struggle between private and public ordering, the scope of them in Canadian and Colombian regimes, the justifications for the doctrine of immutability, and the effects of attenuating immutability of marital agreements in Colombia. Feminist relational contract theory stresses both the context and the power imbalances present in conjugal relationships and helps in critically assessing the effects of a change and the possible remedies for those effects.

6.1.1. Contract theory.

The first point is to identify which contract theory adequately fits this thesis. There is not a definitive contract theory, but there are various approaches regarding the state's intervention into contracts.[19] The classical, neoclassical and economic analysis of contract law are examples of these approaches although they are all rejected from this thesis as they fail to account for some elements in couples' relationships that relational and feminist contract theory do. To exemplify the failure, the focus of classical contract law protects the "sanctity of the agreement" rejecting states intervening in what the

[18] Shida Galleti, "Contract Interpretation and Relational Contract Theory: a Comparison between Common Law and Civil Law Approaches" (2014) 47:2 Comp & Intl LJS Afr 248 at 248.

[19] Thompson, *supra* note 1 at 131.

parties have contractually agreed upon.[20] This classical notion of contracts, what Macneil calls "discrete contracts", excludes the before and after while emphasizing only on the instant of the transaction. "It also ignores the identity of the parties to the transaction."[21]

Many civil codes have followed this logic,[22] and thus judges would only consider the validity requirements of the agreement out of respect for the parties' autonomy.[23] Likewise, the common law of contracts has often relied on this classical autonomy. For instance, in Canadian family law, Buckley accepts that the contextualized subject has replaced the liberal subject, but affirms "that this transition is still highly contested, and that liberal and neoliberal conceptualizations of the subject continue to compete with more relational understandings, even in contextualized judicial discourse."[24] This means that discrete contracts ignoring the context and the identity of the parties still claim their place in both contract and family law in both legal traditions.

Furthermore, neoclassical contract theory, although better framed to face unfairness, remains committed to the "idea of freedom of contract that presupposes autonomy". Such a view, as Thompson suggests, leaves out many inequalities emerging from agreements in the "intimate

[20] *Ibid* at 132.

[21] David Campbell, "Ian Macneil and the Relational Theory of Contract" in David Campbell, ed, *The Relational Theory of Contract: Selected Works of Ian Macneil* (London: Sweet & Maxwell, 2001) 1 at 21.

[22] Rogel Vide, *supra* note 17 at 102.

[23] Suarez Franco, *supra* note 3 at 304–307.

[24] Lucy-Ann Buckley, "Autonomy and prenuptial agreements in Ireland: a relational analysis" (2018) 38:1 LS 164 at 254.

context".[25] On the other hand, Posner's economic analysis of contracts claims that contract law pursues the maximization of wealth.[26] Unfortunately, that theory leaves out the altruistic nature of some human transactions,[27] in which individuals behave irrationally seeking instant gratification[28] or ignore other factors involved in contracts.[29] All of these considerations are essential inside the intimate context of the family and demand a different theoretical approach.

6.1.2. Relational Contract Theory.

This subsection describes the reasons why relational contract theory is more persuasive with regards to the issues that this thesis touches on, since it includes the context of long-term transactions and considers the identity of the subjects. Developing these reasons includes analyzing the context of

[25] Thompson, *supra* note 1 at 134–139.

[26] Richard Posner, "Law and Economics in Common-Law, Civil-Law, and Developing Nations" (2004) 17:1 Ratio Juris 66 at 67, 68.

[27] Larry A DiMatteo et al, *Visions of Contract Theory* (Durham: Carolina Academic Press, 2007) at 37.

[28] *Ibid* at 18, 19.

[29] Macneil considers the idea that a party will breach a contract and compensate his co-contractant for breach if he can make more profit from breaching than from complying is unsatisfactory, since it ignores a lot of other factors that are also part of the contract. He says that one example coming from the relational spectrum can be the damage to reputation or the loss of future opportunities. Ian R Macneil, "Efficient Breach of Contract: Circles in the Sky" (1982) 68:5 Va L Rev 947 at 957–961.

marital agreements and locating this discussion inside the Canadian and Colombian family law. Admittedly, contracts concluded between spouses require special attention to the context of the intimacy and the often-changing circumstances that often are a part of these agreements.

Considering this context in long-term relationships, Professor Macneil has argued "that one of the problems of classical and neoclassical contract theory is that they accounted for transactions between two parties that did not have any relation apart from that one in the contract."[30] He claims "contracts lay within a spectrum between discrete and relational transactions"[31] where relational contracts involve ongoing relationships where the parties' situation is liable to change[32] while in discrete contracts, the parties' circumstances can be fully anticipated with some confidence at a definitive point in time.[33] This view of discrete contracts refers to the concept of "presentiation" that is essential to Macneil's theory and this thesis' emphasis on contextualizing contracts within family relations.

Presentiation is the action of causing something to be (perceived as) present in time or place,[34] meaning one treats something as if it were present. This notion forms the basis of classical contract law and remains applicable to discrete transactions.[35] Unfortunately, in certain transactions, relational

[30] Campbell, *supra* note 21 at 21.

[31] *Ibid* at 34.

[32] Ian R Macneil, "Restatement (Second) of Contracts and Presentiation" (1974) 60:4 Va L Rev 589 at 595.

[33] *Ibid* at 594.

[34] Oxford University Press, "Oxford English Dictionary", online: <https://www.oed.com/view/Entry/266863?redirectedFrom=presentiation#eid>

[35] Macneil, *supra* note 32 at 594.

contracts fail to be presentiated at a certain point in time as classical contract law argues. Macneil gives two reasons for this: first, the presentiation is incomplete and second, the presentiation evolves.[36] This failure of presentiation tends to occur in long-term relationships, which are influenced by a particular person's morality and interdependence, as well as the common share of burdens and benefits between the parties. Instead of being defined in a single point in time,[37] relationships like marriage or a partnership in a family business are ongoing and continuously changing.[38]

Admittedly, contracts entered into in the intimacy of family relations exemplify relational contracts where the evolving and co-operative dimension[39] rejects classical individualistic and selfish subjects.[40] Thompson, relying on Macneil's theory, located marital agreements as relational contracts, precisely since they are developed between spouses or future spouses in the intimacy of their relationships.[41] Those relationships are an integral part of spouses' contractual relationships.[42] Whether or not the law responds to this ongoing relationship and its impact on marital agreements explains the use of this theory to understand the legal regimes analyzed in this thesis. Coherently, the scholarship in Canada

[36] *Ibid* at 596.

[37] Campbell, *supra* note 21 at 39, 40.

[38] Macneil, *supra* note 32 at 595.

[39] Campbell, *supra* note 21 at 50–54.

[40] *Ibid* at 38; Leckey, *supra* note 6 at 106.

[41] Thompson, *supra* note 1 at 142–146.

[42] Nisimblat, *supra* note 17 at 315.

and Colombia approach relational contract theory in family law to stress contextual importance, both methodologically and normatively.[43]

When assessing marriage in Canada as a relational contract, Leckey affirms that "relational contracts differ from transactional contracts recognizing that the preservation of the relationship itself is one objective of the parties, that partners are not fungible, and that the contract is not a casual way of recognizing marital love".[44] Following this logic, marital agreements must account for the context and the identity of the parties without endangering the contractual character of the obligations,[45] but still being sensitive to contextual changes over time. This is only achievable by accepting that obligations do not arise only from the agreement concluded at a certain time but emanate from the relationship's evolution.[46]

[43] Leckey identifies that contextual methodologies were used in family law by courts to back normative concepts of the time, thus leaving subjects in formal categories instead of contextual categories. For instance, illegitimate families, limits to adoption and traditional roles of husbands and wifes in marriage. This explains the need to a methodological and a normative commitment to contextual approches see further development in Leckey, *supra* note 6 at 31–64.

[44] Robert Leckey, "Relational Contract and Other Models of Marriage" (2002) 40:1 Osgoode Hall LJ 1 at 10.

[45] Leckey, *supra* note 6 at 114.

[46] Thompson, *supra* note 1 at 142, 143.

Colombian law relies mostly on classical contract theory[47] where a "contract is objectively valid if it strictly complies with rules governing its formation".[48] Scholars and Colombian courts[49] confirm marital agreements are enforceable if they comply with all formal and substantive requirements at the time of their formation.[50] If the object and the cause of the contract are lawful, the parties are legally capable and gave their unvitiated consent, the agreement is valid and enforceable even if at the time of its execution the circumstances are radically different.[51]

[47] Fernando Montoya Mateus, "La Voluntad: Fundamento del Negocio Jurídico" (2000) 5:1 Revista de Derecho Privado 73 at 82–85.

[48] DiMatteo et al, *supra* note 27 at 211, 212.

[49] Supreme Court of Justice Civil and Agrarian Section, Bogota, 6 December, *N.R.R. en contra de la Sala Civil Familia del Tribunal Superior del Distrito Judicial de Buga* (2017), decision number: STC20605-2017

[50] José Luis Aramburo Restrepo, *Derecho de Familia*, 2da ed (Bogota: Leyer Editores, 2019) at 336, 341; Maria Cristina Escudero Alzate, *Procedimiento de Familia y del Menor*, 25th ed (Bogota: Leyer Editores, 2018) at 448–450; Jinyola Blanco Rodríguez, "Capitulaciones matrimoniales: ¿modificación, sustitución y eliminación del régimen económico del matrimonio?" (2011) 13 Ambiente Jurídico 240 at 250–252.

[51] I see no reason to exclude the doctrine of *rebus sic stantibus* from marital agreements to re-establish the economic equilibrium of the contract. The issue with this doctrine is the high threshold of determining the foreseeability of the change and if it makes contracts' cost unbearable on relationship breakdown.

This notion of contractual autonomy fails to account for the unfairness or inequities which can occur during the negotiation and formation of the contract.[52] More importantly, they exclude future events which alter the relationship and the circumstances surrounding consent.[53] In this vein, a critical assessment of the Colombian law that analyses marital agreements' immutability should use relational contract theory to identify the context and the parties' identity inside marital agreements, thus unveiling a more complete understanding of autonomy applicable to these contracts.[54]

This relational approach, as Nisimblat affirms, includes all the circumstances taking part in the contract even if unwritten.[55] As such, relational theory advocates for an approach which includes more flexibility and which accounts for the need for both context and rigidity, thus avoiding unfair outcomes. However, as Thompson highlighted, relational theory itself, even if applied to intimate relations,[56] is insufficient to address power imbalances caused by the gendered context of the family. Therefore, the next subsection explores the need to include feminist contractual theory to identify the power disparity in marital agreements.[57] This means that a contextual reading of marital agreements needs to focus on

[52] DiMatteo et al, *supra* note 27 at 212.

[53] Arts 1618-1622, Civil Code (Colombia). These norms enable courts to seek parties' will in the contract and to assess future events and contracting in the interpretation of a contract. However, this does not allow parties to change the contract itself, but to determine its interpretation.

[54] Thompson, *supra* note 1 at 144.

[55] Nisimblat, *supra* note 17 at 316.

[56] See Thompson's reference to the work of J Wightman regarding intimate relations and relational contract theory in Thompson, *supra* note 1 at 144.

[57] *Ibid* at 146–152.

the ongoing nature of relational contracts but also on the power imbalances occurring in family contexts.[58]

6.1.3. Feminist contract theory

Feminist contract theory, as argued by Sharon Thompson, allows us to identify the power imbalances and the gendered dimensions of marital agreements.[59] This subsection briefly develops the different feminist perspectives on contract law.[60] It defines which one is most persuasive for the aims of this thesis, rejecting gender neutrality and highlighting the visibility of gender in contract law.[61] Subsequently, this subsection traces how Canadian and Colombian family law engage feminist concerns and suggests that both relational contract theory and feminist contract theory offer a better understanding of marital agreements' effects in an attenuated immutable regime.

There have been three waves of feminist movements. As Aramburo resumes, the first wave cared to show the biological and cultural importance of women,[62] affirming that neither the state nor society

[58] *Ibid* at 146–155.

[59] *Ibid* at 150.

[60] *Ibid* at 147.

[61] *Ibid* at 148, 149.

[62] Diduck and O'Donovan highlight this first wave aimed for women's political recognition in Allison Diduck & Katherine O'Donovan, "Feminism and Families: Plus Ça Change?" in Allison Diduck &

can ignore or discriminate against women. The second wave aimed to achieve real equality[63] and an increased representation of women in society. Finally, the third wave engaged in critical and reactive discourses against masculine theories even if those theories allow for certain concessions in favor of women.[64] Thompson, Diduck and O'Donovan, critically stress that the formal equality discourses present in parts of the first-wave and second-wave feminist movements,[65] even if important, obscure the disparity of power,[66] since the neutrality of those discourses impact men and women differently.[67] Therefore, I opt here for the third wave's theoretical approach as it critically and reactively[68] exposes the gendered power imbalances often present in couples' relationships.[69]

Recognizing these gendered power imbalances is crucial in the family context where women often have less wealth and power than men and are more likely to sacrifice their careers to assume domestic

Katherine O'Donovan, eds, *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish, 2006) 1 at 1.

[63] This includes women financial's self-sufficiency and independece in *ibid*.

[64] Aramburo Restrepo, *supra* note 51 at 42, 43.

[65] Diduck & O'Donovan, *supra* note 63 at 11.

[66] *Ibid* at 6.

[67] Thompson, *supra* note 1 at 146, 147.

[68] Feminist method is about critiquing the normal and the neutral as Diduck and O'Donovan point out in Diduck & O'Donovan, *supra* note 62 at 1, 9–17.

[69] Thompson, *supra* note 1 at 154.

roles.[70] This gender dimension is necessary[71] to critically assess the effects of an attenuated immutable regime in Colombia by analyzing the Canadian experience. Essentially, the dimension helps identify the effects of marital agreements concluded in ongoing conjugal relationships where a spouse has unequal bargaining power.[72] To locate this debate in the mentioned regimes, the paragraphs below briefly explore Canadian and Colombian feminist approaches to family law.

Both Canadian and Colombian law deal with gender in their family law. Boyd and Young, referring to the Canadian experience, show the discursive struggle between the neutral-gender conception of marriage[73] and the recognition of systematic inequality that accounts for women's disparity of power in families.[74] The latter discourse is aware of the threats liberal individualism poses to the substantive equality between genders and therefore criticizes the neutral discourses that frame men and women in the family as equal, autonomous and self-sufficient individuals.[75] These debates emerge in the

[70] *Ibid* at 150.

[71] Gender effects cannot be disentangled from the law as suggested by Diduck and O'Donovan in Diduck & O'Donovan, *supra* note 63 at 5.

[72] Susan B Boyd & Claire F L Young, "Feminism , Law , and Public Policy : Family Feuds and Taxing Times" (2004) 42:4 Osgoode Hall LJ 545 at 556.

[73] *Ibid* at 547, 565.

[74] *Ibid* at 556; Similarly, Diduck and O'Donovan identify the problem with formal equality discourses and the required substantive justice approach that accounts for women disadvantage in family relations in Diduck & O'Donovan, *supra* note 63 at 11–13.

[75] Boyd & Young, *supra* note 73 at 547, 556, 557, 565, 566.

opposing views of the Canadian Supreme Court in *Moge*[76] and *Hartshorne*.[77] While the first decision took one-step forward by recognizing women's systemic inequality,[78] the other decision found a domestic contract waiving property rights to be enforceable based on a debatable notion of "fairness".[79]

This conception of "fairness", under the premise of formal equality, accepts that individuals must fulfil expectations emanating from their contractual relationships while omitting crucial considerations over wealth disparity and unequal power during negotiation. Certainly, this "formal equality" approach recognizes women's equal participation in rights and obligations at a relationship's breakdown but poses difficulties for women themselves. Those difficulties are due to the fact that contracts are a male construct that positions women as subjects of oppression,[80] especially in the context of family, where women are more likely to be economically dependent.[81] Regretfully, neoliberal notions of gender equality that seem correct and politically convincing hide defects that result in disadvantages for

[76] *Moge v Moge*, 1992 3 S.C.R. 813 at 8, 24, 25, 32-49, [1992] S.C.J. No. 107 [*Moge*].

[77] *Hartshorne v Hartshorne,* 2004 SCC 22 [*Hartshorne*].

[78] *Moge*, *supra* note 76 at 8, 24, 25, 32-49.

[79] *Hartshorne*, *supra* note 77 at 576; Boyd & Young, *supra* note 73 at 556–566.

[80] Thompson, *supra* note 1 at 149.

[81] Boyd & Young, *supra* note 73 at 547.

women.[82] Colombian family law, through Decree 2820 of 1974,[83] adopted this neoliberal formal equality by reaffirming men and women's equal positions in marriage[84] and family.[85]

The Colombian Constitution embodies another perspective that accounts for substantive equality of men and women which is imperative for courts in the context of family law.[86] One illustrating case took place when a woman suffering domestic violence claimed a due process violation through a constitutional action after the court declined to order spousal support on divorce.[87] The civil section

[82] Diduck & O'Donovan, *supra* note 63 at 11–13.

[83] Arts 1-71, Decree 2820 of 1974 (Colombia).

[84] Formal equality is also applicable in the case of de facto spouses under Law 54 of 1990 (Colombia).

[85] Yadira Alarcón Palacio, *La Sociedad Conyugal en Colombia* (Bogota: Grupo Editorial Ibañez, 2013) at 87–89.

[86] Constitutional Court, Bogota, August 22, *TNARS v Juzgado XX de FCB* (2018), Sentencia T-338 of 2018 (Colombia) [*Sentencia T-338-2018*]; see also the analysis of restrictive interpretation of family courts rejected in the constitutional context in Helena Alviar García, "Violencia Económica Contra la Mujer y Deber de Alimentos en Colombia: Visiones Teóricas en Conflicto" (2018) 9:1 Comparative L Rev 4 at 22–25.

[87] More recently, the court studied a case of domestic violence against women where the statute of limitations for invoking support after divorce elapsed. Invoking the gendered perspective required under constitutional and international law, the court granted access to support overriding legal formalisms: see further in Supreme Court of Justice Labor Section, Bogota, 14 August, *Sonia Amparo Lozano Arístizabal v The Civil Section of the Supreme Court of Justice* (2019), STL-11149-2019 (Colombia) [*STL11149-2019*]

of the Colombian Supreme Court received this claim against an inferior court's decision. In its decision, the court identified how this woman and other women are the object of systemic violence inside their home and developed an unprecedented path to enable spouses to seek compensation for the damages suffered during their marriage through the general rules of civil liability.[88] This case's relevance to feminist critique lays in its commitment to see women's systemic vulnerability to domestic violence as part of the context of couples' ongoing relationships and offering compensation[89] that is otherwise not expressly provided for in law.

In the context of marital agreements, this perspective is far from materializing in Colombian law. Marital agreements remain as a matter of pure contract law. Therefore, family judges must enforce contractually valid agreements.[90] This means that neither the intimate context nor the gendered power imbalances take part in the judge's analysis.[91] Conclusively, the need to include feminist contract theory

[88] Supreme Court of Justice Civil and Agrarian Section, Bogota, 25 July, *Stella Conto Díaz Del Castillo v Sala de Familia del Tribunal Superior del Distrito Judicial de Bogotá* (2017), STC10829-2017 (Colombia).

[89] Natalia Rueda Vallejo, "La Violencia Intrafamiliar como Fuente de Daño Resarcible en Colombia" (2018) 48:128 Revista de la Facultad de Derecho y Ciencias Políticas 193 at 200–202, 211–214.

[90] Supreme Court of Justice Civil and Agrarian Section, Bogota, 29 July, *Marlén Moreno González v Víctor Hugo Torres Zambrano* (2011), Decision number: 25286-3184-001-2007-00152-01 (Colombia) [*SC-2007-00152*]; Suarez Franco, *supra* note 3 at 302–307.

[91] Art 16, 1602, 1771-1780, Civil Code (Colombia); Supreme Court of Justice Civil and Agrarian Section, Bogota, 6 November, *M.L.C.H. frente a la Sala de Familia del Tribunal Superior del Distrito Judicial*

becomes crucial to this analysis and Thompson's feminist relational contract theory offers a more appropriate analysis of the effects of attenuating immutability in Colombia. The following subsection makes a brief conclusion about the adequacy of feminist relational contract theory to this work.

6.1.4. Feminist relational contract theory

The point of view of the feminist contract theory completes the relational contract theory since it adequately addresses the intimate context of couples' relationships instead of treating marital agreements like commercial contracts.[92] On the one hand, relational contract theory properly engages with long-term relationships having unpredictable changes over their duration, in which conjugal[93] unions are the perfect example. On the other hand, couples' relationships are especially affected by gender.[94] Including this concept in the discussion evidences gendered power imbalances' effects on marital agreements.

de Bogotá y el Juzgado Primero de Familia de la misma ciudad (2014), Decision number: STC15153-2014 (Colombia); Luz Amparo Serrano Quintero, "El Negocio Jurídico y sus Efectos respecto de la Unión Matrimonial" (2008) 2 Revista Via Inveniendi et Iudicandi 2 at 11-15.

[92] Thompson, *supra* note 1 at 151–154.

[93] *Ibid* at 154.

[94] *Ibid* at 151.

Interestingly, as Thompson fruitfully suggests,[95] feminist perspectives on classical law help identify defective classical contract remedies that are adequate for discrete transactions but fail to work for relational contracts. Once those defects appear, feminist critiques will follow.[96] Conversely, feminist relational contract theory allows us to include gender power imbalances as part of the context in long-term contracts, purposely serving to balance the protection of autonomy[97] and to promote gender equality.[98] Feminist relational contract theory satisfactorily leads to this thesis' main objective, which is to critically assess the effects of attenuating the immutability of marital agreements in Colombia.

6.2. History and background of family law.

This subsection provides a historical background of family law to locate the struggle between public and private ordering affecting the financial outcome of conjugal relationships. To do so, this subsection contextualizes the influence exercised by culture and religion over family law and describes marital agreements' use including their interaction with default regimes. This historical description is essential for this thesis so as to adequately explore the grounds for imposing imperative rules to guarantee the state's interests or to privilege private autonomy in conjugal relationships. This approach

[95] *Ibid* at 155.

[96] Thompson, *supra* note 1 at 155.

[97] The traditional concept of autonomy is now unsettled and object of feminist critique as held by Diduck & O'Donovan, *supra* note 63 at 3.

[98] Thompson, *supra* note 1 at 148.

helps our understanding of the benefits of analyzing other regimes' experience through history to critically assess the effects of altering the regulation of Colombian marital agreements.

6.2.1. Family law, culture, religion and society.

Family law is intrinsically related to the culture and religion of a society as the family is inherent to all human communities.[99] This relation between culture and religion can be traced to several influences that permeated the development of western family law over time. Important sources of influence have included Roman law,[100] Christianity,[101] neoliberalism[102] and feminism,[103] all of which have added features to the contemporary conception of the family. Roman law associated family with religion and defined it as a group of people adoring the same god and common ancestors.[104] The family in Rome consisted of a patriarchal institution where the oldest male ascendant exercised dominant power over

[99] Merel Jonker, Mariette van den Hovern & Wendy Schrama, "Religion and Culture in Family Law" (2016) 12:2 Utretch L Rev 1 at 2.

[100] See e.g. the paterfamilias as the chief of the family in Quebec law in Leckey, *supra* note 5 at 41; Aramburo Restrepo, *supra* note 50 at 325, 326.

[101] Suarez Franco, *supra* note 3 at 7–9, 52–54.

[102] Thompson, *supra* note 1 at 132–139.

[103] Aramburo Restrepo, *supra* note 51 at 42, 43.

[104] Suarez Franco, *supra* note 3 at 7.

his wife and children.[105] This power included both personal and economic rights explaining the fact that the wife's estate and intestate succession were transferred to the family of the husband through marriage.[106]

Christianity, on the other hand, regarded family as a rigid institution where marriage was sacred and indissoluble,[107] the role of the husband remained dominant but with a more human view that obliged him to care for his wife and children.[108] This characterization of marriage as an eternal commitment influenced western civil codes even after liberalism began to view marriage as a secular institution.[109] The culture and religion predominant in western legal traditions rejected the idea that unmarried cohabitation could produce legal effects.[110] Thus, only the legitimate family, one derived from marriage, enjoyed legal recognition and the rights and obligations arising from it.[111] The Roman patriarchy, the

[105] Suzanne Dixon, *The Roman Family Law* (Baltimore: Johns Hopkins University Press, 1992) at 2–5; Suarez Franco, *supra* note 3 at 7; Aramburo Restrepo, *supra* note 51 at 325, 326.

[106] Dixon, *supra* note 107 at 3.

[107] Aramburo Restrepo, *supra* note 51 at 95, 96; Suarez Franco, *supra* note 3 at 55, 85.

[108] Suarez Franco, *supra* note 3 at 9.

[109] Aramburo Restrepo, *supra* note 51 at 206, 207.

[110] See a review of Rebecca Probert's work in her book Legal Regulation of Cohabitation where she describes the history of the regulation of de facto spouses in Craig Lind, "The truth of unmarried cohabitation and the significance of history" (2014) 77:4 Mod L Rev 641 at 646–651; Aramburo Restrepo, *supra* note 50 at 257–264.

[111] Leckey, *supra* note 6 at 32.

transfer of women's rights to the husband, and the sacred and eternal marriage influenced the development of family law.

Modernity introduced the secular marriage, but it took too long to change the preconceived role of women inside the family.[112] The first and second feminist waves mentioned in the previous subsection were crucial to offer women an equal position in society and marriage. This formal equality eliminated the husband's role as the sole administrator of family property and gave women an equal role in the determination of the family's economy.[113] Under this modern conception, influenced by feminism, married spouses were equally entitled to benefit from marriage and, contrary to previous conceptions seeking to protect an incapacitated woman, modern law viewed family as a joint enterprise between spouses.[114]

A few decades later, the law identified that besides marriage, people also lived a certain conjugality in de facto relationships in a way almost identical to married spouses, thus making their legal recognition a necessity.[115] Some states adopted models of cohabitation that created rights to de facto spouses after some years of stable cohabitation, while others, still today, reject giving economic rights over property

[112] See e.g. the role of husband and wife in Canadian family law in *ibid* at 31, 32.

[113] Aramburo Restrepo, *supra* note 51 at 42, 43; Diduck & O'Donovan, *supra* note 63 at 1, 2, 9, 11, 12.

[114] See e.g. how the exclusion of certain property from shared regimes shows that family is a joint partnership where men and women are equal contributors in Laura Cardenas, "Married Couple, Single Recipient: Understanding the Exclusion of Gifts and Inheritances from Default Matrimonial Regimes" (2018) 31:2 Can J Fam L 1 at 25, 39, 40, 42, 47, 53.

[115] Aramburo Restrepo, *supra* note 51 at 257–271.

and spousal support, based on an arguable definition of autonomy.[116] Furthermore, the married and unmarried cohabitation that remained a privilege of opposite-sex couples historically in the western tradition are now available to same-sex couples who were long excluded from the framework of family law and were subject to criminal laws penalizing their relationships.[117]

This brief description shows the strong influence played by culture, religion and society in the definition of family law. This impact was exerted on both the personal and the economic spheres. In the personal sphere, it privileged an indissoluble opposite-sex monogamous marriage over other forms of conjugality and, in the economic sphere, it regulated an imperative regime from which spouses were prevented to opt-out. These spheres differ depending on the legal tradition, whether civil law or common law.[118] Civil law, on the one hand, established legally binding regimes of universal, restricted communities or partnerships of movables and gains over the spousal property.[119] Common law, on

[116] L-A Buckley, "Relational Theory and Choice Rhetoric in the Supreme Court of Canada." (2015) 29:2 Can J Fam L 251 at 271–277.

[117] Leckey, *supra* note 6 at 52, 53.

[118] For Pintens, the gap between both traditions is shorter now that several common law jurisdictions enacted regulations governing the division of conjugal property: see Walter Pintens, "Family law in Europe: Developments and Perspectives" (2008) 41:1 Comp & Intl LJS Afr 155 at 160; Pintens, *supra* note 17 at 69.

[119] Aramburo Restrepo, *supra* note 51 at 329–332.

the other hand, regarded spouses as two separate individuals and gave the court the discretion of deciding the financial outcome of a relationship's breakdown.[120]

6.2.2. Marital agreements and family law.

Depending on each tradition, the scope given to marital agreements varied along with history.[121] For the civil law tradition, the so-called marriage contract consisted of an immutable family pact agreed upon between the families of both spouses to ensure the protection of the wife and children and to provide the husband with enough financial resources to care adequately for the well-being of the family.[122] The marriage contract often referred to the donations in consideration of marriage made by

[120] Joanna Miles, "Marital Agreements and Private Autonomy in England and Wales" in Jens M Scherpe, ed, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart Publishing, 2012) 90 at 90.

[121] See e.g. the changes over the marriage contract before 1970 to the present day in Alain Roy, *Le Contrat de Marriage Réinventé Perspectives Socio-juridiques pour une Réforme* (Montreal: Éditions Thémis, 2002) at 95–106; See also the evolution of marital agreements in Australian law Owen Jessep, "Marital Agreements and Private Autonomy in Australia" in Jens M Scherpe, ed, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart Publishing, 2012) 17 at 22–41.

[122] Roy, *supra* note 123 at 98, 99.

third parties or from the husband to the wife, the dowry, and, in exceptional cases, to exclude some property from the community or partnership regime which was mostly imperative in nature.[123]

On the other hand, common law initially prohibited marital agreements as contrary to public policy.[124] They later remained a matter of general contract law when spouses were in a regime of separation as to property and could contract as any other person would.[125] When a relationship broke down, courts would have the discretionary power to determine the financial consequences of the union.[126] Therefore, spouses looking for financial certainty concluded marital agreements to avoid the wide and risky discretion of the court. This need for certainty increased when some common law jurisdictions incorporated default regimes with equal or equitable distribution of property. The purpose of marital agreements became to both ensure certainty and to exclude the default regimes' effects on property.

Both traditions, civil and common law, adapted the rules governing marital agreements to the contemporary contractual economy.[127] Conjugal relationships were no longer stable and eternal as imagined by some Roman and Christian influences, but were rather unstable and changing.[128] Therefore, the nature of marital agreements became more selfish and individualistic. Spouses aimed

123 *Ibid.*

124 Mary Jane Mossman et al, *Families and the Law*, 2d ed (Concord: Captus Press, 2015) at 400.

125 Miles, *supra* note 122 at 90.

126 *Ibid*; See also the case of Australia pointing the influence of common law tradition in Jessep, *supra* note 123 at 19.

127 Buckley, *supra* note 118 at 287.

128 Céline Le Bourdais & Évelyne Lapierre-Adamcyk, "Changement Familiaux au Québec du milieu des années 1970 au milieu des années 2010" (2017) 119:3 Le R du N 471.

at protecting their private wealth, their affairs and to keep the financial consequences of a relationship breakdown as minimal as possible. Some, on the other hand, entered these agreements to protect the family's patrimony by trying to adapt their conjugal life to their private life.

Amid these varied purposes of marital agreements, the struggle between public ordering and private ordering becomes highly relevant. Whether or not spouses can privately define the financial outcome of a relationship gives rise to many of the concerns already identified by feminist relational contract theory. This contextualized view of family law's background and the historical use of marital agreements allowed us to identify the influence of culture, religion and society on conjugal regimes regarding property and the function of marital agreements. The following subsection develops the relationship between state regulation and private contracting further.

6.3. Public and Private Ordering.

This subsection deals with the concepts of public and private ordering in family law. It begins with a conceptual approach of each concept, and then it explores the varied approaches of the civil and common law traditions and identifies the grounds pushing states to opt for more or less autonomy over conjugal property. Once these grounds are identified, they show how the intimate context and gendered power imbalances play a key role in defining the freedom to conclude or modify marital agreements.

6.3.1. Public Ordering.

The concept of public order or public policy refers to some restrictions or aims protected by law. Defining it, however, is a difficult task.[129] Some scholars like Malaurie define it as the "well-functioning of the indispensable institutions for the collectivity";[130] on this view, public order protects certain institutions from the private acts of individuals and limits their mis-use. [131] Similarly, Hackett defines "public order as a social condition or status which the superior has to maintain to protect the community."[132] Admittedly, public order is a socially defined[133] institution which protects the essential interests of society through legal rules.[134]

These legal rules preserve the state's functioning by "limiting the private autonomy of individuals and ensuring the respect of a fundamental social exigency".[135] Considering our discussion, this social exigency is the role of the family in society.[136] Accepting that the family is a broad concept, this subsection addresses the scope of public order limitations on spouses' autonomy to define the effects

[129] Christine Morin, "Contractualisation de l'Union de Fait et Institutionnalisation du Mariage: Choix Pour les Familles Québécoises Swennen, Frederik" in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Cham: Springer, 2015) 113 at 118.

[130] Philippe Malaurie, *L'Ordre Public et Le Contrat* (Paris: Éditions Matot-Braine, Reims, 1953) at 69.

[131] *Ibid* at 70.

[132] John Henry Hackett, *Concept of Public Order* (Washington: Catholic University Press, 1959) at 21.

[133] It depends on time, place and social environment as held by *ibid* at 46.

[134] Fernando Hinestrosa, *Tratado de Obligaciones* (Bogota: Universidad Externado de Colombia, 2002) at 277–279.

[135] Malaurie, *supra* note 132 at 4–7, 9.

[136] Suarez Franco, *supra* note 3 at 14.

of their conjugal relationships on their property. Given that the scope of public order rules vary depending on the jurisdiction and the legal tradition, the following two subsections canvass the civil and common law traditions separately.

6.3.1.1. Public order in the civil law tradition.

This subsection considers the civil law tradition's public order rules regarding marital agreements over conjugal property and the grounds for justifying imperative rules.

The concept of public order in the civil law tradition emanates from the laws which expressly define their imperative nature.[137] The task of judges is to interpret these norms and to distinguish the matters the state regulates from those left to individuals to define autonomously.[138] Family law includes both imperative rules protecting public order and other rules which apply in the absence of private acts.[139]

[137] Malaurie, *supra* note 132 at 14.

[138] *Ibid* at 20–23.

[139] Some authors have departed from this concept of public order as derived from imperative rules. Instead, they consider that the current notion of public order derives from constitutional rights and the protection granted in such norms to the family. See further in Yadira Elena Alarcón Palacio, "Capitulaciones y Rupturas de Pareja en Colombia: Una Revisión de la Autonomía Privada y sus Límites frente al Desarrollo en España, Estados Unidos e Inglaterra." (2019) 39:1 Revista Jurídica Universidad Autónoma Madrid 45 at 49.

The regulations in civil law jurisdictions govern couples' relationships through rules which are both personal and economic in nature.[140] The first type of rule defines which relationships merit the state's recognition and the legal duties arising from said relationships. These rules are restrictive and protected by public order. The second type of rule regulates the effects on property or patrimonial effects. These rules are more permissive; only in exceptional circumstances are the rules governing property-sharing prohibitive or imperative in nature.

Regarding which couples' relationships enjoy the state's recognition, family law has historically only recognized opposite-sex marriage. Other conjugal relations have been left unrecognized since they have been perceived to be contrary to public order.[141] Motivated by a sense of unfairness and a need for social change, some jurisdictions have recognized the relationships of opposite-sex unmarried cohabitants. Likewise, some other jurisdictions, although fewer, extended married and unmarried

[140] See the distinction between personal and economic regimes in Quebec and Colombia in Michel Tétrault, *Droit de la Famille*, 2e ed (Cowansville: Les Éditions Yvon Blais Inc., 2003) at 65–113; Fernando Hinestrosa, "Panorama del Derecho en Colombia" (1966) 8 Inter-American L Rev 183 at 184–192.

[141] Although Roman law recognized some forms of unmarried cohabitation, the strong influence of catholic church over civil law regimes made marriage to prevail, see the historical background made in analyzing Peruvian recognition of de facto relationships in Elizabeth del Pilar & Amado Ramírez, "La Unión de Hecho y el Reconomiento de Derechos Sucesorios según el Derecho Civil Peruano" (2013) 25:1 Vox Juris 121 at 123–126.

cohabitation effects to same-sex couples.[142] Private acts cannot alter these rules which protect the public order of the family.

Similarly, the personal duties arising from these recognized couples are also imperative. These duties can be personal or economic like cohabitation, mutual aid and reciprocal support. The duty of reciprocal support merits special attention given its economic nature. This duty persists during the relationship and enables spouses to claim spousal support after marital breakdown.[143]

Maintaining support depends on a variety of factors. Some jurisdictions recognize a right to support which reflects the economic imbalance created by conjugal relations and which survives regardless of the reasons behind the marriage's breakdown.[144] Other jurisdictions maintain fault-based divorce and limit the right to support to cases where one spouse is responsible for the marriage's breakdown. [145]

[142] Claire Felter and Danielle Renwick, "Same-Sex Marriage: Global Comparisons" (last updated June 27, 2019), online: *Council on Foreign Relations* <https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons> [*Felter-Renwick*].

[143] Katharine B Silbaugh, "Marriage Contracts and the Family Economy" (1998) 93:1 Nw UL Rev 65 at 77.

[144] Brian Bix, *The Oxford introductions to U.S. law Family law* (Oxford: Oxford University Press, 2013) at 172–177.

[145] *Ibid* at 172; In Colombia fault-based divorce can only be asked by the inocent spouse and only guilty spouses are condemned to pay support (alimentos) Aramburo Restrepo, *supra* note 51 at 209.

These different aims pursued by the right to spousal support after marital breakdown may coexist or not, depending on whether the state conceives of divorce as a sanction or as a remedy.[146]

Regarding the rules of property-sharing, the law also regulates the effects on the property of conjugal relationships.[147] These rules regulate different economic regimes such as universal or restricted communities, the partnerships of movables or acquests and other regimes that are derived from communities, partnerships and the regime of separation as to property.[148] In some cases, the property regime is inherent to the conjugal relationship, whether marriage or cohabitation, forbidding its exclusion as a matter of public order.[149]

Importantly, these property regimes, even if inherent to the conjugal relationship, empowered spouses to exclude certain assets and to govern gifts through marital agreements.[150] More liberally, some civil codes let spouses choose the regime they wanted for their union and later, out of deep respect for personal autonomy, some states have permitted them to fix their regime by agreement or to exclude

[146] Aramburo Restrepo, *supra* note 51 at 202–206.

[147] Catherine Brown & Kyle T Gardiner, "The Rights of Unmarried Cohabitants in Canada" (2018) 24:1 Trust & Trustees 86 at 92–93; Hernan Corral Talciani, "Concepto y Reconocimiento Legal de la Familia de Hecho" (1990) 17:1 Revista Chilena de Derecho 35 at 72–74.

[148] Aramburo Restrepo, *supra* note 51 at 327–330; Blanco Rodríguez, *supra* note 51 at 243.

[149] Suarez Franco, *supra* note 3 at 299; Alarcón Palacio, *supra* note 86 at 90–92.

[150] See an example in the legal regime of marital agreements in Spanish law, see in Alarcón Palacio, *supra* note 141 at 52–59.

any sharing by establishing the full separation regarding property. In these contexts, property-sharing regimes became default rules governing conjugal property only in the absence of private agreements.[151]

The scope of public order in the civil law tradition determines which relationships produce legal effects on property and which of those legal effects cannot be subject to private ordering. The concept of public order speaks to the limitations imposed on private acts which aim to protect an essential interest regarding conjugal property and to set the procedural and substantive rules to ensure this purpose. Depending on the state, the rules of public order can oblige marital agreements to be written, notarized in a public deed or a private document, to remain immutable once the relationship begins,[152] or to be subject to future amendments.

Considerations of public order have something to say about whether marital agreements should be mutable or immutable. Roy, Suarez Franco and Alarcón argue that immutability ensures legislative coherence, the preservation of long-lasting stable relationships, the protection of the vulnerable

[151] Alarcón Palacio, *supra* note 86 at 137.

[152] Prior to 1965 in France and 1978 in Belgium post-nuptials were forbiden see further in Pintens, *supra* note 14 at 78; Until 1970, marriage contracts were immutable in Quebec civil law as described by Roy, *supra* note 121 at 100; the marriage contract was immutable until 1970 and became mutable but subject to judicial control un 1981, see Brigitte Lefebvre, *Les Régimes Matrimoniaux: Contrat de mariage, séperation de biens, société d'acquêts* (Cowansville: Éditions Yvon Blais, 2011) at 24; Colombian law preserves the doctrine of immutability modified by letting spouses to enter civil contracts, see further in Suarez Franco, *supra* note 3 at 307, 308.

spouse, and the protection of children and the interest of third parties.[153] These considerations seem compatible with feminist concerns, described earlier in this thesis, while leaving out the relational context.[154] Problematically, the immutability makes impossible to adapt an agreement to the changes happening along with the relationship when they become necessary. For instance, marital agreements may need amendments during the conjugal relationship to ensure the economic well-being of the spouse, which is often the woman, who sacrifices the economic productivity for undertaking domestic work. Otherwise, a mutability which privileges spouses' freedom, autonomy and adaptability to changing circumstances corresponds better to relational theory but exposes vulnerable spouses to coercive agreements[155] and third parties to uncertainty.[156]

The choice between mutability and immutability thus draws on important public order considerations. This thesis considers Quebec's experience with mutability to assess the effects of attenuating the immutability of marital agreements in Colombia. Although both jurisdictions regulate marital

[153] Suarez Franco, *supra* note 3 at 307; Roy, *supra* note 123 at 98; Alarcón Palacio, *supra* note 86 at 140–142.

[154] Leckey, *supra* note 6 at 33.

[155] Leida Gonzalez Degro, "Immutabilidad de las Capitulaciones Matrimoniales en el Codigo Civil de Puerto Rico: Anacronismo Injustificado" (1997) 36 Revista de Derecho Puertorriqueño 267 at 267.

[156] Analyzing Colombian and Spanish law Alarcon exposes the issue of uncertainty and highlights Spanish law address it with a requirement of publicity to marital agreements in a public registry in Alarcón Palacio, *supra* note 86 at 140–142.

agreements[157] and default regimes,[158] Quebec law departed from the immutability of marital agreements and created the public order family patrimony. Colombian law maintains marital agreements' immutability but permits contracts of sale and gifts between spouses[159] as well as the mutually-agreed dissolution of the default regime.[160] These regulations are developed further in section 4.

6.3.1.2. The doctrine of public policy in the common law tradition and the regulations of couples' relationships.

This subsection develops the notion of public policy as it has developed in the common law, the rules limiting autonomy over conjugal property and the grounds that justify the limitation of spouses' autonomy. This subsection also locates the jurisdiction of Ontario within the wider common law tradition.

The notion of public policy in the common law differs from the civil law's concept of public order.[161] Malaurie suggests that the common law's concept of "public policy" refers to limitations on private

[157] Arts 431-442 CCQ; Arts 1771-1774, Civil Code (Colombia).

[158] Arts 448-484 CCQ; Arts 1774-1848, Civil Code (Colombia).

[159] Suarez Franco, *supra* note 3 at 308; Juan Enrique Medina Pabón, *Derecho Civil Derecho de Familia*, 3rd ed (Bogota: Universidad del Rosario, 2011) at 186–189.

[160] Suarez Franco, *supra* note 3 at 426, 427; Aramburo Restrepo, *supra* note 51 at 234, 235.

[161] Malaurie, *supra* note 132 at 10, 20-21.

acts which fill legal gaps in the law. [162] This means that the common law tradition does not use the expression "rules of public order" as the civil law tradition does.[163] Instead, this doctrine "intends to hold that no subject can lawfully do that which has the tendency to be injurious to the public".[164]

Courts rely on the concept of public policy to avoid enforcing contracts which threaten the public good.[165] This public good is drawn from precedents, statutes and considerations regarding public interests.[166] In brief, common law jurisdictions limit autonomy through statutes expressly prohibiting certain private acts or through binding precedents in specific cases.[167] These limitations can be easily related to the civil law concept of "public order". Meanwhile, the common law concept of public

[162] *Ibid* at 10.

[163] *Ibid* at 10, 23.

[164] Elisha Greenhood, *Doctrine of Public Policy in the Law of Contracts* (Chicago: Callaghan & Co., 1866).

[165] Frederick Pollock, *Principles of Contracts: a Treatise on the General Principles Concerning the Validity of Agreements in the Law of England*, 10th ed (London: Stevens and Sons, 1936) at 350; Percy H Winfield, "Public Policy in the English Common Law" (1928) 42:1 Harv L Rev 76 at 92.

[166] "A Law and Economics Look at Contracts agaisnt Public Policy" (2006) 119:5 Harv L Rev 1445 at 1459, 1460.

[167] Malaurie, *supra* note 132 at 78–80.

policy refers specifically to a judicial construct used to void contracts[168] that affect the public good.[169] Therefore, the common law concept of public policy is not, as in the civil law tradition, a well-theorized framework tailored to protect familial relations[170] within family law but rather a limited ground allowing courts to declare contracts illegal.[171]

The next paragraphs canvass the rules limiting the autonomy of spouses. Family law in common law jurisdictions sets out rules which determine which relationships are recognized and attaches legal effects to them.[172] Recognition began with opposite-sex marriages and now extends to unmarried cohabitants[173] and, in a number of jurisdictions now, to same-sex couples as well.[174] These rules

[168] See e.g. how marital agreements were void as against public policy in England, Australia and Canadian common law jurisdictions in Miles, *supra* note 119 at 97–99; Jessep, *supra* note 120 at 22; Derek Mendes da Costa, "Domestic Contracts in Ontario" (1978) 1:2 Can J Fam L 232 at 234.

[169] Pollock, *supra* note 161 at 350; Stephanie Ben-Ishai & David R Percy, *Contracts : Cases and Commentaries* (Toronto: Thomson Reuters Canada, 2018) at 749, 750.

[170] Leckey, "Shifting Scrutiny", *supra* note 4 at 93.

[171] See the cases in United States and Canadian courts in *In re Baby M*, 109 N.J. 396 434-444 (NJ Sup Ct 1988); *Shafron c. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras 15-17; Ben-Ishai & Percy, *supra* note 171 at 749–767; Leckey, *supra* note 5 at 97.

[172] See e.g. the family statutes in the United States and Australia governing family relations in Brian Bix, "The Public and Private Ordering of Marriage" (2015) 2004:1 U Chicago Legal F 9 at 297; Jessep, *supra* note 119 at 18.

[173] Brown & Gardiner, *supra* note 149 at 88–92.

[174] Felter-Renwick, *supra* note 140.

relating to recognition prevent spouses from modifying the type of relationship they find themselves in or from modifying the personal obligations arising therefrom through private agreements.[175]

Regarding economic effects, the common law shares the civil law's focus on rules relating to both maintenance and property. An obligation of support flows from the spouses' reciprocal obligation to support one another and to adequately remedy economic disparities when a relationship breaks down.[176] Some regimes have maintained fault-based divorce, which entitles support or property only to the innocent spouse at the moment of dissolution.[177] To guarantee support in the interest of the public, Canadian common law provinces and some American states empower courts to order support allocations even if they had been previously waived under private agreements.[178]

Concerning the division of property, after "the doctrine of unity" ended, common law jurisdictions regarded spouses as two separate individuals. The rules governing their property then answered to general property law.[179] Given the unfair outcomes that arose at dissolution because of economic

[175] Silbaugh, *supra* note 145 at 79.

[176] Ann C Wilton & Noel Semple, *Spousal Support in Canada*, 3rd ed (Toronto: Carswell, 2015) at 1–3; Adrienne Hunter Jules & Fernanda G Nicola, "The Contractualization of Family Law in the United States" in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Antwerp: Springer International Publishing Switzerland, 2015) 333 at 351, 352.

[177] Hunter Jules & Nicola, *supra* note 180 at 352, 353.

[178] The Family Law Act, s 33(4); The Divorce Act, RSC 1985 c3 (2nd Supp), s 15.2 [*The Divorce Act*]; *Ibid* at 352.

[179] Miles, *supra* note 122 at 90.

disparities between the spouses, several states adopted laws regulating the distribution of property.[180] These rules provide for equitable or equal distribution of property at dissolution[181] which spouses can modify through marital agreements.[182]

The law relating to marital agreements affords parties considerable leeway in terms of what they can agree to,[183] but courts hold the power to set them aside if some requirements are not met.[184] These requirements can include that the agreement be in writing, that each party receive independent legal assistance, that each party fully disclose their assets, that each party understand fully the effects of their agreement, and that the agreement is not unconscionable at the time of its execution or enforcement.[185] These requirements may require further scrutiny if the marital agreement is concluded before or after the conjugal relationship begins. However, this consideration depends on the jurisdiction. English law showed further skepticism to premarital agreements, while some American states reject postnuptial agreements.[186] As Atwood suggests, this skepticism is responsive to the risks

[180] Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 3rd ed (Toronto: Irwin Law, 2015) at 9.

[181] Hunter Jules & Nicola, *supra* note 173 at 350, 351; Leckey, "Shifting Scrutiny", *supra* note 4 at 102.

[182] Barbara Stark, Jacqueline Heaton & Bill Atkin, "Distribution of Property on Divorce" in Barbara Stark & Jacqueline Heaton, eds, *Routledge Handbook of International Family Law* (London: Routledge, 2019) 93 at 100–104.

[183] Leckey, *supra* note 5 at 97.

[184] Leckey, *supra* note 4 at 93, 94.

[185] Silbaugh, *supra* note 141 at 74–76; Leckey, *supra* note 4 at 108.

[186] Ann Atwood, *supra* note 14 at 35–37; Thompson, *supra* note 1 at 100; Sean Hannon Williams, "Postnuptial Agreements" (2007) 2007:4 Wis L Rev 827 at 838–840.

posed to marital stability and coercion.[187] Morality also imposes limits on marital agreements. Hunter and Nicola identify that the limits to marital agreements in the United States are grounded in moral considerations of unfairness and unconscionability[188] rather than legislative coherence.

In Ontario, as Leckey affirms, the law adopts a remedial approach to the relationship's effects over property. Canadian common law provinces, including Ontario, lacked discussions about when spouses could conclude marital agreements - whether before or during the relationship. The regime in Ontario focused on giving discretion to courts to ensure that each spouse gave their free and informed consent before courts can enforce these contracts. This power to set contracts aside was Ontario's way of dealing with issues arising from marital agreements.

Ontario law can illustrate certain mechanisms to protect vulnerable spouses. These mechanisms facilitate a critical assessment of proposals to afford spouses a wider freedom to deal privately with their affairs. The common law's approach, although conferring more autonomy to spouses in general,[189] is still preoccupied with the intimate context of conjugal relationships and provides tools to avoid exacerbating the vulnerability of parties in marriage and cohabitation.[190] These considerations are relevant to this study.

[187] Ann Atwood, *supra* note 14 at 24–28.

[188] Hunter Jules & Nicola, *supra* note 180 at 351.

[189] Leckey, *supra* note 5 at 110.

[190] *Ibid* at 108-110.

6.3.2. Private Ordering.

Considering the limitations imposed on the spouses' autonomy described above, this subsection deals with private ordering. First, it explores the concept of contractual autonomy and private ordering in conjugal relationships. Then, it identifies the clash between imperative state regulations and private autonomy in the family. Finally, it locates private ordering in the legal systems analyzed in this thesis. This section bolsters the criticisms developed later in this thesis by identifying the consequences of attenuating the immutability of marital agreements and by charting the relationship between private and public ordering in family law.

Private ordering prefers to allow contractual autonomy to regulate the legal effects of human relationships, and often assumes a neoliberal, independent and rational being making free and self-interested choices.[191] But what is contractual autonomy? Hinestrosa suggests it is "the power recognized to individuals to define their relations themselves, giving them a sphere of interests and a power of initiative to rule over them".[192] This autonomy reflects the value of free choice and eschews any form of state intervention other than the simple enforcement of the parties' wills.[193] In the context

[191] Campbell, *supra* note 21 at 13.

[192] Fernando Hinestrosa, "Funciones, Límites y Cargas de la Autonomía Privada" (2014) 26:1 Revista de Derecho Privado 5 at 7.

[193] See the discussion over the struggle between private agreements and the state's sovereignty in Montoya Mateus, *supra* note 47 at 84; Bix, *supra* note 172 at 304.

of family law, this notion of private autonomy suggests that individuals should be free to define their relationships and their legal effects[194] – matters traditionally legislated by the state.

As Atwood argues, the essential interests protected under public order clash with this autonomy, which would make conjugal relations more flexible than in the past.[195] Roy suggests, in this vein, that the life commitment of marriage has receded in favour of self-interest and happiness.[196] These new considerations help explain family law's journey from only recognizing indissoluble opposite-sex marriages to contemporary rules regarding no-fault divorce, the recognition of unmarried cohabitation and of same-sex couples' rights.

Regarding the rules over property, private ordering suggests that "future spouses can willingly decide the situation of their property before marriage"[197] as well as during their conjugal relation in the event of its breakdown. Privileging private ordering implies that spouses can conclude marital agreements dealing with their property and can avoid the legislated default rules.[198] Unfortunately, an unlimited

[194] Hunter Jules & Nicola, *supra* note 180 at 337–353.

[195] Ann Atwood, *supra* note 14 at 41, 42.

[196] Roy, *supra* note 123 at 145.

[197] *SC-2007-00152 (Colombia), supra* note 89 at 19.

[198] Silence is also an expression of autonomy when letting default regimes govern private relations as held by Alarcón Palacio, *supra* note 85 at 137.

power to privately order the economic effects of conjugal relationships can lead to unfair outcomes.[199] Commercial law also deals with unfairness by limiting certain contracts in order to safeguard the rights of equals, consumers and third parties affected by transactions.[200] Likewise, family law needs to address these concerns before providing spouses with greater powers and more autonomy to order relations which are often both imbalanced and subject to change. The role of context and power disparities between spouses often increases when the law fails to limit the scope of autonomy.

Dealing with the scope of autonomy, civil law jurisdictions regulate marital agreements by requiring spouses to decide, in advance, what the consequences of their relationship over their property will be. These agreements then become immutable after marriage, following the doctrine of immutability. This doctrine has been criticized widely after formal equality altered the roles of men and women in the family and marriage lost its immutable status.[201] From that point on, immutably imposed restrictive and anachronistic limitations to evolving family relationships. As such, private ordering and the value of spousal autonomy has inspired shifts towards mutability during the course of the conjugal

[199] Aguirre affirms that excessive autonomy can produce undesirable effects to the extent of excluding the basic duties of conjugal relations: Carlos Martínez de Aguirre Aldaz, "Family Law in Spain: Contractualisation or Individualisation?" in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Antwerp: Springer, Cham, 2015) 293 at 308.

[200] Montoya Mateus, *supra* note 48 at 80–82.

[201] Suarez Franco, *supra* note 3 at 300, 301.

relationship in several jurisdictions, including Quebec.[202] Other jurisdictions, including Colombia, still preserve a marital agreement's immutability.[203]

For their part, common law jurisdictions have showed skepticism towards contracts between spouses, both during and after the relationship.[204] Some states adopted regulations permitting marital agreements after complying with some procedural and substantive requirements while others lack statutory regulations. For instance, common law jurisdictions in Canada permit spouses to conclude marital agreements concluded at any time out of respect for spouses' contractual autonomy. However, this autonomy cannot be absolute, in either common or civil law jurisdictions. Thus, private and public ordering need to find a peaceful coexistence where both the selfish and collective interests are afforded equal relevance and protection. This thesis critically assesses attenuating immutability in Colombia in part by examining how the Canadian provinces of Ontario and Quebec have been able to achieve that peaceful coexistence.

6.4. Conclusion

Any proposal intending to alter the economic consequences of marital relationships needs to come to terms with the evolution of society and its institutions. This includes men and women who decide to

[202] Michel Legare, "Le Changement De Regime Matrimonial: Aspects Legaux et Aspects Pratiques" (1978) 80:7 R du N 253.

[203] Arts 1771-1780 Civil Code (Colombia).

[204] Miles, *supra* note 122 at 90.

come together in relationship. The historical influences of religion and culture determine the context under which spouses conclude marital agreements – whether anticipatorily, after marriage, or when their cohabitation begins. In lieu of the theory set out in the first part of this section, regulation of marital agreements must account for that context and the changing circumstances inherent to long-term relationships. Therefore, state intervention must have the purpose of limiting negative contextual influences while still facilitating the exercise of private autonomy. With this challenge in mind, we proceed to examine the legal systems chosen for this thesis and the justifications for keeping marital agreements immutable.

7. Family law regimes.

7.1. Introduction.

This section surveys family law governing conjugal property in the Canadian provinces of Quebec and Ontario, as well as in Colombian law. This survey locates the development of private and public ordering, how these regimes handle the intimate context as well as gendered power imbalances, and, finally, the experience of various regimes concerning the mutability of marital agreements. The purpose here is to give a full picture of the regimes that govern contracting in existing conjugal relationships. This understanding will contextualize section 8's exploration of the justifications for immutability, so that section 9 can critically assess the effects of attenuating immutability in Colombia.

Structurally, this section firstly charts the rules governing conjugal relationships under Canadian family law and considers the default regimes and the rules governing marital agreements in Ontario and

Quebec, including the conditions relating to the formation and enforceability of post-marital agreements. Then, the section explores the marriage partnership of movables and gains adopted in Colombia after 1932 and the current relations of both married and unmarried cohabitants under the contemporary legal and constitutional framework. The final part analyzes the relative immutability of the economic regime in Colombia and how it deals with the context of intimacy and gender power imbalances in conjugal relations.

This section surveys the balance struck between the imperative rules governing family law and the extent to which spouses are afforded some liberty to define the financial outcomes of their relationships. Drawing on the theory exposed in section 6, we identify the ways in which each jurisdiction deals with the intimate context of conjugal relationships and power imbalances. This survey also reviews who is entitled to claim proprietary rights through default rules and to what extent spouses hold power over the economic effects of their relationships in Quebec, Ontario and Colombia.

7.2. Canada.

This subsection deals with Canadian family law. Firstly, it introduces Canadian family law explaining the relation between federal and provincial law with the rules concerning marriage, divorce, unmarried cohabitation and spousal support. Subsequently, it describes the default regime regarding family property in Ontario and Quebec, the scope of marital agreements, and the specific rules applicable when these agreements are concluded during a conjugal relationship.

7.2.1. General rules.

Canadian constitutional law identifies certain matters that fall within the authority of the Parliament of Canada to legislate and certain other matters that fall to the provincial assemblies.[205] With regards to family law, both the national and provincial governments hold power over different matters.[206] Sections 91 and 92 of the Constitution Act of 1867 established that the Parliament of Canada regulates marriage and divorce while provincial law has jurisdiction over the solemnization of marriage, conjugal property and other civil rights.[207] The evolution of family law in Canada has been influenced by various social changes leading to the recognition of unmarried cohabitants [208] and same-sex couples' relationships. [209]

[205] The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3 s 91(26) and 92 (12) 92 (13) [*The Constitution Act, 1867*]; Payne & Payne, *supra* note 184 at 16; Brown & Gardiner, *supra* note 149 at 86; Leckey, *supra* note 5 at 94–97.

[206] Carol Rogerson & Rollie Thompson, "The Canadian Experiment with Spousal Support Guidelines" (2011) 45:2 Fam LQ 241 at 243.

[207] Marion Boyd, Ontario & Ministery of the Attorney General, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Delibris, Document Collection, 2004) at 18.

[208] Payne & Payne, *supra* note 184 at 48–50.

[209] *M. v. H.*, [1999] 2 SCR 3, 43 OR (3d) 254.

The recognition of unmarried cohabitation varies throughout Canada.[210] Some provinces confer rights in equal share with regard to property, access to spousal support and other benefits under social, labor and tax law.[211] The province of Quebec excludes cohabitants from family property and from spousal support in the civil code. However, couples are still allowed to contract privately. Meanwhile, provincial law recognizes unmarried relationships through labor, tax and other social legislation.[212] The conjugal nature of cohabitation calls for economic effects which reflect spouses' contributions in order to avoid unfair results.

Same-sex couples long struggled for recognition. Male same-sex relationships were historically criminalized and considered against morality,[213] while female same-sex relationships were obscured by

[210] See e.g. the reasoning to maintain the distinction between married and unmarried couples in *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 8.

[211] Brown & Gardiner, *supra* note 144; Robert Leckey, "Gimme Shelter" (2011) 34:1 Dal LJ 197 at 198, 199.

[212] Morin, *supra* note 127 at 117; Martha Bailey, "Unmarried Cohabitation in Quebec - Liberté ou Égalité" (2014) Intl Survey of Family L 33 at 34, 35; Leckey, *supra* note 207 at 202.

[213] Robert Leckey, "'Repugnant': Homosexuality and Criminal Family Law" (2019) Forthcoming ULTJ, online:
<https://poseidon01.ssrn.com/delivery.php?ID=546004070078004095031110119005126089100051017087011048030016022006113097113118126127032110017005027000016114124113077115024027020034057083043016122031083080086028024066081016123127087071093117001114086026003 0130> at 4–9.

the legal and social context.[214] Despite gay couples' exclusion from the family, society, activism and constitutional law, particularly the equality guarantee under s 15 of the Canadian Charter of Rights and Freedoms,[215] pushed an inclusive agenda. The recognition of same-sex marriage begun with *Barbeau v British Columbia*[216] and was extended to all of Canada in 2005 with the enactment of the Civil Marriage Act, SC 2005, c 33.[217]

Contemporary family law regulates the effects of all these forms of family. This section considers the economic effects of family in Ontario and Quebec. In this vein, Canadian family law provides for two main consequences of conjugal relations: spousal support and the division of property. The subsection below describes spousal support in Canada and then addresses the division of property in Ontario and Quebec.

7.2.2. Spousal support.

[214] Susan Elizabeth Reese, "The Forgotten Sex: Lesbians, Liberation, and the Law" (1975) 11:3 Willamette L Rev 354 at 356–358.

[215] The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 s 15.

[216] *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251; Christy M Glass & Nancy Kubasek, "The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights" (2008) 15:1 Mich J Gender & L at 168.

[217] Brown & Gardiner, *supra* note 149 at 86.

This subsection explores the concept of spousal support in Canada, the purpose and grounds of a federal regulation permitting claims in all provinces. Then, it describes the grounds to order spousal support, the influence of marital agreements and how it helps or not in addressing context and gender imbalance in marital relations. Although this thesis does not deal with spousal support, it is important to have a general context given that marital agreements may deal with it. It is also important to consider because having spousal support encourages more autonomy over property since the more vulnerable party has an alternative to safeguarding their needs once the relationship has broken down.

As stated above, the Parliament of Canada holds the power to legislate over marriage and divorce.[218] Through the Divorce Act, it regulates divorce[219] and corollary relief.[220] This corollary relief includes spousal support, child support, as well as custody and access to children.[221] This subsection deals with spousal support to give a full picture of all the economic effects of conjugal relations in Canada. Importantly, spousal support in the Divorce Act refers to married spouses.[222] However, under provincial law, with the exception of Quebec, unmarried cohabitants are also entitled to request

[218] Constitution Act, 1867, s 91 (26).

[219] The Divorce Act, s 8.

[220] The Divorce Act, s 15.

[221] Wilton & Semple, *supra* note 180 at 9.

[222] The Divorce Act, s 2(1); *Ibid* at 27; "this also applies to same-sex couples, as the definition of spouse was amended by the Civil Marriage Act in 2005" Mossman et al, *supra* note 126 at 639.

spousal support under certain conditions.[223] If spouses make a claim at both federal and provincial levels, federal law takes precedence under the doctrine of paramountcy.[224]

Bearing in mind the place where support is regulated and who is entitled to seek spousal support, the remaining question is: what is it? And what are the grounds to order it? Rogerson accurately points out that spousal support originated as a financial consequence for guilty spouses responsible for breaking their commitment to marriage. Spousal support was a sanction benefitting innocent spouses, often the wives, with periodic payments for life.[225] However, when divorce evolved beyond this sanction-based justification[226] and stopped requiring fault, spousal support remained as a financial consequence of marriage equivalent to child support and marital property division.[227] Thus, contemporary spousal support is a remedy[228] that under Canadian law aims to compensate for the sacrifices of spouses in marriage[229] and to fulfill the needs of spouses after a relationship breakdown.[230]

[223] "Cohabiting couples who meet the statutory definition for eligibility" Rogerson & Thompson, *supra* note 210 at 244.

[224] Mossman et al, *supra* note 126 at 639.

[225] Carol Rogerson, "The Canadian Law of Spousal Support" (2004) 38:1 Fam LQ 69 at 71, 72.

[226] *Ibid* at 72.

[227] Wilton & Semple, *supra* note 180 at 1.

[228] *Ibid*.

[229] *Bracklow v. Bracklow*, [1999] 1 SCR 420 at 18, 169 DLR (4th) 577.

[230] *Moge*, *supra* note 75; Wilton & Semple, *supra* note 180 at 147.

Canadian law departed from the traditional clean break model,[231] and deals with these two purposes which require the court to consider a number of factors and objectives that justify ordering support. Section 15.2(4) of the Divorce Act[232] states that the court must consider the current[233] conditions, means, needs and other circumstances of the parties including the length of cohabitation, the functions of each spouse in the relationship and the orders, arrangements or agreements concluded between spouses before making a spousal support order.[234] These factors help courts properly assess the circumstances spouses find themselves in so that support can be properly tailored.

The third factor dealing with orders, arrangements and agreements concerning spousal support merits further analysis given the study carried out in this thesis. The rules concerning spousal support empower spouses to conclude agreements over support, so long as they are compatible with the objectives of the Divorce Act.[235] Courts retain the power to vary or set aside these agreements if they fail to comply with the aims pursued by spousal support as held by the Supreme Court of Canada in Miglin.[236] Determining if the agreement is binding requires a two-stage analysis:[237] courts must review the parties' circumstances at the time the agreement was negotiated and a the time the agreement is

[231] Rogerson, *supra* note 229 at 70.

[232] The Divorce Act, s 15.2(4).

[233] The conditions need to be present as held in *Vaughan v Vaughan*, 2014 NBCA 6 at 17, 31.

[234] *Ibid;* Wilton & Semple, *supra* note 180 at 63.

[235] *Ibid* at 114.

[236] *Miglin v. Miglin*, 2003 SCC 24 at para 78 [*Miglin*].

[237] *Ibid* at para 64.

applied or enforced.[238] Courts thus assess power imbalances, the vulnerabilities of the parties, the objectives of spousal support, as well as if there is a significant departure from what the parties anticipated in their agreement.[239]

Spousal support agreements are not reviewed in the same way as those concerning the division of property. The aim pursued by the equal share provisions of provincial statutes is different from the objectives underlying spousal support. The Supreme Court of Canada in Hartshorne[240] ordered a division of property according to a domestic contract significantly departing from the equal share regime applicable in British Columbia because the spouse could claim spousal support.[241] If agreed upon, the division of property, whatever it may be, must be binding. Spouses who claim to suffer from some imbalance, disadvantage, hardship or need must refer to spousal support to remedy these problems.[242]

Spouses may enjoy greater relative autonomy with regards to their marital agreements over family property in part because Canadian law addresses the problems associated with power imbalances and the intimate context through spousal support. However, unfair outcomes can also result from an imbalanced division of property, even with spousal support. The subsections below develop the regimes of property division and marital agreements in Quebec and Ontario

[238] Wilton & Semple, *supra* note 180 at 115.

[239] *Ibid* at 115, 116.

[240] *Hartshorne*, *supra* note 76 at paras 54-59.

[241] Wilton & Semple, *supra* note 180 at 117, 118.

[242] *Ibid* at 147.

7.2.3. Quebec.

This subsection briefly describes the default regime over property in the province of Quebec, including the imperative economic effects protected by public order, the partnership of acquests and finally the rules governing the marriage or civil union contract, the name used in Quebec to describe marital agreements. For this description of Quebec law, the Civil Code of Quebec is referred herein as CCQ.

7.2.3.1. Who is entitled to share rights over property?

Quebec law recognizes three types of conjugal relationships which can produce legal effects. Marriage, civil union and cohabitation. However, it only regulates financial effects under the CCQ for two of them: marriage and civil union. Unmarried cohabitants are left out of these regimes[243] and are considered to have opted out of the CCQ's regime when entering a de facto relationship.[244] Furthermore, the Supreme Court of Canada in Quebec (Attorney General) v. A, concluded that this difference in treatment did not offend s. 15 of the Charter of Fundamental Rights and Freedoms[245] and found instead that this distinction promotes the autonomy of cohabitants.[246]

[243] Brown & Gardiner, *supra* note 149 at 92, 93.

[244] Bailey, *supra* note 216 at 35.

[245] *Quebec (Attorney General) v. A*, [2013] 1 SCR 61, 2013 SCC 5 at 281.

[246] Morin, *supra* note 131 at 126.

Therefore, with the exception of unmarried cohabitants - whose regime is subject to private arrangement - married and civil union spouses find their property-sharing regime in the CCQ. This framework is constituted firstly by the family patrimony and, secondly, by the default regime of the partnership of acquests. Spouses can exclude the default regime at any time through notarized marriage contracts opting for other matrimonial regimes, including separation as to property, communities or fixing their own regime.[247] The following subsections consider these two regimes.

7.2.3.2. The family patrimony

The family patrimony consists of the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serve for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan.[248] As Morin underscores, the patrimonial rights conferred in art 391 of the CCQ are excluded from any private ordering[249] but spouses may assign them at relationship breakdown.[250] Importantly, these rules ensure some sharing of essentials acquired during the

[247] Art 433 CCQ

[248] Art 415 CCQ; Anne Revillard, "Du droit de la famille aux droits des femmes: Le patrimoine familial au Québec" (2006) 62:1 Dr et Soc 95 at 96.

[249] Alain Roy, *La charte de vie commune ou l'emergence d'une pratique réflexive du contrat conjugal* (Montréal: Éditions Thémis, 2007) at 5, 6.

[250] Art 423, 521.12 CCQ; Morin, *supra* note 131 at 120, 121; Revillard, *supra* note 252 at 96.

relationship whether spouses like it or not, thus enforcing the concept of marriage/civil union as a partnership of spouses.[251]

In Roy's view, since the family patrimony includes the essential familial assets, this protection guarantees that agreements, even if made at any time, do not affect the "equal sharing of certain familial property".[252] Although this fails to assess the context of each couple, it certainly answers to the general context ensuring spouses a fair share in the property acquired during the relationship.[253] This might explain why the sharing regime applicable to the rest of the property can be contractually excluded. However, when the value of property outside of the family patrimony is significantly higher, the regime may result in unfairness for the spouse who may not be an owner, but who contributed to the acquisition of that property.

7.2.3.3. Default regime of the partnership of acquests.

The matrimonial regime governing the property of married and civil union spouses in Quebec law applies in the absence of a marital agreement. This default regime creates a partnership of gains or acquests of the property acquired during the relationship and at the time of dissolution allocates an

[251] Roy, Le Bourdais & Lapierre-Adamcyk, *supra* note 9 at 449; Nicholas Kasirer, "Testing the Origins of the Family Patrimony in Everyday Law" (1995) 36:4 C de D 795 at 815–817.

[252] Roy, Le Bourdais & Lapierre-Adamcyk, *supra* note 10 at 449; Revillard, *supra* note 252 at 96.

[253] See the general purpose of the family patrimony in Revillard, *supra* note 252.

equal share of it to each spouse.[254] Generally, there are three characteristics of this regime: an equally divided administration, restrictions over the family residence, gifts and co-ownership, as well as the assessment of which property is private or acquest. Firstly, inspired by assumptions of formal equality, each spouse is entitled to manage their own property during the relationship as if he or she was separated. The only limits are those relating to the family residence, gifts or private assets and to the co-ownership of assets where some acts require the consent of both spouses.[255]

Assessing property is a complicated task but the regime sets out a list of property that remains private.[256] The rest becomes an acquest and is subject to equal division at dissolution. The logic behind this regime generally protects property owned before the marriage or civil union, acquired by gift or bequest, derived from personal values or intrinsically linked to the spouse such as intellectual property or personal belongings.[257] In any case, spouses are entitled to exclude or modify this regime which in general tries to distribute the property of spouses fairly with regards to their share in the gains acquired during the relationship. The mechanisms to alter the default regime are the marriage or civil union contracts explained below.

7.2.3.4. The mutable marriage or civil union contract.

[254] Arts 448-484 CCQ

[255] Arts 401-413 CCQ.

[256] Arts 449-460 CCQ.

[257] Arts 449-460 CCQ; Lefebvre, *supra* note 154 at 43–107.

In Quebec, spouses can conclude a marriage or civil union contract (hereinafter simply marriage contract) to exclude or modify the default regime of the partnership of acquests, to choose a different matrimonial regime, or to fix their own.[258] These agreements were initially anticipatory under the Civil Code of Lower Canada, but they can now be concluded or modified at any time before or after marriage or civil union. Quebec's legislators departed from the immutability of the marriage contract in 1970, when reforms introduced a mutable contract subject to homologation. Later, the CCQ introduced a regulated mutable marriage contract.[259]

To be valid, marriage contracts have to be established by a notarial act *en minute*[260] and when the person concluding the agreement is a minor, a person under parental authority, tutorship or with an advisor, the law requires prior authorization or advice from the court to ensure the contract's validity.[261] Once all requirements are met, these agreements are enforceable even if one spouse finds out later that the agreement was disadvantageous.[262]

For instance, the Superior Court analyzed an anticipatory marriage contract and found that even though the wife claimed to have a lack of understanding over her waiver of rights, the agreement

[258] Arts 431-433 CCQ

[259] Arts 437-438 CCQ; Tétrault, *supra* note 142 at 112.

[260] Arts 440 CCQ

[261] Art 434-436 CCQ; Guy Lefrançois, "Les conventions matrimoniales et le nouveau droit" (1999) 23:1 RDUS 205 at 206.

[262] Miriam Grassby, "Nouveau regard sur les contrats de mariage au Québec à la lumière de l'arrêt Hartshorne" in Barreau du Québec Service de la Formation Continué, ed, *Développements récents en droit familliale* (Cowansville: Yvon Blais, 2008) at 47–49.

remained valid since the wife was informed by a notary of the consequences that the agreement would have over the couple's assets. The wife argued that she "had no recollection of signing a marriage contract; […] does not recall being explained the purpose or content of the marriage contract; […] had no independent legal advice or knowledge of the nature and consequences of the contract and that the notary was a good friend of the husband."[263] However, the court enforced the agreement since the wife could not prove her contractual consent was vitiated. For the court, the wife was simply exaggerating.[264]

Another interesting case concerning mutability involved an opposite-sex couple that got married in 1993 with an anticipatory marriage contract providing for separation as to property.[265] Both spouses had active careers and financial income. They later had three children and, in 1999, after the husband's parents passed away, the wife assumed the children's care. While their careers meant a great deal to both of them, someone needed to take care of the home and children.[266]

The husband promised, through a private document, to transfer an amount to his wife to achieve a balance over the property if she assumed the children's care.[267] After reviewing the effects of the document, the court found it was a *sui generis* marriage contract.[268] This contract did not comply with the requirements to be a marriage contract since it was not executed in a public deed before a notary,

[263] *V.K. v. B.B*, 2015 QCCS 5036 at para 79.

[264] *Ibid* at para 86.

[265] *P.N. c H.C.,* 2011 QCCA 1744 at para 6 [*P.N c. H.C.]*.

[266] *Ibid* at paras 6-26.

[267] Ibid.

[268] This was held by the superior court judgement in *ibid* at paras 27, 28.

nor did it provide for a new financial regime[269] to start after the signing of contract.[270] It was a promise of gift under article 1812 of CCQ.[271]Although this agreement was not a marriage contract, it shows how postnuptial agreements are useful to balance the decisions undertaken by spouses during their life and their ensuing financial outcomes.

This discussion demonstrates how spouses can conclude marital agreements for two reasons. First, out of selfish interest to caring for their property or, second, to ensure the balance of economic disparity caused during the marriage. The effects of having a mutable marriage contract must extend the pure notion of contractual consent to ensure both parties understand the consequences of their agreements. A notary may not suffice to ensure the absence of coercion or misunderstanding of one spouse. Opening the possibility of a mutable contract permits spouses, as seen in P.N. c. H.C.,[272] to adapt their agreements to their changing relationship when someone opts for domestic work.

Incorporating safeguards to conclude valid marital agreements can alleviate the power imbalances showed in these decisions. Exploring the Ontario regime illustrates how agreements concluded in private and without the intervention of public notaries can exacerbate the need for stronger remedies

[269] Although it seems to be a change from separation as to property to a community of property as the Court held in *ibid* at para 42.

[270] Previously, I referred that under art 433 of the CCQ the effects of the marriage contract start after its conclusion given all formal and substantial requirements.

[271] *P.N c. H.C., supra* note 261 at para 47.

[272] *Ibid* at para 6.

and the court's discretion to set agreements aside. The following subsection thus explores Ontario family law.

7.2.4. Ontario.

This subsection surveys the Ontario rules concerning property sharing in conjugal relations. This survey briefly describes who is entitled to share property; the default regime of equalization over the matrimonial property, along with an equivalent regime for unmarried cohabitants; and, finally, the rules governing domestic contracts. For this subsection, the Family Law Act, RSO 1990, c F.3 is referred to as FLA.

7.2.4.1. Who shares property in Ontario?

In Ontario, the FLA establishes that spouses share the net value of the family property instead of the ownership of the property itself.[273] The term spouse used here applies automatically to married spouses or to two persons who entered a voidable or void marriage in good faith.[274] Unmarried

[273] Malcolm C Kronby, *Canadian Family Law* (Mississauga, Ont. : J. Wiley, 2010) at 128, 129.

[274] The Family Law Act, s 1(1).

spouses must opt-in through a private agreement for these rules to affect them.[275] The FLA makes no distinction between same-sex and opposite-sex couples in its definition of spouse as it refers to two persons.[276]

In addition to the equalization of net family property, married and unmarried cohabitants can exceptionally invoke equity and the constructive trust to claim certain proprietary rights in their conjugal relations.[277] These claims may arise from resulting or constructive trusts. The first requires the manifested intention of the spouses and their corresponding contribution in value.[278] The second type requires the enrichment of one spouse in prejudice of the other, the reasonable expectation of sharing property, and a substantial contribution directly linked to the acquisition of property.[279]

Thus, married spouses are automatically entitled to equalization while unmarried cohabitants must agree to it, and both married and unmarried spouses can exceptionally claim proprietary rights through equity and the use of trust doctrines.[280] Knowing who is entitled to share property we now move on to describe the default regime.

[275] Mossman et al, *supra* note 126 at 450; Robert Leckey, "Family Outside the Book of Family" (2009) 88:3 Can Bar Rev 541 at 550.

[276] The Family Law Act, s 1(1).

[277] Kronby, *supra* note 278 at 144, 145.

[278] *Ibid.*

[279] *Pettkus v Becker*, [1980] 2 SCR 834 at 852-854, 117 DLR (3d) 257 [*Pettkus v Becker*]; *Ibid.*

[280] Mossman et al, *supra* note 126 at 582, 583.

7.2.4.2. Default regime.

Kronby and Mossman et al describe a step-by-step process to understand the rules regarding family property in Ontario. After setting out who is entitled to the default regime, the next step is determining when the valuation date is. Then, which property enters, and which property does not. And, finally, what the value of the property that enters is, how the process of equalization works, and how the assessment of any claims for adjudicating a different value from the half of the difference to each spouse occurs.[281] Apart from equalization, two things merit attention in Ontario family law: the possessory rights over the matrimonial home and the use of equity and trusts doctrines.

The valuation date is the earliest of these dates: physical separation, divorce, annulment or death. "Often, in cases of separation and divorce, the valuation date is when spouses separate permanently."[282] Since it may be difficult to identify this date, courts enjoy a margin of discretion in determining when property shall be valued.[283] In terms of which property enters and which does not, Mossman et al describe how the FLA prefers family assets instead of general property to be included in the value of the property that is shared.[284] Equalization thus takes the value of all property that spouses own at the valuation date,[285] including the matrimonial home, but excludes the following: property acquired before marriage; gifts, bequests and the income they produce if expressly provided

[281] *Ibid* at 78, 79; Kronby, *supra* note 278 at 128–137.

[282] Mossman et al, *supra* note 126 at 480.

[283] *Oswell v Oswell*, 12 OR (3d) 95, 43 RFL (3d) 180.

[284] Mossman et al, *supra* note 126 at 469.

[285] Kronby, *supra* note 278 at 129.

by the giver or testator; damages or rights to damages for personal injuries; proceeds or rights to proceeds from life insurance; and property that can be traced to the above categories.[286]

These exclusions cannot affect the matrimonial home and impose a burden of proof on the spouse claiming to exclude the value of that property from equalization.[287] Afterwards, courts must establish the value of the property. Courts often refer to the "fair market value" and rely on expert evidence to determine it.[288] Finally, courts take the resulting value of the net family property of both spouses and choose who has the higher value. Then, they calculate the difference with the lower value, divide that difference in two and the result is what the spouse having the higher value owes to the other one.[289] Habitually, the court must share half and half. However, it may depart from the presumption of equal shares when it would lead to an unconscionable result based on the strict criteria provided for in section 5(6) of the FLA.[290]

As anticipated, apart from equalization, the FLA gives special treatment to the matrimonial home. First, its value cannot be excluded from the net family property if it is the matrimonial home at the valuation date.[291] Second, spouses are entitled to possessory rights over the matrimonial home. Finally,

[286] The Family Law Act, s 4(2).

[287] The Family Law Act, s 4(3).

[288] *Rawluk v Rawluk*, [1986] 3 RFL (3d) 113 at 122, 29 DLR (4th) 754; Mossman et al, *supra* note 126 at 536.

[289] Kronby, *supra* note 278 at 135.

[290] Strict since courts must find the result shocking to be able to depart from the equal share: see further in *Ibid*; Mossman et al, *supra* note 126 at 548, 549.

[291] The Family Law Act, s 4(1)b; Leckey, *supra* note 215 at 206.

married and unmarried spouses[292] can exceptionally claim proprietary rights using equity and trusts doctrines when the requirements are met.

The exceptional use of equity and trusts doctrines in the common law is not new. The Supreme Court of Canada in Murdoch rejected that the wife, Mrs. Murdoch, had any rights deriving from a resulting trust for there was neither clear intent of sharing, nor a direct contribution in the acquisition of property.[293] However, the same court in Pettkus v Becker departed from this view and, hoping to remedy one party's unjust enrichment, advanced the theory of the constructive trust. This theory requires the existence of an unjust enrichment, a causal connection, and the direct contribution to the acquisition of property.[294] Consequently, the impoverished spouse may be entitled to a proprietary interest valued according to his or her contribution to the property.

The rules described above recognize the participation of both spouses in the increase of family assets, protect the interest in the matrimonial home, and ensure that unjust enrichments are properly compensated.[295] These considerations respond adequately to concerns of context and gender, although the distinction drawn between married and unmarried cohabitants fails to impose similar

[292] *Kerr v Baranow*, 2011 SCC 10 [*Kerr v Baranow*].

[293] *Murdoch v Murdoch*, [1975] 1 SCR 423, 41 DLR (3d) 367; Mossman et al, *supra* note 126 at 582.

[294] *Pettkus v Becker*, *supra* note 275 at para 851, in *Sorochan v Sorochan*, [1986] 2 SCR 38, 29 DLR (4th) 1 the Supreme Court of Canada reframed the nexus between the acquisition of property and the constructive trust were the labour of the wife in a farm, acquired by her spouse before cohabitation started, even if not a direct contribution to acquisition was a clear link in its preservation and maintenance; *Ibid* at 589–593.

[295] *Kerr v Baranow*, *supra* note 288.

rules on similar underlying factual situations. Apart from a claim for spousal support, this differential treatment puts a high burden on the vulnerable cohabitant who, without a contract or means to prove his contribution to the family economy, will be unduly impoverished at the breakdown of the relationship.

Given that the FLA permits spouses to exclude these default rules through domestic contracts, the next subsection scrutinizes the margin of autonomy afforded to spouses in Ontario and how this regulation ensures fairness in spouses' property sharing.

7.2.4.3. Domestic contracts for married and unmarried cohabitants.

This subsection deals with marriage and cohabitation agreements in Ontario, as well as the rules governing their negotiation, execution and enforcement. It also explores the rules that apply when these agreements are concluded during existing conjugal relationships.

Married and unmarried cohabitants can conclude domestic contracts regarding the rules in the FLA, with the exception of certain imperative rules. This means spouses can exclude the default rules, modify their application, or tailor their regime, all subject to certain limitations.[296] To exclude the equalization of shares, the contractual provision must be express. A contractual provision that simply

[296] Mossman et al, *supra* note 126 at 401.

addresses ownership is insufficient because the default rules split the value of the net family property and not rights of ownership.[297]

Conceptually, a domestic contract is a "formal written agreement signed by the parties and witnessed,[298] whereby spouses may regulate their rights and obligations during their relationship or on its termination."[299] These domestic contracts can be marriage contracts, cohabitation agreements, separation agreements, paternity agreements or family arbitration agreements.[300] This thesis focusses on marriage contracts and cohabitation agreements where spouses or future spouses can enter into binding agreements to define their respective rights and obligations, including ownership in or division of property; support obligations; the right to direct the education and moral training of their children; and any other matter in the settlement of their affairs.[301]

These agreements are binding but courts can set them aside if the parties fail to disclose significant assets or debts, fail to understand the nature and consequences of the contract, or contravene the law of contract.[302] The court must also privilege the best interest of the child over any stipulation in a domestic contract.[303] The idea behind these remedies is to ensure that both spouses are fully informed

[297] *Bosch v Bosch*, [1991] 95 ACWS (3d) 1098, 4 R.F.L (5th) 264.

[298] Mossman et al, *supra* note 126 at 402.

[299] Payne & Payne, *supra* note 184 at 65, 66.

[300] The Family Law Act, s 51.

[301] The Family Law Act, s. 52(1), 53(1).

[302] The Family Law Act, s 56(4).

[303] The Family Law Act, s 56(1), (1.1).

of the economic situation of the other spouse,[304] of the juridical consequences of signing the contract,[305] and comply with the contract law requirements that can be strengthened by courts considering the context where these agreements take place.[306]

Anticipatory and postnuptial/cohabitation agreements occur in a particular context. The latter, specifically, occurs in the middle of an existing relationship. For the purposes of this thesis, it is important to review the way courts in Ontario interpret the law governing postnuptial agreements. Drawing on Mossman et al's analysis,[307] section 56(4) of the FLA creates a discretionary power for courts to oversee domestic arrangements instead of providing for automatic nullity when certain conditions have been met.[308] Courts exercise their power by undertaking a two-stage approach: first, the court must be satisfied that the spouses fail to comply with one of the statutory requirements

[304] Courts require that parties must request information and that the failure must be significant to invoke this protection see e.g. *Butty v Butty*, 2009 ONCA 852; Mossman et al, *supra* note 126 at 403–405.

[305] As Mossman et al affirm an important factor for courts to define if the party fully understands the nature and consequences of the act is the independent legal advice he or she had at the time of signing the contract *Ibid* at 405.

[306] See for example the requirement of abundant good faith in marriage contracting required by the Ontario Superior Court in *D'Andrade v Scharge*, 2011 ONCS 1174 at paras 69, 70, 76 [*D'Andrade v Scharge*].

[307] Mossman et al, *supra* note 126 at 408–429.

[308] *Levan v Levan*, 2008 ONCA 388 at paras 33, 50 [*Levan*]; *Hartshorne*, *supra* note 76 at para 14.

outlined in section 56(4); second, the court must decide if it should exercise its discretion to set aside the domestic contract.[309]

This form of judicial intervention brings us back to the struggle between private and public ordering in family law considered in section 6. What scope should courts give to autonomy? The Supreme Court of Canada answered this concern by privileging autonomy when analyzing a domestic contract under statutory family law in British Columbia.[310] This case, although outside Ontario, merits attention given its relevance to concerns of private ordering. In Hartshorne, the Court concluded that spouses should be held to their bargains and that fairness results from enforcing their private expectations.[311] Regrettably, even though the vulnerable spouse insisted on her disagreement with the contract,[312] the court upheld the agreement and concluded that judges should refrain from intervening in what parties agree to autonomously, especially if spouses had obtained independent legal advice.[313]

Ontario law has departed lightly from this approach. In McCain,[314] the court found that given similar circumstances of external pressure over the wife to sign the agreement, she had no alternative but to sign. This pressure to sign made the agreement coercive in nature. The decision set aside the wife's waiver of spousal support, recognized her rights over the matrimonial home, and allowed her to retain

[309] *Levan*, *supra* note 304 at para 51.

[310] *Hartshorne*, *supra* note 76 at para 44.

[311] *Ibid at* para 67.

[312] Martha Shaffer, "Domestic Contracts, Part II: the Supreme Court's Decision in Hartshorne v. Hartshorne" (2004) 20:2 Can J Fam L 261 at 282–284.

[313] *Hartshorne*, *supra* note 76 at para 67.

[314] *McCain v McCain*, 2012 ONSC 7344 [*McCain*].

some family assets in her name.[315] Furthermore, courts have found that in contracts concluded within the context of intimate relations, parties are required to have abundant good faith.[316] This obliges parties to disclose all relevant economic[317] and marital information.[318] This good faith becomes even more relevant when agreements refer to reconciliations.[319]

This survey of Ontario law identifies important issues that will later facilitate an assessment of proposals to make contracts mutable in Colombian law. A gender-based and contextual approach in Canadian law, advanced by Majury and Shaffer, criticizes the courts' misconception of autonomy and judges' failure to consider the systematic subordination of women in society.[320] These concerns are intensified in Colombia, given the gross economic disparity in the population where women face special kinds of vulnerability.[321] Before dealing with these concerns, the last subsection surveys Colombian family law regulating conjugal property.

[315] Mossman et al, *supra* note 126 at 423, 424.

[316] *Dubin v Dubin*, [2003] 34 RFL (5th) 227 at para 35, [2003] OJ No 547 (QL).

[317] *D'Andrade v Scharge*, *supra* note 302 at paras 77-82.

[318] *Stevens v Stevens*, 2012 ONSC 706 at para 175 [*Stevens*].

[319] *Ibid.*

[320] Shaffer, *supra* note 308 at 284–286; Diana Majury, "Unconscionability in an Equality Context" (1991) 7 Can Fam LQ 123 at 134; JA Manwaring, "Competing Theories" (1993) 25:2 Ottawa L Rev 235 at 282–283.

[321] *Sentencia T-338-2018*, *supra* note 85; see the income disparity among men and women in Colombia in Isabel Cristina Jaramillo Sierra, "El Papel del Derecho en la Producción de la Desigualdad: El Caso de los Alimentos" (2018) 9:1 Comparative L Rev 120 at 126, 129.

7.3. Colombia

This subsection canvasses Colombian family law regulating conjugal property. Firstly, it develops the general rules of family law in Colombia. Secondly, it charts the default and conventional regimes for married and unmarried spouses. Finally, this section considers the relative immutability of the current regime, where spouses can dissolve the default regime by mutual agreement and where spouses enjoy some freedom to reciprocally conclude contracts of sale.

7.3.1. General rules concerning family law.

Colombia is a Unitarian state under the 1991 Constitution[322] and all the laws regulating the family are enacted by Congress[323] or, exceptionally, by the President who can be vested with transitory legislative powers.[324] The rules concerning marriage, divorce, inheritance and support are generally defined in

[322] Art 1, Colombian Constitution of 1991 (Colombia).

[323] Arts 42-47, 150, 150.1, Colombian Constitution of 1991 (Colombia); Hinestrosa, *supra* note 142 at 183.

[324] Art 150.10, Colombian Constitution of 1991 (Colombia).

the Colombian Civil Code and other laws.[325] Likewise, Law 54 of 1990 and Law 979 of 2005 regulate the regime of de facto couples. Apart from this legislation, constitutional jurisprudence has redefined several aspects of family law concerning family forms, gender-based approaches to marriage and cohabitation, as well as the protection of the best interest of the child.[326]

Colombian family law regulates the legal effects of the relation between parents and children and the effects of couples' relationships. This subsection focusses on the legal effects of couples' relationships. Originally, the law only regulated opposite-sex marriages and excluded other forms of conjugal relations.[327] In 1990, Congress enacted legislation which conferred rights to unmarried cohabitants which included economic rights if they cohabited for more than two years. These economic rights would only be recognized if the cohabitants in question had no legal impediment to marry. If they did, their previous marriage partnership had to be first dissolved.[328]

[325] Alarcón Palacio, *supra* note 84 at 30; Suarez Franco, *supra* note 2 at 17–28; Alarcon recalls that other laws enacted by Congress responded to the changes suffered by Colombian society requiring a departure from the logic of the Civil Code in Yadira Alarcón Palacio, "El Llamamiento Sucesoral en Colombia: Especial Mención a los Derechos del Cónyuge Superstite" (2007) 41:1–2 Revista Jurídica de la Universidad Interamericana de Puerto Rico 211 at 214.

[326] Aramburo Restrepo, *supra* note 51 at 74–87.

[327] Mauricio Bocanument-Arbeláez & Carlos Mario Molina Betancur, "La Estructura Familiar del Concubinato: un Reconocimiento Jurisprudencial en Colombia" (2018) 15:1 Revista Lasallista de Investigación 130 at 131.

[328] Aramburo Restrepo, *supra* note 51 at 292–295.

Both married and unmarried cohabitation belonged exclusively to opposite-sex couples - even after the new Constitution was promulgated in 1991.[329] After a period activism and strategic litigation,[330] in 2007 the Constitutional Court extended rights to same-sex unmarried cohabitants.[331] Later, in 2011, the same Court recognized same-sex couples as a family and provided for a contractual relationship equivalent to marriage.[332] This decision led to some uncertainty regarding the name and effects of such a contractual union until, in 2016, decision SU-214 of the Constitutional Court settled the discussion and confirmed that same-sex couples had access to marriage.[333]

Apart from deciding who can marry and who can be in a de facto relationship, the law regulates two types of rights and obligations: personal and economic. The first refers to the requirements to marry,[334] the duties of spouses to cohabit in a community of life, to mutually support each other and to provide

[329] Art 42, Colombian Constitution of 1991 (Colombia).

[330] Mauricio Albarracín Caballero, "Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia", (2011) 8:14 SUR - Intl J Human Rights 7.

[331] Constitutional Court, Bogota, February 7, *Sentencia C-075* (2007), decision number: D-6362 (Colombia).

[332] Constitutional Court, Bogota, July 26, *Sentencia C-577* (2011), decision number: D-8367 y D-8376 (Colombia).

[333] Constitutional Court, Bogota, April 28, *Sentencia SU-214* (2016), decision number: T- 4.167.863 AC (Colombia).

[334] Arts 113-175, Civil Code (Colombia).

reciprocal aid when necessary, as well as the alternatives to end a marriage.[335] Marriage ends with annulment, divorce or death. Married spouses can divorce by invoking one of nine legally defined grounds.[336] These grounds integrate fault-based divorce and no-fault divorce[337] and include adultery, a serious breach of marriage duties, violence or cruelty, habitual drinking or drug consumption, a serious and incurable illness or abnormality, corrupting behavior, physical separation for more than 2 years, and mutual agreement manifested before a judge[338] or a public notary.[339]

De facto spouses dissolve their union and its corresponding economic effects by permanent separation, mutual agreement or death.[340] The mutual obligation of support for both married and unmarried spouses only subsists during the relationship. It can only be extended beyond the end of the relationship by being imposed on the guilty spouse in the context of a fault-based divorced,[341] against the spouse who caused the end of the community of life in the case of a no-fault divorce,[342] in

[335] Arts 176-212, Civil Code (Colombia).

[336] Suarez Franco, *supra* note 3 at 191–210.

[337] Alarcón Palacio, *supra* note 331 at 220.

[338] Art 154, Civil Code (Colombia).

[339] Art 34, Law 962 of 2005 (Colombia); Suarez Franco, *supra* note 3 at 219–221.

[340] Arts 5, 8, Law 54 of 1990 (Colombia); Aramburo Restrepo, *supra* note 51 at 300.

[341] Aramburo, *supra* note 49 at 415, 416.

[342] Colombian Supreme Court of Justice Civil Section, Bogota, January 24, *Carlos Eduardo Angarita Angarita v la Sala de Familia del Tribunal Superior del Distrito Judicial de Medellín y el Juzgado Segundo de Familia de Envigado* (2019), decision number: STC442-2019 (Colombia); Alviar García, *supra* note 87 at 18–22.

favor of vulnerable women suffering domestic violence,[343] or under exceptional circumstances in the case of former de facto spouses.[344]

Regarding economic rights and obligations, Colombian law imposes a shared property regime which, in the case of marriage, is a partnership of movables and gains, while in the case of de facto spouses it is a partnership of gains. These default regimes differ between married and unmarried spouses, and the next subsections deal with them independently.

7.3.2. Marriage default regime

Marriage originally deprived married women of their legal capacity and provided that the full administration of conjugal property fell to the husband.[345] He was the head of the family and

[343] Even if the statute of limitations operated regarding the divorce as sanction of art 156, Civil Code (Colombia), the systematic violence against women demand a constitutional and conventional rules prevalence over the legal formalisms to ensure substantive justice in these divorces, see further in *STL11149-2019*, *supra* note 87.

[344] Colombian Supreme Court of Justice Civil Section, Bogota, June 4, *Aurora del Cármen Neira Patiño v Sala Civil Familia del Tribunal Superior del Distrito Judicial de Cúcuta* (2019), decision number: STC 6975-2019 (Colombia).

[345] Marco Gerardo Monroy Cabra, *Derecho de Familia y de la Infancia y la Adolescencia* (Bogota: Editorial ABC, 2008) at 422–425.

represented him and his wife in social life.[346] After the introduction of Law 28 of 1932, each spouse became the full administrator of their property during the marriage.[347] The law departed from the community of property of the ancient regime and regulated the partnership of movables and gains, hereinafter the marriage partnership.[348]

This marriage partnership includes all property acquired for consideration by each spouse during marriage.[349] The husband and wife keep as private property all the immovables they owned before marriage or acquire from gift or bequest. Movables owned before marriage and acquired gratuitously during marriage enter the marriage partnership as relative property and are subject to compensation at its dissolution. Finally, all the property that spouses acquire for consideration during marriage enters the marriage partnership and is considered a gain that is divided into two equal shares at the time of liquidation.[350]

Interestingly, the economic regime remains inapplicable during the marriage, allowing spouses to acquire and transfer property reciprocally and with third parties like a separate individual. The only exception are the debts from raising common children and the family expenses that belong solidarily to both spouses.[351] The marriage partnership used to be inherent to marriage, with spouses prohibited from excluding it through private agreement, including the marriage contract. This changed after Law

[346] Medina Pabón, *supra* note 161 at 195; Alarcón Palacio, *supra* note 86 at 31, 32.

[347] Arts 1-9, Law 28 of 1932 (Colombia); Alarcón Palacio, *supra* note 86 at 63–65.

[348] Art 1, 4, Law 28 of 1932 (Colombia); Aramburo Restrepo, *supra* note 3 at 332-334.

[349] Arts 1774-1848, Civil Code (Colombia)

[350] Arts 1774-1848, Civil Code (Colombia)

[351] Alarcón Palacio, *supra* note 86 at 153–155.

1 of 1976 introduced the mutually-agreed divorce and the marriage partnership liquidation. Following this reform, spouses could opt out of the marriage partnership through a marriage contract,[352] subject to restrictions imposed by public order and morality.[353]

7.3.3. Marriage Contract.

The marriage contract is the agreement spouses conclude where they "convene as to the property they bring to the marriage, the gifts and concessions to one another, present and to the future."[354] This contract endures as long as the marriage does[355] and allows future spouses to define their economic regime or to modify the default regime of the Civil Code.[356] Torrado identifies four main goals of the marriage contract: determining the property each future spouse brings to the marriage, establishing the gifts in consideration to marriage, determining the mutual concessions that future spouses make

[352] Monroy Cabra, *supra* note 351 at 417.

[353] Suarez Franco, *supra* note 3 at 299.

[354] Art 1771, Civil Code Law 57 of 1887 (Colombia) Translation made by author of the original text from Spanish: Las covenciones que celebran los esposos antes de contraer matrimonio, relativas a los bienes que aportan a él, y a las donaciones y concesiones que se quieran hacer el uno al otro, de presente o futuro.

[355] Monroy Cabra, *supra* note 351 at 409.

[356] Jorge Parra Benítez, *Derecho de Familia*, 2da ed (Bogota: Editorial Temis SA, 2018).

to each other or will make in the future, and setting out an agreement on the administration of the couple's property.[357]

To be valid, the marriage contract must be in writing and executed in a public deed before a notary,[358] while parties must have unvitiated consent and be capable of marrying (over 14 years old).[359] As to the content, the marriage contract can regulate the economic regime over property; any other agreement is contrary to public order. After marriage, this contract becomes immutable.[360] Regrettably, Colombian couples do not conclude these kinds of agreements. Instead, most marry under the default regime.[361]

[357] Helí Abel Torrado, *Derecho de Familia Régimen económico del matrimonio De la sociedad conyugal*, 7th ed (Bogota: Universidad Sergio Arboleda, 2016) at 10–47.

[358] Parra Benítez, *supra* note 362 at 189, 190.

[359] In this case article 1777, the underaged need judicial authorization or consent to the marriage contract by those entitled to authorize him or her to get married in *Ibid* at 189.

[360] Monroy Cabra, *supra* note 351 at 413; Parra Benítez, *supra* note 362 at 191, 192; Alarcón Palacio, *supra* note 86 at 156; Suarez Franco, *supra* note 3 at 307, 308.

[361] Superintendencia de Notariado y Registro, "Los Colombianos No Son 'Amigos' de las Capitulaciones", (last modified 25 September 2019), online: <https://www.supernotariado.gov.co/PortalSNR/faces/oracle/webcenter/portalapp/pagehierarchy/Page562.jspx?publicacion_id=WLSWCCPORTAL01163607&_adf.ctrl-state=4vqxnjaq8_174&_afrLoop=2332118646379671&_afrWindowMode=0&_afrWindowId=null#%40%3Fpublicacion_id%3DWLSWCCPORTAL01163607%26_afrWindowId%3Dnull%26_afrLoop%3D2332118646379671%26_afrWindowMode%3D0%26_adf.ctrl-state%3D4um30ffx4_29>.

Colombian family law also provides for a similar economic regime for cohabitants, but with significant differences. The subsections below describe the default and conventional regimes for de facto couples.

7.3.4. De facto Relationship.

Colombia disregarded de facto relationships for almost all its republican history. Economically, de facto spouses could not share property, claim support or participate in the succession of the deceased partner unless that person by will left specific property in that person's name. The economic disparity between men and women intensified women's vulnerability. De facto spouses were often left empty-handed after having spent years in conjugal unions with married or unmarried men – and this, even if they participated actively in the acquisition of property with their partner.[362]

Fortunately, courts relied on general private law doctrines to recognize some contributions through the *de facto* corporation. In certain restricted circumstances, this tool permitted the surviving or former de facto spouse to claim their participation in the common property acquired during cohabitation. The Colombian Supreme Court of Justice crafted, with some French inspiration, the *de facto* corporation between concubines to offer a legal alternative given the lacuna on the protection of the economic relations of cohabitants.[363]

In 1990, Congress enacted a law regulating the default economic regime for *de facto* spouses. Law 54 of 1990, modified by Law 979 of 2005, presumed a *de facto* partnership after two years of singular and

[362] Suarez Franco, *supra* note 3 at 431–434.

[363] Aramburo Restrepo, *supra* note 51 at 261.

permanent cohabitation when cohabitants do not have any impediment to marry or, if they have, two years after the dissolution of their previous marriage partnership.[364] For it to produce legal effects, *de facto* spouses, once they have met these requirements, can mutually declare their partnership in a public deed before a notary, manifest it expressly in conciliation minutes before a recognized conciliation center, or claim it in a declaration before a judge. This *de facto* partnership ends primarily with the definitive separation of cohabitants, mutual agreement,[365] or death.

This regime creates a partnership of gains which includes the patrimony or capital deriving from work, the mutual aid and the support to be divided between spouses into equal shares.[366] This means that, unlike the regime for marriage partnership, this regime excludes relative property[367] and only ensures the equal division of property acquired after cohabitation begins. Another difference is that the increase in the value of private property, apart from inflation, is a shared gain; for its part, the marriage partnership leaves out all increases in private property value.[368] Accordingly, this regime differs from the marriage regime regarding its origin, dissolution, assets and the lawful time to conclude marital agreements.[369] The next subsection describes marital agreements of unmarried cohabitants in Colombia.

[364] *Ibid* at 293–295.

[365] Public deed before a public notary or in a conciliation minutes in a state-recognized conciliation center as provided in art 3, Law 979 of 2005 (Colombia).

[366] Art 3, Law 54 of 1990 (Colombia).

[367] Art 3, Law 54 of 1990; Aramburo Restrepo, *supra* note 51 at 379.

[368] Suarez Franco, *supra* note 3 at 451–453.

[369] Aramburo Restrepo, *supra* note 51 at 377, 378.

7.3.5. Marital agreements of de facto partners

Regarding marital agreements, Blanco and Chaux[370] affirm that they were omitted by the law and there was a resulting lack of clarity due to the absence of rules creating a conventional regime. Doctrine and jurisprudence[371] developed a fruitful interpretation of article 7 of Law 54 of 1990[372] and established that the rules relating to the marriage partnership in the Civil Code could be imported to Law 54 and apply to the liquidation of the economic regime of cohabitants.[373] Therefore, the rules governing marriage contracts applied also to *de facto* spouses.

[370] Jinyola Blanco Rodríguez & Daniel Felipe Chaux Rojas, "La Celebración de Capitulaciones en la Unión Marital de Hecho" (2013) 126:1 Vniversitas 65.

[371] Supreme Court of Justice Civil Section, Bogota, 2 February, *N.I.L.G contra la Sala Civil del Tribunal Superior del Distrito Judicial de Medellín* (2009), decision number: 05001-3110-008-2000-0483-01 (Colombia).

[372] The liquidation of the cohabitation property (cohabitation partnership) between civil partners (cohabitants), the rules provided in the Book 4, Title XXII, chapters I to VI of the Civil code will apply. Translated by the author from the original text in Spanish: *A la liquidación de la Sociedad patrimonial entre compañeros permanentes, se aplicarán las normas contenidas en el Libro 4º, Título XXII, Capítulos I al VI del Código Civil.*

[373] Blanco Rodríguez & Chaux Rojas, *supra* note 376 at 73.

Later, Law 962 of 2005 settled the discussion by conferring on public notaries the power to authorize marital agreements. Henceforth, the subject of debate changed: the new issue was to determine when such conventions could be validly concluded. Identifying this interpretative problem, Parra Benitez suggests that since the civil effects of cohabitation derive from a situation of fact – namely, a period of consolidation instead of a specific act like marriage – it is unclear when the cohabitation agreement needs to be concluded in order to be valid.[374]

The presumption of economic effects, in the form of a partnership of gains, exists only after two years of cohabitation.[375] Can the cohabitation agreement be concluded during those two years or before starting cohabitation?[376] Since the applicable regime is the same as the one for marriage, the correct interpretation is that cohabitants must conclude these agreements before cohabitation begins.[377] Nevertheless, the remaining legal uncertainty has led cohabitants to conclude agreements – regardless of their validity – before, during and after they begin cohabitation.[378]

Regrettably, this subject represents an ongoing debate that deserves a definitive judicial determination. The majority position accepts that the adequate time is before cohabitation starts and that, after that, the marital agreement becomes immutable as the marriage contract does. For the moment, let's

[374] Parra Benítez, *supra* note 362 at 379.

[375] Art 3, Law 54 of 1990 (Colombia); *Ibid* at 355–362.

[376] Blanco Rodríguez & Chaux Rojas, *supra* note 376 at 77.

[377] Parra Benítez, *supra* note 362 at 379, 380; Aramburo Restrepo, *supra* note 51 at 335.

[378] Blanco Rodríguez & Chaux Rojas, *supra* note 376 at 81.

develop briefly how married and unmarried cohabitants can alter their regime, bearing in mind that marriage and marital agreements become immutable after the conjugal relationship begins.

7.3.6. The relative immutability of the Colombian financial regime of marriage and de facto relationship.

Private ordering introduces two relevant modifications. The first one enables spouses to dissolve the marriage or *de facto* partnership by mutual agreement resulting in separation as to property. The second eliminates the prohibition on spouses concluding contracts of sale reciprocally which allow them to change ownership of their property during the relationship. We will address them independently.

7.3.6.1. The dissolution of the economic regime

Married and unmarried spouses are entitled to dismantle the financial regime by dissolving and liquidating their partnership by mutual agreement.[379] Remarkably, when they exercise this conventional right, the law holds spouses solidarily liable vis-à-vis creditors who may hold a claim that existed prior to the dissolution and liquidation of the partnership.[380] In marriage, this solidarity is also retained over debts for the maintenance of common children and the household. Regrettably,

[379] Art 25, Law 1 of 1975 (Colombia); Art 3, Law 979 of 2005 (Colombia).

[380] Art 25, Law 1 of 1975 (Colombia); Suarez Franco, *supra* note 3 at 426, 427.

mutually-agreed dissolution can lead to unjust results when spouses opt for separation of property and their economic lives remain the same.

As stated above, Colombian marriage law restricts access to support. Apart from the property sharing regimes, the law does not provide for compensation or any other remedy for the economic disparity between spouses when a relationship breaks down. Consequently, private ordering must be carefully scrutinized since any alteration of the default regime can lead to unjust outcomes.

7.3.6.2. Contracts of sale between married spouses outside family law regimes.

Historically, contracts of sale executed between married spouses had been deemed null under Colombian civil law.[381] This rule changed after 1999, when the Constitutional Court decided that the absolute nullity of these contracts was unconstitutional. In that decision, the Court analyzed the Colombian Congress's reasoning when enacting such prohibition. For Congress, the use of contracts of sale between married spouses could lead to defrauded creditors and the abuse of incapacitated married women. This reasoning was seen to conflict with both the principles of good faith and gender equality which flow from the Constitution.[382] Spouses can now conclude contracts of sale between each other and if a creditor is of the view that a particular contract was concluded to defraud him, the

[381] Art 3, Law 28 of 1932 (Colombia); art 1852, Civil Code (Colombia); art 906 Commercial Code (Colombia).

[382] Constitutional Court, Bogota, 10 February, *Sentencia C-068* (1999), Gaceta de la Corte Constitucional number D-2132 and D-2143 (Colombia). [*Sentencia C-68/1999*]

creditor can rely on the tools provided under general contract law to rescind that contract and to rebuild the patrimony of the debtor. [383]

This prerogative of spouses to conclude contracts of sale is responsive to the demands of formal equality, which are important under Colombian civil law. Unfortunately, it neglects the vulnerability that some spouses face due to power disparities. With adequate safeguards, this disparity can lead to forced contracts occurring within conjugal relationships that end up harming the vulnerable spouses' patrimony.

7.4. Conclusion.

Canadian family law protects the financial interests of spouses in different ways to ensure that each one gets fair compensation for their contribution to the conjugal relationship. The federal regime of spousal support functions adequately alongside provincial law regulations over property sharing. This functioning justifies the scope afforded by marital agreements in both provinces. Even in the presence of a waiver of property rights, spouses can still claim support at the moment of dissolution. This spousal support seeks to correct the economic disparity caused by non-financial contributions to the conjugal union and to address the needs flowing from the breakdown of the relationship.

This regime adequately deals with concerns related to the intimate context and to gendered power imbalances in conjugal relations. Provincial laws introduce additional safeguards: the family patrimony ensures a distribution of the main family assets as well as possessory rights over the matrimonial home.

[383] See also the discussion about allowing spouses to conclude contracts of sale for third parties in Medina Pabón, *supra* note 161 at 188–192.

Unfortunately, one flaw in the Canadian system is that cohabitants are often denied access to the protection afforded to married couples even though they live a normal conjugal relationship and share a common financial life.

Unmarried cohabitants end up suffering the consequences of exclusion. Because of this, Colombian law provides more generous legal protection for de facto spouses - similar to the regimes extended to married couples - that could inform the Canadian experience of both Ontario and Quebec. However, the purpose here is to assess Colombian law. Three aspects arise from this survey. First, Canadian law has different ways to protect couples apart from property sharing that ensure fairness at marital breakdown. Second, strict regulations limit the freedom to contract antenuptial and postnuptial agreements. Finally, Colombian law, which provides for an immutable marital agreement but a relative mutable regime, can give rise to unjust results. This can occur when a vulnerable spouse shares an economic life with their partner and yet must later leave the relationship poor and without support – regardless of their personal contribution – because the couple had opted for separation as to property or because they had agreed to liquidate the default regime.

This demonstrates how immutability must be carefully scrutinized. The following section explores the justifications for immutability and the shift towards mutability in the civil and common law jurisdictions studied in this thesis.

8. Justifications for the doctrine of immutability.

8.1. Introduction.

After surveying these three legal regimes, this section identifies the reasoning behind having an immutable marital agreement in Quebec and Ontario. Before this thesis proceeds with its critical assessment of attenuating immutability in Colombia, it must first consider why marital contracts are immutable in some jurisdictions and what explains the shift towards mutability. Understanding the prior reasoning allows to explore if mutable marital agreements still respond to some interests protected by the doctrine of immutability when the proper remedies to safeguard those interests are set. The intimate context and gender power imbalances play a crucial role here since mutable marital agreements privilege autonomy in a way that may endanger, if not properly limited, the vulnerable party in the relationship.

8.2. The Civil law system.

This first subsection considers the movement from immutability to mutability in Quebec. This discussion covers the reasons which historically justified an unmodifiable regime over property in marriage and how that justification changed over time. Yet, some of those justifications have remained persuasive. As such, the marital agreement, even if mutable, still needs to comply with certain requirements ensuring the protection of particular interests. These requirements include the exigence of a public deed before a notary, the mandatory intervention of third parties affected by the contract, the agreement's publicity in a public registry, as well as the possibility that creditors may claim that prejudicial agreements not to be set up against them.

The French Civil law tradition inspired civil codes in several countries in America including Colombia, Chile and in the Canadian province of Quebec. Both Colombian and Quebec law contemplated an indissoluble marriage with an immutable status, and where economic effects were accessory. In the

same way that marriage had an immutable status, the matrimonial economic regime had to remain immutable until its dissolution based on the legal principle that "the accessory follows the principle".[384] The immutable status of marriage entailed the immutability of its personal and economic effects, including those agreed between future spouses before marriage.[385]

These agreements between spouses were possible through the marriage contract. This contract remained immutable in Quebec until 1970[386] and is still immutable in Colombia.[387] As Roy affirms, Quebec legislators were skeptical to permit contracting between spouses inside family relations.[388] Roy describes the reasons behind this skepticism during the debates looking to change the laws governing matrimonial regimes.[389] These reasons were legislative coherence, the notion of a family pact that included extended family in the agreement, the protection of a dependent, incapacitated and subordinated woman, as well as the protection of creditors.[390] The following subsection expands further on each consideration.

[384] Suarez Franco, *supra* note 3 at 307.

[385] Ernest Caparros, "Loi Concernant Les Regimes Matrimoniaux" (1970) 11:2 C de D 303 at 313.

[386] Roy, *supra* note 123 at 97.

[387] Suarez Franco, *supra* note 3 at 307, 308.

[388] Roy, *supra* note 123 at 95, 96.

[389] *Ibid* at 95–99.

[390] *Ibid* at 98, 99.

8.2.1. Keeping the immutable contract in Quebec law.

Developing these reasons entails locating the legal context of marriage. The previous Civil Code of Lower Canada considered married women incapacitated until 1963,[391] and contemplated a matrimonial regime of a community of movables and gains whose sole manager was the husband.[392] The law prohibited contracts between spouses to protect the interest of the family[393] and of those who had any business with the husband and needed clarity over the legal regime of the person assuming obligations. This explains the first reason in favour of maintaining immutability, which is legislative coherence. The husband had the obligation to care for his wife and children as the head of the family. This role justified an economic regime in which he managed and answered for the family's responsibilities; this regime needed to be static and unchanging.[394]

Following this logic, another reason was concerned with who intervened in these agreements. Marital agreements were family pacts between the families of future spouses. These pacts contained gifts and other concessions with the sole purpose of ensuring the maintenance of the wife and children during marriage and in the event of its dissolution. Accordingly, spouses could not modify these agreements on their own, given that there were other participants.[395] In addition to this, since the married woman

[391] Caparros, *supra* note 391 at 303.

[392] *Ibid* at 302–306, 308–312.

[393] See Leckey's contention that immutability in the past answered to an indissoluble marriage requiring special protections for the wife to secure her economic future in Leckey, *supra* note 5 at 33.

[394] Roy, *supra* note 123 at 98.

[395] *Ibid* at 98–99.

was considered incapacitated and under the husband's dominance, the agreements were characterized by a clear imbalance. Preventing an abuse of this imbalance justified prohibiting modifications to the matrimonial regime after marriage.[396]

Finally, given that the whole regime modified the situation of the property of the husband and the wife, third parties needed clarity over the patrimonial situation of the person with whom they were contracting. Immutability prevented cases of fraud where spouses changed their economic regime to the prejudice of their creditors. However, as professor Caparros has suggested, the marriage contract was no longer considered an untouchable family pact once married women were no longer deemed legally incapacitated and once the new regime of the partnership of acquests was introduced. At any rate, Quebec legislators opted for a mutable marriage contract but with strict requirements and limitations given the importance of family matters.[397] We develop the reasoning for adopting this change in the subsection below.

8.2.2. The reasoning for the change in Quebec.

Formal equality between men and women in marriage changed the whole logic of the regime,[398] justifying a departure from the immutable marriage contract towards a mutable one. Additionally, the new default regime, the partnership of acquests, did not deprive spouses of the ownership, the right

[396] *Ibid* at 99.

[397] Caparros, *supra* note 391 at 313–314.

[398] *Ibid* at 303.

of disposition, or any other prerogative under contract law during the regime – with only a few exceptions regarding the family residence and some gratuitous contracts. Consequently, the law gave the freedom to spouses to conclude marriage contracts at any time.

Nevertheless, these modifications also incorporated safeguards to address the reasons that had once justified immutability. First, all marriage contracts had to be notarized, ensuring the fair participation of a third party in charge of informing the parties of the nature and consequences of the agreement. Second, it was subject to homologation where the court had to approve that the modifications did not affect the interest of the family or creditors. Finally, the agreement had to be included in a public record becoming available to any interested person.[399] These mechanisms aimed to protect the family interests impacted by this type of contracting.

In 1980, Quebec issued the new Civil Code of Quebec. This new legislation eliminated the requirement of court homologation, considering it a bureaucratic and expensive process preventing spouses from privately defining the economic consequences of their relationships.[400] Instead, the new code gives creditors who may find the agreement prejudicial one year to claim that the agreement is not opposable to them.[401] This remedy safeguards prior debts and the extent to which the new matrimonial regime agreed between the spouses affects compliance.[402]

[399] Art 1265 CCBC (Repealed).

[400] Roy, *supra* note 123 at 103.

[401] Art 438 CCQ.

[402] Roy, *supra* note 123 at 104.

Arguably, the current regime of mutable marriage contracts in Quebec privileges a private ordering which permits spouses to adapt their matrimonial regime to their projects. However, this freedom fails to account for the vulnerability and the power imbalances present in intimate relationships. In my view, court homologation, although expensive, seemed like an important step giving control to the court to protect certain interests that may be negatively impacted by alterations to the family economy. Furthermore, the requirements of publicity and notarial intervention could reasonably benefit from additional mechanisms like those used in common law regimes, such as legal advice, full disclosure of assets, or a fixed time of negotiation.

The next subsection deals with postnuptial agreements in Ontario. It incorporates some of these ideas in understanding the effects of marital agreements concluded in ongoing conjugal relations.

8.3. The Common law system.

This subsection develops the reasoning behind the limitations over postnuptial agreements in Ontario. Firstly, it considers the prohibition on marital agreements anticipating a marriage's breakdown. Second, it analyzes the shift towards regulating marital agreements regardless of the time the spouses concluded them. Finally, it explores the requirement of abundant good faith that courts in Ontario require from spouses in their contracting.

8.3.1. From general prohibition to permitting domestic contracts between spouses.

Common law jurisdictions traditionally rejected contracts between spouses that anticipated, in any manner, the relationship breakdown, since they were thought to be against public policy.[403] This prohibition made sense under the coverture and during the time marriage was an indissoluble institution or unmodifiable status.[404] Before the enactment of the Family Law Reform Act in 1978 in Ontario, married spouses could not conclude agreements anticipating a future separation, and unmarried cohabitants could only enter in this type of agreement "in contemplation of marriage". "Agreements for future separation were considered void on public policy grounds because they were thought to undermine the stability of marriage and the family".[405] However, after the introduction of divorce, this limitation to conclude contracts became questionable.

In fact, after the Divorce Act of 1968, provincial legislation regulated the enforceability of domestic contracts.[406] In his analysis of the introduction of the Family Law Reform Act in Ontario, Mendez da Costa reminds us that "public policy is not static, on the contrary, it is a changing concept".[407] Accordingly, domestic contracts were no longer seen as encouraging family instability. Instead, these contracts, subject to certain limitations, permitted spouses to privately define the effects of their relations. Importantly, the legislation introduced in Ontario in 1978 and the one replacing it in 1985 contemplated agreements which could be concluded at any time and which could be modified by future agreements so long as they met certain statutory conditions.

[403] Mossman et al, *supra* note 126 at 400; Kronby, *supra* note 278 at 165.

[404] Mossman et al, *supra* note 126 at 55.

[405] Kronby, *supra* note 278 at 165.

[406] Mossman et al, *supra* note 126 at 400.

[407] Derek Mendez da Costa, "Domestic Contracts in Ontario", 1:2 Can J Fam L 232 at 238.

Therefore, the principles applied to marriage contracts and cohabitation agreements are the same regardless of the time they are concluded. However, the facts surrounding the negotiation and the conclusion of the agreement vary and this can affect the analysis of the grounds for the court to exercise the discretion of setting aside the domestic contract. Additionally, the courts in Ontario incorporated the requisite of abundant good faith to those spouses who contract in ongoing relations.

8.3.2. Skepticism and benefits over postnuptial contracting.

Apart from the general rules provided in the survey over family law in Ontario, these reasons can support a deeper analysis in agreements concluded in ongoing relationships. As Shaffer argues with respect to the decision in Hartshorne, there are some cases where one spouse's situation should lead the court to conclude that there was a lack of free consent.[408] Ongoing relations can create economic dependence leading spouses to sign grossly unfair contracts they mostly disagree with.[409] Yet, courts may enforce those contracts based on a mistaken view of contractual autonomy.[410] Vulnerability can be more revealing in an ongoing relationship where a spouse may have no other choice but to sign.

[408] Shaffer, *supra* note 317 at 281–286; Mossman et al, *supra* note 126 at 422, 423.

[409] *McCain*, *supra* note 310 at paras 65, 66; Mossman et al, *supra* note 126 at 423, 424.

[410] *Hartshorne*, *supra* note 76 at paras 65-67, 89, 90, 91.

Another consideration over marriage is that this type of agreement can promote relationship breakdown.[411] Indeed, some American states have rejected postnuptial agreements during marriage for they may give parties some incentive to leave the relationship.[412] It seems Ontario law rejected this concern, perhaps because divorce is a matter of federal regulation.[413] Furthermore, if the parties enter into an agreement looking to reconcile their differences as a couple and then they fail in the attempt to do so, they are free to divorce or separate. The important thing is that they deal with their property adequately and with the utmost good faith.

For its part, the requirement of utmost or abundant good faith reflects how Ontario law considers contracts between spouses. As already stated, in D'Andrade v Schrage[414] and Stevens v Stevens[415], Ontario courts have insisted on the consequences of having an intimate conjugal relationship when negotiating and concluding a contract. Therefore, spouses must disclose all personal and financial

[411] On the contrary, postnuptial agreements adapt and permit reconciliations. See further in Nicholas Bala, "Governing Relationships by Agreement Instead of Judicial Discretion : Marriage Contracts and Cohabitation Agreements in Ontario" (1980) 3:2 Fam L Rev 91 at 93.

[412] Ann Atwood, *supra* note 14 at 22; Hunter Jules & Nicola, *supra* note 180 at 342, 343; George F Bearup, "Postnuptial Agreements : Navigating the Public Policy Hurdle" (2017) 36:3 Michigan Probate Estate Plan J 5.

[413] Constitution Act, 1867, s 91 (26).

[414] *D'Andrade v Schrage*, *supra* note 302 at paras 77-82.

[415] *Stevens*, *supra* note 314 at para 175.

information, depending on the context,[416] to ensure that the other party has the full picture before signing a contract that defines the financial outcome of the relationship. Interestingly, this good faith requirement influenced the analysis in two cases where couples had used a postnuptial agreement as part of a reconciliation process.[417]

Some benefits of post-marital agreements arise from this analysis. First, these agreements can help in reconciliation processes. Second, they can also respond to the changing circumstances of a couple, accounting for the context of the relationship at all times. Finally, it may enable the parties to protect their assets from the personal choices of spouses that could affect significantly the family economy.

We could cautiously state that these benefits push towards allowing contracts at any time but require a strong regime that protects the power disparity that may impose unfair agreements on one dependent spouse - typically the wife. In my view, this freedom over postnuptial agreements is only justifiable if there are also remedies permitting coercive contracts to be set aside, strict possessory rights over the matrimonial home, as well as enforceable rights to spousal support regardless of the couple's property sharing regime.

[416] See that in *D'Andrade v Schrage*, *supra* note 302 the ONSC found that only full financial disclosure was necessary, since domestic contracts deal mostly with property. In *Stevens*, *supra* note 314, the same court found that financial and personal full disclosure was necessary for the context of reconciliation agreements; see also Mossman et al, *supra* note 126 at 426, 427.

[417] *Ibid.*

8.4. Conclusion.

In the end, all considerations of contracting in ongoing relations in Ontario and Quebec acknowledge the need for special safeguards and considerations protecting the interests of the family. Abandoning the immutability of marital agreements as an accessory characteristic of an immutable and indissoluble marriage came from changes in society, public policy and the governing legal regime. It was only when men and women had equal rights of disposition over property under the law and the dissolution of marriage was permitted that mutability made sense. Therefore, any proposal to attenuate the immutability of the marital agreement in Colombia must consider the interests traditionally protected by immutability and the things subject to private ordering.

However, there are certain flaws with allowing contracts to be concluded at any time. Relaxing these traditional rules may give rise to problems rooted in the context of intimate relationships and gendered power imbalances. Canadian law responds to these concerns lightly by enabling a two-way compensatory and need-based spousal support, Quebec's family patrimony and Ontario's possessory rights over the matrimonial home. Although property arrangements may still be unfair, these public order rules help prevent coercive agreement regarding property from being enforced and prevent vulnerable spouses from being left in poverty at a relationship's break down.

As described above, Colombian law has different mechanisms of protection that can leave vulnerable spouses unprotected if freedom is increased without creating the proper safeguards, some of which have been developed in this section. These safeguards include the requirement of a full disclosure of assets, debts and liabilities; the requirement of a full understanding of the consequences of the contract, as provided by an independent legal advisor; as well as notarial or judicial intervention which can ensure that third parties and creditors are not negatively affected. Likewise, these safeguards may also

contemplate a heightening of contact law's standards. Spouses may be bound to more than just the good faith of an ordinary businessperson. They may instead be obliged to a higher standard of conduct which accounts for the context and realities occurring within a couples' relationship.

Following these conclusions flowing from the Quebec and Ontario experience, the final section critically assesses the effects of attenuating immutability of the marital agreement in Colombian family law.

9. The effects of attenuating immutability in Colombia.

9.1. Introduction.

This final section sets out a proposal for attenuating the immutability of marital agreements in Colombia based on the study carried out in this thesis. It also highlights the advantages and disadvantages flowing from this proposal. This section does not intend to anticipate the effects of law reform - which are unpredictable - nor does it seek to make legal transplants from Canadian law into Colombian law without relying on the pertinent comparative tools. Instead, this final section offers an example of approaching legal reform over the immutability of marital agreements in Colombia based on the theoretical and regulatory frameworks analyzed in the previous sections.

As we have already stated, the reason to carry out this analysis lies in the importance of the economic relations between spouses during their marital relationships. The fact that Colombian law maintains marital agreements' immutability invites us to explore different scenarios dealing with mutable agreements. These alternatives included the rules governing marital agreements in Ontario and

Quebec, considered through the lens of feminist relational contract theory and the controversy between public and private ordering in family law. Drawing on these experiences, which includes the regulation of couples' relationships, the shift from immutability to mutability in Quebec, and the logic of postnuptial agreements in Ontario, this analysis identifies the advantages and disadvantages of a proposal to reform the doctrine of immutability in Colombia.

Identifying those advantages and disadvantages invites further research to propose a future reform into Colombian law considering the benefits and flaws of others' experience. Interestingly, this study focusing on marital agreements suggests that a proposal attenuating immutability should consider the economic effects of couples' relationships as a whole. Otherwise, the increase of autonomy conferred to spouses without adequate limitations can create higher economic imbalances for vulnerable parties after conjugal breakdown often affecting women[418] and children.

Building on this theoretical framework and drawing from the Ontario, Quebec and Colombian experience, this section develops a proposal and its supporting analysis in five parts. First, it identifies the reasoning for attenuating immutability based on the survey of Canadian and Colombian law. Then, it sets out a reform which builds on both the Canadian experience and the characteristics of Colombian law. Sections three and four consider the advantages and disadvantages which may arise from the proposed reform to the regulation of marital agreements. Finally, the fifth section offers some brief conclusions.

[418] See the analysis of gender power imbalances in prenuptial agreements in the United Kingdom and the State of New York in Thompson, *supra* note 1.

9.2. The reasoning for attenuating immutability in Colombia.

This section offers reasons to attenuate the immutability of marital agreements in Colombian law. This reasoning draws from the analysis of Canadian jurisdictions and the justifications for maintaining or rejecting the doctrine of immutability. I will suggest that an immutable contract fixed before marriage or cohabitation prevents spouses from adapting their arrangements according to the changes which occur in their lives over time.[419] The justification for making marital agreements mutable thus relies on a recognition that spouses should be allowed to adapt their agreements to their ongoing relationships.

Indeed, feminist relational analysis of the Canadian jurisdictions surveyed in section 6 of this thesis suggests that attenuating immutability enables spouses to adapt their marital agreements to the changes taking place in their ongoing relationships. Immutability prohibits all alterations to the economic regime during marriage and cohabitation through a modification or conclusion of a new agreement.[420] As discussed above, relational theory suggests that long-lasting relationships like marriage and cohabitation entail economic and social changes which cannot, in Macneil's terms, be presentiated.[421] As such, a relational approach that acknowledges the changing nature of family relations over time justifies attenuating immutability.

[419] A relational approach to marital agreements shows that immutability fails to take into account the changes happening during the relationship, see further in Leckey, *supra* note 6 at 35.

[420] Parra Benítez, *supra* note 3 at 210, 211.

[421] Macneil, *supra* note 32 at 594; Thompson, *supra* note 1 at 153.

Accepting that spouses' agreements may change over time under a regime with attenuated immutability calls for certain limitations to avoid the abuse of private autonomy. The Canadian regulatory framework surveyed above demonstrates that an approach to mutable marital agreements needs to be tempered considering the possible impact on vulnerable spouses' economic rights. The feminist concerns developed earlier also suggest that the reasons motivating change need to be carefully assessed to avoid an abusive exercise of autonomy that affects vulnerable spouses and to ensure access to some essential rights that cannot be excluded through private agreements.

Certainly, the changes happening inside a couple's relationship often affect one spouse more than the other since, as Thompson argues, women are more likely to suffer economic changes during a conjugal relationship.[422] With this perspective, spouses facing significant changes can conclude new marital agreements, distributing property rights fairly between them, or ignore upcoming changes and continue to be bound by the originally-agreed terms. Those original terms can produce unfair results if they wrongly assumed the evolving economic position of the subjects involved in the relationship.

Of course, ignoring future changes can happen equally in prenuptial and postnuptial agreements. However, couples' ability to respond fairly to changes can only occur through a mutable agreement. This reasoning can acknowledge the risks which flow from allowing marital agreements to be amended while demonstrating the benefits of an attenuated immutability which enables spouses to adapt their agreements to the changing circumstances of their relationships.

[422] Thompson, *supra* note 1 at 155.

9.3. The approach proposed to attenuate immutability in Colombian family law.

This section develops the proposal which builds on the analysis in this thesis. This proposal includes amending the current regulatory framework and suggesting some additional rules drawn from the Canadian experience with marital agreements during conjugal relationships. This section proceeds as follows. First, it develops the rules of the Civil Code needing modification. Second, it describes certain additional requirements for concluding valid marital agreements. Third, it sets out a proposed family patrimony excluding some assets from private ordering. Fourth, it proposes an amendment to the rules on spousal support which jettison the sanction-based notion of the Civil Code. Fifth, it proposes certain mechanisms to prevent situations where a modification to a marital agreement can prejudice the rights of third parties.

Again, the idea here is to provide an example of an approach to mutable marital agreements according to the Canadian laws surveyed, the theoretical framework set out in this thesis, and the doctrine of immutability. After describing the proposal, the following section will address the advantages and disadvantages arising from this proposal aiming to promote further research on the conventional regime for Colombian conjugal relationships.

9.3.1. Reforming the current regime of the Colombian Civil Code.

This subsection introduces a few proposed modifications to the existing rules governing the immutability of marital agreements in the Colombian Civil Code and proposes alternative rules based on the elements studied above. This subsection's proposals apply equally to both married and unmarried couples, with only a few differences described in section 7.

Fundamentally, the proposed reform seeks to amend some of the rules governing marriage contracts contained in articles 1771 to 1780 of the Colombian Civil Code. Specifically, articles 1771, 1778, and 1779 require modification in order to attenuate immutability.[423] Currently, all of these articles exclude postnuptial agreements. Thus, these provisions will need to be amended to eliminate the prohibitions which declares all postnuptial agreements to be absolutely null. This modification would permit spouses to conclude marital agreements after marriage or after the beginning of cohabitation. However, these agreements should still be subject to additional requirements in order to reduce or contain the harms that could result from the abuse of private autonomy.

Other rules requiring emphasis are those of articles 1842 to 1848 of the Civil Code regulating the gifts in consideration to marriage. Although these rules rely on the rules of gifts *inter vivos* requiring the participation of the parties for the validity of a modification,[424] the proposed amendment would specify their mandatory participation to guarantee their rights in mutable marital agreements. The proposed rule would include a provision specifying that any modification of the marriage contract that affects third parties' interests in the contract needs their express consent to be valid and enforceable.

The rules requiring marital agreements to be concluded before a notary in a public deed,[425] the limitations of public order and morals[426] and the provisions establishing that in the absence of an

[423] The current regulation forbids any alteration to the marriage contract that takes place after the marriage or the beginning of the de facto relationship, see further in Aramburo Restrepo, *supra* note 51 at 340.

[424] Suarez Franco at 309.

[425] Art 1772, Civil Code (Colombia).

[426] Art 1773, Civil Code (Colombia).

agreement the default regime applies[427] must remain untouched. Additionally, the requirement of making an inventory of assets and debts[428] needs to be strengthened. Instead of being optional, it must become mandatory.[429] A lack of full disclosure leaves spouses uninformed of their finances at the time of the agreement and as such unaware of the consequences of the contract.[430] This failure needs to be a ground to determine the absence of free consent and the consequent invalidity of the agreement.

Apart from these modifications to the existing norms, the Canadian experience calls for including new rules to face the relational and feminist concerns described earlier. This proposal includes four potential amendments developed in the following subsections. First, the introduction of additional requirements to ensure fully informed consent that protects vulnerable spouses. Second, the creation of a group of family assets that remain out of the scope of private agreements.[431] Third,[432] the extension of spousal support to ensure fair compensation for spouses' contributions to the relationship and to attend to the needs of both partners post-dissolution, regardless of who is at fault

[427] Art 1774 Civil Code (Colombia).

[428] Art 1780, Civil Code (Colombia).

[429] Following the remedy of full disclosure of assets, debts and liabilities from the Ontario regime. The Family Law Act, s 56.

[430] The law in Ontario attributes judicial discretion to set aside domestic contracts where spouses failed to disclose significant assets, debts and liabilities. The court must analyze the circumstances surrounding the failure and determine whether or not the contract must be set aside on that ground, see further in Ontario Payne & Payne, *supra* note 184 at 79, 80.

[431] Following Quebec's family patrimony in arts 414-426 CCQ.

[432] Following the Family Law Act, s 56(4).

for the relationship breaking down.[433] Fourth, a mechanism for third parties to claim that prejudicial alterations made through marital agreements cannot impact their obligations or pre-existing debts.[434]

9.3.2. Introducing additional requirements to marital agreements.

The Family Law Act in Ontario regulates the grounds for the court to exercise its discretion in setting aside marital agreements.[435] Among other objectives, these grounds aim to ensure the informed consent of spouses.[436] Considering the effects of long-lasting relationships that change over time[437] and the power imbalances that often take place between spouses,[438] this proposal to attenuate the immutability of agreements needs to include additional safeguards that inform the parties of the nature, consequences and circumstances surrounding their agreements.

[433] Following the The Divorce Act, s 15.2(6); Rogerson, *supra* note 229 at 72–76.

[434] Following art 438 CCQ.

[435] Family Law Act, s 56(4).

[436] Mossman et al, *supra* note 126 at 403–405.

[437] See for example the debate between discreteness and relational theory where Macneil argues that there is a misguided assumption in contract law that contends that a contractual relation is "encompassed in some original assent to it". See further in Ian R Macneil, "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law" 72:6 Nw UL Rev 854 at 887–890.

[438] Thompson, *supra* note 1.

In this vein, Roy and Shaffer remind us that there are circumstances that obscure the contractual consent of one spouse whose only choice is to sign.[439] This coercion can occur due to the "sociological dominance"[440] of husbands over wives, economic dependence, motherhood or other emotions that leave vulnerable spouses no other alternative.[441] These circumstances require stronger remedies that reduce the disadvantageous effects of contracting during conjugal relationships, including the impacts of power imbalances affecting these agreements.[442]

Accordingly, this proposal would introduce 3 additional requirements for the validity of marital agreements which are not currently imposed by Colombian law, and without which these agreements would be considered null.[443] Firstly, spouses who intend to execute a contract with one another must act with abundant good faith.[444] Secondly, each spouse must mandatorily disclose all of their assets,

[439] Roy, *supra* note 123 at 98–100; Shaffer, *supra* note 317 at 264.

[440] Roy, *supra* note 123 at 99.

[441] Thompson, *supra* note 1 at 150; Majury, *supra* note 326 at 134.

[442] Thompson, *supra* note 1 at 161.

[443] Courts' discretion as regulated in the Family Law Act in Ontario creates uncertainty for the economic relations of spouses. Instead, the Civil Code should have additional grounds for the judge to declare the absolute nullity of these agreements. These regulations that belong to a different legal tradition require further scrutiny. For the moment, this proposal includes them as grounds for the absolute nullity to ensure an informed consent given the potential risks studied throughout this thesis.

[444] The good faith is required for all contracts under both Canadian and Colombian law. However, this additional requirement of abundant good faith takes from the criteria used by courts in Ontario

debts and liabilities held at the time of the conclusion of the contract.[445] Thirdly, the law must guarantee that each spouse has understood the nature and consequences of the agreement, with the assistance of independent legal advice, if necessary.[446] These additional requirements, although making these agreements harder and more onerous to conclude, help ensure the informed consent of both parties. However, as Thompson argues, these additional safeguards do not guarantee that power imbalances will not still continue to influence the agreement and affect consent.[447] As this proposal suggests, at least these effects can be appropriately contained or reduced.

requiring spouses to contract with abundant good faith for their contracts to be valid, see in *D'Andrade v Schrage*, *supra* note 302.

[445] Under Colombian law the asset inventory is not mandatory, the lack of full disclosure of assets, debts and liabilities does not invalidate the marital agreement. Art 1780, Civil Code (Colombia).

[446] Colombian law does not require independent legal advice to conclude valid marital agreements, instead it considers that the notarial intervention suffices. The notary must inform the spouses of the impact of such an agreement, but the document can easily be drafted and imposed over a vulnerable spouse who may not have the ability to negotiate the terms of the agreement. On the contrary, s 56(4) of the Family Law Act requires that both spouses fully understand the nature and consequences of domestic contracts and imposes a higher burden on abusive agreements imposed over vulnerable spouses where the only chance they had was to sign.

[447] Thompson, *supra* note 1 at 161.

9.3.3. Introducing public order regulations excluding essential family assets from private ordering.

When this proposal refers to attenuated immutability, the expression "attenuated" implies an approach that contains or reduces the possible abuses of autonomy. Marital agreements take place in a context that needs special attention due to the intimate relations between family members. These relations demand that some rights remain out of scope of private ordering.[448] In this vein, Quebec law has devised one interesting solution – the family patrimony – that merits inclusion in this proposal. Any such proposal must determine, with the proper comparative perspective, what property is essential to the family and thus needs to be shared between spouses at the marital dissolution in order to ensure that they both benefit from the fruits of their relationship.

In Quebec, as described above, spouses are entitled to certain property that falls within the family patrimony[449] and that is excluded from the scope of marriage or civil union contracts.[450] Colombian law does not have a concept or set of rules equivalent to this one. Spouses can opt for a conventional regime or let the default regime regulate their economic relations. If they opt for a conventional regime of full separation of property or decide to dissolve their marriage or de facto partnership, they do not share property at dissolution.[451] Perhaps, the only equivalence is with regards to debts, where spouses, even in a regime of separation of property, share the common debts of the household and the care of

[448] See for instance art 391 CCQ. This norm posits that the effects of marriage and civil union in Quebec have imperative effects protected under public order.

[449] Art 415 CCQ.

[450] Art 391 CCQ.

[451] Parra Benítez, *supra* note 3 at 266–270.

common children.[452] The proposed regulatory approach will ensure that vulnerable parties remain entitled to certain essential family assets at dissolution even if they renounced the benefits of the default regime through a valid marital agreement.

In accordance with the previous analysis, this proposal suggests that the family residence, the cars belonging to both spouses and that are used to transport the family, as well as the movables inside the family residence, should be excluded from private ordering. This proposal takes its inspiration directly from the family patrimony in Quebec,[453] although it recognizes that further comparative research is needed to offer a proper description of the family assets that are essential for Colombian families. As described below, this concern should inform future research regarding the economic regime of couples' relationships, whether legal or conventional.

9.3.4. Strengthening the scope of spousal support to a need and compensatory-based approach.

One additional element of this proposal to attenuate immutability requires a change to the concept of spousal support. As described earlier, the Colombian Supreme Court has already begun to depart from the sanction-based notion of spousal support.[454] Nevertheless, Colombian law still provides that an order of support should be imposed against the guilty spouse after divorce.[455] Unfortunately, this

[452] Suarez Franco, *supra* note 3 at 348.

[453] Art 415 CCQ.

[454] Aramburo Restrepo, *supra* note 51 at 415, 416.

[455] Art 411, Civil Code (Colombia).

traditional concept of support as a sanction can leave spouses unprotected. This lack of protection also affects cohabitants whose relationships do not have an equivalent framework determining the grounds for divorce.[456]

Canadian spousal support, as regulated in the Divorce Act, uses wider criteria in determining who is entitled to support and under what conditions.[457] As developed above, this support is meant to respond to two principal circumstances. First, support is meant to compensate for the contributions to the conjugal relationship, whether monetary or non-monetary. Second, support responds to the needs of the spouses who may leave their relationship without the means to maintain the living standards they had during the union.[458] This proposal prefers this notion of spousal support in order to properly reduce or contain the negative effects of power imbalances between spouses intensified with mutable marital agreements.

This spousal support proposal for Colombia would include the objectives and aims pursued by Canadian law where spouses are entitled to support irrespective of their monetary contributions to the couples' wealth. This new approach would ensure that vulnerable spouses do not leave their relationships completely impoverished and that their non-financial contributions – which can be maintaining the family home and supporting the children's care – get adequately compensated at relationship breakdown.

[456] Law 54 of 1990; Law 979 of 2005 (Colombia).

[457] The Divorce Act, s 15.2(4), 15.2(6).

[458] *Ibid.*

9.3.5. Ensuring the protection of third parties' interests.

Although this proposal focused on the effects of attenuating the immutability of marital agreements on spouses, these rules also affect third parties. Sections 6 and 8 of this thesis discussed marital agreements' notion of a family pact, where relatives and close friends include gifts to the couple in consideration of their marriage and the support of future children. Additionally, the economic regime of married and unmarried cohabitants affects the interest of civil and commercial transactions involving one or both spouses. It is therefore important to determine which patrimony can be called on to pay the debts assumed by a person in a conjugal relationship. Therefore, any proposal for attenuating immutability must include adequate protections for third parties who can be affected by amendments introduced in a postnuptial agreement. This subsection describes a proposal regarding the third parties identified within the contract as well as the couples' creditors.

In Quebec, which deals with these concerns in the civilian legal tradition, any modification to the obligations assumed by third parties in the marital agreement must include their participation.[459] For its part, Colombian law accepts the premise that one can only be obliged to do what one has consented to do. Imagine the absurd outcome of spouses modifying the gifts given by a third party or increasing the obligation of someone without the person's consent. Clearly, the law must require that all modifications to third party's obligations include their express consent.

[459] Arts 437, 438 CCQ.

The Civil Code of Lower Canada, after 1970, allowed modifications to the marriage contract[460] only after judicial homologation where third parties participated.[461] This process of homologation was rejected from the new Code in 1980 for being, in Roy's words, excessively onerous.[462] Instead, the law now only permits amendments affecting third parties in the contract with their express consent.[463] As mentioned above, Colombian law regulates third party's gifts in consideration to marriage in the general rules of gifts *inter vivos*.[464] As a result, any modification to a provision concerning their obligations requires the third party's consent, whether it is in the marriage contract or in any other instrument.[465] It seems that judicial intervention in these matters makes little difference, since a modification of another's obligation is simply invalid due to the lack of consent of the would-be debtor.

Likewise, the case with creditors is also a matter that only involves their interest and the patrimony on which they rely to claim compliance. Importantly, the immutability of marital agreements aimed to achieve some certainty regarding who and under what regime one person could contract. The need for this certainty, however, should not limit proposals to temper immutability if such reforms can include safeguards for creditors to prevent these instruments' from being used to commit frauds.

In Quebec, the first reform proposed was the ex-ante judicial intervention which would declare amendments to marriage contracts as valid, and where creditors could participate and claim any

[460] Art 1265 CCLC (Repealed).

[461] Art 1266 CCLC (Repealed).

[462] Roy, *supra* note 123 at 103.

[463] Arts 437, 438 CCQ

[464] Suarez Franco, *supra* note 3 at 310.

[465] Arts 1848-1852 Civil Code (Colombia).

potential prejudice.[466] Again, the cost of this procedure made these agreements unviable.[467] In my proposal, bearing in mind the Colombian context and the inefficiency of the judicial apparatus,[468] such a requirement will increase family court congestion and diminish the use of marital agreements. Instead, much like Quebec,[469] creditors shall be given the right to seek a judicial declaration that a particular, prejudicial agreement cannot be set up against them. Or, creditors may rely on the *Paulian* action[470] from general contract law to reconstitute the patrimony of the person who fraudulently diminishes the guarantee of his or her debt.[471]

In addition, this proposal suggests that marital agreements should include notarial intervention and the publicity of the agreement in a public registry accessible to all those interested.[472] Consequently, third parties suffering any prejudice from an amendment can follow subsequent modifications in the conjugal regime and challenge those prejudicial to their interests. Although resolving this problem is necessary for the whole proposal to succeed, it does not affect the relationship between spouses.

[466] Art 1265, CCLC (Repealed).

[467] Roy, *supra* note 123 at 103.

[468] Ramón Antonio Peláez Hernández, "El Proceso Civil Oral En Colombia" (2019) 12 Revista Misión Jurídica 249 at 259–261.

[469] Art 438 CCQ.

[470] Creditors can exercise the Paulian action to revoke all acts made by the debtor in prejudice of the interests of his creditors to rebuild his patrimony, see further in Rogel Vide, *supra* note 17 at 79–82.

[471] Ars 1631-1636 CCQ; art 2491 Civil Code (Colombia).

[472] Arts 440-442 CCQ.

Nevertheless, this problem merits further study concerning spouses contracting during marriage under Colombian law. Yet, these issues are left for another project.

9.4. Advantages.

This subsection identifies the principal advantages of the proposal described above, and draws on some of the earlier analysis set out in this thesis. This section describes three advantages. First, mutable marital agreements can adapt to the changing circumstances taking place within family relationships. Second, these agreements can assist with the reconciliation processes of married and unmarried couples. Third, these agreements permit spouses to protect family assets from private initiatives that carry financial risk.

9.4.1. Marital agreements that respond to changes in ongoing relationships.

This advantage constitutes the principal purpose of this proposal. A regime that attenuates the immutability of marital agreements allows spouses to conclude agreements that respond to the ongoing circumstances surrounding conjugality. These changes can include the decision to have children, a change of employment, or the decision to move to a new place. All of these important changes demand the possibility to define (or redefine) how to deal with property. For example, one spouse can agree to leave an economic activity to assume the domestic care but only if the other one assumes some sharing regime for the property acquired after this decision. This example shows how

postnuptial agreements can respond to the changing intentions and plans of the parties during their relationship.

This proposal is aware that marital agreements cannot reflect this ideal at all times. Some agreements can diminish or create disadvantages for one spouse who, being economically or emotionally dependent, has no other choice but to sign. For these agreements, this proposal provides stronger protections for vulnerable parties, allowing them to make more informed decisions and reducing the impact of power imbalances. However, when marital agreements are found to be valid but still lead to unfair outcomes, this proposal suggests that vulnerable spouses should still have access to other means of protection, ensuring access to essential property and spousal support. These imperative rules should prevail in cases in which marital agreements show a disproportionate distribution of the family's wealth at marital breakdown.

9.4.2. The ability to reach reconciliation agreements.

In line with the previous advantage, spouses can face difficulties during their relationships that affect their confidence in the future of their commitments to one another. Sometimes, this lack of confidence gives rise to concerns over their property and their financial situation, both during and after the relationship. The ability to reach new agreements over economic relations can help spouses give their relationships another opportunity while assuaging their financial concerns.

The experience in Ontario surveyed in previous sections analyzed how postnuptial agreements can help to maintain a broken relationship.[473] Entering a postnuptial agreement does not ensure that the relationship will succeed but at least spouses can decide upon the economic conditions they want for this new stage of their relationship. The doctrine of immutability limits these agreements that could help redefine a broken relationship. If circumstances change, the law should allow spouses to conclude agreements in accordance with their new circumstances, without prejudice to the imperative effects which remain the same in the event of a future breakdown.

9.4.3. The protection of family assets from individual initiatives.

Mutable marriage agreements also allow spouses to protect family assets from private initiatives that carry financial risk. For instance, a spouse may wish to start a business requiring credit. This credit, if assumed personally, can increase the common debt of the couple in a sharing regime where the assets of both spouses are the charge of the couple's creditors. This proposal to attenuate immutability in Colombia would allow spouses to exclude assets that they want to keep out of the sharing regime, or to even opt for a full separation of property in order to prevent the negative outcomes that these initiatives can have on the family economy.

[473] *D'Andrade v Schrage*, *supra* note 302 at paras 77-82, *Stevens*, *supra* note 314 at para 175.

9.5. Disadvantages.

This section describes the disadvantages arising from my proposal to attenuate immutability in Colombian law. This section canvasses three disadvantages. First, power imbalances within conjugal relationships can impair a spouse's free consent. Second, it is possible that marital agreements can ensure that vulnerable spouses leave marriage or cohabitation impoverished. Third, fraudulently conceived marital agreements can harm third parties.

9.5.1. The power imbalances strengthened during conjugality can impair free consent.

One of the reasons which Roy believes justified the doctrine of immutability in Quebec is a sociological dominance exercised by men over women within conjugal relationships.[474] This thesis has considered the feminist critiques of formal equality which obscures these power imbalances that exist in marriage and cohabitation. These marital agreements that take place during conjugality can crucially strengthen the impact of power imbalances that often affect women.[475] These power imbalances can negatively impact the exercise of autonomy when signing or negotiating new agreements that alter the economic regime of their relationships.

[474] Roy, *supra* note 123 at 99, 100.

[475] Thompson, *supra* note 1 at 150.

9.5.2. The impoverishment of vulnerable spouses and children.

Thompson highlights the risks associated with unduly privileging autonomy in marital agreements.[476] Strengthening autonomy will inevitably increase the impact of power imbalances in couples' contracting. To respond to this disadvantage, the only choice would be to introduce legal protections to reduce the harmful effects that power imbalances can have over spouses' consent. Apart from additional legal requirements for marital contracts to be valid, there needs to be certain things that can be guaranteed to vulnerable spouses and their children and that escape the autonomy of the parties. These things include some property and spousal support, along the lines described above. Regrettably, the misuse of marital agreements during conjugal relationships cannot be totally excluded or prevented. These modifications, however, can reduce certain harmful effects while permitting spouses to adapt their economic regimes to the changing circumstances of their relationships.

9.5.3. The harmful impacts to third parties.

As described above, the general law of obligations may offer simple solutions to any amendment which purports to alter the obligations of third parties included in a marital agreement. These cases include marital agreements where third parties give gifts in consideration of marriage or future

[476] Thompson, *supra* note 1.

children.[477] Altering marital agreements can pose a risk to these legal relations. The proposal described above attempts to prevent these negative outcomes by requiring third parties' consent to any modification that alters their participation in a new or modified marital agreement.[478]

Apart from these risks to third parties, another disadvantage requiring further analysis is the possibility that spouses may use these instruments to defraud their creditors. Quebec law – reflecting a trend among French-inspired civil codes – has attempted to maintain some certainty with regards to the patrimony which remains the charge of a debtor's creditors.[479] Roy refers to the need for legislative coherence,[480] calling for mechanisms of protection that allow creditors to claim against any modification that could prejudice their interests. In this vein, this proposal draws from Quebec's experience and offers creditors affected by a modification of the economic regime the power to claim that particular amendments do not affect their existing debt. This proposal seeks to reduce the impact of agreements concluded with the sole purpose of defrauding third parties.

[477] Professor Caparros recalls the concerns expressed in the Province of Quebec regarding the impact of mutability for the family's economy and the couple's credit. See further in Caparros, *supra* note 391 at 313, 314.

[478] Arts 1848 to 1852 of the Colombian Civil Code already require the debtor's consent. Yet, the elimination of the immutability of the marriage contract requires a specific norm that ensures the protection of third party's obligations within the contract.

[479] Parra Benítez, *supra* note 3 at 195.

[480] Roy, *supra* note 123 at 98–100.

9.6. Conclusion

This section showed that a relational feminist analysis of marital agreements in Ontario and Quebec law facilitated a critical assessment of a proposal to attenuate the immutability of marital agreements in Colombia. These effects were analyzed by distilling the advantages and disadvantages arising from a specific proposal to reform Colombian family law. Two suggestions were inspired by Canadian approaches and philosophies regarding conjugal property. First, conjugal relationships involve an economic partnership where spouses contribute and, as such, each partner is entitled to participate in the property acquired and accrued during marriage or cohabitation at the relationship's dissolution, regardless of the nature or amount of that person's contribution. The rules governing compensatory and need-based support at a relationship's breakdown should remain unmodifiable in order to fulfill their underlying objectives.

Second, the rights that exceed the basic prerogatives mentioned in the first suggestion can be the subject of private agreements evolving together with the relationship. Nevertheless, this private autonomy must be cabined by additional safeguards which guarantee a free, informed and contextual consent. For the remaining gender or contextual imbalances that these additional safeguards fail to address, any proposal to attenuate immutability should maintain the imperative rules, described above, which prevent unfair agreements from impairing essential rights at marital dissolution.

After introducing these suggestions to the proposal attenuating immutability, this section concluded that the current rules of the Civil Code require amendment to eliminate the prohibition on postnuptial agreements. These amendments would modify articles 1771 to 1780 and 1842 to 1848 of the Colombian Civil Code regulating the marriage contract and the gifts in consideration of marriage. In the end, these proposed amendments reflect the approach of several Canadian jurisdictions which

allow spouses to modify their marital agreements while protecting certain core family interests. This family protection focusses on the needs of fundamentally vulnerable parties like women and children at relationship breakdown.

Critically assessing the effects of attenuating immutability also recalled the benefits of allowing spouses to fully exercise their autonomy in building their life projects inside and outside the family. The reforms proposed above would facilitate reconciliation agreements, allow couples to better anticipate and adapt to changes, protect family wealth from individual risky initiatives and maintain the relationship's economic balance. Since this new freedom can be abused, the law must scrutinize the consent of both parties and, in any event, guarantee certain economic benefits which must remain impossible to waive, such as spousal support or Quebec's family patrimony.

Finally, when third parties intervene in any manner in the family economy, it is their right to oppose any prejudice affecting their interests. The law must therefore require their consent under general contract law principles. The proposal described above would also introduce requirements of publicity and notarial intervention, as well as other judicial remedies safeguarding third parties' rights when marital agreements modify a spouse's financial situation.

10. General Conclusion.

Attempting a critical analysis of marital agreements' immutability in the Napoleonic-based civil codes is hardly a new project, but it remains a necessary one in Colombian family law. Ontario and Quebec law have both facilitated my critical assessment of proposals to reform Colombian law. The experiences of these jurisdictions suggest that family property law requires an approach that ensures

a peaceful coexistence between public and private ordering, all while attending to context and limiting the harms that can arise from gendered power imbalances. Although some jurisdictions privilege private autonomy in family law, others impose imperative rules which respond to the true partnership lived by many couples, compensate for spousal contributions, and satisfy the needs of vulnerable spouses at marital dissolution.

Some scholars avoid discussing marital agreements given their lack of use in Colombia. However, the current regime of relative mutability – which allows spouses to conclude contracts transferring property and to dissolve the default regime by mutual agreement – calls for further discussion. Colombian couples are exposed to many of the same risks associated with mutable and postnuptial agreements, but they do not benefit from the same legal tools or avenues addressing these risks. Vulnerable spouses can thus be left unprotected at dissolution under regimes like the full separation of property, or may be harmed by property transfers completed during marriage or cohabitation or from pressures from their spouse which do not meet the threshold of vitiating consent.

The problem with the current framework is that it only permit anticipatory agreements which may or may not reflect the changing intention of spouses throughout their relationship. This thesis demonstrated in detail how anticipatory contracts fail in long-term and interdependent relationships like marriage and cohabitation. These contracts do not respond to the evolution of the relationship or to other mutual agreements concluded in the future. Instead, spouses are bound by a "presentiation" which may poorly anticipate how spouses wish to carry on their economic relations as a couple.

This thesis proposed a different path, inspired by Canadian law, where anticipatory and post-marital agreements coexist with additional contractual and public order regulations which together cabin certain disadvantageous effects. For its part, Canadian law illustrates the evolution of two legal traditions with a social and historical context different from the one in Colombia. For instance,

cohabitants do not enjoy the same extent of protections in all jurisdictions as they do under Colombian law. Still, the Canadian experience remains useful because it demonstrates how endangering the family with "clean break" models can leave vulnerable spouses unprotected after relationships break down.

These dangers have been met with fruitful public order responses such as the Quebec family patrimony and the federal regime for spousal support under the Divorce Act. These mechanisms respond adequately to the concerns highlighted in section 6 of this thesis. Together, they propose a model that is attentive to the context of conjugal relationships and that limits the risk of abuse of private autonomy.

Likewise, the rights which remain within the sphere of private autonomy must depend on carefully scrutinized consent. Ontario law has introduced additional safeguards to ensure an informed and contextual consent, as required in conjugal relationships. Together, the requirements of abundant good faith, full disclosure of assets, and a full understanding of the nature and consequences of marital agreements permit spouses to make their own decisions over the economic effects of their relationships. However, even with these additional safeguards, autonomous decisions may still fail to protect vulnerable parties from abusive agreements which can intensify the power imbalances of conjugal relationships.

The Colombian context, both legal and social, intensifies these power imbalances due to the burdens of a developing economy, widespread sexism as well as the armed violence that has objectified women and children, separated families, and impoverished the family economy. This context, apart from the intimate nature and gender power imbalances of conjugal relations, justified the relational feminist approach to Canadian and Colombian law over marital agreements set out in this thesis. Although this thesis emphasized the family law framework, the social context cannot be underestimated and should inform further research on the effects of autonomy over conjugal property in Colombia.

The analysis of private and public ordering in Canadian law under the feminist relational perspective facilitated an assessment of proposals to attenuate immutability in Colombia. If Colombia wants to modify the current regime over marital agreements, the law should enhance autonomy by allowing these contracts during conjugal relationships. At the same time, the impact of such a reform demands the legislature's careful attention over certain control mechanisms which can cabin harms threatening the family.

Finally, this thesis' assessment highlights a dearth of laws which develop the gender-based, contextual approach to family law that the Colombian Constitution demands. The current regulatory framework privileges autonomy over the economic effects of conjugal relationships and leaves vulnerable spouses unprotected even though marital agreements remain in theory immutable. Therefore, the law governing marriage and de facto relationships should jettison this archaic immutability while also reassessing what kinds of spousal contributions to conjugal welfare are valued and compensated. The additional protections contemplated in this thesis include stricter contractual safeguards, a more generous, remedy-based spousal support, and an imperative construct of essential family assets in which spouses own an equal share at the relationship's breakdown.

This exercise left us with two important lessons. The first is that the problems of private autonomy within couples' relationships cannot be approached simplistically with an optic guided by pure commercial transactions. Regrettably, the traditional approach from private law would ignore the context of intimate relations which involve emotions, economic dependence as well as circumstances which can change over the long term. The second lesson is that any amendment to the doctrine of immutability of marital agreements cannot focus only on the interest of spousal autonomy. We must instead assume a tempered approach which recognizes that certain rules must remain mandatory in order to reduce the harms associated with gendered power imbalances.

Future research should draw on comparative law to adequately review the impact of introducing some of these proposed regulations into Colombian law. Furthermore, additional studies on this subject can analyze the impact of these reforms on the whole private law regime with greater detail and care. This means that future research should analyze how amending the doctrine of immutability in Colombian law produces effects over the certainty of civil and commercial transactions which include individuals inside a marriage or cohabitation.

Finally, any proposed reform must consider the social context of Colombia. This thesis explored the problems associated with the predominance of formal equality in family law. Women are generally more vulnerable within conjugal relationships than men, since they assume domestic roles more often than men do.[481] Consequently, the regulatory framework governing the economic effects of conjugal relationships should adopt a gendered perspective when analyzing the impact of conventional and default regimes. Unfortunately, the current regime still unintentionally facilitates fraud through simulations or the use of third parties to exclude some property from the sharing regimes of marriage and cohabitation.

In this vein, a reform which attenuates immutability should consider the many concerns explored in this thesis in order to contain the negative effects of increasing spouses' private autonomy. The long-lasting nature of relationships, where circumstances change over time, should also be taken into account. Moreover, the disadvantages suffered by many women and children after a marital breakdown should always be considered. Future research concerning marital agreements should attend

[481] Thompson, *supra* note 1.

to these concerns to ensure a regime that responds to the nature of conjugality and to the impact of private ordering on vulnerable spouses.

11. Bibliography.

Legislation: Canada.

The Civil Code of Quebec.

The Civil Marriage Act, SC 2005, c 33.

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3.

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

The Divorce Act, RSC 1985 c3 (2nd Supp).

The Family Law Act, RSO 1990, c F.3.

Legislation: Colombia

The Civil Code of Colombia. Law 57 of 1857 (Colombia).

The Colombian Constitution of 1991 (Colombia).

Decree 2820 of 1974 (Colombia).

Law 28 of 1932 (Colombia).

The Commercial Code of Colombia. Decree 410 of 1971 (Colombia).

Law 1 of 1975 (Colombia).

Law 54 of 1990 (Colombia).

Law 962 of 2005 (Colombia).

Law 979 of 2005 (Colombia).

Jurisprudence: Canada

Barbeau v. British Columbia (Attorney General), 2003 BCCA 251.

Bosch v Bosch, [1991] 95 ACWS (3d) 1098, 4 R.F.L (5th) 264.

Bracklow v Bracklow, [1999] 1 SCR 420 at 18, 169 DLR (4th) 577.

Butty v Butty, 2009 ONCA 852.

D'Andrade v Schrage, 2011 ONCS 1174.

Dubin v Dubin, [2003] 34 RFL (5th) 227 at para 35, [2003] OJ No 547 (QL).

Hartshorne v Hartshorne, 2004 SCC 22.

Kerr v Baranow, 2011 SCC 10.

Levan v Levan, 2008 ONCA 388.

M. v H., [1999] 2 SCR 3, 43 OR (3d) 254.

McCain v McCain, 2012 ONSC 7344.

Miglin v Miglin, 2003 SCC 24.

Miron v Trudel, [1995] 2 SCR 418, 124 DLR (4th) 693.

Moge v Moge, 1992 3 S.C.R. 813 at 8, 24, 25, 32-49, [1992] S.C.J. No. 107.

Murdoch v Murdoch, [1975] 1 SCR 423, 41 DLR (3d) 367.

Nova Scotia (Attorney General) v Walsh, 2002 SCC 8.

Oswell v Oswell, 12 OR (3d) 95, 43 RFL (3d) 180.

Pettkus v Becker, [1980] 2 SCR 834 at 852-854, 117 DLR (3d) 257.

P.N. c H.C., 2011 QCCA 1744.

Quebec (Attorney General) v A, [2013] 1 SCR 61, 2013 SCC 5.

Rawluk v Rawluk, [1986] 3 RFL (3d) 113 at 122, 29 DLR (4th) 754.

Sorochan v Sorochan, [1986] 2 SCR 38, 29 DLR (4th) 1.

Vaughan v Vaughan, 2014 NBCA 6.

V.K. v B.B., 2015 QCCS 5036.

Stevens v Stevens, 2012 ONSC 706.

Shafron c KRG Insurance Brokers (Western) Inc., 2009 SCC 6

Jurisprudence: Colombia

Supreme Court of Justice Civil and Agrarian Section, Bogota, 6 December, *N.R.R. en contra de la Sala Civil Familia del Tribunal Superior del Distrito Judicial de Buga* (2017), decision number: STC20605-2017.

Constitutional Court Sixth Revision Chamber, Bogota, August 31, *Yolanda Porras Corredor contra Pablo Emilio Leal Guerrero* (1994), Sentencia T-278 of 1994 (Colombia).

Constitutional Court, Bogota, August 22, *Sentencia T-338-2018 TNARS v Juzgado XX de FCB* (2018), decision number T-6.702.009 (Colombia).

Supreme Court of Justice Labor Section, Bogota, 14 August, *Sonia Amparo Lozano Arístizabal v The Civil Section of the Supreme Court of Justice* (2019), STL-11149-2019 (Colombia).

Supreme Court of Justice Civil and Agrarian Section, Bogota, 25 July, *Stella Conto Díaz Del Castillo v Sala de Familia del Tribunal Superior del Distrito Judicial de Bogotá* (2017), STC10829-2017 (Colombia).

Supreme Court of Justice Civil and Agrarian Section, Bogota, 29 July, *Marlén Moreno González v Víctor Hugo Torres Zambrano* (2011), Decision number: 25286-3184-001-2007-00152-01 (Colombia).

Constitutional Court, Bogota, February 7, *Sentencia C-075* (2007), decision number: D-6362 (Colombia).

Constitutional Court, Bogota, July 26, *Sentencia C-577* (2011), decision number: D-8367 y D-8376 (Colombia).

Supreme Court of Justice Civil and Agrarian Section, Bogota, 6 November, *M.L.C.H. frente a la Sala de Familia del Tribunal Superior del Distrito Judicial de Bogotá y el Juzgado Primero de Familia de la misma ciudad* (2014), Decision number: STC15153-2014 (Colombia).

Constitutional Court, Bogota, April 28, *Sentencia SU-214* (2016), decision number: T- 4.167.863 AC (Colombia).

Supreme Court of Justice Civil Section, Bogota, January 24, *Carlos Eduardo Angarita Angarita v la Sala de Familia del Tribunal Superior del Distrito Judicial de Medellín y el Juzgado Segundo de Familia de Envigado* (2019), decision number: STC442-2019 (Colombia).

Supreme Court of Justice Civil Section, Bogota, June 4, *Aurora del Cármen Neira Patiño v Sala Civil Familia del Tribunal Superior del Distrito Judicial de Cúcuta* (2019), decision number: STC 6975-2019 (Colombia).

Supreme Court of Justice, Civil Section, Bogota, 2 February, *N.I.L.G. contra la Sala Civil del Tribunal Superior del Distrito Judicial de Medellín* (2009), decision number: 05001-3110-008-2000-00483-01 (Colombia).

Constitutional Court, Bogota, 10 February 1999, *Sentencia C-068* (1999), Gaceta de la Corte Constitucional number D-2132 and D-2143 (Colombia).

Jurisprudence: United States

In re Baby M, 109 N.J. 396 434-444 (NJ Sup Ct 1988).

Secondary Materials: Monographs

Alarcón Palacio, Yadira. *La Sociedad Conyugal en Colombia* (Bogota: Grupo Editorial Ibañez, 2013).

Aramburo Restrepo, José Luis. *Derecho de Familia, 2da ed* (Bogota: Leyer Editores, 2019).

Ben-Ishai, Stephanie & David R Percy. *Contracts: cases and commentaries* (Toronto: Thomson Reuters Canada, 2018).

Bix, Brian. *The Oxford introductions to U.S. law Family law* (Oxford: Oxford University Press, 2013).

Boyd, Marion, Ontario & Ministery of the Attorney General. *Dispute resolution in family law: protecting choice, promoting inclusion* (Toronto: Delibris, Document Collection, 2004).

DiMatteo, Larry A et al. *Visions of Contract Theory* (Durham: Carolina Academic Press, 2007).

Dixon, Suzanne. *The Roman Family Law* (Baltimore: Johns Hopkins University Press, 1992).

Escudero Alzate, Maria Cristina. *Procedimiento de Familia y del Menor, 25th ed* (Bogota: Leyer Editores, 2018).

Greenhood, Elisha. *Doctrine of Public Policy in the Law of Contracts* (Chicago: Callaghan & Co., 1866).

Hackett, John Henry. *Concept of Public Order* (Washington: Catholic University Press, 1959).

Hinestrosa, Fernando. *Tratado de Obligaciones* (Bogota: Universidad Externado de Colombia, 2002).

Kronby, Malcolm C. *Canadian family law* (Mississauga: J. Wiley, 2010).

Leckey, Robert. *Contextual subjects: family, state and relational theory* (Toronto: University of Toronto Press, 2008).

Lefebvre, Brigitte. *Les Régimes Matrimoniaux Contrat de mariage, séperation de biens, société d'acquêts* (Cowansville: Éditions Yvon Blais, 2011).

Malaurie, Philippe. *L'Ordre Public et Le Contrat* (Paris: Éditions Matot-Braine, Reims, 1953).

Medina Pabón, Juan Enrique. *Derecho Civil Derecho de Familia, 3rd ed* (Bogota: Universidad del Rosario, 2011).

Monroy Cabra, Marco Gerardo. *Derecho de Familia y de la Infancia y la Adolescencia* (Bogota: Editorial ABC, 2008).

Mossman, Mary Jane et al. *Families and the Law, 2d ed* (Concord: Captus Press, 2015).

Parra Benítez, Jorge. *Derecho de Familia, 2da ed* (Bogota: Editorial Temis SA, 2018).

———. *Derecho de Familia Tomo I Parte Sustancial, tercera ed ed* (Bogota: Editorial Temis SA, 2019).

Payne, Julien D & Marilyn A Payne. *Canadian Family Law, 3rd ed* (Toronto: Irwin Law, 2015).

Pollock, Frederick. *Principles of Contracts: a Treatise on the General Principles Concerning the Validity of Agreements in the Law of England, 10th ed* (London: Stevens and Sons, 1936).

Rogel Vide, Carlos. *Derecho de obligaciones y contratos.* (Madrid : Editorial Reus, 2013).

Roy, Alain. *Le Contrat de Marriage Réinventé Perspectives Socio-juridiques pour une réforme* (Montreal: Éditions Thémis, 2002).

Suarez Franco, Roberto. *Derecho de Familia Tomo I, 10th ed* (Bogota: Editorial Temis SA, 2017).

Tétrault, Michel. *Droit de la Famille, 2e ed* (Cowansville: Les Éditions Yvon Blais Inc., 2003).

Thompson, Sharon. *Prenuptial agreements and the presumption of free choice: issues of power in theory and practice* (London: Bloomsbury, 2015).

Torrado, Helí Abel. *Derecho de Familia Régimen económico del matrimonio De la sociedad conyugal, 7th ed* (Bogota: Universidad Sergio Arboleda, 2016).

Wilton, Ann C & Noel Semple. *Spousal Support in Canada, 3rd ed* (Toronto: Carswell, 2015).

Secondary Materials: Articles and Book Sections

Alarcón Palacio, Yadira. "El Llamamiento Sucesoral en Colombia: Especial Mención a los Derechos del Cónyuge Superstite" (2007) 41:1–2 Rev Jurídica la Univ Interam Puerto Rico 211.

Alarcón Palacio, Yadira Elena. "Capitulaciones y Rupturas de Pareja en Colombia: Una Revisión de la Autonomía Privada y sus Límites frente al Desarrollo en España, Estados Unidos e Inglaterra." (2019) 39:1 Revista Jurídica Universidad Autónoma de Madrid 45.

Albarracín Caballero, Mauricio. "Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia", (2011) 8:14 SUR - Int J Hum Rights 7.

Alviar García, Helena. "Violencia Económica Contra la Mujer y Deber de Alimentos en Colombia: Visiones Teóricas en Conflicto" (2018) 9:1 Comprative L Rev 4.

Ann Atwood, Barbara. "Marital Contracts and the Meaning of Marriage" (2012) 54:12–08 Ariz L Rev 11.

Bailey, Martha. "Unmarried Cohabitation in Quebec - Liberté ou Égalité" (2014) Intl Survey of Family L 33.

Bala, Nicholas. "Governing Relationships by Agreement Instead of Judicial Discretion: Marriage Contracts and Cohabitation Agreements in Ontario" (1980) 3:2 Fam L Rev 91.

Bearup, George F. "Postnuptial Agreements : Navigating the Public Policy Hurdle" (2017) 36:3 Michigan Probate Estate Plan J 5.

Bix, Brian. "The Public and Private Ordering of Marriage" (2015) 2004:1 U Chicago Legal F 9.

Blanco Rodríguez, Jinyola. "Capitulaciones matrimoniales: ¿modificación, sustitución y eliminación del régimen económico del matrimonio?" (2011) 13 Ambiente Jurídico 240.

Blanco Rodríguez, Jinyola & Daniel Felipe Chaux Rojas. "La Celebración de Capitulaciones en la Unión Marital de Hecho" (2013) 126:1 Vniversitas 65.

Bocanument-Arbeláez, Mauricio & Carlos Mario Molina Betancur. "La estructura familiar del concubinato: un reconocimiento jurisprudencial en Colombia" (2018) 15:1 Revista Lasallista de Investigación 130.

Bourdais, Céline Le & Évelyne Lapierre-Adamcyk. "Changement Familiaux au Québec du milieu des années 1970 au milieu des années 2010" (2017) 119:3 Le R du N 471.

Boyd, Susan B & Claire F L Young. "Feminism, Law, and Public Policy: Family Feuds and Taxing Times" (2004) 42:4 Osgoode Hall LJ 545.

Brown, Catherine & Kyle T Gardiner. "The rights of unmarried cohabitants in Canada" (2018) 24:1 Trust & Trustees 86.

Buckley, L-A. "Relational theory and choice rhetoric in the Supreme Court of Canada." (2015) 29:2 Can J Fam L 251.

Buckley, Lucy-Ann. "Autonomy and prenuptial agreements in Ireland: a relational analysis" (2018) 38:1 LS 164.

Campbell, David. *"Ian Macneil and the Relational Theory of Contract"* in David Campbell, ed, *The Relational Contract Theory: Selected Works of Ian Macneil* (London: Sweet & Maxwell, 2001) 1.

Caparros, Ernest. "Loi Concernant Les Regimes Matrimoniaux" (1970) 11:2 C de D 303.

Cardenas, Laura. "Married Couple, Single Recipient: Understanding the Exclusion of Gifts and Inheritances from Default Matrimonial Regimes" (2018) 31:2 Can J Fam L 1.

Corral Talciani, Hernan. "Concepto y Reconocimiento Legal de la Familia de Hecho" (1990) 17:1 Revista Chilena de Derecho 35.

Costa, Derek Mendes da. "Domestic Contracts in Ontario" (1978) 1:2 Can J Fam L 232.

Diduck, Allison & Katherine O'Donovan. *"Feminism and Families: Plus Ça Change?"* in Allison Diduck & Katherine O'Donovan, eds, *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish, 2006) 1.

Galleti, Shida. "Contract Interpretation and Relational Contract Theory: a Comparison between Common Law and Civil Law Approaches" (2014) 47:2 Comp & Intl LJS Afr 248.

Glass, Christy M & Nancy Kubasek. "The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights" (2008) 15:1 Mich J Gender & L.

Gonzalez Degro, Leida. "Immutabilidad de las capitulaciones matrimoniales en el Codigo Civil de Puerto Rico: anacronismo injustificado" (1997) 36 Revista de Derecho Puertorriqueño 267.

Grassby, Miriam. *"Nouveau regard sur les contrats de mariage au Québec à la lumière de l'arrêt Hartshorne"* in Barreau du Québec Service de la Formation Continué, ed, *Développements récents en droit Familliale* (Cowansville: Yvon Blais, 2008).

Hinestrosa, Fernando. "Panorama del Derecho en Colombia" (1966) 8 Inter-American L Rev 183.

———. "Funciones, Límites y Cargas de la Autonomía Privada" (2014) 26:1 Revista de Derecho Privado 5.

Hunter Jules, Adrienne & Fernanda G Nicola. *"The Contractualization of Family Law in the United States"* in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Antwerp: Springer International Publishing Switzerland, 2015) 333.

Jaramillo Sierra, Isabel Cristina. "El papel del Derecho en la Producción de la Desigualdad: El Caso de los Alimentos" (2018) 9:1 Comparative L Rev 120.

Jessep, Owen. *"Marital Agreements and Private Autonomy in Australia"* in Jens M Scherpe, ed, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart Publishing, 2012) 17.

Jonker, Merel, Mariette van den Hovern & Wendy Schrama. "Religion and culture in Family Law" (2016) 12:2 Utretch L Rev 1.

Kasirer, Nicholas. "Testing the Origins of the Family Patrimony in Everyday Law" (1995) 36:4 C de D 795.

Leckey, Robert. "Gimme Shelter" (2011) 34:1 Dal LJ 197.

Leckey, Robert. "Relational Contract and Other Models of Marriage" (2002) 40:1 Osgoode Hall LJ 1.

———. "Family Outside the Book of Family" (2009) 88:3 Can Bar Rev 541.

———. *"Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada"* in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Cham: Springer, 2015) 93.

———. "'Repugnant': Homosexuality and Criminal Family Law" (2019) Forthcoming Univ Tor Law J, online:

<https://poseidon01.ssrn.com/delivery.php?ID=546004070078004095031110119005126089100051017087011048030016022006113097113118126127032110017005027000016114124113077115024027020034057083043016122031083080086028024066081016123127087071093117001114086026003 0130>.

Lefrançois, Guy. "Les conventions matrimoniales et le nouveau droit" (1999) 23:1 RDUS 205.

Legare, Michel. "Le Changement De Regime Matrimonial: Aspects Legaux et Aspects Pratiques" (1978) 80:7 R du N 253.

Lind, Craig. "The truth of unmarried cohabitation and the significance of history" (2014) 77:4 Mod Law Rev 641.

Macneil, Ian R. "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law" 72:6 Nw UL Rev 854.

———. "Restatement (Second) of Contracts and Presentiation" (1974) 60:4 Va L Rev 589.

———. "Efficient Breach of Contract: Circles in the Sky" (1982) 68:5 Va L Rev 947.

———. "Bureaucracy and Contracts of Adhesion" (1984) 22:1 Osgoode Hall LJ 5.

Majury, Diana. "Unconscionability in an Equality Context" (1991) 7 Can Fam LQ 123.

Manwaring, JA. "Competing theories" (1993) 25:2 Ottawa L Rev 235.

Martínez de Aldaz Aguirre, Carlos. *"Family Law in Spain: Contractualisation or Individualisation?"* in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Antwerp: Springer, Cham, 2015) 293.

Miles, Joanna. *"Marital Agreements and Private Autonomy in England and Wales"* in Jens M Scherpe, ed, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart Publishing, 2012) 90.

Montoya Mateus, Fernando. "La Voluntad: Fundamento del Negocio Jurídico" (2000) 5:1 Revista de Derecho Privado 73.

Morin, Christine. *"Contractualisation de l'Union de Fait et Institutionnalisation du Mariage: Choix Pour les Familles Québécoises Swennen, Frederik"* in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Cham: Springer, 2015) 113.

Nisimblat, Nattan. "La Negativa a Negociar: El Ejemplo de la Negociación Precontractual del Acuerdo Marital y Matrimonial entre Abogados" (2012) 124:1 Vniversitas 293.

Peláez Hernández, Ramón Antonio. "El Proceso Civil Oral En Colombia" (2019) 12 Revista Misión Jurídica 249.

Pilar, Elizabeth del & Amado Ramírez. "La Unión de Hecho y el Reconomiento de Derechos Sucesorios según el Derecho Civil Peruano" (2013) 25:1 Vox Juris 121.

Pintens, Walter. "Family law in Europe: developments and perspectives" (2008) 41:1 Comp & Intl LJS Afr 155.

———. *"Marital Agreements and Private Autonomy in France and Belgium"* in Jens M Scherpe, ed, *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart Publishing, 2012) 69.

Posner, Richard. "Law and Economics in Common-Law, Civil-Law, and Developing Nations" (2004) 17:1 Ratio Juris 66.

Reese, Susan Elizabeth. "The Forgotten Sex: Lesbians, Liberation, and the Law" (1975) 11:3 Willamette Law J 354.

Revillard, Anne. "Du droit de la famille aux droits des femmes: Le patrimoine familial au Québec" (2006) 62:1 Dr et Soc 95.

Rogerson, Carol. "The canadian law of spousal support" (2004) 38:1 Fam LQ 69.

Rogerson, Carol & Rollie Thompson. "The Canadian experiment with spousal support guidelines" (2011) 45:2 Fam LQ 241.

Roy, Alain, Celine Le Bourdais & Evelyne Lapierre-Adamcyk. "La Famille d'Hier a Aujourd"hui" (2017) 119:3 R du N 425.

Roy, Alain. "La charte de vie commune ou l'émergence d'une pratique réflexive du contrat conjugal", (2007) 41 RJT 399.

Rueda Vallejo, Natalia. "La violencia intrafamiliar como fuente de daño resarcible en Colombia" (2018) 48:128 Revista de la Facultad de Derecho y Ciencias Políticas 193.

Shaffer, Martha. "Domestic Contracts, Part II: The Supreme Court's Decision in Hartshorne v. Hartshorne" (2004) 20:2 Can J Fam L 261.

Silbaugh, Katharine B. "Marriage contracts and the family economy" (1998) 93:1 Nw UL Rev 65.

Stark, Barbara, Jacqueline Heaton & Bill Atkin. *"Distribution of property on divorce"* in Barbara Stark & Jacqueline Heaton, eds, *Routledge Handbook of International Family Law* (London: Routledge, 2019) 93.

Terradas, Beatriz Añoveros. "Jurisdiction Clauses in International Premarital Agreements: A Comparison Between the US and the European System" (2018) 26:4 Eur R Priv L 537.

Williams, Sean Hannon. "Postnuptial Agreements" (2007) 2007:4 Wis L Rev 827.

Winfield, Percy H. "Public Policy in the English Common Law" (1928) 42:1 Harv L Rev 76.

"A Law and Economics Look at Contracts agaisnt Public Policy" (2006) 119:5 Harv L Rev 1445.

Secondary Materials: Online documents

Claire Felter and Danielle Renwick, "Same-Sex Marriage: Global Comparisons" (last updated June 27, 2019), online: Council on Foreign Relations <https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons>

Oxford University Press, "Oxford English Dictionary", online: <https://www.oed.com/view/Entry/266863?redirectedFrom=presentiation#eid>

Superintendencia de Notariado y Registro, "Los Colombianos no son 'amigos' de las capitulaciones", (last modified 25 September 2019), online: <https://www.supernotariado.gov.co/PortalSNR/faces/oracle/webcenter/portalapp/pagehierarchy/Page562.jspx?publicacion_id=WLSWCCPORTAL01163607&_adf.ctrl-state=4vqxnjaq8_174&_afrLoop=2332118646379671&_afrWindowMode=0&_afrWindowId=null

#%40%3Fpublicacion_id%3DWLSWCCPORTAL01163607%26_afrWindowId%3Dnull%26_afrLoop%3D2332118646379671%26_afrWindowMode%3D0%26_adf.ctrl-state%3D4um30ffx4_29>