VNIVERSITAS

Vol. 73
Publicación continua
2024

ISSN: 2011-1711 (En línea) | ISSN: 0041-9060 (Impreso)

Artículos

Unraveling Heteronormativity inside Colombian Family Law: Juridical Perspectives on the Economic Differences between Same-Sex and Opposite-Sex Couple Relationships*

Desentrañando la heteronormatividad dentro del derecho de familia colombiano: perspectivas jurídicas sobre las diferencias económicas entre las relaciones de parejas del mismo sexo y de sexos opuestos

Juan Camilo Arboleda Restrepo [a]
Pontificia Universidad Javeriana, Colombia
juan-arboleda@javeriana.edu.co
ORCID: https://orcid.org/0009-0002-7367-8210

DOI: https://doi.org/10.11144/Javeriana.vj73.uhic

Received: 01 may 2024
Accepted: 31 may 2024
Published: 10 july 2024

Abstract:

This research paper analyzes the sufficiency of the economic implications of couples' relationships regulation for same-sex couples after both marriage and unmarried cohabitation laws were judicially extended on these family forms in Colombia. I start describing the existing regimes for these marital relationships in Colombian law and how heterosexuality and economic dependence are embedded inside the regulations' origins and current developments. Then, I identify the categories that show slight differences between same-sex and opposite-sex couples like the likelihood of having children and its impact on caregiving distribution, the domestic tasks allocation and the existing gender differences in access to the labor market and the income disparity. Based on these differing features and a theoretical framework that warns about sameness discourses that obscure the differences between gay, lesbian, and straight families, I critically analyze some empirical studies conducted in Colombia that reveal existing differences between heterosexual and homosexual households. This analysis invites future research to gather the absent data in Colombia concerning same-sex families to bring proposals of legal interpretation and law reform that are better equipped for all family forms.
Keywords: Same-Sex Couples, Opposite-Sex Couples, Marriage, Unmarried Cohabitation, Economic Effects, Economic Dependence, Private Autonomy, Default Economic Regimes for Couples' Relationships, Economic Disparities.

Resumen:

Este trabajo de investigación analiza la suficiencia de las implicaciones económicas de la regulación de las relaciones de pareja para parejas del mismo sexo, luego de que tanto las normas relativas al matrimonio como a la unión marital de hecho se extendieran judicialmente a estas formas familiares en Colombia. Comienzo describiendo los regímenes existentes para estas relaciones de pareja en el derecho colombiano, y cómo la heterosexualidad y la dependencia económica están incrustadas en los orígenes y desarrollos actuales de tales regulaciones. Luego, identifico las categorías que muestran ligeras diferencias entre parejas del mismo sexo y del sexo opuesto, como la probabilidad de tener hijos y su impacto en la distribución del cuidado, la asignación de tareas domésticas y las diferencias de género existentes en el acceso al mercado laboral y a la disparidad en los ingresos. A partir de estos rasgos diferenciadores y de un marco teórico que advierte sobre discursos de igualdad que oscurecen las diferencias entre familias de gais y lesbianas, y las de heterosexuales, analizo críticamente algunos estudios empíricos realizados en Colombia que revelan diferencias existentes entre hogares heterosexuales y homosexuales. Este análisis invita a futuras investigaciones a recopilar los datos ausentes en Colombia sobre las familias conformadas por parejas del mismo sexo para aportar propuestas de interpretación jurídica y reforma legal que estén mejor equipadas para todas las formas de familia.
Palabras clave: parejas del mismo sexo, parejas de sexo opuesto, matrimonio, unión marital de hecho, efectos patrimoniales, dependencia económica, autonomía privada, regímenes supletivos para las relaciones de pareja, desequilibrios económicos.

Introduction

This research paper critically analyzes social empirical studies that describe the differences between the economic relations of same-sex and opposite-sex couples after the achievement of formal equality in Colombia to evaluate whether heterosexually conceived marriage and unmarried cohabitation law

Author notes

[a] Correspondence author. E-mail: juan-arboleda@javeriana.edu.co

results sufficient to regulate same-sex couples' relationships. I confront Colombian legislation and its conceptual background with some empirical studies conducted in the country that describe heterosexual and homosexual couples' distribution of monetary and non-monetary tasks inside and outside the household. I use some foreign scholarship as theoretical reference in my analysis, particularly that which has developed similar studies abroad and is cited in domestic writings. My aim is to uncover some inconsistencies between the regulations' purposes as heterosexually conceived and its coherence when governing homosexual couples' relationships. These apparent inconsistencies justify my claim that the extension of opposite-sex couples' relationships' economic effects to same-sex couples may result insufficient in some respects for these types of relationships considering the existing differences between homosexual and heterosexual households.[1] For this analysis, I use the Cambridge Dictionary definition of the term sufficient to analyze the interaction between the legal regulations and the empirical data.[2]

Regarding the theoretical approach I use here, one part of queer activism criticized the extension of marriage or marriage like institutions to same-sex couples in several latitudes during the processes leading to the legal recognition of these unions in Western countries.[3] Their objection laid on three main features: first, the extension of patriarchal gendered structures embedded in marriage law that characterized man and woman in caregiving and breadwinner roles and that such specialization would result reinforced through extending these rules on gay and lesbian couples. Second, the intervention of the state in the private life of individuals who preferred to keep the eyes of public officials outside of their households, and, finally, the increase in segregation that normalization of certain same-sex couples could do to those who opted for other ways of relating outside of the state-sanctioned couple.[4] These concerns lost their fight into LGBT activism since they did not sell the bourgeois, middle class, heterosexual like family that could push forward the gay and lesbian rights campaign.[5] These sameness discourses that pictured homosexual couples as heterosexual ones for whom a denial of rights resulted in an illegitimate discrimination served as argumentative basis for LGBT rights' judicial recognition in Colombia.[6]

In brief, after lobbying at the Colombian Congress failed and once certain attempts through constitutional actions were rejected before the Constitutional Court, strategic litigation found a way to change the current law so that it could embrace same-sex couples' relationships.[7] This process, however, did not include research questioning whether the current legal framework over the economic implications for married and unmarried couples fit properly these new family forms.[8] Therefore, once the family law regulations were transposed on gay and lesbian couples, one remaining query was if the differing characteristics of homosexual couples could redefine certain aspects of marriage in the same way that heterosexual couples did.[9] Building on the prior work of family and constitutional law scholars in the United Kingdom, the United States and Canada, I critically analyze if Colombian family law regulations sufficiently fit same-sex couples' relationships. This analysis aims to expose how by extending couples' regulations, we reinforced our traditional understandings of marriage and unmarried cohabitation law for all couples. I also want to show how by exploring inside same-sex unions' characteristics, we could contribute to reshaping these regulations in accordance with contemporary ways of relating as a couple while attending to power imbalances and vulnerabilities inside couple relationships.[10] I delve particularly into the heterosexual gender role specialization and the economic dependence thereby associated that is embedded in the economic consequences of couple relationships inside the family law.[11]

To carry out this endeavour, I employ both legal doctrinal and socio-juridical methodologies to analyze regulations, legal scholarship, and other social sciences materials. I develop this paper in the following structure: I begin describing the current marriage and unmarried cohabitation laws and their extension onto same-sex couples. Then, I expose the features of dominant heterosexuality and economic dependence rooted into the economic implications of couple relationships. In the third section, I critically analyze some foreign experiences evaluating empirical data on same-sex couples' regulations from a literature review and use that information in analyzing some empirical studies conducted in Colombia that reflect some differences

between same-sex and opposite-sex couples' economic lives. Finally, I provide some conclusions that invite future research and legal reform to debate how family law regulations should better respond to both same-sex and opposite-sex couples' contemporary dynamics.

Understanding the economic effects associated with couple relationships inside the family law

Some reference to the economic implications of couple relationships in Colombia is necessary to locate the main features of the regulation that were extended to same-sex couples and how a judicial decision based on the idea of sameness considered this new family model characteristics in the process. Accordingly, this section briefly describes these legal institutions in Colombian family law to show how the family law currently regulates a mutually dependent couple with a presumption of property sharing and a limited scope to the exercise of private autonomy. Then, I expose how these norms were judicially extended on same-sex unions based in part in the ability to assimilate them with heterosexual couples. I use the term 'economic implications' to depart from the traditional approach that domestic scholarship employs when categorizing the legal effects of couple relationships.[12] The traditional approach generally distinguishes between personal and patrimonial effects of marriage and unmarried cohabitation law.[13] On one hand, the personal effects refer to those obligations that arise from a couple relationship such as the duties of cohabitation (permanence and a community of life in unmarried cohabitation), fidelity (singularity for *de facto* spouses), mutual aid, and support.[14] These mentioned norms are rules of public order under Colombian law which means that neither married nor *de facto* spouses can stipulate against these regulations.[15]

The patrimonial effects, on the other, include the rules governing the partnership of movables and gains inside marriage and the partnership of gains in unmarried cohabitation. These legal regimes produce effects after marriage or 2 years of unmarried cohabitation if spouses do not agree otherwise. Spouses can exclude or modify through marital agreements these legal regimes' effects before getting married for marriage and prior to starting the cohabitation or before 2 years of cohabitation have elapsed for unmarried cohabitants.[16] I use the category of economic implications in this text to include the legal institutions that whether being traditionally categorized either as personal or patrimonial effects of couple relationships have economic consequences for married or *de facto* spouses. These regulations oblige one spouse to provide maintenance for the other even after a relationship breakdown, may produce changes over the ownership of property, and determine the responsibility for debt between spouses and with third parties.

I refer then to two economic implications: first, the spousal support (*obligación alimentaria entre cónyuges o compañeros permanentes*) that emanates from the legal duty of mutual aid and support, and as developed by recent decisions of the Civil Section of the Colombian Supreme Court the constitutional principle of solidarity. Second, the regime over the marital property that can be either fixed through marital agreements or governed by the default regimes regulated in the Civil Code. These regulations are relevant when distributing the couple's finances along with the relationship and allocating rights to each former spouse at dissolution. They also promote certain economic relations between spouses as they play a crucial role in how spouses take economic choices during their time in a couple relationship.[17]

All in all, the distribution of family property, the common debt emanating from the household and children maintenance, and the right to spousal support determine the economic relations of spouses during the relationship and the result of it at the breakdown. These implications determine whether there is a fair balance and substantive justice when allocating the rights and obligations at dissolution and liquidation proceedings. I focus only on rules that belong to the realm of family law (*as private law*) and not from other fields such as tax law and administrative law where the family as a protected category carries certain legal

implications. I also leave outside this analysis the regulations concerning the unseizable family property and the limitations imposed on the disposition over the family household as these regulations neither affect the ownership over the property at marital breakdown nor impose monetary allocations between married or *de facto* spouses.

The next sections develop the current normative framework regulating spousal support and family property in Colombian law.

Mutual aid and support between spouses

The obligation to provide mutual aid and support between spouses was initially regulated under Article 179 of the Colombian Civil Code that provided that the husband owed to procure all the necessary means for his wife's maintenance according to his economic capacity while the wife had the same obligation if the husband had no property. As Roberto Suárez Franco recalls, this regulation changed its original philosophy when the President exercising legislative powers enacted the Decree 2820 of 1974 that reaffirmed formal equality between men and women inside marriage.[18] The second part of Article 2 of this last regulation currently provides that: "Both spouses should contribute to the domestic needs in proportion to their capacities."[19] This reciprocal duty entails contributing the necessary means of livelihood for the family members including spousal support (*obligación alimentaria*) and other non-monetary exigences such as providing affective and moral support during marriage.[20]

The monetary side of mutual aid and support between spouses is defined in Article 411 of the Colombian Civil Code that regulates who is obliged to provide support (*alimentos*). Article 411.1 regulates that a person owes support to the married spouse and Article 411.4 provides spousal support for the innocent divorced spouse that shall be paid by the guilty one and the same obligation for a spouse who is "*separado de cuerpos*"[21] without guilt. Accordingly, spousal support persists if the marriage does, and it may continue after divorce or *separación de cuerpos* only in two exceptional circumstances. First, when a judge decides a contentious divorce determining that one spouse is guilty under one or several subjective grounds contained in Article 154 of the Colombian Civil Code or whenever the divorce decree comes from an objective ground but there is evidence supporting that one spouse was responsible for ending the matrimonial community.[22] Second, spousal support remains for both spouses when there is a *separación de cuerpos* mutually agreed and for the innocent spouse if it is based on guilt grounds as per Article 165 of the Colombian Civil Code.

Regarding unmarried cohabitants, Law 54 of 1990 did not expressly provide support between *de facto* spouses. Article 3 of that regulation uses a similar language to that of marriage's duty to provide mutual aid and support when it describes that "common efforts, aid, and support belongs to both *de facto* spouses in equivalent proportions". However, such wording describes which property belongs to the partnership of gains, the marital property regime for unmarried cohabitants, instead of referring to an obligation between *de facto* spouses to provide mutual support to each other.

Given this unjustified difference between married and unmarried spouses in terms of a legal regulation requiring spousal support during unmarried cohabitation, the citizen Janeth González Romero presented a legal suit claiming the unconstitutionality of Articles 411.1 and 411.4 before the Colombian Constitutional Court on the grounds of unjust differential treatment between two family forms with equal constitutional protection. The Court decided this case through Decision C-1033 of 2002 affirming that Article 411.1 was constitutional only if it included the right of spousal support for the *de facto* spouse. As for Article 411.4, the Court declared itself inhibited to decide as there was not coherent connexion between the grounds for declaring a guilty spouse and as such ordering spousal support after a divorce or *separación de cuerpos* in marriage and the permanent separation of unmarried cohabitants where the notion of 'the guilty spouse' does not apply.[23]

Accordingly, both married and *de facto* spouses share the obligation to provide spousal support to each other during the relationship. Only in marriage, there are some exceptions on sanction-based divorce and *separación de cuerpos* where such obligations persist mostly as a punishment to the guilty spouse (I used 'mostly' because when both spouses agree to separate from bed and board, the obligation remains as they both choose to keep the marriage valid, and no sanction is required in that case). The consequence of keeping spousal support only during the relationship is that after the breakdown, former married and unmarried spouses stop having an obligation to secure the other one's means of livelihood even if one of them leaves marriage impoverished.

This situation led to numerous divorced spouses, often women, who were separated of property or for whom the family property distribution was not sufficient to procure their livelihood to end without any rights to claim support from their former couples even if they had enough resources to provide it. In response to that, the Civil Section of the Colombian Supreme Court developed a new interpretation of spousal support based on the constitutional principle of family solidarity. Although the general rule is that this obligation persists only during the marriage or unmarried cohabitation, in some cases, it shall continue after the relationship breakdown when there is a relevant need that demands monetary support from the former spouse considering the specific facts of the case such as "the roles inside marriage" or "the future access to the labor market" of former spouses.[24]

In consequence, the obligation to provide mutual aid and support between spouses derives, among other reasons, from a logic in which spouses are economically interdependent subjects who specialize in certain labours. Such specialization is often associated with traditional heterosexual gender roles (caregiver-breadwinner). Thus, in those households where one spouse becomes economically dependent on the other for example for taking care of the common children, spousal support is a legal instrument that ensures the maintenance of that person during the relationship and in some cases after the dissolution.

Private autonomy and the default sharing property regimes

Both married and *de facto* spouses can conclude marital agreements to fix the economic regime applicable to marriage or unmarried cohabitation. They can choose whether they want to let the marital partnerships apply while excluding some of the property, fix their own regime subject to good morals and rules of public order, or fully exclude the legal regime and be separated of property.[25] For a while, some authors like Roberto Suárez Franco affirmed that the total exclusion of the marital partnership contravened Article 180 of the Civil Code providing that "from the fact of marriage derives a 'conjugal' partnership (marriage partnership)".[26] This interpretation changed in most of the domestic scholarship after the Law 1 of 1976 introduced the mutually agreed dissolution and liquidation of the marriage partnership by both spouses during the marriage and, after, the Constitutional Court's Decision C-068 of 1999 allowed purchase contracts between married spouses. The logic was that if both spouses could dissolve and liquidate the partnership one day after the marriage takes place and transfer property through sale contracts, what was the point of it being forbidden one day before marriage through a marital agreement? Moreover, the interpretation of the Civil Section of the Supreme Court of Justice favored such an approach as it upheld that the so-called patrimonial effects of marriage are governed by private autonomy and, as such, spouses can agree on the regime they want for their relationship.[27]

There is no consensus on whether married or unmarried spouses can opt for a fixed regime different from (i) altering the partnership of movables and gains regulated in the Civil Code, a partnership of gains for *de facto* spouses, by excluding certain property, or (ii) the regime of full separation of property that excludes the default rules. For example, it remains unclear whether spouses can opt for a co-administered universal community, a regime of participation in the acquests[28] or a fixed regime that delays the application of certain sharing rules to a moment in the future when one spouse sacrifices economic productivity to provide house

and childcare or to follow his or her partner in a personal project.[29] Also, a regime that is subject to certain conditions when one spouse makes risky investments that may compromise the family's wealth. If one takes the Civil Section of the Colombian Supreme Court's decisions literally, one shall conclude that some of these options should be possible given that fixing the patrimonial effects belongs to the domain of private autonomy of spouses.[30] Yet, part of the domestic scholarship does not develop other options when describing the economic effects of marriage leaving some uncertainty over their validity.[31]

These agreements, whether we agree or not to include different economic regimes from those traditionally described, shall be concluded only before marriage, before starting unmarried cohabitation, or until 2 years of unmarried cohabitation have elapsed and cannot be modified afterward. This rule derives from the doctrine of immutability of the marital agreement that states that spouses are bound by the original pact and cannot modify or exclude it during the relationship through a new one.[32] Yadira Alarcón considers that this doctrine was attenuated by the possibility of dissolving and liquidating the marital partnership, however, that can only occur once and is legally fixed as it simply allows the full separation of property.[33] Through these agreements, spouses can fully exclude the sharing rules provided in the Civil Code or those fixed in a marital agreement. It remains anachronic that married and unmarried spouses are under these strict limitations to their private autonomy as if circumstances do not change in these kinds of long-lasting relationships.[34] Nevertheless, marital agreements are useful tools for those who aiming to start a couple relationship want to fix the economic effects in a way that can more adequately respond to their needs and expectations.

Future married and unmarried spouses can also opt to remain silent and let the law takes its course. This decision implies that the partnerships regulated for marriage and unmarried cohabitation govern the effects over the property of spouses.[35] Briefly, the marriage partnership is one of movables and gains in which spouses contribute their movable property before marriage and all the property acquired during the relationship except for gifts, inheritances, and bequests consisting in immovable property.[36] All movables belonging to future spouses before the marriage, those acquired gratuitously, and the product of selling private property impose a compensation for the value they contributed to the family.[37] Immovable property acquired before marriage or excluded through a marital agreement and its increase in net value remains as the private property of the owner.[38] Regarding debt, it belongs to each spouse during the relationship and, at the liquidation, it is presumed to be part of the marriage partnership unless it was exclusively used to maintain children from a previous union or for the exclusive benefit of one spouse's interests or private property.[39]

Article 2 of Law 28 of 1932 adds a particular rule concerning debt during the marriage. All credits acquired to satisfy daily domestic or child-rearing needs, education and the establishment of common children will make both spouses solidarily responsible before third parties and proportionally between them. This rule cannot be excluded, even in couples who choose to have a regime of full separation of property, since it defines the legal framework from the field of obligations law that should apply to all credits belonging to the above-described categories.[40] The consequence is that whether spouses are bound by a sharing regime or are separated of property, these debts that are very common in every couple relationship, mostly in those having common children, are bound by the rules of solidary obligations as regulated in the Civil Code.[41]

Regarding unmarried cohabitants, the regulation is slightly different since each partner only contributes to the marital partnership the property or capital acquired during the relationship that results from the common efforts, aid, and support of both *de facto* spouses.[42] This means that the property acquired through gifts, inheritances, or bequests remains as the private property of each spouse at the liquidation of the regime and all the property that each *de-facto* spouse had before the cohabitation begun. Yet, the increase in the net value of the private property of each unmarried cohabitant, excluding the monetary inflation, belongs to both *de facto* spouses in equal shares meaning that it belongs to the partnership.[43] The rules concerning the debt are not equally regulated as in the case of the marriage partnership, thus pursuant to Article 7 of Law 54 of 1990, the

applicable legislation are Chapters I to IV, Title XXII, Book 4 of the Civil Code regulating the legal regime for married couples. Consequently, all debt acquired during cohabitation belongs to the marital partnership unless it is proved that only one *de facto* spouse benefitted from it in the same terms referred for marriage.

From the reading of the property regimes, I derive two ideas for our purpose here. First, although there is a margin to private autonomy in fixing the economic regimes of marriage and unmarried cohabitation, it is limited in time and to some extent in its content.[44] Some of those limitations were grounded in marriage indissolubility, the protection of the weak members of the family (incapacitated women and children) and the rights of third parties.[45] The notion of economic dependence and the vulnerability of one party *vis-à-vis* the other one remains rooted in these restrictions to private autonomy even in a context of formal equality between spouses as provided in our current laws. Second, the presumption of an equal share on all assets and debt acquired during the union[46] reveals a common feature of the family law regulations in the civil law tradition, which is the distribution of the wealth between two interdependent subjects that make monetary and non-monetary contributions to build the marital property.[47]

Judicial extension of marriage and unmarried cohabitation laws to same-sex couples' relationships

Both the spousal support and the economic regimes of marriage and unmarried cohabitation were extended t o same-sex couples' relationships who opted for one or the other through Constitutional Court decisions.[48]This jurisprudence focused on the principle of human dignity, equality, and freedom to decide that there was no legitimate reason that could justify a differential treatment of homosexual unions that were traditionally r ejected from family law regulations.[49] For the Court, homosexuals were equally capable of having long-lasting couple relationships as their heterosexual counterparts and they should thus receive an equal t reatment.[50] Regarding unmarried cohabitation, the extension of the economic implications took part in decisions C-075 of 2007 and C-029 of 2009. The Constitutional Court affirmed in the first ruling that t he patrimonial effects of article 3 of the Law 54 of 1990 were applicable to the same-sex *de facto* spouse a nd then, in 2009, that all the regulations governing the legal effects for unmarried cohabitants (*compañeros p ermanentes*) were to be interpreted as including same-sex unions.[51]

Same-sex marriage took a little bit longer. In 2011, a new constitutional action was filed before the Court to decide on the constitutionality of article 113 of the Civil Code and other regulations that circumscribed the family to the union of opposite sexes. The ruling found that the notion of family in Colombia changed from the traditional union between a man and a woman to include diverse family forms like those formed by same-sex couples. For the Justices, there was a deficit of protection under the 1991 constitution since homosexual couples did not enjoy a contractual legal framework like heterosexual marriage to solemnize their unions. In consequence, they decided that it was for the Congress to redress the lack of legal protection and exhorted that institution to legislate a valid contractual framework to solemnize homosexual unions in a maximum period of two years that were to elapse in June 2013. If the Congress failed on this task, same-sex couples could come before judges and notaries in the country to formalize their contractual link subject to the rules applicable in the respective time.[52]

In its 2011 ruling, the Constitutional Court did not exhort Congress to extend marriage itself nor of all its rules, but to legislate a formal union capable of redressing the lack of protection faced by same-sex unions in the country. Perhaps, the debates inside Congress could have led to explore more profoundly the needs and expectations of the diversity among same-sex couples' relationships to bring an institution capable of regulating all couples. Instead, on July 31 of 2012, Bill 047 of 2012 was introduced to the Senate to legislate t he same-sex civil union. This regulation would have a different name from that of marriage but

en tail the same economic implications as per article 8 of the Bill. Simultaneously, the Bills 67, 101 and 113 of 2012 were introduced before the House of Representatives to regulate the civil union pact and others to modify marriage so that it included same-sex couples. Both projects were accumulated so that there was only one Bill that modified marriage law to include homosexual unions. The Bill was filed in 2013 and the date fixed by the Court for the Congress to legislate arrived without any law being promulgated.

Any of the bills that was presented before Congress ever considered that the economic implications of marriage needed to be subject to further scrutiny if they were to regulate both same-sex and opposite-sex couples.[53] One, because same-sex couples may have some specific characteristics that could require reshaping some of the consequences of marriage[54] and, two, because opposite-sex couples relationships have also changed in the recent years with the reduction in couples having children and the increased participation of women in the labour market.[55] In the absence of such legislation, the ruling of the Court applied giving same-sex couples the possibility to formalize their union through a contractual legal framework.[56] Problematically, the name of that institution was unclear while some authorities used the term marriage others used solemn contractual link.[57] This uncertainty and discrimination of using a separate but equal institution led several homosexual couples to claim through constitutional actions the protection of their individual rights. In 2016, through decision SU-214/2016, the Constitutional Court accumulated 6 actions claiming the recognition of their unions as a marriage to ensure the protection of their fundamental rights.[58] The Court ruled that marriage was in fact available to same-sex couples since 2013 and that, whatever denomination was used during those years, those solemnized unions had the same *inter partes* effects of marriage. From then on, same-sex marriage was fully available, subject to no uncertainty, in the Colombian juridical system.[59]

However, the Court did not analyze whether there were economic differences between same-sex and opposite-sex couples' households that could merit rethinking the current regulations. Marriage law was considered optimal for every couple and the debate remained in reaffirming the equivalent moral worth of different forms of coupledom.

Dominant heterosexuality and economic dependence in marriage and unmarried cohabitation economic effects

After describing the current economic implications for married and unmarried couples under Colombian law and its extension to same-sex couples, in this section, I describe two features embedded in these regulations. First, the heterosexuality, and second, the protection of economic dependence. These features are intrinsically related to each other since what I call heterosexuality emanates from the fact that marriage and unmarried cohabitation economic implications aimed to protect one vulnerable party that was traditionally dependent due to the caregiving role assumed inside the relationship. This role of caregiving was traditionally imposed on women while men were responsible for providing for household maintenance.[60] Thus, both heterosexuality (a relationship between a man and a woman and economic dependence (caregiving and breadwinner roles were elements taking part in couple relationships for what the law needed sufficient answers.

Some family law scholars affirm that after western-influenced jurisdictions like Colombia implemented gender formal equality inside marriage law, the legal regime abandoned its gendered past and both men and women became equal participants in the family economy.[61] However, the truth in the paper is not always the truth in the practice and although the regime changed offering equivalent rights to both genders inside couple relationships, women remained in charge of most of the household and children care with no economic retribution while men kept having more access to the labor market and economic productivity.[62] Therefore, maintaining spousal support during and even after marriage and unmarried cohabitation safeguarded the vulnerability arising from the remaining economic dependence that although reduced in the present, persists.

The sharing property regimes and the limitations to private autonomy they carry also find a justification on heterosexual economic dynamics. If one partner could assume household tasks and is less likely to earn the same as the married or *de facto* spouse due to external factors, one useful way to ensure that both monetary and non-monetary contributions to the family economy are equally treated is that marital property distribution responds, at least in the default regime, to a 50-50 logic. The fact that the default regime offers these advantages, even with the possibility of spouses agreeing on a regime of full separation of property, is that parties have a tool to negotiate whether opting for a marital agreement is in their best interest. Most spouses embedded in caregiving roles, mostly women, will choose to remain in the sharing regime instead of accepting a marital agreement. My query over these assumptions is what if these roles are less likely to be present due to the lack of children as well as the absence of gender differences and should this logic be attenuated if both partners are more likely to have a similar income outside the household.

To address these issues, I start describing how couples' relationships regulations subscribed to both 'dominant heterosexuality' and economic dependence. I then reflect on how gender formal equality in the law did not eliminate the context where the law operates and how it influences its own development. Finally, I identify the characteristic features of opposite-sex relationships that are relevant to the economic implications that the law attributes to marriage and unmarried cohabitation. Identifying these features provides some categories to explore in the last section of this paper whether empirical studies on same-sex and opposite-sex couples dynamics show some lack of adequacy and/or sufficiency of the current law for the same-sex couple family model.

From the incapacitated married women to gender formal equality inside marriage

In her description of the history of the marriage partnership in Colombia, Yadira Alarcón explains how Andres Bello's Civil Code regulated a restricted community of movables and gains whose sole administrator was the husband pursuant to the concept of the *marital power* that entitled him over the person and the property of his wife.[63] Accordingly, the whole system of contributions, compensations, and debt responded to two categories of spouses, the almighty husband, and the needed-to-be-protected wife who required the husband's authorization to dispose of her private property and the common property of the family. Carmen Diana Deere and Magdalena León Gómez associate these regulations to both Hispanic colonialism[64] and the Napoleonic inspired conception of marriage where the husband provided "protection" and the wife "obedience".[65]

This protection in charge of the husband occurred in both the personal and the economic sphere. Some examples of the personal effects included the husband's representation of the wife who became incapacitated through marriage and the need for the husband's authorization for the wife to appear at a trial before a Court.[66] In the economic sphere, the husband was the sole administrator of all the property including the private property of the wife[67] and before third parties, the husband's private wealth and the common property of the spouses formed one patrimony that responded for all the obligations. Thus, the wife's private property remained out of the scope of third-party creditors unless the obligations were acquired by the wife with judicial license without her husband's authorization, an urgency allowing a presumption of the husband's acquiescence, from accepting an inheritance without inventory benefit[68] or from acting as the executor of a will with the husband's approval.[69] Finally, the protection of married women's property also included the husband's need for judicial authorization to sell the wife's immovable property given he proved the necessity and utility of such transaction.[70]

The *marital power* was repealed from the Colombian legislation by the Law 28 of 1932 regulating that both spouses would manage the marriage property in equal conditions and maintaining the full legal capacity of married women. This reform was also crucial because it changed the regime from the restricted community of movables and gains in the husband's name to the partnership of movables and gains that I described in section 2 above. This reform towards gender formal equality continued and consolidated with the Decree 2820 of 1974 and the Law 1 of 1976 reaffirming women's equality inside the family and the civil marriage divorce with its implications over the economic effects of marriage.[71] The idea of a partnership that would fairly distribute the economic contributions of both spouses remains as the default regime in marriage law where both men and women participate as equals. Yet, this distribution acknowledges that inside marriage there can be monetary and non-monetary contributions that could create economic dependence of one spouse who becomes less economically productive during the relationship and is then to be supported to ensure the economic balance in case of dissolution or death.

The protection of disadvantaged women as one basis for regulating unmarried cohabitation

Opposite-sex unmarried cohabitation was traditionally rejected in most jurisdictions, only marriage had the privilege of producing legal consequences.[72] Therefore, *de facto* couple relationships did not produce juridical effects neither personal nor economic. Nevertheless, these relationships also carried long-lasting commitments where interdependency among its members also emerged. Facing the lack of regulation and the hegemony of marriage as the sole legitimate way of living as a couple, the Civil Section of the Colombian Supreme Court elaborated from a French-inspired doctrine, the *de facto* partnership between concubines, to allocate monetary contributions between opposite-sex cohabitants. According to the Court, to declare this form of partnership "concubines needed to have a common economic exploitation, a commitment from which both expected benefits, an equal footing as partners, that their endeavor did not consist in a simple division of common assets and more importantly, that it did not promote unmarried cohabitation as a way of living."[73] The Supreme Court also analyzed the doctrine of unjust enrichment but considering unmarried cohabitants as two separate individuals with no regard for their relationship but the unjust increase in one individual's wealth in prejudice of the other one with no fair cause.[74]

Apart from these judicial constructions from general civil law, *de facto* spouses did not enjoy family law prerogatives.[75] Therefore, unless the factual circumstances complied with the strict requirements for proving an unjust enrichment or the *de facto* partnership between concubines, unmarried cohabitants left their relationships without any legal alternative allowing a claim for support or property distribution. This situation led to numerous injustices where one unmarried cohabitant that contributed with child-rearing, and domestic responsibilities was not the owner of any property acquired during the union and lacked the legal tools to claim a fair allocation for the efforts executed during the relationship. Given the traditional gender roles associated with men and women and the less participation of women in the labor market, they were the most affected by the lack of regulation of unmarried cohabitation since caregiving did not qualify as a contribution to any economic exploitation or asset improvement.

To face this unfairness, the Colombian Congress regulated the *de facto* union (*Unión Marital de Hecho*) through the Law 54 of 1990 by instituting personal and economic consequences to stable cohabitation between unmarried partners of the opposite sex. The need for this legislation resided in the fact that male partners often owned property disproportionately in comparison with their female counterparts and a default partnership was the only way to ensure a fair allocation of the property acquired during the union. Although unmarried women were neither incapacitated nor subject to *marital power* by being in a *de facto* couple

relationship due to gender formal equality, the law needed to compensate with an equal share in the acquests of the union the non-monetary contributions of those in charge of a caregiving role (often the women) who could not acquire property in equal footing with the breadwinner (often the men) counterpart but whose effort took part in building the family economy. The Colombian legislators understood that these opposite-sex *de facto* relationships often led to economic dependence and property distribution imbalances that required a safeguard through regulating a default regime that would allocate fair shares of the capital and wealth acquired during the union.[76]

The remaining economic disparities arising from gender differences inside heterosexual couple relationships inside and outside the household

After the legal reforms that took place between 1922 and 1990, Colombian legislation undertook important steps in acquiring formal equality between men and women inside the family law. Likewise, the 1991 Constitution reaffirmed the institutional commitment not only to formal but gender substantive equality. Therefore, married and *de facto* spouses are considered as equals without any consideration for their gender when addressing the economic effects of couple relationships. Nevertheless, the differences between men and women persist, although with less intensity. [77] From existing data,[78] I identify two categories where these differences are evident and impact the financial outcome of couple relationships. First, the preservation of traditional gender roles that impose caregiving tasks on women more than on men inside most households.[79] Second, the persisting barriers of women in the labor market and the income inequality between both genders.[80]

The next section confronts some empirical studies that engage with these two categories where gender differences seem to affect the economic relations to see if same-sex and opposite-sex couples' relationships have some differences demanding further analysis of the economic implications that the law confers. First, I emphasize the likelihood of having children and its impact on caregiving distribution. Then, I turn to domestic tasks allocation. Finally, I present the existing gender differences in access to the labor market and the income disparity. Scholars in the United Kingdom and Canada identified these features as somehow distinctive between same-sex and opposite-sex households,[81] I follow their path to see if their approach applies in the Colombian context.

Empirical perspectives on the economic lives of opposite-sex and same-sex couples' relationships

The debate over formal equality and same-sex couples recognition emphasized the similarities between same-sex and opposite-sex couples following the idea that if both couple relationships were analogical, no legitimate distinction would be valid under the law.[82] I share Robert Leckey's point that in terms of moral worth gay and lesbian couples are no different from straight ones.[83] Even more, there are same-sex couple relationships that engage in very similar dynamics to those lived by heterosexual couples and that circumstance does not make them better or worse.[84] However, the achievement of formal equality poses several questions on how these relationships may differ from each other and whether those differences should redefine some characteristics of the legal regimes.

Both the jurisprudence and the legislative bodies debated the impacts of marriage and unmarried cohabitation inside opposite-sex households including the impact of children, the traditional gender roles associated with these relationships, and the consequences deriving from the economic dependence. The

same analysis did not take place regarding same-sex couples' relationships. Their participation in the legal regime was subject to their assimilation to opposite-sex couples' particularities and the reasoning behind the extension of marriage and unmarried cohabitation legal effects emanates from the identity between homosexual and heterosexual couples.[85] Of course, those were the things that strategic litigation had to point out when claiming the recognition before the Constitutional Court.[86] We are, however, in a different moment when same-sex couples can already marry and start a *de facto* relationships with all the consequences thereby established.[87] In this regard, scholars like William Eskridge and Nancy Polikoff debated before the achievement of formal equality about the possibility that gay and lesbian couples could change the institution of marriage in the United States after they were let in.[88] While Eskridge was confident that a step-by-step process could open the family law to new family forms that were not so different from the traditional one and could redefine these institutions if necessary, Polikoff considered that pursuing marriage would only perpetuate its hegemony together with its patriarchal features.[89]

I consider that as Polikoff predicted marriage was reinforced after same-sex couples joined the institution. However, I also believe that we still have an alternative in evaluating how these new family forms experience their couple relationships and the interaction they have with the family law regulations to propose some change, if necessary. This optic, which I see in some research in the United Kingdom and Canada, focuses on "After Equality" perspectives of the family law.[90] This section makes a brief analysis of some empirical studies on same-sex and opposite-sex couples' differences. I insist that if we choose to obviate that there are differences that need attention so that family law regulations can adapt to the new family forms,[91] we will force same-sex couples to fit in a box that may not be sufficient, and perhaps perpetuate gendered standards that could be revaluated even for straight couples. In the following subsections, I confront some empirical studies of the last 10 years that point to some differences between homosexual and heterosexual households in Colombia with the couple relationships' economic effects and the features I described in the previous sections.

Economic relations inside the household

During the 1990s, social scientists like Lawrence A. Kurdek and Christopher Carrington conducted studies in which they analyzed several gay and lesbian couples in the United States to identify the particularities of their domestic lives. The purpose of that research was to see whether there were differences between same-sex and opposite-sex couples' dynamics. They concluded that these relationships were quite similar, yet gay and lesbian couples tended to have a more egalitarian distribution of home tasks so that one of them would not assume all the home caring responsibilities and the negotiation over such distribution was more likely to happen than inside opposite-sex unions.[92] Other scholars in Europe and Latin America carried out similar studies analyzing same-sex unions' stability, parenthood, and distribution of home caring responsibilities.[93] Their conclusions resemble in finding that the lesser impact of traditional gender roles makes the distribution of domestic responsibilities different than the hegemonic breadwinner-caregiver couple.

In Colombia, for instance, Oscar Gallego and Edith Barreiro built on those theoretical and methodological frameworks used abroad adapting them to the Colombian context to explore same-sex couples' characteristics in Bogota.[94] Likewise, Marlon Niño analyzed gay couples' relational dynamics in Cali and Gabriel Gallego *et al.* analyzed same-sex couples' domestic relationships in a larger research project in the Colombian *Eje Cafetero*.[95] These studies affirm that same-sex couples reproduce certain heteronormative stereotypes in their relationships like the specialization in certain activities both inside and outside the household. Usually, when one spouse earns more than the other, the latter tend to dedicate more time to home caring tasks. This choice however is not based on gender, and it is more open to negotiation. Thus, the allocation of house labor is more egalitarian between same-sex couples than it is between opposite-sex couples.

According to the 2020 report on gender inequality in Colombia, the likelihood of egalitarian distribution of home tasks may vary depending on the level of education of spouses, their income, and whether they live in urban or rural areas.[96] Yet, gender roles in opposite-sex couple families determine who oversees unpaid caring obligations even in couples where women have paid jobs. In addition to the impact of gender, families with children increase the level of caregiving obligations, and even without them, women will remain in charge of more caregiving than men.[97] Same-sex couples do not have the man-woman dichotomy and are less likely to have children if compared to opposite-sex couples producing households with fewer caregiving tasks in general.[98] The importance of the dedication to unpaid domestic and caregiving work resides on the ability of the spouse in charge to be economically productive or to become partially or dependent on the other to satisfy the day-to-day needs. Another effect is the likelihood of the less or non-productive spouse to be able to acquire property during the relationship unless his or her partner decides to purchase in co-ownership.[99]

Taking this information into account, I see two reflections about the family law governing the above-described economic implications of couple relationships. To begin, same-sex couples' domestic work distribution is more egalitarian so that both partners can dedicate the same amount of time to earn and satisfy their needs.[100] This difference clashes with the regulation of spousal support during and even after the relationship if both married or *de facto* spouses maintain their economic productivity all along. Consequently, the less impact of gender roles allocation of domestic and caregiving work, the higher level of private autonomy spouses should have to decide over their duty to provide support. If vulnerability appears inside the couple, be it homosexual or heterosexual, the law should respond with a higher level of public order protection.

Second, the same logic should apply to arranges over the property, lesser disparity in domestic and caregiving work distribution should widen the scope of private autonomy to exclude, modify or fix an economic regime. More importantly, the distribution of unpaid work changes during long-lasting relationships like marriage and unmarried cohabitation making it necessary to reject the doctrine of immutability and in turn, allow spouses to conclude marital agreements at any time to arrange both spousal support and the property regime subject always to the existing conditions of vulnerability. Therefore, the current economic regime for couples' relationships in Colombia may result insufficient as it neither provides different rules for support in more egalitarian households nor allows for private agreements or other arrangements over the marital property during the relationship specially when the financial vulnerability of one spouse is less likely to appear.

Economic relations outside the household

Moving to the economic lives of spouses taking place outside of the household, the income disparity between two individuals depends on numerous variables including race, social class, nationality, immigration status, gender, sexual orientation, among others. An accurate analysis of the economic differences of two spouses in marriage or unmarried cohabitation should then use an intersectional approach to avoid generalizing all same-sex and opposite-sex couples.[101] Yet, for our analysis, I will limit the scope to one difference that exists between all same-sex and opposite-sex couples which is the difference or equivalence of sex between the spouses.[102] The existing differences between men and women concerning access to the labor market and their financial independence offer one difference that gay and lesbian couples do not face in the same way. In the following lines, I briefly describe the remaining gender disparities in Colombia, and then, I suggest that the relative absence of a gender difference inside a couple relationship impacts the economic balance between spouses[103] questioning the hegemony of both the presumed sharing property regime and the mandatory spousal support.

Official statistics show that there is a difference between men and women inside the job market that although smaller than in the past persists and imposes a burden on women since they must get a job in a competed market where women have a higher burden to achieve employment, assume their job responsibilities with less retribution, and often keep most of the domestic work inside the family.[104] According to Roberto Mauricio Sánchez-Torres, "the unemployment rate for women by early March 2020 was 13,9% compared to 8,1% in men and the participation in the labor market was 52,5% for women versus 74,1% for men." Before the COVID-19 pandemic, women even if more educated than men earned 21% fewer salaries.[105] Even women in heterosexual households with no children keep an imbalanced allocation of domestic work that reduces their hours of paid work.[106] These economic disparities due to gender and the dedication that women maintain for most of the unpaid domestic work[107] justify that inside marriage and unmarried cohabitation they become either economically dependent or at least poorer than their male partners. Therefore, the legal effects of couples' relationships address these economic imbalances between men and women through the rules of spousal support and the sharing property regimes.

Regarding same-sex couples, there are no official statistics that allow us to know the income disparities in these households in Colombia. Only in August 2020, the Colombian authority in charge of providing official statistics, *DANE*, measured how many Colombians considered themselves as LGBTQ+.[108] In other latitudes, recent studies confronted the income differences between gay, lesbian and heterosexual couples showing that gay households have a higher income than heterosexual households, and those of lesbians have statistically less income than straight families.[109] However, this information does not inform us on the gap between two gay or lesbian individuals who live in a state-sanctioned couple relationship in the same way that statistics show the existing disparity between men and women in heterosexual households.

Early studies that engaged with differences between same-sex and opposite-sex couples pointed to the fact that men and women specialized in different activities, while men provided for the maintenance of the family, women focused on domestic work. Conversely, gay, and lesbian couples did not face the effects of such specialization due to the absence of gender differences.[110] Recent scholarship, however, found that regarding specialization gay couples also share "intra-household earning gaps that are even higher than those of heterosexual couples and only lesbian couples were less likely to show this tendency.[111] Oppositely, a 2018 study from Canada pointed to less specialization in gay couples, and some specialization in lesbian couples; yet lower than that present in heterosexual households.[112] On this point, in a 2010 study of Gallego and Barreiro already referred, they found through interviews conducted in Bogota that homosexual households were likely to have low levels of economic dependence and that the distribution of responsibilities was more egalitarian rejecting in that way gendered specialization.[113]

These empirical studies show that there are certain differences between same-sex and opposite-sex couples while recognizing that both specialization and income disparities are present in almost every couple relationship. Knowing these empirical results on the differences between same-sex and opposite-sex couples, Robert Leckey made a similar analysis about marriage and civil union's economic effects in the Civil Code of Quebec. He concluded that for "unions with a less likelihood of entrenched gender roles, there might appropriately be a lesser place for obligatory rules of equal division or a presumption of equal division, and more for discretionary, fact-based provisions. The lesser specialization of labor and less frequent presence of children as well as a greater commitment to the spouses' retaining economic independence are key findings"[114]. Likewise, local data analyzed here suggests that same-sex couples are more likely to retain their economic independence,[115] that are less likely to have children and that are more likely to have an egalitarian distribution of responsibilities. Thus, suggesting that a default regime providing an equal division of assets and mandatory mutual support could be questioned as ideal in regulating all couple relationships.

The Colombian context needs special attention on the above referred issues since producing conclusive proposals requires further data on intra-household economic gaps, statistics on same-sex couples' access to

the labor market and the number of children rearing same-sex households.[116] Moreover, as multiple factors impact an individual's income, one cannot conclude that same-sex couples' earnings are more alike based only on gender equivalence.[117] Therefore, an approach that suggests attenuating public-ordered regulations or an increase in private autonomy regarding the economic effects of couple relationships based on homosexual household's earnings should be very careful to vulnerable spouses that exist in every long-lasting relationship like marriage and unmarried cohabitation. While less dependency calls for further autonomy, enough safeguards for protecting a weak party from any abuse should always be in the legislation.

Conclusion

I began this paper questioning if the extension of opposite-sex couples' marriage and unmarried cohabitation legal regimes to same-sex couples relationships carried a financial regime that may not be sufficient to regulate same-sex couples' family model. This critical analysis showed that there are some differences between same-sex and opposite-sex couples that suggest mutual support and property sharing can allow a higher degree of discretion to spouses through private ordering when gendered specialization, child-rearing, and economic dependence do not traduce in vulnerability. Yet, we still need further information on same-sex couples' lives for concrete proposals.

We do know that the current regulation has some implicit purposes that are associated with traditional values of heterosexual couples and economic dependence deriving from traditional gender roles in our culture. Empirical data, although precarious, suggests that there are some economic differences between same-sex and opposite-sex couples in the distribution of domestic work, child-rearing, and access to monetary resources in the job market. These differences call for further analysis of the interaction between private and public ordering in the family law regulating couple relationships and of course, more information about same-sex couples including data on the intra-household earning gaps and their tendency to gendered specialization.

Apart from this general remark, I identify the following points from these lines. First, Colombian law provides an imperative regime of mutual support between both homosexual and heterosexual married and *de facto* spouses during the relationship and exceptionally after the dissolution. It also regulates a default regime stipulating an equal division of assets (movables and gains, and only gains in *de facto* unions) that operate in absence of a mutual agreement subject to certain restrictions. This current regulation was extended by the Constitutional Court to same-sex couples based on the idea of sameness with the heterosexual model and not through a careful analysis of the characteristics and dynamics of these couple relationships.

Second, the economic implications of couple relationships discussed in the first section emerged in a time when they focused on offering legal protection to an incapacitated woman and a social context where men and women specialized in the roles of a breadwinner husband and a caregiving wife. Although the regulation moved to gender formal equality, there are remaining disparities that produce economic dependence and vulnerability affecting the way marriage and unmarried cohabitation law evolves. This process keeps certain structures that perpetuate the protection and, in some way, the promotion of economic dependence due to a social reality that maintains an income gap between men and women inside the family. Finally, when confronting empirical data with the legal regime, apart from the scarcity of data, I found a tendency of more egalitarian households in same-sex unions where child-rearing and gendered role specialization are less likely to exist and, as such, spouses end up having more equivalent income, asset acquisition, and economic independence.

The ideas I presented here invite future research to focus on gathering the absent data in Colombia, and once collected and analyzed, bring proposals to help the family law regulations to be better equipped in offering answers that result more sufficient for the variety of family forms already recognized in Colombian law.

Acknowledgements

This research piece was elaborated as part of the doctoral program at Pontificia Universidad Javeriana. This paper takes part in the overall research project and reflection of my doctoral endeavour. It was presented and commented on inside the periodical session of the Private Law Research Group and the doctoral Seminario Permanente at the Faculty of Legal Sciences of Pontificia Universidad Javeriana. Some comments that were considered in this writing were offered by the members of these seminars. I am especially grateful to Professor Lina Buchely and my doctoral thesis director, Professor Yadira Alarcón, whose important suggestions are included in this final version that I submit for publication.

Juan Camilo Arboleda Restrepo is a juridical sciences doctoral student at Pontificia Universidad Javeriana, Master of Laws (LLM-Thesis) from McGill University, BCL/LLB from Pontificia Universidad Javeriana. Lecturer of Successions and International Family Law courses at the Pontificia Universidad Javeriana. Family law practitioner, coordinator of the Private Law *Semillero* at Pontificia Universidad Javeriana and legal researcher currently involved in queer, feminist, and relational contract studies of the family law. Former research assistant of Dean Robert Leckey at the McGill Faculty of Law and former editorial assistant of Vniversitas Law Journal at Pontificia Universidad Javeriana, Bogotá, Colombia.

Bibliography.

Legal materials and jurisprudence

Civil Code (Colombia).

Constitutional Court, 1999, Decision Number: C-68 of 1999.

Constitutional Court, 2000, Decision Number: C-1995 of 2000.

Constitutional Court, 2007, Decision Number: C-075 of 2007.

Constitutional Court, 2009, Decision Number: C-029 of 2009.

Constitutional Court, 2011, Decision Number: C-577 of 2011.

Constitutional Court, 2012, Decision Number: C-238 of 2012.

Constitutional Court, 2016, Decision Number: SU-214 of 2016.

Decree 2820 of 1974 (Colombia).

Law 28 of 1932. (Colombia).

Law 54 of 1990 (Colombia).

Political Constitution of 1991 (Colombia).

Supreme Court of Colombia, Civil Section, August 31, 1935.

Supreme Court of Colombia, Civil Section, November 30, 1935, G XLII.

Supreme Court of Justice, Civil Section, 2019, Decision Number: STC-442-2019.

Supreme Court of Justice, Civil Section, 2021, Decision Number: SC0005.

Supreme Court of Justice, Civil Section, March 26, 1958, G LXXXVII Nrs. 2191, 2192, 2193, 2194, delivered by Justice Arturo Valencia Zea.

Monographies and articles

Alessandra Voena, *Yours, Mine, and Ours: Do Divorce Laws Affect the Intertemporal Behavior of Married Couples?*, 105 no. 8 American Economic Review 2295-2332 (2015), https://doi.org/10.1257/aer.20120234

Alfonso Uribe, *En defensa de la mujer casada*, 9 no. 92 *Estudios de Derecho* 2113-15 (1923).

Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations,* 47 no. 1 University of Louisville Law Review 113-66 (2008).

Antonio Bohórquez Orduz, *Unión marital de hecho y sociedad patrimonial una línea jurisprudencial inconclusa* (Ediciones Doctrina y Ley, 2019).

Cambridge University Press, *Cambridge Dictionary* (2021), https://dictionary.cambridge.org/.

Carmen Diana Deere & Magdalena León Gómez, *De la potestad marital a la violencia económica y patrimonial en Colombia*, 23 no. 1 Estudios Socio-Jurídicos (2021), https://doi.org/10.12804/revistas.urosario.edu.co/sociojuridicos/a.9900

Charlotte Bendall & Rosie Harding, *Heteronormativity in Dissolution Proceedings Exploring the Impact of Recourse to Legal Advice in Same-Sex Relationship Breakdown,* in Elizabeth Brake & Lucinda Ferguson, eds., Philosophical Foundations of Children's and Family Law 134-52 (Oxford University Press, 2018), https://doi.org/10.1093/oso/9780198786429.001.0001

Christopher Carrington, *No Place Like Home: Relationships and Family Life Among Lesbians and Gay Men* (University of Chicago Press, 2000), https://ebookcentral.proquest.com/lib/mcgill/detail.action?docID=471841

Clara Cortina, *Demografía de las parejas homosexuales en España*, 153 Revista Española de Investigaciones Sociológicas 3-22 (2016), https://doi.org/10.5477/cis/reis.153.3

Claude Martin, *Emergence of a Contractual Family? The French Debate around the PACS and Cohabitation*, CNRS-IEP de Rennes (2000), https://www.researchgate.net/profile/Claude_Martin2/publication/261925300_Emergence_of_a_contractual_family_The_French_debate_around_the_PACS_and_cohabitation/links/00b49535f6786b621e000000.pdf

Claudio Robles, Lía Ieso, Alejo García, Pamela Rearte & Mariel González, *Diversidad familiar: un estudio sobre la dinámica de los hogares homoparentales*, 1 no. 6 RiHumSo. Revista de Investigación del Departamento de Humanidades y Ciencias Sociales 104-26 (2014).

Daniel Bonilla, *Parejas del mismo sexo en Colombia: tres modelos para su reconocimiento jurídico y político*, 0 no. 6 Anuario de Derechos Humanos 183-200 (2010), https://doi.org/10.5354/0718-2279.2010.11492

David Campbell, *Ian Macneil and the Relational Theory of Contract*, in David Campbell, ed., The Relational Theory of Contract: Selected Works of Ian Macneil 158 (Sweet & Maxwell, 2001).

Departamento Administrativo Nacional de Estadística (DANE), Consejería Nacional para la Equidad de la Mujer (CPEM) & ONU-Mujeres, *Mujeres y hombres. Brechas de género en Colombia*. (Bogotá, 2020), https://www.dane.gov.co/files/investigaciones/genero/publicaciones/mujeres-y-hombre-brechas-de-genero-colombia-informe.pdf

Departamento Administrativo Nacional de Estadística (DANE), Guía para la Inclusión del Enfoque Diferencia e Interseccional (2020), https://www.dane.gov.co/files/investigaciones/genero/guia-inclusion-enfoque-difencias-intersecciones-produccion-estadistica-SEN.pdf

Eduardo García Sarmiento, *Elementos de derecho de familia*, 1st ed. (Editorial Facultad de Derecho, 1999).

Gabriel Gallego Montes, Claudia Patricia Jaramillo Ángel, Juana Uribe Arango & José Fernando Vanco Alzate, *Develar la diversidad familiar: parejas del mismo sexo en el Eje Cafetero colombiano* (Editorial Universidad de Caldas, 2017).

Helí Abel Torrado, *Derecho de familia régimen económico del matrimonio de la sociedad conyugal*, 7th ed. (Universidad Sergio Arboleda, 2016).

Hugo A. Garcés G., *Perspectiva histórica del concubinato en Colombia*, 9 Revista de Derecho. Escuela de Postgrado 91-111 (2017).

Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 no. 4 Virginia Law Review 589-610 (1974).

Isabel Cristina Jaramillo, *Derecho y familia en Colombia* (Universidad de los Andes, 2013).

Jens Rydström, *Legalizing Love in a Cold Climate: The History, Consequences and Recent Developments of Registered Partnership in Scandinavia*, 11 no. 1-2 Sexualities 193-226. (2008), https://doi.org/10.1177/1363460707085470

Jorge Parra Benítez, *Derecho de familia, tomo I, parte sustancial,* 3.° ed. (Editorial Temis, 2019).

José Luis Aramburo Restrepo, *Derecho de familia*, 2.° ed. (Leyer Editores, 2019).

Juan Camilo Arboleda Restrepo, *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* (McGill University, 2020).

Juliana Jaramillo-Jaramillo & Jair Eduardo Restrepo-Pineda, *Familias conformadas por padres y madres con orientaciones sexuales e identidades de género diversas en Colombia. avances y tendencias en la investigación*, 19 no. 2 El Ágora USB 596-608 (2019), https://doi.org/10.21500/16578031.4388

Kathleen Cataño Cadavid, Natalia Díaz Gonzalez & Julieth Rodríguez Torres, El rol femenino en el mercado laboral y el desempleo en Colombia, 11 no. 16 Punto de Vista (2019), https://revistas.poligran.edu.co/index.php/puntodevista/article/download/1417/1233/3949#:~:text=En%20Colombia%2C%20el%20desempleo%20muestra/%E2%80%9D%20(Dinero%2C%202019)

Lawrence A. Kurdek, *The Allocation of Household Labor by Partners in Gay and Lesbian Couples*, 21 no. 1 Journal of Family Issues 132-248 (2007), https://doi.org/10.1111/j.1540-4560.1993.tb01172.x

Lawrence A. Kurdek, *The Allocation of Household Labor in Gay, Lesbian, and Heterosexual Married Couples*, 49 no. 3 Journal of Social Issues 127-39 (1993), https://doi.org/10.1111/j.1540-4560.1993.tb01172.x

Libby Adler, *Gay Priori A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press, 2018).

Lorenzo Bernini, *Las teorías queer. Una introducción* (Editorial EGALES, S.L., 2018).

Maryam Dilmaghani, *Sexual Orientation, Labour Earnings, and Household Income in Canada*, 39 no. 1 Journal of Labor Research 41-55 (2018), https://doi.org/10.1007/s12122-017-9249-4

Mauricio Albarracín Caballero, *Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia*, 8 no. 14 SUR - International Journal on Human Rights 7-31 (2011), https://sur.conectas.org/es/corte-constitucional-y-movimientos-sociales/

Mauricio Bocanument-Arbeláez, Carlos Mario Molina Betancur & Carlos Mario Molina Betancur, *La estructura familiar del concubinato: un reconocimiento jurisprudencial en Colombia,* 15 no. 1 Revista Lasallista de Investigacion 130-42 (2018).

Merriman-Webster Dictionary (n. d.), https://www.merriam-webster.com/

Michael Warner, *Beyond Gay Marriage*, 5 no. 2 GLQ: A Journal of Lesbian and Gay Studies 119-71 (1999), https://doi.org/10.1215/9780822383871-008

Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry,* 1 Law & Sexuality: A Review of Lesbian and Gay Legal Issues 18-19 (1991), https://heinonline.org/HOL/Page?handle=hein.journals/lsex1&id=13&div=&collection=

Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 no. 1 American University Journal of Gender, Social Policy & the Law 167-76 (2000).

Nancy D. Polikoff, *We Will Get What We Ask for: Whay Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage,* 79 no. 7 Virginia Law Review 1535-50 (1993).

Óscar Mauricio Gallego Villa & Edith Barreiro De Motta, *Análisis de los factores asociados a las relaciones de pareja homosexual (gays y lesbianas) en la ciudad de Bogotá*, 17 no. 1 Suma Psicológica 69-81 (2010).

Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, in Andrew Sullivan, ed., Same Sex Marriage: Pro and Con 118-24 (Vintage Books, 2004).

Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto University Press, 2008), https://doi.org/10.3138/9781442687745

Robert Leckey, *Introduction*, in Robert Leckey, ed., After Legal Equality (Routledge, 2015).

Robert Leckey, *Must Equal Mean Identical? Same-Sex Couples and Marriage, International* 10 no. 1 Journal of Law in Context 5-25 (2014), https://doi.org/10.1017/S1744552313000347

Roberto Mauricio Sánchez-Torres, *Mujeres y mercado laboral en Colombia: salarios no Compensan cualificación, UN Periódico Digital* (March 8, 2020), https://periodico.unal.edu.co/articulos/mujeres-y-mercado-laboral-en-colombia-salarios-no-compensan-cualificacion/#:~:text=Econom%C3%ADa-/Mujeres%20y%20mercado%20lab

oral%20en%20Colombia%3A%20salarios%20no%20compensan%20cualificaci%C3%B3n/empleadas%20dom%C3%A9sticas%20o%20no%20remuneradas.

Roberto Suárez Franco, *Derecho de familia*, tomo I, 10th ed. (Editorial Temis, 2017).

Rosemary Auchmuty, *The Experience of Civil Partnership Dissolution: Not 'Just like Divorce*, 38 no. 2 Journal of Social Welfare and Family Law 152-74 (2016), https://doi.org/10.1080/09649069.2016.1156884

Semana, *Colombia: crece la brecha laboral contra la mujer. ¿Por qué?* (February, 2019), https://www.semana.com/management/articulo/cifras-de-la-brecha-laboral-contra-la-mujer-en-colombia/267712/

Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Bloomsbury, 2015).

Susan B. Boyd, *'Marriage Is More than Just a Piece of Paper': Feminist Critiques of Same Sex Marriage*. 8, no. 2 National Taiwan University Law Review 264-98 (2015), https://doi.org/10.3966/181263242013090802001

Susan Boyd & Claire F L Young, *'From Same-Sex to No Sex'?: Trends Towards Recognition of (Same-Sex) Relationships in Canada,* 1 no. 3 Seattle Journal for Social Justice 757-94 (2003).

William N. Eskridge Jr., *Equality Practice Civil Unions and the Future of Gay Rights* 217-222 (Routledge, 2002).

Yadira Alarcón Palacio, *La sociedad conyugal en Colombia* (Grupo Editorial Ibáñez, 2013).

Yadira 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,* 39 no. 1 Revista Jurídica Universidad Autónoma de Madrid 45-108 (2019).

Yuvraj Joshi, *Respectable Queerness*, 43 no. 2 Columbia Human Rights Law Review 415-68 (2012). https://www.boe.es/buscar/pdf/2003/BOE-A-2003-20838-consolidado.pdf.

Notes

* Research article.

1 I must warn the readers that the purpose of this writing is not to undermine the goals that gay and lesbian couples have achieved inside the Colombian legal system. I share with the Colombian Constitutional Court that all family forms including opposite-sex and same-sex couples are equally worthy of legal protection. Yet, I want to build on the gained terrain to problematize the new legal and constitutional framework that applies to all couples aiming to see if it is sufficient to meet same-sex couples needs. I claim that there may be some inconsistencies between the regulation as it is and the economic lives of gay, lesbian and even some straight couples. These inconsistencies will be described later in this paper, but they refer to the differing implications of specialization and the traditional gender roles entrenched in the family law that may affect differently opposite-sex and same-sex couples' economic relations in the Colombian context. In addition to this, I chose to write this essay in English to engage in the global discussion mostly developed in this language. Yet, future publications that debate the results of further research on these issues directly connected with the Colombian context will be published in Spanish to enrich the domestic scholarship and contribute into broadening our understandings of same-sex families and their interactions with the law.

2 Sufficient: enough for a particular purpose, taken from Cambridge University Press, *Cambridge Dictionary* (2021).

3 Consider for instance the debates over the French PACS in Claude Martin, *Emergence of a Contractual Family? The French Debate around the PACS and Cohabitation*, CNRS-IEP de Rennes 4-6 (2000); also, the confronting position of lesbian feminists in the Scandinavian countries Jens Rydström, *Legalizing Love in a Cold Climate: The History, Consequences and Recent Developments of Registered Partnership in Scandinavia*, 11 no. 1-2 Sexualities 196-99 (2008); for a similar approach in the United States see Nancy D. Polikoff, *We Will Get What We Ask For: Whay Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 no. 7 Virginia Law Review 1541 (1993); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8, no. 1 American University Journal of Gender, Social Policy & the Law 173 (2000); Yuvraj Joshi, *Respectable Queerness*, 43 no. 2 Columbia Human Rights Law Review 424 (2012); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, in Andrew Sullivan, ed., Same Sex Marriage: Pro and Con 118-24 (Vintage Books, 2004); For the Canadian experience with same-sex marriage see Susan Boyd & Claire F L Young, *'From Same-Sex to No Sex'?: Trends Towards Recognition of (Same-Sex) Relationships in Canada*, 1, no. 3 Seattle Journal for Social Justice 772-77 (2003); Susan B. Boyd, *'Marriage Is More than Just a Piece of Paper': Feminist Critiques of Same Sex Marriage*, 8 no. 2 National Taiwan University Law Review 288-90 (2015).

4 William N. Eskridge Jr., *Equality Practice Civil Unions and the Future of Gay Rights* 217-222 (Routledge, 2002).

5 Libby Adler, *Gay Priori a Queer Critical Legal Studies Approach to Law Reform* 2075 (Duke University Press, 2018).

6 See the following excerpt from the Constitutional Court (2011), Decision Number: C-577 of 2011: "Agregan que, a la luz del ordenamiento superior, las parejas integradas por homosexuales tienen una necesidad de protección idéntica a la otorgada a las parejas heterosexuales y que ambas clases de parejas son 'asimilables', por lo cual 'la diferencia fundada en que solo la pareja heterosexual puede constituir una familia, no puede servir de base para negar *prima facie* el carácter asimilable de estos dos tipos de pareja respecto al contrato de matrimonio' y que tampoco la adscripción a la noción de familia puede justificar, *per se*, el trato diferente".

7 Mauricio Albarracín describes the path of same-sex couples' rights in Colombia between 1999 and 2011. He brings forward the role played by LGBT activism, the Constitutional Court and the failed attempts of a legal recognition at the Colombian Congress. Mauricio Albarracín Caballero, *Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia,* 8 no. 14 SUR - International Journal on Human Rights 12-24 (2011).

8 It assumed all gay and lesbian couples were equally capable of having long-lasting relationships in the same way heterosexuals did and therefore, the same legal institutions fit them well, see for example the description of the importance of a "liberal notion of equality" in the process of recognition of same-sex unmarried cohabitation in Daniel Bonilla, *Parejas del mismo sexo en Colombia: tres modelos para su reconocimiento jurídico y político*, 0 no. 6 Anuario de Derechos Humanos 185-90 (2010).

9 I agree with Professor Nan D. Hunter in affirming that in the same way social forces changed marriage in the past, the inclusion of gay and lesbian couples can help redefining the institution, see further in Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality: A Review of Lesbian and Gay Legal Issues 18-19 (1991); For a detailed description of how the economic effects of marriage changed in Colombia see Yadira Alarcón Palacio, *La sociedad conyugal en Colombia* (Grupo Editorial Ibañez, 2013).

10 Charlotte Bendall & Rosie Harding, *Heteronormativity in Dissolution Proceedings Exploring the Impact of Recourse to Legal Advice in Same-Sex Relationship Breakdown,* in Elizabeth Brake & Lucinda Ferguson, eds., Philosophical Foundations of Children's and Family Law 134-52 (Oxford University Press, 2018). Robert Leckey, *Must Equal Mean Identical? Same-Sex Couples and Marriage, 10 no. 1 International Journal of Law in Context* 5–25 (2014). Adler, *supra* note 4.

11 See similar approaches to the differences between same-sex and opposite-sex unions in Christopher Carrington, *No Place Like Home: Relationships and Family Life Among Lesbians and Gay Men* 193 (University Chicago Press, 2000). Joshi, *supra* note 3, at. 428; Michael Warner, *Beyond Gay Marriage*, 5 no. 2 GLQ: A Journal of Lesbian and Gay Studies 126 (1999). Charlotte Bendall & Rosie Harding, *supra* note 10, at. 151-152.

12 On this point, Isabel Cristina Jaramillo describes the first Colombian authors that addressed marriage and parentage law in our civil law tradition, she emphasizes two initial ways in which those initial civil law treatises categorized the legal effects deriving from marriage. One way was to distinguish patrimonial and civil effects using the French treatises method and the other way was to expose the subjects pursuant to the order of the Civil Code, see further in Isabel Cristina. Jaramillo, *Derecho y familia en Colombia* 250 (Universidad de los Andes, 2013); More recent treatises of the family law maintain the French inspired distinction of personal and patrimonial effects when referring to the legal effects of marriage and unmarried cohabitation see for instance, Roberto Suárez Franco, *Derecho de familia*, tomo I, 10th ed. (Editorial Temis, 2017); Jorge Parra Benítez, *Derecho de familia*, tomo I, parte sustancial, 3.° ed (Editorial Temis, 2019); José Luis Aramburo Restrepo, *Derecho de familia*, 2.° ed. (Leyer Editores, 2019); Eduardo García Sarmiento, *Elementos de derecho de familia*, 1st ed. (Editorial Facultad de Derecho, 1999); Helí Abel Torrado, *Derecho de familia régimen económico del matrimonio de la sociedad conyugal*, 7th ed. (Universidad Sergio Arboleda, 2016).

13 Parra Benítez, *supra* note 12, at. 187; See e.g. the last book of Roberto Suárez Franco who describes the personal effects of marriage as the reciprocal obligations between spouses and leaves the marriage property regime for another chapter. He also makes such a distinction when describing the unmarried cohabitation regime Suárez Franco, *supra* note 12, at. 139-51, 245-428, 431,439-457.

14 Parra Benítez, *supra* note 12, at. 188.

15 *Id*., at. 187.

16 Supreme Court of Justice, Civil Section, 2021, Decision Number: SC0005.

17 Regarding the effects of the law on state-sanctioned couple relationships' finances, see Alessandra Voena, *Yours, Mine, and Ours: Do Divorce Laws Affect the Intertemporal Behavior of Married Couples?*, 105 no. 8 American Economic Review 2296-99, 2329-30 (2015).

18 Alarcón Palacio, *supra* note 9, at. 7-89.

19 Suárez Franco, *supra* note 12, at. 145-146.

20 Roberto Suárez Franco distinguishes the economic content of the obligation dividing support and aid as two legal duties emanating from marriage. For him, support refers to the monetary obligation that traduces in spousal support

(obligación alimentaria) and aid relates to non-monetary obligations such as "assisting in all life circumstances like illnesses or aging". Suárez Franco, supra note 12, at. 147-148; Parra Benítez, *supra* note 12, at. 192.

21 The Spanish expression *separado de cuerpos* has a direct translation to English that would be separated of bodies. Yet, I prefer either using the Spanish wording or take from the Civil Code of Quebec which is a civil law regulation written originally in both English and French that could illustrate an equivalent expression in the English language which is "separation of bed and board" as an equivalent to the French *separation de corps* that resembles the notion used in Spanish by the Colombian Civil Code. To exemplify this, see for instance Article 167 of the Colombian Civil Code modified by Article 17 of Law 1 of 1976 establishing that the *separación de cuerpos* does not dissolve the marriage but suspends the community of life between married spouses. Likewise, Article 499 of the Civil Code of Quebec regulates the separation from bed and board as follows: "An application for separation from bed and board releases the spouses from the obligation to share a community of life".

22 Constitutional Court, C-1995 of 2000; Civil Section of the Supreme Court of Justice, STC-442 of 2019.

23 Constitutional Court, 2002, Decision Number: C-1033 of 2002.

24 Supreme Court of Justice, Civil Section, 2019, Decision Number: STC-6975-2019 Delivered by Justice Luis Armado Tolosa at. 23-33; Constitutional Court, 2000, Decision Number: C-1495 of 2000; Constitutional Court, 2017, Decision Number: T-559 of 2017.

25 Suárez Franco, *supra* note 12, at. 308; García Sarmiento, *supra* note 12, at. 231-32.

26 Suárez Franco, *supra* note 12, at. 299-300.

27 Supreme Court of Justice, Civil Section, 2021, Decision Number: SC0005 at. 2.3 *Redimensión de las capitulaciones matrimoniales*, delivered by Justice Álvaro Fernando García Restrepo; García Sarmiento, *supra* note 12, at. 232-33; Aramburo Restrepo, *supra* note 12, at. 342-44.

28 See the description of the regime that exists in the Spanish, German and French Civil Code in García Sarmiento, *supra* note 12.

29 For instance, Eduardo García Sarmiento affirmed in a publication from 1999 that "through marital agreements, spouses choose [...] the patrimonial system they consider convenient to their aspirations, which can be totally different to the legal system, combined with other one or only excluding certain property from the legally-fixed partnership" García Sarmiento, *supra* note 12, at. 232-33; While Suárez Franco considers that marital agreements can either exclude the legal regime or modify it in 3 specific ways: "(i) identify the property that future spouses contribute or exclude from the marriage, (ii) refer to the gifts and (iii) to certain reciprocal concessions agreed between spouses, for the present and the future". Suárez Franco, *supra* note 12, at. 301.

30 Supreme Court of Colombia, Civil Section, 2019, Decision Number: STC 9891.

31 Parra Benítez, *supra* note 12, at. 209; Suárez Franco, *supra* note 12, at. 301.

32 Art. 1773, Civil Code (Colom.); See a description of the doctrine of immutability in Supreme Court of Justice, Civil Section, 2021, Decision Number: SC0005 at 2.1.; Suárez Franco, *supra* note 12, at. 307-8; Alarcón Palacio, supra note 9, at. 156; 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*, 39 no. 1 Revista Jurídica Universidad Autónoma de Madrid 82-87 (2019).

33 Alarcón Palacio, *supra* note 9, at. 156.

34 Family relationships are ongoing and thus require legal instruments capable of adapting to new circumstances. Couples cannot anticipate all the situations that would occur in their intimate and long-lasting relationships, the economic implications that they could have on their wealth, property and needs, see further in Juan Camilo Arboleda Restrepo, *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* 21-25, 31 (McGill University, 2020); See other authors that developed relational contract theory and its application inside family business or relationships in Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60, no. 4 Virginia Law Review 595 (1974); David Campbell, *Ian Macneil and the Relational Theory of Contract*, in David Campbell, ed., The Relational Theory of Contract: Selected Works of Ian Macneil 38, 50-54 (Sweet & Maxwell, 2001); Robert. Leckey, *Contextual Subjects: Family, State and Relational Theory* 106 (Toronto University Press, 2008); Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* 142-46 (Bloomsbury, 2015).

35 Arts. 180, 1774, Civil Code (Colom.); Supreme Court of Colombia, Civil Section, August 1, 1979, "A la libre y espontánea voluntad de los esposos queda, pues, pactar el régimen de bienes durante el matrimonio. Ellos tienen la opción de otorgar capitulaciones matrimoniales o de someterse, en caso contrario, al régimen legal de sociedad conyugal. Entre uno y otro caminos, son los futuros cónyuges quienes pueden hacer la elección".

36 Arts. 1781, 1782, Civil Code (Colom.); Regarding the application of Article 1782 exclusively to immovable property see Supreme Court of Colombia, Civil Section, August 31, 1935.

37 Arts. 1797, 1798, 1800-1804, Civil Code (Colom.).

38 Art. 1783.3, Civil Code (Colom.).

39 Art. 1796, Civil Code (Colom.); Suárez Franco, *supra* note 12, at. 349.
40 For García Sarmiento, spouses cannot resign to the application of this rule through a marital agreement. García Sarmiento, *supra* note 12, at. 233.
41 Article 2, Law 28 of 1932 (Colom.).
42 Article 3, Law 54 of 1990 (Colom.).
43 Article 3, Law 54 of 1990 (Colom.).
44 Helí Abel Torrado identifies certain specific purposes of marital agreements as provided in the Civil Code, see further in Torrado, *supra* note 12, at. 10-47; García Sarmiento, *supra* note 12, at. 232-33.
45 See my description of the reasoning behind immutability in French inspired Civil Codes in Arboleda Restrepo, *supra* note 34, at. 100-103; Consider also national doctrinal descriptions of marital agreements in Suárez Franco, *supra* note 12, at. 307.
46 Also, movables acquired before the marriage and gratuitously during the relationship subject to compensation and the increase in net value of private property for unmarried cohabitation, see in Art. 1781, Civil Code, Art. 3, Law 54 of 1990 (Colom.).
47 The economic regime of marriage is a partnership of equals under our current legal system, see further in Suárez Franco, *supra* note 12, at. 313-15.
48 Constitutional Court, 2007, Decision Number: C-075 of 2007; Constitutional Court, 2009, Decision Number: C-029 of 2009; Constitutional Court, 2011, Decision Number: C-577 of 2011; Constitutional Court, 2012, Decision Number: C-238 of 2012; Constitutional Court, 2016, Decision Number: SU-214 of 2016.
49 Bonilla, *supra* note 8, at. 184.
50 Constitutional Court, 2007, Decision Number: C-075 of 2007; Constitutional Court, 2011, Decision Number: C-577 of 2011; Constitutional Court, 2016, Decision Number: SU-214 of 2016.
51 Antonio Bohórquez Orduz, *Unión marital de hecho y sociedad patrimonial una línea jurisprudencial inconclusa* 82 (Ediciones Doctrina y Ley, 2019).
52 Constitutional Court, 2011, Decision Number: C-577 of 2011.
53 Gaceta del Congreso 128 of 2013; Gaceta del Congreso 480 of 2012; Gaceta del Congreso 717 of 2012 available online in https://www.senado.gov.co/index.php/az-legislativo/proyectos-de-ley
54 Lawrence A. Kurdek, *The Allocation of Household Labor in Gay, Lesbian, and Heterosexual Married Couples*, 49, no. 3 Journal of Social Issues 127-39 (1993); Lawrence A. Kurdek, *The Allocation of Household Labor by Partners in Gay and Lesbian Couples*, 21 no. 1 Journal of Family Issues 132-248 (2007).
55 Departamento Administrativo Nacional de Estadística (DANE), Consejería Nacional para la Equidad de la Mujer (CPEM) & ONU-Mujeres, *Mujeres y hombres. Brechas de género en Colombia* (Bogotá, 2020).
56 Constitutional Court, 2011, Decision Number: C-577 of 2011.
57 See also the description of the unnamed contractual link between homosexuals that operated between 2013 and 2016 in Aramburo Restrepo, *supra* note 12, at. 318-20.
58 Constitutional Court, 2016, Decision Number: SU-214 of 2016.
59 Aramburo Restrepo, *supra* note 12, at. 149-54.
60 I refer here to the notion of marriage in the XIX and XXth Centuries and the social reality that even after women's emancipation persists, see further development of family economy and economic violence in Carmen Diana Deere & Magdalena León Gómez, *De la potestad marital a la violencia económica y patrimonial en Colombia,* 23 no. 1 Estudios Socio-Jurídicos 221-22 (2021).
61 See for instance Suárez Franco's description of the two party administration of the partnership derived from marriage in Suárez Franco, *supra* note 12, at. 368-72.
62 Deere & León Gómez, *supra* note 60, at. 222.
63 Alarcón Palacio, *supra* note 9, at. 28-32.
64 Regarding Hispanic colonialism, Hugo A. Garcés reminds us that Spanish laws including the regulation named *Ley de las Siete Partidas* "imposed a normative regulation based on the Roman juridical tradition that provided juridical superiority to the husband and the father inside the family unit. Such hierarchy derived from the Catholic principles' influence considering marriage as a contract-sacrament, but that also recognized other domestic communities like the '*barraganía*,' which was another manifestation of monogamy or the union between a man and woman, relatively stable, characterized by the absence of parentage between its members and the absence of a religious link between them to consecrate in the service of God", see further in Hugo A. Garcés G., *Perspectiva histórica del concubinato en Colombia*, 9 Revista de Derecho. Escuela de Postgrado 97 (2017).
65 Deere & León Gómez, *supra* note 60, at. 225.
66 Arts. 178, 181, Civil Code (Colom.) (*repealed*); Deere & León Gómez, *supra* note 60, at. 224.
67 Suárez Franco, *supra* note 12, at. 261-64.

68 The inventory benefit (*beneficio de inventario*) refers to a rule in estate law that allows the heir to receive the debt from the deceased only until it concurred with his participation in the estate.

69 Arts. 146, 1273, Civil Code (Colom.) (*repealed*); R. Suárez Franco, *supra* note 12, at. 267; Y. Alarcón Palacio, *supra* note 9, at. 34-35.

70 Art. 1810, Civil Code (Colom.) (*repealed*); Alfonso Uribe, *En defensa de la mujer casada*, 9 no. 92 Estudios de Derecho 2113-15 (1923).

71 Suárez Franco, *supra* note 12, at. 278; Deere & León Gómez, *supra* note 55, at. 227-30.

72 Instead, unmarried cohabitation was subject to criminal persecution in case it took place between married women and a person different from the husband. Also, Spanish power came with the imposition of the hegemony of marriage as the only legitimate source of family relations, see further in Garcés G., *supra* note 64, at. 97, 99.

73 Supreme Court of Colombia, Civil Section, November 30, 1935, G XLII, at. 476; Bohórquez Orduz, *supra* note 51, at. 3-4; Mauricio Bocanument-Arbeláez & Carlos Mario Molina Betancur, *La estructura familiar del concubinato: un reconocimiento jurisprudencial en Colombia*, 15 no. 1 Revista Lasallista de Investigacion 132-35 (2018).

74 Supreme Court of Justice, Civil Section, 26 March 1958, G LXXXVII Nrs. 2191, 2192, 2193, 2194, delivered by Justice Arturo Valencia Zea at. 502-503.

75 There were some social security, labor, and agrarian benefits, see further in Suárez Franco, *supra* note 12, at. 431-34.

76 Art 3, Law 54 of 1990 (Colom.).

77 Women dedicate more time to caregiving compared with men. This fact leads to less income and less social security protection for those in charge of care, see further in DANE, CPEM & ONU-Mujeres, *supra* note 55, at. 66.

78 *Id*., at. 48-71.

79 *Id.*, at. 67.

80 *Id*., at. 57, 62; Semana, *Colombia: crece la brecha laboral contra la mujer. ¿Por qué?* (February, 2019); Kathleen Cataño Cadavid, Natalia Díaz Gonzalez & Julieth Rodríguez Torres, *El rol femenino en el mercado laboral y el desempleo en Colombia*, 11, no. 16 Punto de Vista 8 (2019).

81 Robert Leckey, *Must Equal Mean Identical? Same-Sex Couples and Marriage*, 10 no. 1 International Journal of Law in Context 17-18 (2014); R. Auchmuty, *The Experience of Civil Partnership Dissolution: Not 'Just like Divorce,* 38, no. 2 Journal of Social Welfare and Family Law 163-65 (2016).

82 Constitutional Court, 2007, Decision Number: C-075 of 2007; Constitutional Court, 2011, Decision Number: C-577 of 2011; Albarracín Caballero, *supra* note 7, at. 14-24; Bonilla, *supra* note 8, at.185.

83 Leckey, *supra* note 81, at. 4.

84 Gabriel Gallego Montes *et al*., *Develar la diversidad familiar: parejas del mismo sexo en el Eje Cafetero colombiano* 135 (Editorial Universidad de Caldas, 2017).

85 Bonilla, *supra* note 8, at. 189.

86 Albarracín Caballero, *supra* note 7, at. 14-24.

87 SU-214 de 2016, 577 de 2011, C075 de 2007.

88 Nancy D. Polikoff, *supra* note 3, at. 1541 (1993).

89 *Id.*, at. 1540-50; Polikoff, *supra* note 3, at. 170-76 (2000).

90 Robert. Leckey, *Introduction*, in Robert Leckey, ed., After Legal Equality (Routledge, 2015).

91 See, for instance, how Alicia Brokars Kelly points out some differences given the absence of differentiated gender roles inside same-sex households in Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 no. 1 University of Louisville Law Review 131 (2008).

92 Kurdek, *supra* note 54, at. 136-37 (1993); Carrington, *supra* note 11, at. 135-40.

93 Claudio Robles et al., *Diversidad familiar: un estudio sobre la dinámica de los hogares homoparentales*, 1 no. 6 RiHumSo. Revista de Investigación del Departamento de Humanidades y Ciencias Sociales 105-12, 119-20 (2014); Clara Cortina, *Demografía de las parejas homosexuales en España*, 153 Revista Española de Investigaciones Sociológicas 6-7 (2016).

94 Óscar Mauricio Gallego Villa & Edith Barreiro De Motta, *Análisis de los factores asociados a las relaciones de pareja homosexual (gays y lesbianas) en la ciudad de Bogotá*, 17 no. 1 Suma Psicológica 71, 73 (2010).

95 Gallego Montes et al., *supra* note 84, at.135-40.

96 DANE, CPEM & ONU-Mujeres, *supra* note 55, at. 58-61.

97 *Id.*, at. 62-64.

98 I did not find data on how many homoparental households there are in Colombia in contrast to heterosexual families with children, foreign data shows less tendency in same-sex unions to have children, see further in Leckey, *supra* note 81, at. 11-12.

99 DANE, CPEM & ONU-Mujeres, *supra* note 55, at. 65-67.

100 Gallego Villa & Barreiro De Motta, *supra* note 94, at. 81; Kurdek, *supra* note 54, at. 11 (2007); Leckey, *supra* note 81, at. 11.

101 DANE, Guía para la Inclusión del Enfoque Diferencia e Interseccional (2020).

102 Lorenzo Bernini, *Las teorías queer. Una introducción* 33 (Editorial EGALES, S.L., 2018).
103 As I warn in this paragraph, I am focusing only on the impact of gender in couple relationships. Other factors such as race, nationality, and social class can also affect couples and produce vulnerability that would require a certain level of legal protection during a long-lasting relationship like marriage or unmarried cohabitation.
104 Cataño Cadavid, Díaz Gonzalez & Rodríguez Torres, *supra* note 80, at. 3; DANE, CPEM & ONU-Mujeres, *supra* note 55, at. 57-58.
105 Roberto Mauricio Sánchez-Torres, *Mujeres y mercado laboral en Colombia: salarios no compensan cualificación*, UN Periódico Digital (March 8, 2020).
106 DANE, CPEM & ONU-Mujeres, *supra* note 55, at. 62-63.
107 *Id.*, at. 58.
108 Juliana Jaramillo-Jaramillo & Jair Eduardo Restrepo-Pineda, *Familias conformadas por padres y madres con orientaciones sexuales e identidades de género diversas en Colombia. avances y tendencias en la investigación*, 19 no. 2 El Ágora USB 597 (2019).
109 Maryam Dilmaghani, *Sexual Orientation, Labour Earnings, and Household Income in Canada*, 39 no. 1 Journal of Labor Research 42-43 (2018).
110 *Id.*, at. 43; Kurdek, *supra* note 54, at. 140 (2007); Kurdek, *supra* note 54, at. 129-30 (1993).
111 Dilmaghani, *supra* note 109, at. 45.
112 *Id.*, at. 52-53.
113 Gallego Villa & Barreiro De Motta, *supra* note 94, at. 76-77.
114 Leckey, *supra* note 81, at. 18.
115 Gallego Villa & Barreiro De Motta, *supra* note 94, at. 76-77.
116 Jaramillo-Jaramillo & Restrepo-Pineda, *supra* note 108, at. 597-98.
117 See the dangers of the "gender empty approach" in Leckey, *supra* note 81, at. 12.

How to cite this article: Juan Camilo Arboleda Restrepo, *Unraveling Heteronormativity inside Colombian Family Law. Juridical Perspectives on the Economic Differences between Same-Sex and Opposite-Sex Couple Relationships*, 73 Vniversitas (2024), https://doi.org//10.11144/Javeriana.vj73.uhic