Beyond Conjugal Borders:
The Impact of Jurisdictional Boundaries on Women's Family Law Rights in Mexico and Quebec

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Dedication

Para *Javier y Mis Chicas*, gracias por su ejemplo, paciencia y fe ciega...

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Abstract

Through a critical engagement with the family law modernization framework, this thesis argues for the need to take more seriously the internal and global jurisdictional issues that can arise from top-down, women-centred family law reform. It argues that the problem with the family law modernization thesis lies in its close relationship with the law and development school of thought, which endorses images of consensus, unity and uniformity with respect to family law reform. As an example, this thesis uses a broad political lens first to tease out how family law reforms adopted in Mexico City between 2000 and 2009 were shaped by legal, political and jurisdictional changes to the Mexican capital's Federal District. The thesis then explores Mexico's early and contemporary legal history to uncover how the recognition and development of women's divorce and cohabitation rights in Mexico were influenced by the politics of colonization, independence, federalization and internationalization. As a way to reveal connecting threads between the political dynamics of family law reform in Mexico and Canada, it examines how legal, political and jurisdictional issues in Quebec have had an impact on the development of cohabitation rights. The thesis concludes by examining, from the comparative law perspective, the types of assumptions and lines of thinking that are required within family law scholarship to break with the family law modernization pattern of thinking.

Sommaire

À travers un engagement critique vis-à-vis de la modernisation du droit de la famille, la thèse plaide pour le besoin de prendre davantage au sérieux les questions juridictionnelles globales et locales qui peuvent émaner d'une réforme descendante du droit de la famille axée sur la femme. Elle soutient que le problème lié à la thèse de la modernisation du droit de la famille réside dans sa relation étroite avec l'école de pensée du droit et du développement, laquelle endosse, en ce qui à trait à la réforme du droit de la famille, des images de consensus, d'unité et d'uniformité. À titre d'exemple, cette thèse fait d'abord usage d'un objectif politique général pour éclaircir la façon dont les réformes du droit adoptées à Mexico entre 2000 et 2009 étaient façonnées par des changements légaux, politiques, et juridictionnelles dans le District Fédéral de la capitale mexicaine. La thèse explore ensuite le passé et l'histoire contemporaine du Mexique afin de dévoiler la manière dont la reconnaissance et le développement des droits de divorce et de cohabitation de la femme au Mexique ont été influencés par des politiques de colonisation, d'indépendance, de fédéralisation et d'internalisation. Constituant une façon de révéler des liens qui unissent les dynamiques politiques de la réforme du droit de la famille au Mexique à celles qui se manifestent au Canada, la thèse examine la façon dont des questions légales, politiques, et juridictionnelles au Québec ont eu un impact sur le développement des droits de cohabitation. La thèse conclut en examinant, dans une perspective de droit comparé, les pistes de réflexion et les types d'hypothèses qui seraient doctrinalement nécessaire pour rompre avec le modèle de la modernisation du droit de la famille.

Chapter 1 : The Family- Law-Assimilation Way of Thinking

1. Introduction

Otto Kahn-Freund's 1974 article on the "uses and misuses of comparative law" marks a defining moment in comparative family law scholarship. In this article Kahn-Freund unequivocally states that "... in hardly any legal field have we seen so intensive and so rapid an assimilation of ideas and institutions as in family law".[1] Backed by examples of reform abolishing polygamy, codifying family law, recognizing married women's property rights and incorporating no-fault divorce Kahn-Freund pointed out how family laws around the world were assimilating.[2] However, Kahn-Freund warned that the comparativist would be wise not to take for granted the political and power implications of legal reform.[3] Even when geographical, economic, social and cultural borders had "greatly lost" in importance, "political" problems as a result of reform were on the rise.[4] Kahn-Freund's point was that while family laws appeared to be assimilating there were also important political implications to these changes that could not be "taken for granted".[5]

The family law assimilation thesis established a path dependency within comparative family law scholarship. Mainstream family law scholars concurred with Kahn-Freund's assertion, finding that despite national differences and divergent contexts of law there

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[1] Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37:1 M.L. Rev. 1 at 14 [*Kahn-Freund 1974*].
[2] *Ibid*. at 14-17.
[3] *Ibid*. at 8.
[4] *Ibid*. at 27.
[5] *Ibid.* at 8 & 27.

was a strong movement towards modernizing family laws.[6] Between the 1980's and 1990's studies became heavily focused on studying how family laws were changing in particular ways and increasingly becoming alike.

However, by the year 2000, the family law landscape had radically changed from the one portrayed by Kahn-Freund. Policies facilitating women's legal access to birth control, abortion, divorce and marriage had given rise to new and inconspicuous political voices and developments. While there were jurisdictions in the process of opening up access and liberalizing access to birth control, abortion, divorce and marriage, there were also jurisdictions that were reconsidering the liberal turns that family related reform was taking.[7] It became increasingly clear that "modern" family reform had been neither as universal nor uniform as it had once appeared.[8] As Krause concluded, while family laws were apparently unfolding in "similar directions", actions and reactions to contemporary reforms on "unmarried cohabitation, birth control, abortion, legalized same-sex relationships et. al." had rendered comparative family law more contentious and complex.[9]

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[6] See generally Mary Ann Glendon, *Abortion and divorce in Western law* (Cambridge, Mass.: Harvard University Press, 1987) [*Glendon 1987*]; Mary Ann Glendon, *The transformation of family law: state, law, and family in the United States and western Europe* (Chicago: University of Chicago Press, 1989) [*Glendon 1989*], and David Bradley, "Politics, Culture and Family Law in Finland: Comparative Approaches to the Institution of Marriage" (1998) 12:3 Int. J Law Policy Family 268.

[7] Harry D. Krause, "Comparative Family Law" in Mathias Reinmann and Reinhard Zimmerman ed., The Oxford Encyclopedia of Comparative Law (Oxford: Oxford University Press, 2006) at 1108-1111 [*Krause 2006*].

[8] Michael Grossberg, "How to give the present a past? Family law in the United States from 1950-2000", in Sanford N. Katz et al., *Cross currents: family law and policy in the United States and England* (Oxford ; New York: Oxford University Press, 2000) at 21 [*Grossberg 2000*].

[9] *Krause 2006 supra* at note 7 at 1108-1111.

2. Cohabitation and Divorce Reform in Mexico City and Quebec

I agree with Kahn-Freund on the political component of family law reform. The watershed family law reforms undertaken in Mexico City in 2000 encapsulate Kahn-Freund's point on the political component behind family law change. At that time, the Civil Code for the Federal District (*Código Civil para el Distrito Federal* or CCDF 2000) was amended to recognize almost full marriage rights for concubinage unions.[10] This was followed by similar amendments, all taking place between 2006 -2009, and incorporating civil unions, same sex marriage and adoption, unilateral divorce as well as legal abortion.[11]

With these reforms Mexico broke new ground in the realm of equality rights. However, the reforms were imbued with a strong political component. For instance, the primary catalyst for the reforms was the private law autonomy granted to the Federal District/Mexico City as part of the national "democratic transition" that took place in Mexico between 1986 and 2000. The constitutional reforms introduced by presidents Carlos Salinas and Ernesto Zedillo in 1993 gave Mexico City/Federal District a new status that not only limited the federal government power over the Federal District but

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[10] See art. 291 Quater of the CCDF 2000 (G.O.D.F. May 25, 2000 and D.O.F. May 29, 2000) [all translations by author unless otherwise noted].

[11] See "*Decreto de Ley de Sociedad de Convivencia para el Distrito Federal"* (G.O.D.F. November 16, 2006) [*Mexico City Ley de Sociedad de Convivencia, 2006*]; "*Decreto por el que se reforma el Código Penal para el Distrito Federal y se adiciona la Ley de Salud para el Distrito Federal*" (G.O.D.F. April 26, 2007) [*Mexico City Decriminalization of Abortion, 2007*]; "*Decreto por el que se reforma y deroga el Código Civil para el Distrito Federal y se reforma, deroga y adiciona el Código de Procedimientos Civiles para el Distrito Federal*" (G.O.D.F. of October 3, 2008) [*Mexico City Divorcio Express, 2008*];"*Decreto por el que se reforman diversas disposiciones del Código Civil para el Distrito Federal y del Código de Procedimientos Civiles para el Distrito Federal*" (G.O.D.F. December 29, 2009) [*Mexico City Same Sex Marriage and Adoption, 2009*].

that also gave the District more powers. The latter, in turn, conferred greater power to Mexico City's Legislative Assembly to legislate in civil and criminal law matters.[12]

Also embedded in Mexico City's reform process were historical, jurisdictional and international components. The concession of private law authority to the federal government had instigated federalism issues in the early nineteenth century when Mexico City was designated as the Federal District and later developed into the main point of contention between conservatives and liberals during Mexico's independence and revolution.[13] Particularly problematic was that under the constitutional divisions of power, private law is theoretically a matter of state jurisdiction in Mexico. However, the same civil code applicable to family matters in Mexico City was also applicable throughout Mexico in federal civil law matters[14], because until the year 2000[15], family

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[12] See *Constitución Política de los Estado Unidos Mexicanos, 1917*, art. 122, section C, first requisite, subsection V (as amended by D.O.F. October 25 1993) [*Constitución de México, 1917*]; *Estatuto del Gobierno del Distrito Federal, 1994*, art. 52-66 (as amended by D.O.F. July 26, 1994) [*Estatuto del Gobierno del Distrito Federal, 1994*].

[13] From the time when the Mexican federalist project began to take shape, there were struggles over the location of the Federal District. Critics insisted that the federalization of capital of the state of Mexico would entail a "confusion of powers", instigating the development federalism issues. Supporters for the federalization of the city of Queretaro argued that Mexico City's constituency already had "too much influence over the national government". Some felt that a downscale of the political and economic power of the state of Mexico was required to reduce its influence on national government. Centralist, speaking mainly for the state of Mexico, argued that to uncouple Mexico City from the state of Mexico for the purpose of transforming the polity into the seat of the powers of the union was paramount to expropriation. Others perceived that the federalization of Mexico City would have a multi-layered centralizing effect on the nation by giving "national authorities...a territory of their own in which they would have a preponderance of power". Those in favor of federalization of Mexico City maintained that the arrangement could direct the city's rich resources towards the federation as a whole as opposed to a single state. When the federal system instituted in 1824, Mexico City was assigned as home of the powers of the union. The city's unique jurisdictional status was designed to counteract the centralizing effects of Mexico City's federalization. See also Gerald L. McGowan, El Distrito Federal de dos leguas, o, cómo el Estado de México perdió su capital (El Colegio Mexiquense: Gobierno del Estado. 1991) [*McGowan 1991*] at 27; and see also Timothy E. Anna, Forging Mexico: 1821-1835 (Lincoln: University of Nebraska Press, 1998) [*Anna 1998*] at 192.

[14] *Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, 1928 (*D.O.F. January 7, 1926, January, 3, 1928 and August 30, 1928) [CCDF-MCRMF 1928]. This code was applicable in the Federal District in local matters and applicable throughout Mexico in federal civil law

law in Mexico City was under the jurisdiction of the federal government due to the status of the Federal District as the residence of the powers of the union.[16]

Thus an often neglected aspect of Mexico's City's reforms is their evolution amidst a complex mix of political, jurisdictional and legal change, which allowed for a whole new generation of family law rights in Mexico.[17] A similar political component is evident in the recognition of cohabitant rights in Quebec. In Quebec, despite multiple proposals to incorporate cohabitants into the Quebec civil code, the legislature has continuously retreated from providing these unions with a private law status given its policy of not submitting these relationships to the legal constraints of marriage. [18] This lack of

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matters until the enactment of the CCDF 2000 and the *Código Civil Federal* in the year 2000. (D.O.F. May 29, 2000) [Civil Federal Code or CCF 2000].

[15] See *ibid.*

[16] Mexico is country divided by thirty two sub federal entities, thirty one of which are full sovereign states and one functions as a Federal District (Distrito Federal or "D.F."). States have residual legislative power over all subject matters not expressly reserved for the federal government which imply states have sole power to legislate in civil and criminal matters while the Federal District has a unique jurisdictional status. Up to the 1980's this jurisdictional arrangement had the effect of creating multi-layered private law centralization of the nation. The federal governments' authority over the CCDF-MCRMF 1928 drew from the same powers granted to the executive in 1884 and extended over again in 1927 and 1928 which had originated from centralization movement. The federal government's power over federal civil law is tainted by the discarded centralization policies from which they drew. By creating its own conditions for its application, the drafters of the Civil Code of 1928 Code also crafted out their own niche, assuring the federal government continued authority over civil law matters. See *Constitución Federal de los Estados Unidos Mexicanos de 1824*, art. 4, 52, 56, 73 secc. VI., subsection 3a [*Constitución Federal de 1824*]. See also Joel Jiménez García, "Código Civil para el Distrito Federal de 1928" (2003) Revista de Derecho Privado No.5 at 30 [*Jiménez García 2003*].

[17] This mix included the constitutional reforms introduced by presidents Carlos Salinas and Ernesto Zedillo in 1997 giving Mexico City/Federal District a special political government of "mixed system of distribution of competence" and the creation of three different levels of governance for Mexico City's new regime and the series of "express" powers reserved for the Congress of the Union, a reserve in favour of the Congress of the Union over subject matter not expressly conferred to the Legislative Assembly of the Federal District and a set of express and bounded assignations of power in favour of Mexico City's Legislative Assembly. *Constitución de México, 1917,* art. 122, s. A, i, II-V (as ammended up until 2005). For an explanation of Mexico City's new three tiered system of governance see José Maria Serna de la Garza, *El Sistema Federal Mexicano: Un Análisis Jurídico* (Mexico City: Instituto de Investigaciones Jurídicas UNAM, 2008).

[18] See Paul-André Crépeau, "Civil Code Revision in Quebec" (1973) 34 Louisiana Law Review 921 [*Crépeau 1973*] especially at 394. Roy also notes the political background through which Quebec's policy choice took place, making reference to opinions submitted to legislators that asked for "respect of non-married couples' desire to keep their choice of lifestyle distinct from marriage". This perspective has been

recognition has led to cohabitation becoming a Quebec cultural icon.[19] However, federalism politics have been implicated in Quebec's current position on cohabitation rights from the start. These examples highlight how different scales of politics and jurisdictional struggles can make up an important component of family law reform within jurisdictions that are former colonies, federalized states or engaged in internationalization processes.

3. The New Political Lens

The dominance of the family law modernization framework has resulted in quick dismissal of the political and legal importance of these disputes within the family and comparative law arenas and their impact on the development of women's rights. Developing on Kahn-Freund`s point and taking account the present family law reform landscape, I argue that a wider and more subtle political lens must be used to expose the historicism and intra and international issues of power that family law change can generate within a context. I propose that women's family law rights need to be examined through a political reading of the jurisdictional rules used by authorities to define, prioritize and justify law and adjudication practices in family law.[20]

Jurisdictional boundaries is an umbrella term used here to refer to the explicit or implicit rules invoked by authorities to make pronouncements and administer justice on legal

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reinforced by opinions of the *Conseil du statut de la femme* in 1991and the *Barreau du Québec* and the *Chambre des notaires* in 2002. See Nicole Roy, *De facto Union in Quebec*, (Department of Justice Canada, 2005) [*Roy 2002*].

[19] For an explanation on the iconic symbolism of the civil codes and its institutions in Quebec and its relation to family law institutions like cohabitation see *Crépeau 1973*, *ibid.* especially at 394 and also *Roy 2002 ibid.* at footnotes 9-11.

[20] I contend that jurisdictional lines are complex constructions that require deep historical and contextual scrutiny in order to understand their multifaceted effect on women's family law rights.

matters that denote geographical area or subject-matter competency within a defined area of responsibility. From a family law perspective, the term includes women's family law rights that can arise within the sphere of private law and within the context of the family (or family law). It includes women's right to own property, conclude valid contracts, appear in court. It also refers to women's respect of their personhood and status as within the family and their right over their sexuality and reproductive capabilities. Jurisdictional struggles refer to the struggles about law and adjudication in family law that can arise in the context of both formal and informal (implicit and explicit) legal pluralism.

Recently, scholars have described the different ways that women's rights have been influenced by jurisdictional politics. For example Benton and Merry have noted how the large transfer of laws and multiplications of authorities in the colonial context and the legal pluralism that resulted made these ripe forums for jurisdictional disputes where questions of identity could become tools of women's oppression and resistance.[21] Likewise scholars writing on federalism have noted the different federal-state "boundary" issues that family law reform has uncovered within the U.S and Canada given the strong political question at play behind rights-based approaches to family law reform.[22] Scholars

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[21] See generally, Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev. 869 [*Merry, 1988*]; Sally Engle Merry, "Law and Colonialism" (1991) 25 Law & Soc'y Rev. 889; Lauren Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State" (1999) 41:3 Comparative Studies in Society and History 563 [*Benton 1999*]; Lauren Benton, "The Legal Regime of the South Atlantic World, 1400-1750: Jurisdictional Complexity as Institutional Order" (2000) 11:1 Journal of World History 27; Lauren Benton, "Making Order Out of Trouble: Jurisdictional Politics in the Spanish Colonial Borderlands" (2001) 26:2 Law & Social Inquiry 373 [*Benton 2001*].

[22] See generally Ann Laquer Estin, "Federalism and Child Support" (1998) 5 Va. J. Soc. Pol'y & L. 541[*Estin, 1998*] (provides a picture of family law as one constituted by multiple "overlapping layers" or of -state and federal authority," as opposed to one divided by the federal state division); Ann Laquer Estin, "Family Law Federalism: Divorce and the Constitution" (2007) 16 Wm. & Mary Bill Rts. J. 381[*Estin, 2007*] (by way of divorce reform the author underscores the increasing nationalization of family law through improved federal and state coordination); Ann Laquer Estin, "Sharing Governance: Family Law in

have more recently drawn attention to the different problems of "interlegality"[23] as a result of internationalization of family law through its efforts to simultaneously unify legal systems and eliminate family law "localisms".[24] Using hybrid legal pluralism lenses these scholars noted the multiple and overlapping legal spheres that women's rights touch upon within legal systems. Two important points issue emerge from the literature: the need to consider more extensively the complex overlapping power dynamics that can be

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Congress and the States" (2008) 18 Cornell JL & Pub. Pol'y. 267[*Estin, 2008*] (highlights the shift in the location of political and legal authority of the family in the and its implication to U.S. federalism); Judith Resnik, "Categorical federalism: Jurisdiction, gender, and the globe" (2001) 111 Yale LJ 619 [*Resnik, 2001*] (offers an reappraisal of what an unbounded federalism could mean for women); Judith Resnik, "Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism" (2007) 57 Emory LJ 31[*Resnik 2007*]; Naomi R. Cahn, "Family Law, Federalism, and the Federal Courts" (1993) 79 Iowa L. Rev. 1073[*Cahn 1993*] (examination of the effect that double stranded federalism has for women) and Jill Vickers, "A Two-Way Street: Federalism and Women's Politics in Canada and the United States" (2010) 40 Publius J. Federalism 412 [*Vickers, 2010*] (comparison of the how federalism has shaped abortion politics differently in the U.S. and Canada) and Susan E. Clarke, "Is 'Thinking Federally' Enhanced by a Governance Perspective?" in Michael A. Pagano and Robert Leonardi, eds., *The Dynamics of Federalism in National and Supranational Political Systems* (Basingstoke: Palgrave Macmillan, 2007) pp. 555-87 [*Clarke 2007*].

[23] See Boaventura de Sousa Santos, "Law: a map of misreading. Toward a postmodern conception of law" (1987) 14:3 Journal of Law and Society 279 especially at 289-290 [*de Sousa Santos 1987*].

[24] From a supranational law lens see generally Barbara Stark, "When globalization hits home: international family law comes of age", (2006) 39 Vand. J. Transnat'l L 1551 [*Stark, 2006*](showcases the different supranational sources influencing family law internationalization and their effect on women and families); Adair Dyer, "Internationalization of Family Law, The" (1996) 30 UC Davis L. Rev. pp. 625-646ff [*Dyer 1996*](noting the top-down and bottom-up effect of family law internationalization in the area of children's rights); From a supra-national and federalism perspective see Ann Laquer Estin., "Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States" (2010) 62 Fla. L. Rev. 47 [*Estin 2010*] (draws attention to the hybrid nature of family law internationalization and the different scales of governance it intersects in the area of children's rights); Merle H. Weiner, "Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States over the Last Fifty Years" (2008) 42 Fam. LQ 619 [*Weiner, 2008*](underscores the domestic laws that have developed at the state and federal in the U.S. to take into account family law disputes with transnational dimensions, that incorporate international laws to domestic family affairs and the international forums created to address litigants family law issues); Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry" (2005) 115 Yale LJ 1564 [*Resnik, 2005]*(highlights the different ways international laws have made their way into U.S. despite opposition to foreign and international law); from a legal pluralism perspective see generally Sally Engle Merry, "Colonial and Postcolonial Law" in *The Blackwell Companion to Law and Society:* (Oxford: Blackwell Publishing Ltd, 2008); Sally Engle Merry, "Anthropology and international law" (2006) 35 Annu. Rev. Anthropol 99 [*Merry 2006*]; from a comparative law lens see generally Keebet von Benda-Beckmann, "Globalisation and legal pluralism" (2002) 4 Int'l LFD Int'l 19 [*von Benda-Beckmann 2002*] and Brian Z. Tamanaha, "Understanding legal pluralism: past to present, local to global" (2008) 30 Sydney L. Rev. 375.

embedded in women's law reform and the need to challenge the different way courts and authorities use juridical "borders" as political symbols to avoid engaging with other patterns of inequality. The impact that internationalization has on women continues to be multifaceted. This complexity is related to the historical contingency that underlies the formation of state law and to the power that law itself has to "certify" and validate positions of power. While national and transnational processes are critical to understanding the current situation of women's family law rights, these must be read through the lens of (1) the legal and political "remnants" left by colonial takeovers, (2) the factors behind independence (3) and aspiration of self-government and self-rule.

3.1. Legal Pluralism

Legal pluralism is used to refer to a "situation in which two or more legal systems coexist in the same social field".[25] Early on "legal pluralism" was used as a concept to explain the "relations between colonized and colonizer" encompassing situations when a sovereign put into force different bodies of law for different groups divided by reason of "ethnicity, religion, nationality.[26] Nonetheless, the different sources, period and forms of rule imposition as well as the distinct circumstances and motivation to exert legal authority over jurisdictions or populations have led to unique forms of legal pluralism. Since the 1970's the term has expanded to include more diverse contexts like the coexistence of laws arising from: (1) the distribution of legislative powers that occurs within federalized jurisdictions, (2) the divisiveness that the international system and its laws have on states

[25] *Merry 1988 supra* at note at 21 at 870.
[26] *Ibid*. at 871-873.

and (3) the fragmenting or harmonizing effect that human rights legislation and lobbying by non-governmental organisations ('NGOs') have come to have on legal systems.[27]

While legal pluralism is a term drawn from the examination of colonial settings, it is still important in describing the persisting patterns of legal relations that result from unequal power at the local, national and global levels. Given the different colonial legacy, the federal-state power asymmetries, global political power differentials, and different challenges of women in Mexico *vis a vis* their counterparts in countries north of Mexico, the versatility of legal pluralism lenses is a useful tool that provides contemporary insights into how women's rights are implemented at the local level. These insights can, in turn, help map new law reform patterns that establish new connections between seemingly disconnected North American law reform places like Mexico and Quebec.

3.2. Outlining Pre-Existing Patterns of Governance and Resistance

Several law and society scholars have observed that the colonial context presented rich sites for jurisdictional disputes and the impact that such disputes could have on women. As Merry notes, the process of colonialism usually implicated a comprehensive transmission of laws and legal institutions between one society to another, each with its own distinct forms of "socio-cultural organization and legal culture".[28] This transfer resulted in plural legal systems, typically one for "the colonized peoples" and a different one for the colonizers.[29]

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[27] See *von Benda-Beckmann 2002*, *supra* at note 24.
[28] *Merry 1991*, *supra* at note at 21 at 890.
[29] *Ibid.*

There was also a more technical historical, ideological and global component by which colonial and colonialized communities competed for authority. Less obvious but also present were the clashes between the various legal authorities created by the imposition of colonial law and the complicated jurisdictional rules crafted to determine which authority and law governed over a particular subject matter or group.[30] These clashes were further complicated by the plurality of European legal systems themselves which intensified the antagonism between groups for colonial rule.[31]

The normative and political complexity of colonial settings made jurisdictional conflicts an important factor in the construction of the colonial state and the characterization of cultural difference between colonial and colonialized communities.[32] This complex model of legal and political pluralism had the effect of altering the discourse about law and the legal actions taken by colonial subjects.[33] It was through these jurisdictional disputes that the state came to acquire a unique legal authority which both assimilated alternative legal authorities and but also ascertained a monopoly over definitions of political identity.[34]

While the process of colonial imposition was highly varied, certain patterns developed in the way colonial powers endeavoured to enforce compliance with colonial law and the

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[30] *Benton 1999, supra* at note at 21 at 567.
[31] *Ibid.* at 563.
[32] *Ibid.* at 564.
[33] *Ibid.*
[34] *Ibid.* Benton describes how "jurisdictional arguments" were the true center of political conflict during the colonial era: "Jurisdictional politics in colonial settings was irresistible to all parties. Colonizing powers in most places sought both to limit the costs of judicial administration and to extend jurisdiction over European settlers and agents, and their allies. Colonizers erected jurisdictional boundaries that were precise but inherently unstable and, therefore, subject to frequent revision".

means by which communities resisted. One such commonality was the use of jurisdictional arguments as a way to maintain the stability of the colonial regimes. Because colonialization also presented opportunities to reduce the influence of colonial institutions that were impinging on colonial powers, realignment of jurisdictional borders became a tool to "subsume" competing legal authorities and stake political claim.[35] For example, colonization offered the Spanish Crown the opportunity to narrow the jurisdictional powers of the Church.[36]

In efforts to promote stability colonial authorities often cast a wide jurisdictional net over matters of "customary law" as a way of resisting "devolving authority" to colonialized leaders.[37] Stability of colonial regimes was maintained through their power to define relationships and rights. Merry notes how colonial laws, through their system of enforcement, created and redefined work relations as well as notions of property.[38] Colonial courts by exercising their power also introduced unique means of determining truth and tackling decision-making.[39] Courts also established the templates by which the ordeals of colonized peoples were understood and interpreted.[40]

Given the imbalance of the contest between colonial officials, settler and colonized groups jurisdictional issues came to shape and develop the discourse about cultural, ethnic, and racial differences within colonies.[41] For example Merry notes how in early

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[35] *Ibid.*
[36] *Benton 2000 supra* at note at 21 at 31.
[37] *Merry 1991, supra* at note at 21at 898.
[38] *Ibid*. at 890.
[39] *Ibid*. at 918.
[40] *Ibid.*
[41] *Ibid*. at 891.

twentieth century colonial Zanzibar many Africans were "arrested for drinking, dancing, and assaults".[42] These punishments were associated with racial and ethnic bias about these activities which were linked to ideas of savageness, "idleness" and the lack of work discipline in Africans.[43] The redrawing of boundaries and the establishment of new "hierarchical" divisions were useful in reducing choice in legal forums for litigants and sources of law contending for power.[44] For example the "*Real Patronato de las Indias*", which established royal authority over the church in the Americas, also left religious institutions with purposefully limited autonomy.[45]

Nonetheless for colonizer and colonized alike, jurisdictional divisions were not only "procedural" or "tactical weapons", but they were also "symbolic markers of the boundaries" dividing colonial groups.[46] The divisions themselves were judgment symbols about group characteristics and the qualities that separated one group from one another".[47] As Benton argues, "contests over cultural and religious boundaries and their representations in law become struggles over the nature and structure of political authority".[48] These tensions established a framework and a resource for colonial legal disputants to enforce their "cultural and religious group boundaries".[49]

Jurisdictional disputes could at times benefit women. Courts in the British colonies often used their jurisdictional powers as a way to "attack the systems of inequality and control"

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[42] *Ibid.*
[43] *Ibid.*
[44] *Benton 2000 supra* at note at 21 at 31.
[45] *Ibid.*
[46] *Ibid.* at 564
[47] *Ibid.*
[48] *Benton 2001 supra* at note at 21 at 375.
[49] *Ibid.*

that prevailed among colonialized communities such as "the authority of men over women, masters over slaves, witchfinders over witches" which also had the effect of undermining the power of colonialized leaders.[50] For instance, Merry cites how early British administrators and judges tried to "protect women from abusive husbands" by permitting Chewa or Tumbuka "captive wives" to divorce more and by refusing to recognize "slave status altogether".[51]

However, because boundaries could be highly unstable and were subject to shift when there were larger political stakes at risk, jurisdictional conflicts could become a double edged sword for those involved. Thus the scope and arguments of these groups were subject to change depending on the political climate of the colonial settings. For example, the "jurisdictional jockeying" for power between church and state authorities over the legal representation of Mexico's Aboriginal peoples, undermined the Crown's efforts to streamline legal authority in the new colony.[52] Identities were also often co-opted by colonized groups in colonial courts to their own advantage. In the New Spain the discourse of "hispanization" of "Indians" was often geared to improve economic and social status, and linked to permit "intermarriage" between members of different socio-economic status.[53] However, Indian status was a valued asset in private law actions, Inquisition investigation[s] and in political controversies to protect communal rights against settler intrusions.[54]

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[50] *Merry 1991, supra* at note at 21 at 898.
[51] *Ibid.*
[52] See *Benton 2000 supra* at note at 21 especially at 3, 13, and 33.
[53] *Ibid.* at 31.
[54] *Ibid.*

Merry suggests that while both "customary law" and colonial law could provide women the opportunity to resolve marriage and family issues, their success depended on the legal sources made available to women and their social and economic position.[55] The competition for power involved struggles between "traditional leaders" and colonial authorities as well as with the "elites", "missionaries" and "settler populations".[56] Groups adjusted legal strategies to the "patchwork" of available laws and judicial jurisdictions.[57] For women this meant that benevolent uses of authority to protect women could be circumscribed "to enforce discipline about work and taxpaying" giving them relief from the abuse and authority of "chiefs and husbands".[58] For example, the breakdown of authority among the traditional communities during the 1920's led British magistrates to reject divorce requests by abused wives using ideas of Christian marriage to "maintain customary marriages" and uphold the authority of husbands.[59]

3.3. Recurring Patterns of Divisions

Another way of thinking about the legacies of colonial law is to view the divisions of federalism as akin to those of colonialism. Federalism is defined by as "a form of government in which the sovereign powers are constitutionally divided between a central government and geographically defined, semi-autonomous levels of government."[60] This form of government means that some powers are reserved for the federal governments;

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[55] *Merry 2008 supra* at note 24 at 577.
[56] *Merry 1991 supra* at note 21 at 896.
[57] *Benton 2000 supra* at note 21 at 31.
[58] *Merry 1991 supra* at note 21 at 899.
[59] *Merry 2008 supra* at note 24at 577.
[60] Keith S. Rosenn, "Federalism in the Americas in Comparative Perspective" (1994) 26 U. Miami Inter-Am. L. Rev. 1 at 5.

others for the sub-national units and other are exercised concurrently. In addition, the power to create, apply and enforce law is allocated to the respective levels of government. Complicating the otherwise neat picture of federalism are Clarke and Benton's statements on the complexity of federalist architectures. Benton indicates that the "struggles over difference" that so sharply shaped and divided colonial communities had a strong impact on institutions and strategies many of which left a deep imprint on colonial state laws.[61] This means that many of the patterns of division around which federalism operates today are ones that are rooted in the "oppositions and racial codings of colonial law".[62] Clarke likewise states that many of the developments that have a decisive input on law reform take place outside of "what constitutional nested federalism models dictate".[63] This means that the context in which governance take place can extend across different levels of government and "jurisdictions", and can also operate on a "supranational and global scale".[64]

Vickers echoes Benton and Clark's ideas by showing how the effect that federalism has on the women's equality-seeking claims is influenced by the policies on which women's demands intersect within federal structures. For example, the U.S. decriminalization of abortion lead to questions about the power of the Supreme Court *vis a vis* "'separate spheres paradigm", the system of "judicial federalism" and state's residual powers.[65] This is in contrast to Canada where the schisms influencing decriminalization were the provinces and federal governments' rift over criminal law power, the new expanded role

[61] *Benton 2000 supra* at note 21 at 2 & 163.
[62] *Merry 2008 supra* at note 24at 577.
[63] *Clarke 2007 supra* at note 22 at 58-59.
[64] *Ibid.* at 56 & 57.
[65] *Vickers 2010 supra* at note 22 especially at 428-429.

of the Supreme Court and the asymmetrical power of the provinces of Quebec *vis a vis* the federal government and other common law provinces.[66]

However, as Vickers notes, questions over the federalism doctrine or state rights did not produce the same results in these two federal jurisdictions. When the U.S. Supreme recognized a woman's constitutional privacy right to abortion in 1973 it enabled women to circumvent the negative division of powers and the need for many state campaigns.[67] However because Roe v Wade did not recognize reproductive freedom but did recognize that states had a ''legitimate interest in potential life. . . at viability'', this same landmark was used by states to "uphold laws limiting Medicaid funding and let public hospitals refuse to perform abortions".[68] In Canada, on the other hand, linguistic and legal divisions within Canadian federalism were an important factor behind maintaining the face of coverture.[69] In the U.S., coverture was maintained through its "entanglement" in within "jurisdictional" and "separate spheres".[70] For Quebec, the only Canadian civil law jurisdiction, this meant that abortion was handled as a jurisdictional autonomy issue.[71]

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[66] *Ibid.* especially at 429-432.
[67] *Ibid.* at 429.
[68] *Ibid.*
[69] The elimination of coverture from private law in Canada followed two different time tracks for the civil law province of Quebec and the common law provinces. While relatively short-lived for English-Canadian women, coverture laws continued in Quebec until the 1960s. Quebec's delay in improving the legal status of married women was related to the symbol of "loyalty and devotion" that hold of old ways and the French legal tradition represented to conservative reformers. While reformers considered that improvement in the legal status of married women was necessary, they were worried that changes informed on English law could result in a "wrongheaded" form or worse, would result in a "sacrifice" of principles basic to the civil law. To conservatives, alliance with French law for reforming women's property in marriage, was the only way to protect French-Canadian women See generally Jean-Maurice Brisson & Nicholas Kasirer, "The Married Woman in Ascendance, the Mother Country in Retreat: from Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform 1866-1991" (1995) 23 Man L.J. 406.
[70] *Ibid.* at 430. Resnik for example, argues that from a federalism perspective there are strong parallels between the reasoning s used to "designate" marriage as a matter of local jurisdiction and the "common law doctrines of marital privacy" which argued that state intervention in the family undermined "marital

Particularly illuminating are the jurisdictional struggles that family law reforms can create between the different spheres and levels of governance in federalized jurisdictions. U.S. feminists exploring the interrelationship between women, family, and the shifts in private law governance within federalized jurisdictions have noted how the assumption of a concrete and long-standing jurisdictional or subject matter division in family matters are more a myth than a reality. With respect to the political connections between women, family law and federalism, Laquer Estin's article highlights the malleability of federal state division and the partitions by which we organize family law issues like that of divorce.[72]

Laquer Estin examines the U.S. Supreme Court's alteration of constitutional full faith and credit clause as a result of divorce revolution in the U.S. during the 1960's-70's.[73] Laquer argues that the divorce cases during this period radically altered state power and shifted long standing family law boundaries.[74] While divorce was not the only issue that brought up significant questions about the limits of the full faith and credit clause, the fact that it

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harmony". The idea that husband and wife were one legal entity was central in limiting women access to federal diversity jurisdiction in the United States, excluding domestic relations cases from federal court despite meeting the requirement of diversity jurisdiction. In the landmark nineteenth century case of Barber v. Barber, which ultimately allowed a woman plaintiff to invoke diversity jurisdiction to enforce a state alimony award, the dissent stated that this decision risked destroying the foundation of coverture and marital unity. Resnik, 2001 supra at note 21 at 636 and Reva B. Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy" (1996) 105 Yale L.J. 2117, at 2203 in Jill Elaine Hasday, "Federalism and the Family Reconstructed" (1997) 45 U.C.L.A. 1297 at footnote 39 at 1308.

[71] *Ibid.* In 1969 the Canadian federal government decriminalized hospital-based, abortions performed with approval by a therapeutic abortion committee. Women's organizations protested against the law due to the delays and unfairness caused, by the law. Quebecois women made use of the political opportunities created by the pronvince's asymmetrical powers and election of the leftist Parti Québécois (PQ) government to lobby for a fairer law. To respond to claims for ''free abortion on demand' the liberal government trumped federal legislative power with its constitutional power to administer the law, this resulted in the opening of health clinics to provide provincially funded abortions and the provision of women in Quebec of de facto reproductive freedom.

[72] *See Estin 2007 supra* at note 22.

[73] *Ibid.* at 381.

[74] *Ibid.* at 383.

touched both moral and political sentiments that affected the daily lives of citizens, made it the federalism "problem of the era" in the U.S.[75]

Cross-border movement of couples and increase in marital separation in the U.S. had increasingly become an issue given the diversity of divorce laws between U.S. states. Family courts had become overly preoccupied with complex conflict of laws questions most of which involved a direct competition between two different states" over which one had authority to resolve family disputes.[76] It was clear however that, more than a problem of legal pluralism or of conflicting laws, the dispute over divorce between states was a "political problem" with few "political solutions".[77] It was also an issue on which the Supreme Court was "unwilling" to permit certain state policies to "block...more workable national compromise".[78]

The changes that took place in Supreme Court case law during the 1960's and 70's, the set family law on a "new course".[79] The Supreme Court rendered rulings which imposed on states more unified approach to the conflict of laws questions in divorce.[80] These Court cases also had the effect of limiting the ability of states to enforce their divorce laws finding that when "important personal rights were at stake... the individual interest in

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[75] *Ibid.* at 431.
[76] *Ibid.* at 420.
[77] *Ibid.* at 431.
[78] *Ibid.*
[79] *Ibid.* at 432.
[80] *Ibid.* at 431.

marital freedom and the national interest in uniform rules were more important than state divorce policies".[81]

This change was particularly important to conservative states which were concerned that legal harmonization efforts would become equivalent to a moral downgrade of divorce and encroach on state's private law authority. The Court treated financial and custody matters different from matters of status.[82] It also divided and differentiated jurisdictional issues between those required for a divorce decree and those required to litigate the financial and custodial issues of divorce.[83] In this way, the Court supported sub-federal efforts to develop public policies in favour of wives and children while also supporting state's authority pursue other family controversies that appeared before their courts.[84]

This shift and shakeup of the full faith and credit clause and regrouping of divorce issues was important for women. The change in the treatment of marital status from a purely private matter to a "question of individual right" placed citizen family issues in an area of law that "prevailed over important state interests in marriage".[85] Recognition that marriage status issues were worthy of constitutional protection, gave women greater liberty in choosing which jurisdiction would control their marital status. This was critical in assuring wives' access to "property titles, inheritance claims" and welfare benefits when posed with problems of desertion, spousal abuse, or the laws of

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[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.* at 431-432.
[85] *Ibid.* 432.

coverture.[86]Nonetheless the same solution giving wives greater access to divorce also had the effect of putting a "restraint on state powers over marriage and divorce", fundamentally altering constitutional full faith and credit clauses.[87]This was particularly relevant given that women had been "largely excluded from the uniform law process" and were singled out as responsible for the increase in divorce during the early twentieth century.[88]

Cahn has stressed how the question of "jurisdictionality" has been used to dismiss constitutional scrutiny of the private sphere, one which has been especially detrimental to women.[89] Despite the lack of a constitutional or federal diversity statute in the U.S. explicitly restricting federal court consideration of family law issues, this bias has led to the development of "a legislative and judge-made Domestic Relations Exception".[90] This principle has permitted federal courts to exercise a certain freedom in choosing whether to hear "family law cases that have arisen in lower federal courts under diversity jurisdiction".[91] With respect to family law, this principle has exempted courts from hearing "divorce, alimony, and child custody cases".[92]

Cahn argues that U.S. federal courts discrimination against family law cases is in part due to the application of orthodox ideas about the the family but is also a result of the "bias

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[86] *Ibid.* at 383 & 420.
[87] *Ibid.* at 394.
[88] *Ibid* at 392-393.
[89] See *Cahn 1993 supra* at note 22 at 1073-1126.
[90] *Ibid.* at 1073.
[91] *Ibid.* at 1074.
[92] *Ibid.* at 1125.

against women".[93] Given the links of women with family, the court interpretation sends the message that federal "courts [needn't] be required to decide women's concerns, especially when they would prefer to decide other kinds of cases".[94]

This double stranded federalism is problematic for women. The Domestic Relations Exception is based on two different understandings of what family law federalism is.[95] The first is that "family law is a traditional area of state regulation" a matter that is beyond "national business" while the second is based on the idea that "family law is somehow out of place in the federal courts".[96] These principles have resulted in a different treatment of women's claims, depending on whether they are brought forth in the sphere of family law or as workplace issues.[97] However, because women tend to outnumber men in as litigants in family law cases", interpretations which exclude family law from Supreme Court review severely limit the scrutiny of issues that most frequently affect women.[98] This has resulted in case law which has denied married women possibilities for recourse which could have been transcendental for women.[99]

Despite this principle, the Supreme Court has interceded in state's right over family law when important constitutional rights have been at stake, to the point where the Court "has

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[93] *Ibid.* at 1098.
[94] *Ibid.* at 1098-1099.
[95] *See ibid.* at 1073.
[96] *Ibid.* at 1074.
[97] *Ibid.* at 1100-1101.
[98] *Ibid.* at 1100.
[99] Like enforcement of a maintenance decree given by a state court as part of a separation action, refusing to limiting state courts from hearing a divorce suit filed against a foreign dignitary by his American citizen and U.S. state resident wife, and tort suit seeking monetary damages for ex-husbands physical and sexual abuse of his two daughters.

constitutionalized some family law issues".[100] In one case, the Court reviewed the constitutionality of a state statute regulating the right to marry, ultimately striking down the statute.[101] Other Supreme Court cases reviewed the rights of parents "to guide the religious future and education of their children" and questioned the father's right to due process and to the custody of his children.[102]

The Courts intervention in these cases illustrates how "family law is no longer reserved solely to the states" and that both the private sphere and federal-state law "boundaries" are "permeable" when significant interests are at stake.[103] However from a policy perspective, the Domestic Relations Exception principle continues to send the message that families are not a national priority. Thus, the consideration of family law cases by federal courts in line with other diversity cases would go far in endorsing "the changing status of family law in our society" highlighting the fact that "families are a national issue" and that women's concerns are important.[104]

3.4. The Political Architecture of Transnationalism

For women internationalization has meant that family law and women's equality is now a matter that goes beyond the state and federal scope.[105] Internationalization in this area has taken place through the incorporation of principles and rights recognized in human rights and private international law instruments. Interconnected with this phenomenon, however

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[100] *Cahn 1993 supra* at note 22 at 1102.
[101] See *Zablocki v. Redhail*, 434 U.S. 374 (1978) in *Cahn 1993 supra* at note 22 at 1102.
[102] See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) and Stanley v. Illinois, 405 U.S. 645, 651 (1972) in *ibid*. at 1103.
[103] *Ibid.* at 1125.
[104] *Ibid.* at 1075.
[105] See generally *Stark 2006, Dyer 1996, Estin 2010, Weiner 2008, Resnik 2005*, supra at note 24, highlighting the different ways international laws have made their way into U.S. law despite opposition to foreign and international law.

are the effects that supranational organizations and their laws have had on the national family law legal landscape. Taking on a broad interpretation of federalism, scholars have highlighted how contemporary supra-national institutions and non-state rights actors have changed the political architecture for women and how these structures influence and are influenced by gender claims.[106]Resnik for example highlights the increasingly important role being role played by "mayors, governors, and members of state and city legislatures" in domesticating international treaties as models of local policy. [107] Global corporations, law firms, state development agencies, supranational and non-governmental organisations, as well as political and social movements are also potential important players.[108]

Thus, another way that state's legal levels are multiplied is by the normative and political effect that internationalization has on the national landscapes. Legal pluralism scholars have recently turned their attention to the ways that "transnational law" brings in "another layer of supranational and international legal regimes" on top of the "already existing constellations of legal pluralism" that exist within states.[109] Among the main global "actors" that contribute to the rescaling of national legal systems through "transnational laws" are large corporations, law firms, national state agencies, international organisations; NGO's and social movements.[110]

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[106] See generally *Estin 1998, 2007, 2008*, and *Resnik, 2001, Cahn 1993*, and *Vickers 2010* supra at note 22.
[107] *Ibid. Resnik 2001* at 626.
[108] *von Benda-Beckmann 2002 supra* at note 24 at 20.
[109] *Ibid.* See also *Tamanaha 2008 supra* at note 24 at 410.
[110] *Ibid. von Benda-Beckmann 2002*.

State and international organizations add normative layers through their financing and promotion of law and development projects and the transplantation of laws and systems of operation for receptor states.[111] This global-rescaling of state's legal system is multiplied by the political and legal lobbying power of the dissemination work of local, national, and transnational NGO's. The activism and conscious awareness activities of international human rights NGO's have become important within legal systems given their support in implementing international rights within states.[112] The unique niche of power from which these public/private global webs operate have made them noteworthy forces in the importation and exportation of ideas and "norm entrepreneurship".[113]

Further "fragmentation" of internationalization measures has been noted as a result of the different reasons for which states incorporate international law. This incorporation depends on a country's status as a global player, the different levels of governance and non-state actors involved in incorporating international obligations at the local level and the rhetorical strategies at hand.[114] States and international organizations can be influential within global, national and local arenas given their power over "the rules, procedures, and criteria" by which tools and resources are provided to states.[115] The patterns of asymmetry between states under these new supranational institutions differs to that of colonialism in that this new form of imperialism is "based on a regime of sovereign nations rather than the political control of empire".[116] This power over

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[111] *Tamanaha 2008 supra* at note 24 at 388.
[112] *See generally Merry 2006 supra* at note.
[113] *Resnik 2007 supra* at note 22 at 34-35.
[114] *See Merry 2006 supra* at note 24 at 100.
[115] *von Benda-Beckmann 2002 supra* at note 24 at 21.
[116] *Merry 2008 supra* at note 24 at 578.

resources derived from states voluntary submission of sovereignty for the greater good contributes to a "power differential" between states and institutions as well as between states themselves and their legal systems. While states are treated as equal within these regimes they often suffer "sharp informal inequalities" which are tied to their "unequal...ability to govern the key financial institutions of the international community".[117]

Thus internationalization has meant that family law and women's equality is now a matter that goes beyond the state and federal scope. This movement has been especially important for women given the increasing role that international laws have had on the spread of women's rights.[118] While these new global actors have favoured women in some areas, they have also been used by provincial and state governments to undermine women's rights. The invocation and language of these treaties has "become a powerful tool with which to challenge the public/private distinction" by which state authorities have traditionally limited their intervention in women's family issues.[119]

4. Canonical Understandings about Family Law Change

My concern is not with the view that family laws are assimilating, per se; I am concerned about the theoretical, methodological and contextual groundings attached to the family law assimilation thesis. In particular, I am concerned with the effect that this assumption has on family law and how scholarship portrays legal change and the consequences that these images have on how women`s family law rights are understood and mobilized.

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[117] *Ibid*.
[118] *See Stark 2006 ibid*. at 1574-1602*ff.*
[119]*Ibid*. at 1575.

Hasday has recently argued in favour of challenging the canonical understanding of family law.[120] The "family law canon" is an example of "shared ways of thinking about family law" that have important power implications for women and family law reform.[121] This canon encompasses the set of "foundational texts" that constitute the discipline as well as the stories and ideology prevalent among legal academic and practitioners with respect to family law.[122] The family law canon has been central in: 1) holding together arguments to enact and defend change to family laws that impinge heavily on women; 2) in removing or obstructing protective mechanisms that favour women; 3) facilitating the use of jurisdictional arguments to obstruct pro-women statutes; 4) helping courts and legislatures avoid explaining why the law uses different sets of rules to regulate the family as opposed to other groups or members.[123]

Family law canons particularly affect women given women`s cultural association to the family, the effect that the private-public law divide has on how women`s claims are understood, and women`s more prevalent use of family law and courts for legal relief. The most dangerous aspect of the family law canon is its binding effect on authorities and legal scholar's judgments about particular family law debates. In other words it has a "distorting" effect on how family law content and its "animating tenets" is understood.[124] Thus, challenging the canonical understanding operating at the background of family law

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[120] See generally Jill Elaine Hasday, "The Canon of Family Law" (2004) Stan. L. Rev. 825 [*Hasday 2004*].
[121] *Ibid.* at 1-2 & 5-9.
[122] *Ibid.* at 1-2.
[123] *Ibid.* at 2-3.
[124] *Ibid.* at 79. Sacco notes for example how the propositions, reasons and conclusions about a legal system made by judges and scholars make up part of the broader structures of legal systems affecting the way rules are explained, understood and interpreted. Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)." (1991) 39 Am. J. Comp. L. 1 at 5, 7, 24 and 31-32 [*Sacco 1991*].

can help uncover the tenets of the canon but also uncover frameworks of inequality present in family law.

The family law assimilation thesis operates in the same way as the family law canon. It reflects shared ways of thinking about family law. However, it is much more complex due to its lack of explicit national grounding and its connection with the comparative law school of throught. I argue that there are important issues of imperialism, positionality and situatedness embedded in the ways that family law and legal change are studied through this framework. While this issue may appear as merely academic on the surface, it is important not to discount so quickly the discursive effect of images of family law change.

Like the family law canon, the real world implications of the family law assimilation canon are broad, but it has a particular effect on women given the increased reliance of family and comparative scholarship as a judicial and legislative resource at both the national and supranational levels.[125] The perpetuation of explanations of family law change based on constructed images of a state's romantic commitment towards gender equality or as a "technical solutions to shared problems", have an important role in expanding the evolutionary and developmentalist canons on jurisdictions and on women.[126] The images can undermine the "legal capital" of these systems, bind the limits of operation of a legal system and manipulate the broader organization of "legal space" at

[125] See William Twining, "Diffusion of law: A global perspective" (2004) 49 J. Legal Pluralism & Unofficial L. 1 especially at 28 [*Twining 2004*].
[126] See *ibid*. especially at 28.

a more global level.[127] The assimilation thesis also has the effect of inflating the perception of achieved equality. This in turn can be critical to determining (1) if, when and how judges "treat foreign precedents and other sources as persuasive authority"[128]; (2) the strategies undertaken by opposing stakeholders to counteract or reduce "the impact" of unwanted legal change. [129]

There are also important practical and political implications involved in endorsing the paradigm of assimilation, not only for women but also within and between states. Perspectives that focus on consensus, unity and uniformity in family law reform dangerously dichotomize and inflate changes that have occurred in family law over time and space, which promote the perception of achieved equality. The presumption of achieved equality can influence women's law reform by: (1) wrongly perpetuating the idea that"family law no longer supports social inequality and need no longer worry about the status of historically subordinated people"; (2) relieving legislatures and state courts from contending with issue of women' inequality; (3) repositioning in a more persuasive manner those same institutions that law reform sought to remove.[130]

I argue that the problem with the family law assimilation thesis lies in its close relationship with the law and development school of thought. By endorsing images of consensus, unity and uniformity with respect to family law reform this approach exacerbates the rights paradigm through which human rights, powerful jurisdictions,

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[127] Jorge L. Esquirol, "Failed Law of Latin America, The" (2008) 56 Am. J. Comp. L. 75 at 77 [*Esquirol 2008*] .
[128] *Ibid*.
[129] *Twining 2004 supra* at note 125 at 10.
[130] *Hasday 2004supra* at note 120 at 81-82.

transplantation and central governments are axes of reform. As a result, this type of thinking severely downplays the complex legal and jurisdictional issues behind top-down legal change[131]

This thesis represents a concise inquiry, based on case studies selected according to the issues and the context, that involves the contrast of cross-border family law developments and their rhetoric in terms of women's rights. Cohabitation and divorce are used as case studies to understand Mexico and Quebec in terms of internal jurisdictional issues but also with respect to North American neighboring jurisdictions. They are meant to showcase how the lack of further scholarly engagement with jurisdictional aspects of family law in Mexico is an example of a pattern of thought about family law change that tends to prevail in family law in general. In Mexico, this is due to the strong hold the family law modernization framework has had on Mexican family law scholarship. Interconnected with these assumptions however, are also the theoretical groundings of comparative family law. The latter has made certain assumptions about the beginning, the direction, the destination and the consequences of family law change and has long presumed the assimilation of family laws.

My approach draws on a mix of legal pluralism lenses as well as Mexican, U.S. and Canadian literature that intersect family, private and comparative law. The comparative approach adopted in this work also calls into question certain presumptions about top-down family law change. As examples, it integrates into the analysis different scales of political tensions, the jurisdictional politics as a result of changes to divorce and

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[131] *Grossberg 2000*, supra at note 8 at 3.

concubinage laws, and often overlooked changes to family law that took place at the sub state level. All these are examined for their effect on women. Considering shifts in time and including different time periods of cohabitation and divorce reform offer a means to compare and find unaccounted factors influencing the development of reform and how these, in turn, have affected women. The exploration of the deep history behind concubinage and divorce in Mexico and Quebec in different time periods support the points later raised in the final chapter of how evolutionary accounts of family law reform fail to capture the important recurring legal and political developments that form the basis of reforms.

After the introduction, the thesis develops four case-studychapters showcasing and analyzing how jurisdictional politics have had important implications on the development of women's family law rights in Mexico and Quebec and the implications within the comparative family law literature. The case-study chapters examine different but interconnected jurisdictional struggles linking the regulation of concubinage and divorce in Mexico and conjugal cohabitation in Quebec. Chapter two examines the political importance of the status of marriage and the regulation of informal conjugal unions during the colonial period, independence and the revolutionary period in Mexico. The chapter ends with an examination of how concubinage rights have intersected with issues of federalism and justice reform. Chapter three builds upon the previous chapter by highlighting how the reintroduction of unilateral divorce by Mexico City rekindles the importance of pre-existing jurisdictional tensions between liberal conservatives and the discourse of women's rights. It thus examines the effect that national legal harmonization efforts have had on divorce reform and highlights the gendered effects of divorce after

the 1930's which now make unilateral divorce a viable gender equitable option. Chapter four discusses how internationalization of family law in Mexico and its shifting effect on traditional divisions and spheres of law-making power has introduced new political actors in the development of women's family law rights. Chapter five is a historical review of the interplay between federalism politics and family law reform in the development of cohabitant rights in Quebec as a way to analyze the effect that jurisdictional tension between federal and sub-national units had on women's family law rights and to link it with the Mexican experience. Chapter 6 concludes by examining the different scales of theoretical and methodological canons embedded in the family law assimilation thesis, its effect on how family law comparisons are undertaken and the issues of "situatedness" and "positionality" that arise for feminist comparative endeavour.

Chapter 2 : At the Crossroads of Concubinage Rights in Mexico

1. Introduction

The reforms of the Civil Code for the Federal District in the year 2000 (hereafter referred to as CCDF 2000) broadened cohabitant rights by including concubinage as a family form.[132] The distinction between concubines and married partners was viewed as discriminatory. The explicit recognition and inclusion of concubinage as a family form was deemed to have equalized it to marriage in form and in status. Further, by incorporating concubinage within the sphere of the family, the reforms sought to formally provide the protective mechanisms of the CCDF 2000 in recognizing concubines.

Up until this time, the term "family" had not been clearly defined in any of the Mexican codes. The CCDF 2000 assimilated concubinage status to marriage status by including concubinage in the types of bonds created through affinity.[133] Through this unequivocal recognition of family status, concubine rights were expanded to include a number of marriage-like rights. The objective of legislators was to equalize concubinage and marriage while maintaining the primacy of marriage.[134] Thus reforms recognized cohabitation between a woman and man to have a legal consequence which created

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[132] Article 138 quintus, CCDF 2000. The CCDF defined family as the "legal relationships that generates duties, rights and obligations arising from persons connected by relationships of marriage, parentage and concubinage" [translation and emphasis by author].

[133] Art. 294, *ibid*. Kinship by affinity (*parentesco de afinidad*) is that which is adquired by marriage or concubinage between a woman or a man and their respective blood relatives.

[134] See "CONCUBINATO. NO GENERA EL DERECHO A LA INDEMNIZACIÓN A QUE SE REFIERE EL ARTÍCULO 289 BIS DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXV, Enero de 2007; Pág. 2221. [CONCUBINATO 619/2006].

support and succession rights as well as presumptions of paternity regarding children derived from the concubine relationship.[135]

By assimilating concubinage to marriage, concubinage status has also created divorce like status rights and obligations. As such, these reforms have introduced the notions of recognition of economic and non-economic contributions and the division of property principles equivalent to those within marriage and divorce. [136] Thus, assimilation of concubinage to marriage in the CCDF 2000 also involved recognition of support rights. However, limitations on how these rights were implemented were imposed. Specifically, payment of obligations (1) are only enforceable after dissolution of the relationship, (2) can only be granted for a period of time equal to that of the relationship and (3) are only admissible when one of the concubines does not have any personal income or assets. Furthermore, support cannot be given to a concubine who has shown "ingratitude" or is involved in another concubine relationship or marriage. Lastly, support claims can only

[135] Art. 291 bis & quater, CCDF 2000. The reforms did not adopt a definition of concubinage per se. However, by outlining the requisites for recognition of rights and obligations of concubines, the reforms indirectly defined the institution. Thus chapter eleven of the CCDF 2000 relating to concubinage states that a concubinage relationship results from a reciprocal relationship of obligations and rights between women and male concubines, if and only when they both are devoid of legal impediments to contract marriage, have cohabited together continually for a minimum of two years or when a child has been borne from the relationship. The code establishes that a relationship of concubinage can only be established between two persons, and that multiple concubinages will annul all actions for concubinage.

[136] Art. 164, *ibid.* Article 308 of the CCDF 2000 details what is considered support. Support (*alimentos*) comprises: I. The food, clothing, dwelling, medical attention, hospitalization and, when appropriate, pregnancy and birth expenses; II. In addition, regarding minors, the expenses for their education and for providing them with a trade, art or profession adequate to their personal needs; III. With regard to persons with some kind of physical incapacity or those declared in state of interdiction, what is necessary to accomplish, within feasible means, their training or rehabilitation and their development; and IV. Regarding elderly people (*adultos mayores*) who lack economic capacity, in addition to whatever is needed for their geriatric care, and effort should be made for them to receive support, incorporating them into the family."

be brought one year following dissolution of the relationship.[137] With respect to inheritance rights, continuation of the rights recognized under the "old" code remains.

Justification for cohabitation reforms in Mexico City arose from the view point that the distinction between concubines and married partners was discriminatory. However, specific limitations on marriage-like rights continue to keep concubines from full marriage status. The reforms did not adopt a definition of concubinage per se; nonetheless, not all cohabiting relationships are considered "concubines".[138] Cohabitants who have not born children together, who have lived together less than two years, or who have lived separately at different times are some examples of cohabitation arrangements that continue to be unrecognized by the code.

While the objective of legislators was to equalize concubinage to marriage, Mexico City's reforms have instead reinforced many of the patriarchical notions which gave rise to concubinage the first place. Concubines were not recognized to have property rights; mandatory support payments were only enforceable after dissolution of the concubinage relationship and only when the claiming concubine could show that she/he did not have any personal income or assets.[139] Moreover, the reforms did not reduce the patriarchic notions since concubines' behaviour is taken into account to reward rights. For example,

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[137] Art. 291 *quintus* CCDF 2000.
[138] *See ibid.* art. 291 *ter*., *ibid.*
[139] *See ibid.* art. 291 *quintus*, *ibid.*

support cannot be claimed by a concubine who has shown "ingratitude" or is involved in another concubine relationship or marriage.[140]

Although the CCDF 2000 is no longer the main model followed by states, Mexico City's concubinage reforms reflect the conflicting positions that exist both within the Mexican legislative and judicial arenas about the type and amount of protection a concubine partner should have a right to. This incongruity is evident not only in Mexico City's reforms but also in recent reactions by state legislatures and federal courts with respect to concubines' marriage status and property rights. For example, while more expansive protection appeared in the state civil codes of Hidalgo and Queretaro in 2007-2008 providing marriage status and divorce rights to cohabitants, in the same period the Collegiate Circuit Courts released contradictory case law which first denied then later recognized concubines' property rights.

In the first case the Court denied a former concubine the division of property rights after the dissolution of her concubinage relationship.[141] The court found that a concubinage relationship does not generate divisions of property rights according to the terms of divorce for married partners.[142] The court recognized that while the institutions may be

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[140] For analysis on benefits of "concriptive" and non-statutory rights on cohabitants see Sonya Garza, "Common Law Marriage: A Proposal for the Revival of a Dying Doctrine" (2005) 40 New Eng. L. Rev. 541; Cynthia Grant Bowman, CG, "Feminist Proposal to Bring Back Common Law Marriage, A" (1996) 75 Or. Law Rev. 709 [*Bowman 1996*]; Marsha Garrison, "Nonmarital Cohabitation: Social Revolution and Legal Regulation" (2008) 42 Fam. LQ 309; Martha Bailey, "Regulation of Cohabitation and Marriage in Canada" (2004) 26 Law & Pol'y 153; *Bradley 1999* supra at note 6; Ariela R. Dubler, "Wifely Behavior: A Legal History of Acting Married" (2000) 100 4 Columbia Law Review 957; Martha L. Fineman, "Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation" (1981) Wis. L. Rev. 275 [*Fineman 1981*]; Robert Leckey, "Cohabitation and Comparative Method" (2009) 72 M.L.R. 48 [*Leckey 2009*] .

[141] See CONCUBINATO 619/2006 supra at note 134.

[142] *Ibid.*

similar, they are "abstractly and ethically different".[143] Furthermore, the court found that while the legislature sought to balance and remedy the effects of the differences relating to property rights between partners married under a regime of division of property rights and those married under community property, claims for the division of property rights relating to divorce are only applicable to those who have a marriage certificate, something that is absent from concubinage relationships.[144] Lastly, although the court recognized the many options within the "mosaic" of the Mexican legal system that can resolve the issue of concubinage rights, it also supported states in their autonomy to legislate in civil law matters, to provide solutions and to use judicial criteria to resolve problems relating to property regimes. Thus, options to resolve concubine rights questions should center on local law and criteria without trying to apply external rules and interpretations.[145] A year later, the same courts announced very different non-binding case law based on the lack of a specific property regime associated with concubinage relationships. It stated that when division of concubine rights and property results from the products that arose from the joint collaboration of concubines, the criteria for determination of division of property should be based on the rules for de facto partnerships.[146] The court reasoned that while there might not be not express consent of the partnership, the nature of concubinage relationships as a family institution, suggests that concubines tacitly agree to combine their resources and efforts for a common

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[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*
[146] "CONCUBINATO. LA INEXISTENCIA DE UN RÉGIMEN PATRIMONIAL, NO IMPIDE LA LIQUIDACIÓN DE LOS BIENES Y DERECHOS ADQUIRIDOS POR EL TRABAJO COMÚN DE LOS CONCUBINOS, MEDIANTE LAS REGLAS DE LA SOCIEDAD CIVIL" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; XXVIII, Septiembre de 2008; Pág. 1219 [translation by author].

objective: the constitution of a family nucleus.[147] Tacit consent is deemed to be given on behalf of the partners through the act of cohabitation. Contributions can be non-economic or economic and those contributions of property imply transmission of property to the partnership.[148] As such the court found that division of property rights between concubines is to be determined by the rules of partnership under civil law.[149]

These two opposing takes on cohabitant rights exemplify the types of ideological and political divisions that have surrounded concubinage law change in Mexico, which I argue are rooted in the political significance that marriage and informal marriage laws came to signify in Mexico during key political periods.

Currently, informal marital unions are on the rise worldwide and so are cohabitation claims. This rise is related to the negative effect that present-day neutralization policies have had on cohabitation laws. This policy has put constrictive alternatives, like concubinage, at risk of disappearing or remaining undeveloped.[150] The situation of cohabitant women is particularly problematic given the lack of "formal" acknowledgement of women's susceptibility to poverty based both on their biological reproductive capacity but also on "cultural" assumptions of their greater responsibility for family and childcare.[151]Family law policies that eliminate institutions or doctrines of common law marriage or concubinage and replace them with the rhetoric--"freedom of

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[147] *Ibid.*
[148] *Ibid.*
[149] *Ibid.*
[150] See *Fineman1981 supra* at note 140 at 275-332.
[151] Susan Moller Okin, "Feminism, women's human rights, and cultural differences" (1998) 13 Hypatia at 35.

choice"--do so mostly at the expense of women.[152] Furthermore, alternative piecemeal options based on gender neutral frameworks like marriage by estoppel and contractually based remedies may be insufficient in addressing the pressing complex matters of economic interdependence that result from conjugal cohabitation.[153]

Despite its double sided effects, concubinage in Mexico continues to fill many of the legal gaps left by mainstream alternatives to women's rights. Concubinage laws provide a more inclusive group of women legal relief that would otherwise be unviable or untenable to women under non-statutory mechanisms.[154] This is not only due to the presumptions built within concubinage (which diminishes the evidentiary standard, time and resources imposed on "vulnerable and deserving" women under contractual alternatives) but also due to the social and historical importance that recognition of informal conjugal unions can symbolize.[155]

Nonetheless, the history of concubinage for women in Mexico is blemished by the classist, ethnic, religious and gendered tensions, and anti-miscegenation sentiment of the colonial era. In addition, during the modern era there were also important conservative-liberal tensions, feminist divisions, and federal-state conflicts over concubinage which shaped the development of concubinage in Mexico. I argue that the development of concubinage laws in Mexico reflects unaccounted ways that authorities used marriage- and marriage-like-rights as a way to mediate, counter or promote "lines of authority"

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[152] See *Bowman1996 supra* at note 140 at 756-757.
[153] *Ibid*. at 759-776.
[154] *Ibid.*
[155] In contrast to non-conscriptive approaches, concubinage assumes that cohabitating couples, by living together as a couple and behaving as a married couple or having a child, have implicitly chosen to take on many of the obligations of marriage.

between competing powers and political groups during different key historical periods. Thus in order to more fully account for the present conflicting state of women's concubinage rights in Mexico, this needs to be read through a broader and more political lens.

This chapter aims to uncover the benefits and drawbacks of conscriptive approaches towards cohabitants. Reviewing the development of concubine rights in Mexico through a "political lens" in this chapter is one way to draw lessons from this country's approach to conjugal cohabitation and its effect on women, elucidating upon lesser known struggles that impinge heavily on cohabitants' rights. Part one of this chapter examines the regulation of informal conjugal unions by ecclesiastical authorities, Spanish laws, and the Laws of the Indies in Mexico during the colonial era. Part two examines the political factors during the revolutionary era that converged to set the stage for a stacked system of conjugality within the civil codes. Part three and four examine how concubinage intersected with the tensions between conservative and liberal circles for the protection of women of the lower classes and elite women's marriage rights and struggles over the authority over private law during the period of independence. Part five examines the legal alternatives that developed to recognize the gendered and non-gendered contributions of concubine's wives from the modernity period to the contemporary period and the impact that recognition has had upon women. Part six discusses the challenges in retaining, reinstituting, or expanding conscriptive approaches to informal marital unions like concubinage.

2. Marriage Status Distinctions as a Way to Reroute Power

The regulation of concubinage in Mexico is an institution whose origins predate Mexico's independence. The regulation of concubinage is therefore a combination of (1) laws and policies inherited from colonialization by the Spanish Crown, (2) the laws enacted during the independence and revolutionary periods to counteract the power of the Crown and the Church in the independent colony, and (3) rules put in place during the modern and contemporary periods giving informal conjugal unions a place within the public and private law.

During the colonial period, Mexico was regulated through a mix of Castillian law, Pre-Columbian Indian law, and special Spanish law created solely for New Spain (*Derecho Indiano* or Laws of the Indies).[156] Given the incorporation of the *Celula Real* of the Council of Trent into Spanish Law in 1564 in the areas of family and marriage, ecclesiastical law was an overarching source of law.[157] This move not only brought the legal aspect of Christian marriage to colonial laws but also established the Church's authority in family matters. The Church's authority over the family coincided with the Church's Christianizing endeavours in New Spain and its role in protecting the status quo of marriage there.

When the Spanish Crown realized that the "Castillian legal structure" could not be fully transplanted, a system of hierarchical laws was implemented by colonial authorities.[158] In

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[156] Francisco Avalos, "The Legal Personality of the Colonial Period of Mexico" (1991) 83 Law Library Journal 393 at 394-395 [*Avalos 1991*].
[157] See generally *Benton 2001 supra* at note at 21.
[158] *Ibid.* at 398.

principle the Laws of the Indies had priority over Castillian law.[159] Within Castillian law, the order of preference for Colonial Mexico was outlined by the Ley del Toro, which established that preference was first to be given to the *Ordenamiento de Alcala*, followed by that of the *Fueros Municipales, Fuero Real* [if its use had been approved]; and the Siete Partidas (which encompassed the Statutes of Alcala, the Municipal Codes, the Royal Code, and the Acts).[160]

In theory, all power derived from the Crown required the King's name and personal approval. However, jurisdictional lines were never clearly defined resulting in subject-matter dependent sources and authorities within areas of colonial law that were frequently subject to shifts in authority to prevent empowerment.

A main example of these fluid lines were the ways that issues of ethnicity and class, which were often at the "core of public and private" law divisions and allocation of rights, were used to define conjugal unions and determined these unions' access to private law rights on the basis of class and ethnicity.[161]

For example, an exception to this priority of Laws of the Indies order was in private law where Castillian Law reigned as robustly if not more than the Laws of the Indies with respect to Spaniards. The public laws of the Indies, however, created separate government institutions for Indians, which included rules for the establishment of communities, their governance and the role and functions of Spanish or Mestizo's in

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[159] *Ibid*.
[160] *Ibid*. at 396.
[161] Matthew C. Mirow, *Latin American law: a history of private law and institutions in Spanish America* (Austin: University of Texas Press, 2004) at 56 [*Mirow 2004*].

Indian settlements.[162] Separate laws within colonial private law also addressed questions of property, inheritance and extent of indigenous rules of law within indigenous communities.[163]

2.1. Establishing Conjugal Boundaries

Another example of how conjugality drew legal boundaries in the new colonial setting was how marital status was thus closely tied to the ways that ethnicity and class was organized. Ethnicity was essential in determining legal and social status of unions. This conflict was reflected in the elite Spanish community's hostility towards the increasing practice of clandestine marriage and their demands to the Church to exercise greater authority in their offspring's marriage decision-making process. However, the requisites of form for civil marriage relied largely on the effect that the competition among and challenge to the ethnic, class, religious, and gender borders had on the policies implemented to promote and protect colonial era marriage and families.

In the new colony most of the unions that occurred between Spaniards and the castas or Indians in the New Spain took place outside of marriage. Up to the fifteenth century, informal conjugal unions could acquire certain status rights through the tradition of *barragania* and clandestine marriage. Either union could result from the declaration of promise of marriage between the consorts (though clandestine marriage lacked the fulfillment of the requirement of solemnity and publicity to be full-fledged marriage) or

[162] *Benton 2001 supra* at note at 21 at 395.
[163] *Ibid*. 396.

through the conjugal cohabitation between two unmarried persons which appeared as formal marriage but was more easily dissolved (*barragania*). [164]

The only real difference between *barragania* and clandestine marriage was the intention of the parties and the social standing of these unions. [165] In order for a union not to become a clandestine marriage, male partners were required to publicize their *barragania* relationship as such. [166] In contrast, a *barragania* relationship could transform into a clandestine marriage if and when the bond had not been publicized as such and the woman was a virgin or had lived an "honest" life. [167]

Free choice in marriage was based on either the exchange of vows or a solemn promise of future marriage, both of which became indissoluble by an act of sexual intercourse. Thus consent, understood as a combination of marriage intention and marriage behavior, constituted "marriage between a man and a woman". [168] However, these differences between *barragania* and clandestine marriage dictated the status of the progeny and their inheritance rights. The classification of progeny of the *Siete Partidas* made two main

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[164] See Alejandra Verónica Zuñiga Ortega, "Pasado y futuro del concubinato en México"(2010) 22, Revista Letras Jurídicas at footnote 3 at 3 [*Zuñiga Ortega 2010*]. See also Federico Puig Peña, "Las uniones matrimoniales de hecho" 1949 VVIII Revista de derecho privado at 1096.

[165] Enrique Gacto, "El Marco Jurídico de la Familia Castellana. Edad Moderna" (1984) 57 Historia, Instituciones y Documentos 37 at 41 [translation by author] [*Gacto 1984*].

[166] *Zuñiga Ortega 2010 supra* at note 164 at 1096.

[167] *Gacto 1984 supra* at note 165 at 41.

[168] Section (4, 2, 5) of the Partidas "*Consentimiento solo, con voluntad de casar, faze el matrimonio entre el varon, e la muger*." The vision of marriage as established in the Partidas contrasts to the definition of marriage as translated in the doctrinal work of Febrero Mejicano. Drawing on Pothier's Traité du Marriage, he defined marriage as "a contract celebrated with the formalities that law has prescribed by which one man and one woman, able to contract it, obligate themselves reciprocally to remain throughout life in the union that should exist between a husband and a wife", *ibid*. at 6.

distinctions between progeny, namely, legitimate and illegitimate.[169] With the exception of "natural" progeny (born from a single woman, a faithful *barragana*, (a friend of the man but not his wife), all other categories of illegitimate progeny, namely those born from a *barragana* in an adulterous relationship, were devoid of inheritance rights and could not receive any honors. [170]

2.2. Re-drawing Social, Ethnic and Political Boundaries

The coexistence of laws and conflicting policies put in place to promote and protect marriage and families during the colonial era, made marriage and informal conjugality a subtle breeding ground and resource for competition among and challenge to the ethnic, class, religious, and gender borders that organized these groups. [171] For example, where rules were established to promote marriage between Spaniards but colonizers cohabitation with indigenous women became commonplace, policies were implemented to punish Spaniards with loss of inheritance.[172] While these contradicting policies were justified by the Crown's aim to both populate and Christianize the colony, a caste system operated at the root of marriage and family laws. However, it was the obliqueness of jurisdictional lines in family law matters as well as the Crown's and Church awareness

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[169] Sara Montero Duhalt, "Evolución legislativa en el tratamiento a los hijos extramatrimoniales (México independiente)" in José Luis Soberanes Fernández, ed., *Memoria del III Congreso de Historia del Derecho Mexicano* (Mexico City: UNAM, 1983) at 438 [*Montero Duhalt 1983*] [translations by author].
[170] *Ibid*. at 438.
[171] Guillermo Floris Margadant, *Introduccion a la Historia del Derecho Mexicano* (Mexico City: UNAM, 1971) at 126.
[172] *Mirow 2004 supra* at note 161) at 56.

of private law as a key "centralizing" tool that made concubinage and marriage a much more racially and class based contentious arena .[173]

The movement to nullify marriages celebrated without the ecclesiastical sanction is an example of the ways that conjugal laws were used to not only redraw ethnic and class division but also allocate power. The change to marriage process and subsequent assertion of full authority over ecclesiastical matters in the new colonies by the Spanish Crown had four important effects. It: (1) placated the ethnic and status concerns held by parents, who used marriage as a social and economic springboard;[174] (2) exacerbated the already tense ethnic relations within the new colony and constructed new ones within and between groups,[175]; (3) increased tensions between royals and ecclesiastic authorities in Spain with respect to the Indians, and;.[176] (4) diminished legal concerns over women's family honor.

Pressure was exerted on the Church to change the laws on marriage validity. Under canon law and prior to the reforms debated in the Fourth Mexican Provincial Council, marriage validity was not measured by the fulfillment of requisites of form but the "consent" expressed by the parties. The *Partidas* only stated one requirement of form to contract marriage, "*Consentimiento*", which literally means consent but is understood as

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[173] Avalos notes that by the Mid-Colonial Period of Mexico, the Spanish Crown had achieved a "centralized control" of Mexico, through the weakening of the first colonizers and the abolition of the "Encomienda" and the and the control of the Church . By giving power over a tract of land and the subjects within its circumscription, the Encomienda system had the effect of dividing power over land and communities between the Crown and Spanish conquerors and other loyal subjects. This authority included power over the labour of the Indians, their "religious and temporal well-being" and taxation power over towns and villages within their domain. *Avalos1991 supra* at note 156 at note 22 at 397.
[174] *Mirow 2004 supra* at note 161 especially at 31-34.and 58.
[175] *See ibid*. especially at 31-34.
[176] *Ibid*. at 385.

an expression of will or desire.[177] The *Partidas'* focused on the promise of marriage and on carnal union as acts binding consorts in marriage. With or without the intervention of the Church, the *Partidas* regarded the promise of marriage accompanied with carnal union as constituting an act that binds two people in marriage, making its manifestation irrevocable. A verbal promise was only revocable if sexual intercourse had not taken place.[178] Free choice in marriage was understood to be based on either the present exchange of vows or a solemn promise of future marriage, both of which became indissoluble by an act of sexual intercourse. Thus, the idea prevailed that consorts were "ministers of the sacrament of matrimony" and that a priest only intervened as a mere witness.[179] Thus, even when consorts did not fulfill this requisite, the marriage continued to be valid. As a result, clandestine marriages, created through the pronouncement of a promise of marriage by the partners but which were not celebrated by a priest were considered null, but nonetheless, resulted in formal marriage as a way to avoid scandal.[180]It was through the argument of "clandestinity" that marriage-seekers could overcome parental opposition to marriage choice. Knowing that parents would be anxious to protect a woman and man from the loss of honor and reputation, clandestine marriage served as a powerful tool for potential heirs to exercise their right to spousal choice. By arguing for the promise of marriage and engagement in sexual intercourse, conjugal

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[177] *Ibid*. at 5.
[178]Section (4, 2, 1) of the Siete Partidas, *ibid.* at 4-5.
[179] See Jorge Carlos Adame Goddard, "Evolucion del concepto de matrimonio en el derecho mexicano (1821-1917)" in *Estudios en Homenaje a Don Manuel Gutierrez de Velasco* (Mexico City: UNAM-Instituto de Investigaciones Juridicas, 2000) at 6 [translations by author] [*Adame Goddard 2000*].
[180] *See* José Febrero et. al., Nuevo Febrero Mexicano: Obra completa de Jurisprudencia, Vol. I (Mexico City: M. Galván Rivera, 1850); see also Susan Migden Socolow, *The women of colonial Latin America* (Cambridge: Cambridge Univ. Press, 2000) at 60 [*Socolow 2000*].

partners could coerce their families to accept a marriage they would otherwise have opposed.[181]

Marital process thus transformed into a tool to re-draw conjugal boundaries in the new colonial setting. As many inter-ethnic unions in New Spain turned to marriage, they also threatened the status quo of marriage in the new colony. Marriage to women considered acceptable only as concubines, threatened the most revered foundations upon which the colony had been constructed. Not only did these women jeopardize the borders that linked concubinage to ethnicity and class but they also threatened the continuity or enhancement of status and wealth of families.

It was in this context that the reforms to the formalities of marriage were implemented. As a way to curtail clandestine marriage, the Fourth Provincial Counsel first established the formality of consent *in facie Ecclesia* for marriage consorts and excommunication for those who were clandestinely married. In order to provide the necessary proof of consent, canonists used the reasoning behind the canons of the Counsel of Letran of 1215 that punished the clandestinely married with excommunication, and established the formality of consent *in facie Ecclesiae*.[182] These reforms modified the regimen of canonical marriage by requiring marriage to be celebrated "*a la faz de la Iglesia*", in other words "in the presence of the community and the priest, which asked the couple if it was their

[181] *Ibid.*
[182] See *Adame Goddard 2000 supra* at note 179 at 6.

will to join themselves in marriage, and having expressed their consent", the priest declared them united in marriage.[183]

Following the change to the requisite formality of consent and excommunication for those involved in a clandestine marriage, the Council considered the introduction of formal and substantive changes to marriage. Until the reforms, parents could only intervene in their offspring's marriage choice through personal guidance or by introducing a claim in ecclesiastical court arguing "the existence of a diriment or prohibitive impediment" to the marriage. [184] Parental consent was to be made mandatory.[185] The Council also thought that in order for partners to marry there had to be equality of "wealth and position".[186] When a man and a woman of unequal social status wanted to marry, "the ecclesiastical judge was to order them to desist from their intention to marry".[187] The Council was to be authorized to oppose a marriage or not validate it "if infamy or scandal would result from the match".[188]

Change to the laws on marriage validity thus came about as a political response by the Church to pressure from those who wanted to have a role in their descendants' marriage decision-making process.[189] Nonetheless, the Church's lack of position with respect to concubinage and its alliance with the political elite coincided with its ambitions to expand

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[183] *Ibid.*

[184] See Patricia Seed, *To love, honor, and obey in colonial Mexico: Conflicts over marriage choice, 1574-1821*(Palo Alto :Stanford Univ. Press, 1992) especially at 197 [*Seed 1992*].

[185] See Pilar Gonzalvo, *Género, familia y mentalidades en América Latina*: (Puerto Rico: La Editorial Universidad de Puerto Rico, 1997) at 109, 159-160 [*Gonzalvo 1997*][translations by author].

[186] *Ibid.* especially at 137-138

[187] *Seed 1992 supra* at note 184 at 197.

[188] See *Gonzalvo 1997 supra* at note 185.109, 159-160.

[189] See *generally* Asuncion Lavrin, *Sexuality and marriage in colonial Latin America* (Lincoln: University of Nebraska Press, 1989) [*Lavrin 1989*] and *Seed 1992 supra* at note 184.

its spiritual and political jurisdiction. Beginning in the middle of the thirteenth century, the Church had already begun expressing an interest in intervening in "infidel matters" where there was a question of "justice".[190]

While economic status was a main concern of parents in the formation of conjugal alliances, social and racial status also influenced potential marriage alliances.[191] Marriage was an ethnic, social and cultural milestone in a person's life. The legitimacy it bestowed were "marks of status" for the colonial authorities and colonizers.[192] The increasing turn to marriage by interracial couples drew attention to the class, ethnic, and cultural boundaries by which conjugal unions were defined. This devaluation arose from the impact that Spanish law, canon law and the Laws of the Indies had on the status accorded to informal conjugal unions. Informal conjugal unions became second-rate, given that the Church did not recognize these unions as marriage and that it labelled any resulting progeny as "illegitimate".

The changes to the requirements of form by the Council of Trent were justified in order to facilitate the proof of consent. The reforms for more rigid formality however hid the Church's political catering to the interest of elite parents as a way to extend its jurisdiction in the New Colony. The Council's reforms, however, never became binding since lower clergy, local clerics and Church courts continued to favour the will of couples over parents up to the end of the decade. [193] Thus, even when consorts did not fulfill the requirement of exchanging consent in the presence of the priest the marriage continued

[190] Benton *2001* supra at note at 21 at 378.
[191] See *Gonzalvo 1997 supra* at note 185 at 30-31.
[192] *Socolow 2000 supra* at note 180 at 60.
[193] *Seed 1992 supra* at note 184 at 200.

to be valid given the prevailing idea that consorts were "ministers of the sacrament of matrimony" and that a priest only intervened as a mere witness.[194] The discussions in favor of more rigid formality reveal the difficulty in preserving the status quo of marriage and in maintaining it as a tool to form political and strategic conjugal alliance in the new colony. It also indicated an acceptance of the move away from free will in marriage when there were ethnic and class factors at stake.[195]

Marriage was already prevalent among the upper colonial society and among Indians due to their close supervision by priests. At the same time, inter-ethnic marriage was not as closely monitored resulting in concubinage becoming the solution for parental conflict over unions between individuals of the intermediate social strata. Yet, because the wealthy required the legitimacy of marriage to receive economic support or inheritance from families, the decree induced wealthy individuals to marry and dispute parental vetoes. Thus, these discussions had the effect of deploying reforms by the Spanish Crown to limit the free will in marriage. By requiring parental authorization, the Crown's decree split conjugality. In 1776, the Spanish King emitted a royal decree requiring all persons under the age of twenty five to obtain parental consent of the marriage partner while those over twenty-five had to notify parents.[196] This decree was extended to the American colonies two years later making parental authorization obligatory,[197] although there, interracial unions were the underlying reason. [198]

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[194] *Adame Goddard 2000 supra*, at note 179.
[195] *Seed 1992 supra* at note 184 at 199.
[196] *Ibid.* at 200-204.
[197] *Ibid.*
[198] *Ibid.* at 206-223.

In 1803, in response to comments to the King about nobles and some full blooded Spanish attempting to marry blacks, *mulatos* and other castes, the King extended the decree stipulating the age for marriage authorization. This extension meant that all interracial unions required government approval but it also legitimize parental vetoes over their children's marriage. The reforms deployed by the Spanish Crown to limit the free will in marriage had broader effects. The institutionalization of parental vetoes not only changed Church doctrine, it also had the effect of limiting the Church's authority over marriage. The decree ordered that disagreements between parents and consorts were to be resolved by royal rather than ecclesiastical courts.[199] When the decree was extended to New Spain, the Church was unable to marry persons under twenty five years of age unless evidence of parental consent had been given. Moreover, questions about the validity of engagements could only be heard by ecclesiastical court after royal courts had judged the merits of parental vetoes.[200] Thus, this change effected by the Crown was part of a larger effort to reduce the Church's jurisdiction over marriage to the benefit of royal courts.[201]

These changes to the requisites of form in marriage had the effect of diminishing the concern over women's honor which in turn became an important precursor to the stacked system of conjugality operating within current Mexican civil codes. The appeal of marriage as an entry to the upper classes increased apprehension over family interests and class boundaries even at the expense of preserving women's honor. By not enforcing the

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[199] *Ibid.* at 200.
[200] *Ibid.*
[201] *Ibid.* at 201.

upholding of broken promises of marriage and clandestine marriages, the emphasis on protecting women's honor was weakened and access to the aristocratic society was now limited.

3. Disengage, Counteract and Reconcile

The colonial divisions left by disagreement over inter-class and interracial unions and marriage authority in the New Spain left an important legacy on Mexican law and institutions. During the postcolonial era it resulted in making marriage and conjugality: (1) a key revolutionary symbol; (2) a central topic of dispute between conservatives and liberals, and; (3) a site of disagreement between women of the elite and lower social state. Politically, jurisdiction over marriage helped to (1) disengage independent Mexico from both the Spanish Crown and the Church, (2) to counteract the radical anti-clericalism left that emerged from the Laws of Reform, and (3) to reconcile the civil and religious left after the French intervention. For women, the shift in authority over marriage from that of colonial authorities to civil authorities had the double-effect of perpetuating the hierarcharized systems of family regulation inherited from the colonial era while recognizing and legitimating concubines and illegitimate offspring within the civil codes. As a result, women's concubinage rights tended to at times compete with or supersede married women's family law rights.

These divisions in turn have become reflected in the different forms and levels of marriage like rights afforded to concubines from the first civil codes in Mexico to the present legal landscape. This section examines the ideological divisions that underpinned the regulation of the unmarried partner during the postcolonial era in Mexico.

The struggles over authority of family and marriage matters proved to be a contentious area during independence. Change to social institutions and recognition of rights were central in producing the profound social reform necessary for a society that had been divided, stratified and hierarchized by its colonial predecessor. Marriage authority in New Spain had proven to be a powerful enterprise in the Church's expansion throughout Mexico. The power of the Church over marriage during the process of Mexico's colonialization meant that the Catholic Church was very firmly entrenched in the governance of family law. The shared authority between the colonial authorities and the Catholic Church resulted in the latter giving itself and its officials ample authority in private law matters.

Accordingly, it was through marriage reform that the newly independent government began to first disengage the state from the Church's power. Thus, during the independence and post-colonial eras, reform to family institutions in Mexico became an important part of the political project sought by the new independent government. The effects of these reforms to marriage laws had both political and women's rights impacts.

To curtail the power of the Catholic Church, the new independent government also passed the Laws of Reform (*Leyes de Reforma*).[202] The first measure adopted by the federal government to exclude the Church from having authority in family affairs was the

[202] The Laws of Reform is an umbrella term used to refer to the different laws decreed to that laid the foundation for the disempowerment on the Church in Mexico. The laws included are: "*Ley de Desamortización de Fincas Rusticas y Urbanas Propiedad de Corporaciones Civiles y Religiosa, 23 de junio de 1856*"; "*Ley de Nacionalidad de los Bienes del Clero Regular y Secular, 12 de julio de 1859*"; "*Ley del Registro Civil, Julio 28 de 1859*"; "*Ley de Secularización de Hospitales y Establecimientos de Beneficencia, 2 de febrero de 1861*"; "*Ley que Extinguió las Comunidades Religiosas, 26 de febrero de 1863*"; "*Ley sobre Adicciones y Reformas a la Constitución, 25 de septiembre de 1873*".

decree that created the Civil Registry in 1859.[203] Through the creation of civil registries and civil judges (*jueces del estado civil*), this law substituted the Church's monopoly over registration and certification of births, marriages, and deaths.[204]

Following the enactment of the Law of Civil Matrimony of 1859[205], the Church was first excluded from having authority in state affairs. By removing reference to canonical authorities and requirements for questions of form, substance and administration of marriage, the state substituted its authority for that of the Church in marriage matters. In addition, the Laws of Reforms suppressed the Church's extensive authority in family matters, confiscated and nationalized the Church's extensive landholdings, and abolished the clergy's political and civil rights.

In questions of formality of marriage, the state continued to require an exchange of consent in the presence of a proper authority to establish a valid marriage. However, the state instituted the requirement of freedom of choice in the acceptance of marriage and of marriage partners.[206] The law established that once marriage partners had manifested their consent, the officer of the civil registry was required to read the Melchor Ocampo epistle.[207]

The separation of Church and State in family matters was reaffirmed in matters of faith by the Law of Religious Freedom of 1860. [208] This law specified that the Church was

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[203] *Ley del Registro Civil de 28 de Julio 28 de 1859* [Law of the Civil Registry of 1859]
[204] *Ley de Matrimonio Civil del 23 de julio de 1859* [Law of Civil Matrimony of 1859]
[205] Manuel Chávez Asencio, *La Familia en el Derecho: Derecho de Familia y Relaciones Jurídicas Familiares* (Mexico City: Editorial Porrúa, 2007) at 57[*Chavez Asencio 2007*][translations by author].
[206] Art. 15, *Ley de Matrimonio Civil del 23 de julio de 1859*.
[207] *Ibid*. at 57-58.
[208] *Ley Sobre Libertad de Cultos de 4 de diciembre de 1860*[Law of Religious Freedom of 1860].

only to have "spiritual" authority, one which was purely religious, and did not involve coercion or authority in civil law matters. [209] Article 20 of this law also noted that state authorities would not intervene in the rites and practices relating to religious marriage. However, the state cautioned that it would not give legal status to marriages that did not fulfill the formalities required by the state.

3.1. Counteracting Anti-Clericalism

The movement for the removal of Church authority over family matters did not reach its zenith until the publication of the Civil Code of 1870. In the interim and subsequent to the publication of the Law of Religious Freedom, Mexico was invaded and captured by the French. During this time Maximilian, Emperor of Mexico from 1864 to 1867, finalized the execution of the reformist laws in Mexico to separate the Church and State and also implemented a series of measures that moderated the strong anti-clerical flavor of the revolutionary movement. These laws drew on a liberal policy based on a different form of separation of church and state.

During the French intervention, Maximilian publicized the Law of the Civil Registry of the Empire of 1865[210] recognizing a dual system of ideology, state and religious freedom, in a move towards the regulation of marriage. While this law required prioritization of the civil laws of the state, it also sought to clarify that allegiance to the state through registration before civil authorities did not annul or restrict exercising other laws or

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[209] Art. 5, *ibid.*

[210] *Ley sobre el Registro Civil en el Imperio de 1 de noviembre de 1865* [*Ley del Registro Civil del Imperio* or Law of the Civil Registry of the Empire], in *Chávez 2007 supra* at note 205 at 60-61.

beliefs relating to marriage and conferred to the Church and its officers control of the Civil Registry but as civil authorities.

3.2. Reconciling Civil and Religious Tensions

In an effort to reconcile conservative-liberal divisions and promote a political environment of religious tolerance, Maximilian decreed laws which reintroduced the authority of the Church in family matters.[211] Through this approach, Maximilian sought to conserve the state/church relationship in marriage matters while preserving the principle of separation of state and church. In 1866, Maximilian also decreed the Civil Code of the Mexican Empire[212] which stated that those who declared themselves as Catholic before state civil authorities could formalize their marriage before both religious and civil authorities.[213] However, Maximilian imposed limits on the Church's prior wide-reaching family jurisdiction. Ecclesiastical authorities were limited from celebrating marriages when parties did not present a certificate of civil registry verified by the state.[214] Religious marriages were recognized but were devoid of the status rights involved in civil marriage.[215]

Upon restoration of the republic in 1867, Benito Juarez published a decree similar to that of Maximilian, which revalidated religious marriages and marriages celebrated under

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[211] Ana Lidia García, *El Fracaso del Amor: Genero e Individualismo en el Siglo XIX Mexicano* (Mexico City: Colegio de México, 2006) [*hereinafter* García, 2006] at 109.
[212] *Código Civil del Imperio Mexicano, 6 de julio de 1866* [CCIM].
[213] Art. 24, *ibid.* The CCIM was also the first to provide for vincular divorce. This article was drafted as a way to provide for divorce for those that professed a religion that did permit vincular divorce. It was Maximilian's intention to promote economic development in Mexico through mixture of the qualities and values of catholic and protestant communities. Maximilian's laws were to set the foundation for protestant migration to the Mexican Empire and the likely incidence of mixed marriages. *See* García 2006 *supra* at note 211 at 109-110.
[214] Art. 36, *Ley del Registro Civil, 1 de noviembre de 1865* Chávez Asencio 2007 supra at note 205 at 36.
[215] Art. 24, *ibid*. at 109-110.

Maximilian's rule. The reforms established marriage as a civil contract under the exclusive jurisdiction of state civil authorities.[216] Regarding religious marriage, the Laws of Reforms reiterated Maximilian and Juarez laws establishing that religious rites were neither proscribed nor imposed and that spouses were free to receive or forego the blessing of the ministers of "cults", but that such blessings had no legal validity unless verified by civil authorities.[217]

It was not until after the first national Civil Code of 1870 that the Federal Constitution of 1857[218] was amended in 1873[219] to incorporate the Laws of Reform. These reforms not only separated the State and Church but also stripped ecclesiastical authorities of official power.[220] Thus, secularizing religious institutions like marriage and establishing the rules by which the state would recognize marriage as legally valid. This cut the last official vestiges of the pre-existing relationship between the State and the Church.

4. Push by Liberal Groups During the First Phase of Private Law Federalism

Initially, regulation of marriage and family by the independent government became symbolic of the political caesura of the colony from the political Spanish colonial authorities and the Catholic Church.[221] Furthermore, authority over marriage became

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[216] See *Ley sobre adiciones y reformas a la Constitución, de 25 de septiembre de 1873* (Decree ammending the Constitution of 1857 to incorporate the Laws of Reform).
[217] Art. 22, *ibid*.
[218] *Constitución Política de la República Mexicana de 1857(12 de Febrero de 1857)*
[219] *Ley sobre adiciones y reformas a la Constitución, de 25 de septiembre de 1873.*
[220] See Imer B. Flores, "La Constitución de 1857 y sus reformas: a 150 años de su promulgación" in Diego Valades & Miguel Carbonell, eds., *El Proceso Constituyente Mexicano. A 150 años de la Constitución de 1867 y 90 de la Constitución de 1917* (Mexico City: UNAM, 2007) at 296-297.
[221] It was through one of the Laws of Reform, the Law of Civil Matrimony of 1859, supra at note 204, that marriage was removed from the jurisdiction of the church. With this objective in mind, article 1 the law defines marriage as a civil contract and establishes the state as the single legitimizing institution. This law

illustrative of the departure from the values of the Church. The influence of the Church and canon law, however, was never totally removed from the regulation of marriage and the family.[222] Central to the maintenance of the Church's continued influence was the system of centralism by which state family laws operated under the federal governments' power over civil law matters in the Federal District.[223] Despite the strong emphasis on disempowering the Church, the important power of conservative groups motivated the newly independent government to continue to accommodate the coexistence of canon law within the structures of state law. Thus, while the power that the Church had had over marriage and family was eliminated, this control was replaced by the legitimization of the conservative agenda in the family law arena.

Central to the recognition of concubinage within the civil codes was the expansion of liberal politics during the first phase of private law federalism in Mexico, between 1824 and 1835, the publication of the Civil Code of 1870 and its amendments in 1884 and the Law of Family Relations of 1917[224] (LFR 1917).Thus, the struggle for concubinage rights is a story that has been resurfaced from: (1)the discourse by politicians concerning authority over private law during federalization; (2) the scattered discussions between conservative and liberal circles for the protection of lower classes and women's marriage

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also recognized divorce as the "temporary separation" of married spouses. However, this form of divorce did not leave spouses free to marry others (articles 4, 20, 21 26).

[222] Chávez Ascencio notes that "[t]he struggle by the state to assume authority over marriage, required the elaboration of a theory of marriage as a contract…and as means to justify the intervention of the state implicating that its essence is constituted by the liberty of marriage consorts." Thus the success of civil marriage in Mexico consisted in its symbolic "affirmation and respect to the liberty of creed". *Chávez Asencio 2007 supra* at note 205 at 55.

[223] In 1842, the authority of the federal legislature was amplified to authorize the making of civil, criminal, commercial and mineral codes applicable to the whole republic. This power was extended in 1856, on the basis of which Benito Juarez, then governor of Veracruz, to requisition the drafting of a civil code. *Bases Orgánicas Mexicanas de 1843*.

[224] *Ley de Relaciones Familiares, 12 de abril de 1917*.

rights, and; (3) women's marriage centered family law claims during the early modern period.

The first pro-concubinage reform originated from the push by liberal groups during the first phase of private law federalism in Mexico, between 1824 and 1835. During this time, all the state codes, except for Zacatecas', maintained the Church's primacy over family and marriage matters.[225] Zacatecas however, drafted a civil code which began to break with this arrangement by inscribing warnings about future secularizing reforms and adding its own laws over matters that were under Church jurisdiction.

The civil code of Zacatecas as well as that of Oaxaca state also included an arrangement that gave parents testamentary freedom over half of the estate if they had only one child while this amount could be reduced to one-fourth if there were three or more children. This testamentary freedom provided fathers the possibility to bequeath part of their estate to their illegitimate offspring or concubines if they so wished.[226] The code also added "natural" and "illegitimate" offspring into the category of descendants that had rights over parent's property through the guise of support.[227] The code left the administration of parents' inheritance to illegitimate offspring to the beneficiaries.[228]

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[225] Ma. del Refugio Gonzalez, "Notas para el estudio del proceso de la codificación civil en México (1821-1928) in Jorge Dávila, eds. *Libro del cincuentenario del Código Civil (*Mexico City: UNAM, 1978) especially at 118.

[226] For a broader explanation of the broader implications of incorporation of testamentary freedom and its intersection with women's family law rights see Silvia Marina Arrom, "Changes in Mexican Family Law in the Nineteenth Century: the Civil Codes of 1870 and 1884" (1985) 10 J. Fam. Hist 305 especially at 313-314 [*Arrom 1985*].

[227] Art. 622, Código Civil de Oajaca [Oaxaca] de 1928 (Decreto no. 39. publicado 14 de enero de 1829). See Francisco García Gonzalez, "Liberalismo y Familia en Zacatecas Durante el Siglo XIX" 1991 Revista 8 <http://www.uaz.edu.mx/vinculo/webrvj/rev8-6.htm> [*García Gonzalez, 1991*].

[228] Art. 622, *ibíd*.

4.1. Threatening the Very Institution of the Family

The pro-concubinage reforms introduced in the states of Zacatecas and Oaxaca were controversial from several standpoints. Despite these new rights, the absence of recognition of concubinage within family law left women and children largely without a voice or standing from which to argue for the status rights afforded to married consorts. [229] However, greater testamentary freedom and inclusion of illegitimate children into the circle of heirs threatened the very institution of the family. Although these reforms permitted a husband the freedom to bequeath all property to the wife, those reforms which freed husbands from their obligations to their wives and heirs also opened up the possibility of bequeathing family patrimony in favour of a concubine or illegitimate children. The reforms thus not only reduced the protection afforded to legitimate descendants but to the legitimate family itself because heirs might have had to share their inheritance and even their share of the inheritance with a concubine and her illegitimate children.

From the legitimate children's perspective, such reforms decreased the protection afforded to them under colonial law. The reforms also benefitted mostly women of the higher classes who had more assets than their husbands or had their own income. For women of the lower strata or that did not have income, the separation of property regime was prejudicial, given that husbands were more likely to have assets. Moreover, dissolution of the marriage under a separation of property regime meant that wives would not have a share in her husband's property or income. Reforms in favour of more individualized rights also had the effect of disqualifying from the outset the economic and

[229] *Ley de Relaciones Familiares, 12 de abril de 1917*.

non-economic contribution of wives to the marriage. Nonetheless, early sub-national efforts to integrate concubines within the codes showed that there were clear competing interests between married women's and concubinage rights.

4.2. Encouraging Adultery and Polygamous Unions

The liberal trend set by the early state codes was truncated by the period of centralization prior to 1870. When the federalized systems of civil law had been readopted, the national congress commissioned a codification project for the Federal District of Mexico and the territories of Baja California.[230] This resulting code was crafted to be applicable only within the Federal District/Mexico City and the federal territories in local matters. However, almost all states adopted the federal civil code model with few or no modifications. This had the effect of harmonizing, to a great extent, the civil laws of Mexico including those from states that had pioneered civil codes during the revolutionary era. [231] As the following chapter on divorce will highlight, the Civil Code of 1870 was a significant departure from the liberal state civil codes.

Nonetheless, the Civil Code of 1870 did incorporate subtle but important innovations for married women, many of which were offset by the different marital standards placed on women and men. The different expectations of women and men in marriage translated

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[230] *See* Oscar Cruz Barney, *La codificación en México: 1821-1917: una aproximación* (Mexico City: Universidad Nacional Autónoma de México, 2004) at 59.

[231] Contrary to the division of power set forth in article 73 the constitution, which did not provide the federal government with explicit power to legislate in civil matters and article 124 which clearly stated that all powers that are not expressly conferred to the federal government are understood as reserved to the states. *See ibid.* at 33. The Civil Code of 1870 was adopted without modifications in the states of Guanajuato (1871), Puebla (1871), Durango (1873), Guerrero (1872), San Luis Potosi (1871) and Zacatecas (1872). States that adopted the code with a few modifications were Chiapas (1872), Hidalgo (1871), Michoacán (1871), Morelos (1871), Queretaro (1872), Sinaloa (1874), Tamaulipas (1871), Sonora (1871). States that adopted the code but incorporated substantial changes are Campeche and Tlaxcala. *Ibid.* at 111. See also *García Gonzalez 1991* supra at note 227.

into a promotion of men's adultery or polygamy over monogamy. [232] The double standard also worked against women in judicial practice given the preference shown for husbands and the frequent negative rulings against women in divorce cases. [233] The Civil Code of 1870 thus disempowered married women by making them easy legal targets of false adultery claims and complicating women's accusation of their husband's adultery. [234] Recognition of concubine rights within the civil codes implied more than mere marriage-like rights for the individuals involved--it also involved enlarging the circle of potential heirs.[235] Combined with the push for concubine rights, it was clear that the liberal path of reforms was being forged at the expense of married women.

5. Removing Concubines from Their Category of Illicit

Motivated by women's revolutionary efforts, the revision of the conservative values engrained within private law became a priority within the political project that aimed to legitimize women's contributions to Mexico's independence.[236] Silvia Buentello, one of the foremost women political activists of the revolutionary feminist movement and a leading critic of the Civil Code of 1884 Code, believed law was the cause of the unjust

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[232]Anna Macías, *Contra viento y marea: el movimiento feminista en México hasta 1940* (Mexico City: Universidad Nacional Autónoma de México, 2002) at 36 [*Macías 2002*].
[233] *See ibid.*
[234] For an analysis of the change that the double standard had on women's claim for divorce during Mexico's revolutionary era, *see* Stephanie Smith, "If Love Enslaves...Love be Damned!" in Jocelyn Olcott, Mary K. Vaughan & Gabriela Cano eds., Sex in revolution: gender, politics, and power in modern Mexico (Durham: Duke Univ. Pr. 2006) at 100-109[[*hereinafter Smith, 2006*].
[235] See *García Gonzalez 1991* supra at note 227.
[236] Women's contributions to the independence movement were both in the realm of non-combat and combat related activities such as couriers, arms runners and spies and nurses. See Carmen Ramos Escandón, "Women's Movements, Feminism and Mexican Politics" in Jane S. Janquette, *The women's movement in Latin America: participation and democracy*, (Boulder: Westview Pr., 1994) especially at 200.

and dependent relationships that women had with men.[237] In her view, law, in the way that it was organized, interpreted and implemented, was the cause of the secondary social condition of women in Mexico.[238] Buentello saw family law reform as a key element in reorganizing the status of gender roles both within and outside where inclusion of notions of equality in marital rights was a key element in improving the condition of women.[239]

Women's marriage-centered claims became the focal point of prerevolutionary feminists.[240] Women insisted that the first step in obtaining gender equality was to drastically revise the civil codes through the incorporation of notions of equality within the institution of marriage.[241] As Hermila Galindo, a feminist in the revolutionary era, stated about this Code:

> *"The wife has no rights whatsoever in the home. [She is] excluded from participating in any public matter [and] she lacks legal personality to draw up any contract. She cannot dispose of her personal property, or even administer it, and she is legally disqualified to defend herself against her husband's mismanagement of her estate, even when he uses her funds for ends that are most ignoble and most offensive to her sensibilities. [A*

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[237] See Carmen Ramos Escandón, "Desafiando el orden legal y las limitaciones en las conductas de género en México. La crítica de Sofía Villa de Buentello a la Legislación familiar mexicana. 1917-1927" (2002) VII La Aljaba (Redalyc) [*Escandón 2002*].

[238] Sofia Villa de Buentello, *La mujer y la Ley* (Mexico: Imprenta Franco Mexicana, 1921) at 148 cited in *ibid*. She stated that "ni el antiguo Código Civil, fundado en el derecho romano, ni la moderna ley de Relaciones Familiares están en consonancia con las ideas de la mujer civilizada".

[239] *Ibid.* at 137. Safa notes that "Latin American women's emergence into the public sphere interacts with profound changes in the private sphere, and women are demanding more "'democracy in the home"' as well as in the state." Helen Icken Safa, "Women's Social Movements in Latin America" (1990) 4 Gender and Society 354 at 366.

[240] Anna Macías, *Against all odds: the feminist movement in Mexico to 1940 (*Westport: Greenwood Pub Group, 1982) at 13 [*Macías 1982*] at 13.

[241] *Ibid.* at 36.

> *wife] lacks all authority over her children, and she has no right to intervene in their education.... She must, as a widow, consult persons designated by her husband before his death, otherwise she can lose her rights to her children."*[242]

At the core of women's efforts in favour of greater equality within civil law were struggles to improve the economic rights of married women. Mexico had already become a pioneer of marital property rights in 1870 by including the required separation of marital property while maintaining shared property rights as a default. These liberal economic reforms were followed by the introduction of testamentary freedom in 1884 and recognition of married women's rights in 1917 to celebrate all types of contracts, appear in court and exercise all legal actions and defense, without approval of her husband.

In 1917, the publication of the Law of Family Relations (LFR 1917) brought with it a legislative movement to eliminate the gendered limitations that had been established by the Civil Code of 1870 and 1884. In its inception, the LFR 1917 substituted and separated family law from the civil code, and eliminated all explicit regulation of the family from the Civil Code of 1884. With this new de-coded family law, many institutions that recognized the supremacy of the husband were reformed and were replaced by a system where spousal rights and obligations were handled on a basis of greater equality.[243] Nonetheless, given the post-colonial environment of the revolutionary era, the predominance of women's marriage-centered claims also meant that women's family law

[242] *Ibid.* at 13.
[243] *See Ley de Relaciones Familiares*, preamble.

concerns were dominated by elite conservative feminist agendas. An important factor for this division between women was the abundance of adulterous concubinage unions that prevailed among the colonial elite.

The LFR 1917 established the equal capacity of women, the rights of married women to celebrate all types of contracts to appear in court and exercise all legal actions and defense, without approval of her husband.[244] Within the family, the same law established that both husband and wife had authority in the household and that decisions relating to the upbringing, education and administration of children's property would be decided by mutual agreement of both parents. [245] It also recognized the right of *patria potestad* to be exercised by both the father and the mother. [246] Lastly, it integrated legal divorce by defining marriage as a dissoluble union obtainable through the institution of divorce.[247]

In the matter of unmarried cohabitants, the code changed the classifications of hiercharized offspring by simply differentiating "legitimate" and "natural" offspring as those children that were born within or outside of marriage, respectively. It also recognized as legitimate those children born within three hundred days of the dissolution of the marriage through divorce.[248]

Nevertheless, while the Law of Family Relations made substantial fundamental changes in favour of women's rights, it also maintained and protected other inequalities that left

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[244] Art. 45-50, *ibid.*
[245] Art. 43, *ibid.*
[246] Art. 241, *ibid.*
[247] Art. 13, 75 and 76, *ibid.* Paradoxically, the notion of gender equality in the public law realm did not come about simultaneously. In wasn't until 1953 that women were accorded the right to vote and not until 1974 that the principle of gender equality was incorporated into the Constitution.
[248] Art. 186, *ibid.*

women at the mercy of partners, many of which prevail within civil codes today. For example women's concubinage rights tended to compete or come at the expense of married women's family law rights. The CCDF-MCRMF 1928, however, constituted an important milestone for women's rights. It not only re-codified family law within the federally enacted civil code, but also integrated and improved the innovative features that had arisen under the LFR 1917.

However, these changes came with unforeseen consequences. Reforms in favour of concubine rights also had the contradicting effect of: (1) removing concubines from their category of illicit while simultaneously perpetuating certain gendered categories; (2) aggravating political and ideological divisions between women and political groups, which in turn; (3) helping to reinforce the constitutional line by which concubinage remains a different and separate institution from that of marriage under present day Mexican civil codes.

5.1. Giving Concubinage Unions and their Consorts a Civil Law Status

Among the chief changes to the CCDF-MCRMF 1928 Code was the explicit inclusion of notions of equality within the civil code through the re-codification of the LFR 1917. The reforms also made an important symbolic gesture in favour of women. It included an article in the civil code which acknowledged the power disparities that could result from the application of civil law. Article 2 of the CCDF-MCRMF 1928 stated that, “[t]he legal capacity is the same for women and men; in consequence, women are not subjected by reason of their sex to any restrictions in the acquisition and exercise of their civil rights”. Through this statement, legislators sought not only to establish a principle of equality but

also to acknowledge the ways civil law could be instrumental in legitimizing gender inequality.

More importantly, the CCDF-MCRMF 1928 introduced a pivotal change in favor of unmarried cohabitants and had the effect of transplanting and expanding the institution of concubinage throughout the different Mexican codes. While the code did not directly define concubines, it established the criteria through which cohabitant women could exercise their right of inheritance.[249] There were five factors that determined and distinguished concubinage rights from those of mere cohabitants and which determined inheritance rights: (1) marriage like behavior, (2) time in the union, (2) procreation, (4) subsistence of "legitimate" family members, and (5) being the sole concubinage claim.[250] In order to establish cohabitation, a woman would have to prove that she had lived in a marriage-like relationship and/ or the existence of a child borne from the relationship. However, if there was another simultaneous concubinage claim, it automatically eliminated the cause of action. Other criteria included the determination of the inheritance right of the concubine with respect to the rights of blood relatives. Whether or not she was the only person claiming an inheritance right, the most a concubine could aspire to inherit was fifty percent. The recognition of this fifty percent required that no other concubine had an inheritance claim and that there were no other descendants,

[249] As such article 1602 stated that "Tienen derecho a heredar por sucesión legitima: I.-Los descendientes, conyugue, ascendientes, parientes colaterales dentro del cuarto grado, y en ciertos casos la concubina." CCDF-MCRMF 1928.
[250] Art. 1635, s. I-VI, *ibid.*

ascendants, spouses or collateral familial links up to the fourth degree.[251] The other 50% percent was to be designated by the state towards beneficiary institutions.

The reforms were most important because the reforms situated informal conjugal unions in a category significantly removed from that of "illicitness" that colonial laws had given them. In addition, the reforms no longer required women to prove themselves as morally or sexually competent to be considered a "wife", nor were women punished for the secrecy or lack of publication of the relationship. Economically, it represented the first step in including a concubine wife and her offspring in the list of potential family heirs. More importantly, these reforms gave these unions and their consorts a form of civil law status which later became foundational to the advancement of cohabitant rights before legislatures and the judiciary.

5.2. Perpetuating Gendered Asymmetries

However, concubines were not legally recognized. The civil codes continued to remain silent with respect to the legal status of concubinage unions. This sent the message that while concubinage was to be tolerated it was also devoid of a full-fledged status like that of marriage.

Likewise many gender inequalities were maintained in other areas. For example, even as the ages for women and men to marry were increased to 14 for women and 16 for men, the gender-based age difference was maintained.[252] While it recognized that both women

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[251] *Ibid.* s. VI. Also, a parallel to the presumption of paternity of children born from within the concubinage relationship was introduced.

[252] Under the Civil Code of 1884 women could marry at 12 and men at 14. Under article 18 of the Law of Family Relations the minimum age changed to 14 for women and 16 for men however the gender asymmetry was maintained.

and men combined authority to administer the family and the household, the reforms left women the obligation to attend to all aspects of the household, especially the caretaking and education of the children.[253] It also ordered that married women required permission from husbands to work, practice a profession, or establish a business. [254] Lastly, the law also preserved the gendered fault-based justification for divorce through which adultery committed by the husband could only be a cause for divorce under certain conditions although adultery remained a cause for divorce in all cases when committed by the wife.

5.3. Entrenching Political and Ideological Differences

The publication of the CCDF-MCRMF 1928 Code did not placate the political divisions over concubinage. There were conservative-liberal divisions over the mere mention of concubines within the civil codes. Conservatives believed that recognition of concubinage unions or their mentions within the civil codes was "morally wrong and contrary to the legal institution of marriage" whereas liberals considered "concubines an integral "part of the fabric of Mexican culture, customs and social mores". [255]

Moreover, division over the extent of reform aggravated ideological and federal divisions. Many states were not in accord with the novel reforms put in place by the CCDF-MCRMF 1928 in favour of concubines. This was made evident by the extensive delay by the states of Guanajuato, Puebla, Zacatecas, Campeche, Jalisco, Morelos,

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[253] Art. 44, *Ley de Relaciones Familiares*.
[254] Art. 45, *ibid.*
[255] Jorge A.Vargas, "Concubines under Mexican Law; with a Comparative Overview of Canada, France, Germany, England and Spain" (2005) 12 Sw. JL & Trade Am. 45 at 53-54 [*Vargas, 2005*].

Sonora and Tamaulipas in recognizing concubines' inheritance or support rights. [256] The mention of concubines within the CCDF-MCRMF 1928 and their recognition of inheritance rights also led many states to become divided in their positions on concubinage. While states like Jalisco, failed to recognize concubines, other states like Tamaulipas, Veracruz, Hidalgo and Sonora enacted more progressive legislations than that of the CCDF-MCRMF 1928.[257] These tensions not only delayed publication of the 1928 Code for four years, but also entrenched small but important disparities between the state civil codes and their communities. [258]

6. Divisions over Concubinage Rights

Because the country did not agree on proper limits on concubine's rights with respect to "marriage", many differences arose among the codes of different states in terms of concubinage rights. While some states afforded concubines many marriage-like rights, others continued to maintain the premises by which concubines took on a secondary legal status within the code. In contrast to the CCDF-MCRMF 1928, the Civil Code of Veracruz required only three years of cohabitation to constitute concubinage and also recognized both female and male partners' inheritance rights.[259] Concubines in Veracruz were also adjudicated a larger share in descendant's inheritance than what was proposed

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[256] Antonio Aguilar Gutiérrez & Julio Dérbez Muro, *Panorama de la Legislación Civil en México*, (Mexico City, UNAM, 1960) at 40-42 [*Aguilar Gutiérrez & Dérbez Muro 1960*].
[257] *See* "*Código Civil del Estado de Jalisco*" (P.O.E.J. May14, 1935); "*Código Civil para el Estado de Tamaulipas*" (P.O.E.T., October 12, 1940) [*Código Civil para el Estado de Tamaulipas (1940)]*; "*Código Civil para el estado de Veracruz*" (G.O.E.V. September 15, 1932) [*Código Civil para el estado de Veracruz (1932)]*; "*Código Civil de Hidalgo*" (P.O.E.H., December 01, 1940) [*Código Civil de Hidalgo (1940)]*; "*Código Civil para el Estado de Yucatán*" (D.O. E.Y. December 24, 26, 27, 29, 30 y 31, 1941 and January 5, 1942) [*Código Civil para el Estado de Yucatán 1942]*.
[258] *See below*, sub-section d. Divisions and Disparities over Concubinage Rights
[259] Art. 1568, *Código Civil para el estado de Veracruz (1932).*

in the CCDF-MCRMF 1928. Specifically, whereas the CCDF-MCRMF 1928 only gave concubines' two-thirds of their descendant's share of an inheritance, Veracruz awarded them with the full right over their offspring's share of the inheritance. In the same manner the 1942 civil Code of Yucatán provided concubines with the exact same inheritance rights as that of a wife. [260] While the 1940 Civil Code of Hidalgo followed the CCDF-MCRMF 1928 in stating that all partners lost rights to claim inheritance when there were multiple concubines, it limited this restriction when concubines had given birth to a child of the direct inheritor.[261] Thus in Hidalgo's case, all concubines that had a child had a right to inherit.

Disparities also developed with respect to support rights of concubines. The civil codes of Tamaulipas and Sonora provided concubines with support rights, whereas the CCDF-MCRMF 1928 did not. The Civil Code for Tamaulipas and also Sonora went beyond the CCDF-MCRMF 1928's stipulations by extending equal support rights between female and male concubines (Sonora and Tamaulipas) and considering married and consorts as equal (only Tamaulipas).[262] Likewise, even when they were concubinage offspring both the Civil Codes of Oaxaca and Tamaulipas placed the obligation on the state to provide economic support to minors or invalids in cases of parental death resulting from a public sector work accident.[263]

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[260] Art. 2416-2417, *Código Civil para el Estado de Yucatán (1942).*
[261] Art. 1616, *Código Civil de Hidalgo (1940)]*.
[262] Art. 467 & 489, *Código Civil para el Estado de Tamaulipas (1940).*The Civil Code for the State of Sonora only recognized concubine limited support rights (*Código Civil para el Estado de Sonora*, B. O. 24 de agosto de 1949).
[263] Art. 63. & 336, *Código Civil Para el Estado de Oaxaca*, P.O.E.O. 25 noviembre 1944)

Also, whereas the CCDF-MCRMF 1928 only provided a guiding principle in determining support payments and obligations, the 1940 code for Tamaulipas stipulated how support payments were to be calculated and to be paid.[264] Support could not exceed 30% of the normal income of the supporter and advance payments were required monthly.[265] Lastly, in 1940, Tamaulipas fully eliminated the requirement of solemnity before a civil official as a requisite of marriage. The Tamaulipas Code defined marriage as the "continuous union, cohabitation and sexual relation of a single man and a single woman".[266] These changes made Tamaulipas the only state to fully recognize marriage and cohabitating conjugal unions as equal.

6.1. Limiting the Equalization of Concubinage to Marriage

Amidst the changes in favour of concubinage unions within state codes, was a non-binding, but important case, rendered by the Supreme Court with respect to Tamaulipas efforts to equalize concubinage and marriage.[267] In this 1944 case, the court declared Tamaulipas's reforms that eliminated the requisites of form for civil marriage as unconstitutional. The Court found that while the Constitution provided states power to legislate over the civil status of persons and regulate the form of celebration and registration of marriages, these rights were entrenched with the limitation set by article 23

[264] Art. 63-67, *Código Civil para el Estado de Tamaulipas (1940)*.
[265] Art. 67, *ibid.*
[266] Art. 70, *ibid.*
[267] "ESTADO CIVIL DE LAS PERSONAS. LEYES DE REFORMA", [TA]; 5a. Época; 3a. Sala; Informes; Informe 1944; Pág. 39.

of Juarez's 1874 decree.[268] Thus in order for conjugal unions to be deemed validly married consorts were required to express their will to marry before civil authorities.

This case does more than endorse requirement of form for marriage, it also reinforces the liberal idea of separation of Church and State, the federal governments' power over marriage law and established a complex "constitutional" ceiling on concubine's access to marriage-like rights. Soon after, the 1944 case had an impact on the type of legal avenues that concubines used from here on to access marriage rights.

The court used outdated jurisdictional arguments as a way to override the state's exclusive power over private law and impose constitutional limits on concubines access to marriage-like rights. Through framing of the concubinage vs. marriage debate on the principles of the Laws of Reform the court justified the lack of marriage rights for concubines in revolutionary terms. Thus, even when the formal separation of Church and State was already in full swing during the 1940's, by curtailing the state's private law autonomy in marriage matters, the court also put an early stop to the state's use of marriage and concubinage to push forward new revolutionary or political ambitions, quashing conservative expectations that religious marriage could again be considered equal to civil marriage.

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[268] *Ley sobre adiciones y reformas a la Constitución, de 25 de septiembre de 1873*. Article 23 of Juarez decree stated that while states had the power to legislate over the civil status of persons, they also had to respect the principles established by this law with respect to marriage. Among the principles established by Juarez was that: (1) civil marriage was a monogamous union, and that bigamy and polygamy were crimes that laws should punish (secc VII); (2) the will of the consorts freely expressed in the form required by law was an "essential requirement of civil marriage" (secc. VIII); (3) civil marriage could only be dissolved by the death of one of the parties, but temporary separation (non-vincular divorce) for grave reasons was admitted (secc. IX); (4) civil marriage was inapplicable to person incapable of realizing the aims of marriage, and (secc. X); (5) that the law does not impose or prescribe religious rites to marriage, but that the "blessing" from religious authorities had no legal effect [translation by author].

The Court also sent a strong political message with respect to women's family law rights. These developments showed the irreconcilable views among the legislative aims of concubine rights, the reality of unions and the needs of married women. States had implemented laws assuming that the unions were equal to marriage by giving legal status to "permanent free unions" without competing with the rights of married women. This logic, however, was problematic for women. By holding concubinage to marriage standards claims from shorter-term relationships and other de facto conjugal relationships were excluded. In addition equal rights for concubinage unions had the more important risk of displacing marriage as the main civil law institution and putting at risk married women's property rights by expanding the pool of potential right holders. Therefore, by establishing a glass ceiling on the evolution of concubinage rights within Mexican civil codes, this historic case cemented the perpetual second-rate status of concubines *vis a vis* married wives.

With this case the Court also offered a glimpse of how the court would address further legal changes equalizing concubinage to marriage or state's attempt to contravene federal marriage principles. The case thus sent a strong message to state legislative bodies. The Court declared that while the Constitution provides states power to legislate over the civil status of persons and the form of celebration and registration of marriages, for a marriage to be valid in the federation marriages were required to be celebrated in the forms prescribed by both present and historical constitutional marriage laws. It also meant that state measures to equalize marriage to concubinage by eliminating the requirements of form were to be deemed unconstitutional. Reforms that had the objective of equalizing concubinage with marriage were not required to be accepted by other states or to be

endorsed by the Court. The Supreme Court determination thus resolved, in jurisdictional and constitutional terms, the position of concubine unions *vis a vis* married consorts and future questions on concubine expectations within the civil law arena.

6.2. Using Labor Law Litigation to Seek Compensatory Relief

Nonetheless, restrictions on concubines' access to marriage-like rights in early twentieth century Mexico pushed wives to change their approach and engage in battle to have these relationships and their economic contributions to these unions acknowledged through labor law litigation. Based on the argument of "default of payment for services rendered" concubine wives sought compensatory relief through recognition of their economic and "non-economic" contributions.[269] At first, labour law courts saw concubine labour claims favorably. This meant that the existence of a concubinage relationship was irrelevant to determining a woman's labour rights.[270] Concubines' use of labour courts had the effect of recognizing that a dual relationship could exist between the (conjugal) parties and those concubines could preserve access to dual status (concubine and employee) rights.[271] This in turn put to test the unwritten presumption within the family that conjugality for women

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[269] See "CONCUBINATO, NO ES INCOMPATIBLE CON EL CONTRATO DE TRABAJO" TA]; 5a. Época; 4a. Sala; S.J.F.; Tomo XLVII; Pág. 1114 Tesis, Registro No. 381752, 5° Época, Sem. Jud. Fed., Tomo XLVII, Pag. 1114. ["CONCUBINATO, NO ES INCOMPATIBLE CON EL CONTRATO DE TRABAJO"]. This non-binding case, its finding and reasoning, has been reiterated three times by the court, but not consecutively. The court clearly states that "even supposing the existence of a concubinage relationship, this does not exclude, logically or legally, that the lover could have had, in addition to the status of employee…" [Translation by author].

[270] *See ibid.* The court found that given the jurisdiction of labour tribunals, they cannot "define civil law questions relating to relationships of sexual nature", nor base their judgments relating to labour conflicts on the assessment of the intimate relationship between the parties. "[E]ven when it is an obvious fact that the employer lived in a concubinage relationship with his employee", this does not exempt [employer's] obligations towards his employee". The court reasoned that using the existence of "illicit marital life" as a reason to quash labour rights would result in leaving women employees at the mercy of "seductive employers" in order to be freed from paying women employees the proper remuneration for work performed. This non-binding case, its finding and reasoning, has been reiterated three times by the court, but not consecutively.

[271] *Ibid.*

necessarily implied duties for the benefit of the husband or the family. Ensuing judgments found that while "coexistence of claims" is possible, concubines were required to show that they had performed "precise and definite activities" that clearly represented work rendered.[272] In one judgment, the Court found that concubines had to show that their work was not in this category.[273] Concubines were also required to show that services rendered were "under the direction and dependence of the business proprietor and for a retribution agreed to beforehand".[274]

Nonetheless, the court's wavering recognition of the economic contribution of concubines drew attention to the Court's awareness of the importance of the recognition of women's economic contributions within conjugal unions. As a result concubine wives' labour claims put to challenge unwritten legal and logical presumptions within code interpretation of marriage and concubinage that worked against women's equal share in the marriage assets. The result of the cases was relevant for both married and concubine wives because of the negative effect that the separation of property regime for married consorts had on dependent wives that did not work or have family patrimonies to rely on. The use of labour law to address concubinage rights at a very early stage highlighted the disempowering effect that lack of property or support rights had on spouses. Given

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[272] *See* "CONCUBINATO EN RELACIÓN CON EL CONTRATO DE TRABAJO" [TA]; 5a. Época; 4a. Sala; S.J.F.; Tomo LIX; Pág. 2562.
[273] *Ibid*.
[274] *See* "TRABAJO, INEXISTENCIA DE LA, RELACIÓN CONTRACTUAL DE.(CONCUBINATO)", Tesis, *r*egistro no. 368316, 5°Época, Sem. Jud. Fed., Tomo CX, p. 511. By shifting of the principle of the burden of proof from a burden imposed on the employer to one imposed on the concubine employee (contrary to Mexican labour law principles), the court reintroduced the reasoning of cohabitants' gendered contributions, while simultaneously not recognizing their contribution within the realm of marriage or family. It wasn't until 2000 that the judgments by the Supreme Court reveal a return to the criteria through which concubines were recognized as having the right to coexistence of claims. *See* also "CONCUBINATO, NO ES INCOMPATIBLE CON EL CONTRATO DE TRABAJO"", [TA]; 5A. ÉPOCA; 4A. SALA; AP. 2000; TOMO V, TRABAJO, P.R. SCJN; PÁG. 53.

concubines' limited access to private law protective mechanisms for women in conjugal relationships, the aforementioned cases shed light on the situation of women when separation of property was presumed. This issue would only resurface sixty years later in Supreme Court discussions about married women.

7. Conclusions

Despite their contradictory effects concubinage laws provide a more inclusive group of women legal relief that would otherwise be unviable or untenable to women under non-statutory mechanisms.[275] This is not only due to the presumptions built within concubinage but also due to the ironic social and historical importance that recognition of informal conjugal unions can symbolize.

Currently there are strong questions about the ability of law and women's rights rhetoric to empower women, and examination of the woman question within family law has become a suspect subject. This study argues against these conclusions. Mexico City's concubinage reforms reflect the present conflicting positions that exist both within the Mexican legislative and judicial arenas about the type and amount of protection concubine partners should have a right to. While some Mexican states have enacted more expansive protection in favour of unmarried consorts others maintain more conservative laws towards concubines. In addition courts have not received positively the states' attempt to equalize concubine and marriage rights. An important breakthrough for concubines has been forestalled by the court's' invocations of the moral and historical role

[275] See *Bowman 1996 supra* at note 140 at 759-776.

of marriage and questions about the proper jurisdictional authority for marriage equality reforms.

The development of concubines' rights in Mexico however highlights the different levels of laws and politics that have shaped the present state of concubines' rights in Mexico This conflicting landscape however can only be understood in its complex historical and political context. The requirements of form required of informal conjugal unions during these periods reflect the moral division about marriage that prevailed. However, the requirements limiting concubines from marriage are also a reflection of how the formalities of marriage were used as strategic tool to steer political alliances and extend power over communities and key legal arenas. For example change to the laws on marriage validity during the colonial era was a response by the Church in favour of elite parents who wanted to be involved in their offspring's marriage choice. For the Church, alliance with elite social circles represented an opportunity to expand its spiritual and political jurisdiction in the new colony. For the Crown, heightened requisites for marriage validity transformed into an opportunity to begin disengaging the Church from its authority over marriage by relaying to royal courts to resolve disagreements between parents and consorts. This in turn affected women negatively by diminishing concern over women's honor and by reinforcing a system of stacked conjugality within private law.

The colonial divisions over conjugal consorts' marriage rights left an important legacy on Mexican concubine laws and institutions. During the postcolonial period tension over marriage rights resulted in making marriage and conjugality a key revolutionary symbol.

Jurisdiction over marriage helped to disengage independent Mexico from both the Spanish Crown and the Church, neutralize the radical anti-clericalism as result of the Laws of Reform, and reconcile the civil and religious divisions caused by the French intervention. The shift in authority over marriage from that of colonial authorities to civil authorities only formalized the hierarcharized systems of family regulation inherited from the colonial era. These divisions in turn became central topics of dispute between conservatives and liberals and women of the elite and lower social classes during federalization of private law in Mexico. Given these divisions, reforms in favour of concubine rights also had the contradicting effect of removing concubines from their category of illicit unions while simultaneously perpetuating certain gendered categories within marriage and reinforcing a constitutional justification differentiating concubine from marriage consorts under present day Mexican civil codes. Nonetheless, early twentieth century restrictions on concubines' access to marriage-like rights motivated wives to change their legal strategy. The use of labour law to address concubinage rights challenged presumptions within code interpretation of marriage and concubinage that worked against married and concubine wives' equal share in the marriage assets. This set of cases highlighted the disempowering effect that lack of property or support rights had on female spouses at a very early stage of women's rights, an issue that would only resurface sixty years later in Supreme Court discussions about married women.

These are important lessons to be learned from the history surrounding development of concubine rights in Mexico. The legal-political patterns by which cohabitant's rights develop are varied. The varied concubinage law landscape in Mexico is the sum result of the rules on non-conjugal unions inherited from the Spanish Crown, the class and

ethnicity-based legal divisions used to determine conjugal unions' access to marriage rights, the anticlerical politics introduced during Mexico's process of independence, the surge of private law power introduced by the federalized form of private law governance and the gendered legal remedies instituted for unmarried women and mothers during Mexico's early codification period. However, the most contemporary broadening of cohabitant rights within the Mexican civil codes has resulted from a combination of the complex democratization process that had taken place in the Federal District and the inclusion of concubinage as a family form. Nonetheless the struggle for substantive rights for cohabitant women has had different origins at different periods of time. In Mexico it is a story that is interwoven among movements for equality rights in marriage and divorce, and class and racial tension.

Another lesson is how concubines' rights take a back seat to more central legal-historical events and how the issues surrounding these rights and the results give different images of many of Mexico's main historical events and political discourses. For example even when the CCDF-MCRMF 1928 is famous for its regrouping of family law within the civil code and introducing important women's rights, it is not well known that there was a four year delay in the publication of this code due to opposition from conservative forces. This was related not only to the innovative reforms that the code introduced, but also to the private law federalism tension that this code gave rise to.

An important point of the hidden history surrounding development of concubine rights in Mexico is how it showcases that struggles over authority rather than concerns over morality or protection of women were important factors shaping concubine rights. At one

period of time, lack of agreement on the extent of rights for cohabitants entrenched regional differences and created sharp divisions between state codes only to be capped first by the Supreme Court and later by the influence of CCDF-MCRMF 1928. Concubinage rights put to test the long held constitutional principle that states have sovereignty over their private law. While this uncovers the relevant role that states actually had in shaping women's rights policy, it is clear that private law sovereignty, a key principle within Mexican federalism, is one that ebbs and flows along complex political tides.

Finally, there is the actual role that women's rights discourse or women's politics had for concubines within private law. Despite the fact that Mexico was a leading model in the incorporation of women's rights within family law within Latin America during the early nineteenth and twentieth centuries, many of these rights tended to be centered on marriage, leaving concubines persistently at the margin. But this marginalization was itself complex. There were ethnic and class based components, there were moral considerations, and moves to equalize concubinage to marriage were associated more with the religious agenda than with aims to protect women. But there was a feeling that recognizing more rights for concubines was paramount to celebrating a husband's adultery. With the recognition of concubine rights competing interests arose between wives and husbands, and wives and concubines. Political groups also used concubinage as a political symbol to push forward or counteract political action. The chapter thus showcases how in exploring the history behind an alternative versions of women's family law rights it is important to take into account the broad range of past and present

obstacles to the amplification of women's family law rights, in context, and explore in depth how these intersect with key national policies.

Chapter 3 : Reconfiguring Gender through Divorce Landscapes

1. Introduction

In 2008, Mexico City's legislature enacted parallel reforms to both the substantive and the procedural civil codes removing fault-based or necessary divorce [276] and incorporating unilateral divorce. [277] Strategically, this latter process requires divorce solicitants to either apply for administrative voluntary divorce or unilateral divorce.[278] Nicknamed by the press, "*divorcio express*", Mexico City's unilateral divorce process goes beyond the existing no-fault Mexican civil law divorce framework.[279] Unilateral divorce streamlines the dissolution of the marital bond by disengaging it from orthodox civil procedure as well as from the issues of custody, support, and property division. Lastly, it abbreviates the process and the resolution by only requiring a request for dissolution by one spouse. This allows for separate processes for dissolution and support, assets and children. The resolution that dissolves the marital bond cannot be appealed. [280]

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[276] Fault-based divorce or necessary divorce gives the innocent spouse a right to divorce when the other spouse has either committed adultery, corrupted offpring through the commission of immoral acts, has a chronic and incurable disease, cannot bear children or is impotent, or incited the other spouce to participate in prostitution or commit a crime, among other reasons.
[277] See Mexico City Divorcio Express 2008, supra at note 11.
[278] The reform eliminated article 273 of the CCDF 2000 which established the option for voluntary divorce via judicial procedure.
[279] See Mexico City Divorcio Express 2008, supra at note 11.
[280] See art. 287, CCDF 2000 (as amended by reforms published in the G.O.D.F. October 3, 2008)

Under the reforms, the process for unilateral divorce can originate from one or both spouses when requested before a judicial authority, indicating their wish to discontinue the marriage. This process does not require spouses to state a reason or cause for the request after one year of marriage.[281] A spouse is only required to present the divorce request accompanied by an agreement regarding the consequence of marriage dissolution before a first instance civil court or a family court.[282]

The "agreement" is proposed by the spouse making the request and should resolve issues concerning: (1) custody and support of minor children; (2) spousal support; (3) use and distribution of the marital home and its contents, and; (4) administration of the marital assets and necessary compensation based on marital property regime. [283]The requesting spouse must remit along with the divorce request, and the proposed agreement, evidence that demonstrates the basis of the divorce agreement.[284] The other spouse is notified of the divorce request and can respond by accepting the terms of the agreement or counter proposing it with a new agreement. This new agreement must also be accompanied by

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[281] Article 266, *ibid*.
[282] Art. 267, *ibid*.
[283] *Ibid*. This article list through in its subsections the issues that must be stipulated in the divorce agreement proposal. The divorce agreement must designate the person that will have care and custody of minor children; the modality under which the non-custodial parents will exercise visitation rights, maintain respect for meal times, rest and school. The agreement must also specify the form, place and dates of payment of support for children, as well as the form of warranty that will guarantee fulfillment of this obligation. It must also stipulate the spouse that will use the marital home, as well as its moveable's and how the assets of the marriage society will be administered during the divorce process until they are liquidated, showing also the marriage property agreement and an estimate of the assists. If spouses have celebrated a marriage under a division of property scheme, this document must also show the compensation that a spouse who was dedicated to working in the home and caring for children has a right to, which must not be more than the 50% of the value of combined assets. This stipulation is also required when a spouse who for some reason did not acquire property under their own name or having acquired it these are notably of inferior value than those of the other spouse.
[284] Art. 282, *ibid*, art. 255, secc. X and 272 A, paragraph 6, *Código Procesal Civil para el Distrito Federal (Procedural Civil Code for Federal District)* D.O.F. September 1, 1932 as amended by all the subsequent reforms published in the G.O.D.F up until June 15, 2011[CPSDF, 2011].

evidence to support the new agreement. When the parties agree on the terms and the judge is satisfied that the agreement fulfills the requirements of law, the judge decrees the dissolution of the marital bond, which cannot be appealed, and approves the agreement by publicizing the ruling.[285]

Even when separating spouses do not agree on terms of the divorce, the court will proceed and decree the dissolution of the relationship but will note that the issues relating to the agreement are to be resolved through an incidental process.[286] In this incidental process, meetings scheduled by the court encourage parties to come to an agreement. If this fails the court will then open the evidentiary phase of the process, which consists of an oral presentation by the parties before the court.[287] In the event that conciliation attempts also fail to determine mutually agreeable terms, the judge will proceed to make a judgment concerning these issues.

Nonetheless, why Mexico's City's unilateral divorce laws are notable is not well understood. Mexico City's unilateral reforms are problematic from several standpoints. The reforms, first, do not engage the access and enforcement issues affecting women's and children's support recovery in Mexico. In addition to the typical enforcement issues that arise in family matters, there are distinctive socio-economic issues which affect support recovery in Mexico, such as unemployment, sub-employment and migration. Mexico City's reforms also do not explicitly engage the procedural mechanisms and

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[285] Art. 287, CCDF 2000 & art. 272 a, para.4, 287, ibid. CPCDF 2011 *ibid*.
[286] *Ibid*. CPCDF 2011 & art. 685 bis, CCDF 2000 *ibid*. See also Güitrón Fuentevilla, J. "Es inconstitucional el divorcio incausado, regulado en el Código Civil para el Distrito Federal?" Editorial, *El Sol de México* (30 september 2012) online: El Sol de México < http://goo.gl/lJOKj>.
[287] Art. 290 & 299, CPCDF 2011 *ibid*.

larger economic problems that complicate women's access to support from fathers that have been embedded within the prevailing systems of divorce in Mexico. This is particularly important in Mexico where an increasing number of families are supported through income from informal work, migration remittances and female-headed households.

Second, there is also an important historical and political component behind Mexico City's move towards unilateral divorce. The City's reforms represent a *retour* to the 1930's easy divorce schemes that once made Mexico a divorce pioneer.[288] The Civil Code of Yucatan, Home of the First Mexican Feminist Congress, became a no-fault divorce pioneer by being one of the first jurisdictions to implement unilateral divorce laws. However, by the 1930's Mexican unilateral divorce had become disreputable.[289] The reforms are ironically a *retour* to the 1930's easy divorce schemes declared unconstitutional during the 1940's by the Supreme Court.

Last, given that the federal civil code and the remainder of Mexican states continue to govern divorce under fault and mutual consent divorce frameworks, Mexico City's reforms bring forward new and old private law federalism issues.

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[288] Mutual consent divorce takes place under a non contentious judicial process; the only requirement is that both parties are in agreement regarding support, custody and distribution of assets. Administrative divorce is also another non-contentious divorce option. Under this scheme spouses that are in agreement of divorce who do not have children subject to custody and have already distributed marital assets can appear before an officer of the civil registry to request divorce. If the parties fulfill the documentary requirements and spouses ratify their request spouses can be divorced in a span of fifteen days. For a broad explanation of the prevailing systems of divorce in Mexican civil codes prior to Mexico City's reforms. See generally *Vargas 2005* supra at note 255.

[289] The introduction of this criterion by the court was surprising since at the time international private law principles stated that the domicile of the wife followed that of the husband. *See also* Lionel M. Summers, "The Divorce Laws of Mexico" (1935) 2:3 Law and Contemporary Problems at 310 [*hereinafter Summers 1935*].

Thus renaissance of unilateral divorce in Mexico City inevitably poses questions like: Why did the first unilateral divorce laws in Mexico disappear in the first place? What were the factors behind the renaissance of unilateral divorce (in Mexico City) and why Mexico City? What changed in the Supreme Court's perspective to now make unilateral divorce politically and constitutionally viable?

The following chapter thus analyzes how Mexico City's re-enactment of unilateral divorce sheds light on (1) the specific economic enforcement issues that divorce creates within the Mexican family law context; (2) the distinctive socio-economic issues affecting support recovery in Mexico, and; (3) the political and historical factors surrounding the no-fault divorce movement in Mexico.

This section is organized in three subsections. Part one discusses the rise, fall and renaissance of unilateral divorce during the 1920's and 30s and how it intersected with federal-state jurisdictional issues and states' private law rights, and its effect on women. Part two examines the contemporary enforcement issues that divorce creates within the Mexican family law context as well as the distinctive socio-economic issues affecting support recovery in Mexico. Part three analyzes three sets of factors making Mexico City's unilateral divorce laws politically and constitutionally viable: (1) the causes of the demise of Mexico's early twentieth century unilateral divorce laws; (2) the shortcomings of voluntary and necessary divorce; and; (3) changes in Mexico's civil law landscape (as a result of the CCDF 2000) and the Supreme Court's views on divorce.

2. Engendering Revolutionary Discourse via Divorce

In Mexico, the Laws of Reform laid the groundwork for the introduction of divorce by first removing the Church from marriage matters. By granting the federal government power over religious worship, Benito Juarez--Mexican president (1806-72), and resistance leader--secularized all civil acts, including marriage. Prior to the decree that introduced full-fledged divorce in 1914 the term "divorce" was understood as a "temporal" separation arrangement that did not dissolve the marital bond.[290] The Law of Civil Matrimony of 1859 declared marriage to be indissoluble but provided a possibility for separation of bed and board, in other words *non-vincular divorce*.

Given women's key participation during the independence period, family law change was endorsed through a political policy to improve the status of women in accordance with their efforts in the independence movement.[291] However, early on , liberals and conservatives had been divided on the issue of divorce. Liberals contended that divorce would improve the quality of marriage unions and provide greater family stability. Conservatives argued that divorce would harm and degrade women by taking away the protection and security of indissolvable marriage. Ironically, even though the "woman question" persisted throughout these debates, an examination of the enactment of these laws shows that Mexico's innovative divorce reforms had less to do with women than with who retained the authority to regulate the family. Nonetheless, the intersection of

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[290] Art. 239, *Código Civil para el Distrito Federal y Territorio de la Baja California, 1870 [Civil Code of 1870 or Código Civil de 1870]*[translations by author]; see also Silvia Marina Arrom, "Cambios en la Condición Jurídica de la Mujer Mexicana en el Siglo XIX" in José Luis Soberanes Fernández, ed., *Memoria del II Congreso de Historia del Derecho Mexicano (1980)* (Mexico City: Universidad Autónoma de México, 1981) at 493-518 [*Arrom 1981*].

[291] See *Arrom 1981, ibid.*

these tensions meant that the discourse of women's rights was frequently co-opted in favour of political projects and personal convenience in marriage matters.

An earlier proposal for the introduction of vincular divorce in 1894 had been quickly withdrawn due to violent reaction by conservative political forces. [292] These groups called for an outright rejection to the foreign "divorcist" movement pledging never to allow the laws of Mexico to consent to divorce.[293] To conservatives, vincular divorce represented a total fissure from the Catholic Church. Divorce also symbolized a challenge to Benito Juarez's revolutionary idea of civil marriage as an indissoluble union.[294]

Debates regarding the liberalization of divorce in Mexico also expressed concerns about the consequences of divorce on women. It was believed that any attempt at facilitating divorce would most probably have a negative impact on women. As the author of the *Nuevo Febrero Mexicano* stated about the possible implementation of divorce:

> *Ya se sabe cuán fugaz por lo ordinario es la hermosura de una mujer, solo porque tenía la misma edad es causa suficiente de su deterioro, sino también porque los embarazos, los partos y los trabajos de crianza le hacen estrago terrible. Tiene por consiguiente una desigualdad grande, respecto del marido, el cual libre de estos azotes, y más fuerte que ella aun físicamente, podría algunas veces pensar en los medios de separarla de su compañía y obtener un consentimiento que solo seria*

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[292] *See Summers, 1935 supra* note at 310; *see also* Manuel F. Chavez Asencio, *La Familia en el Derecho: Derecho de Familia y Relaciones Juridicas Familiares* (Mexico D.F.: Editorial Porrua, 2003) [*Chávez Asencio 2003*] quote in note 2, "Un cáncer del hogar Mexicano-El divorcio (1924) 2 Revista Jurídica de la Escuela Libre de Derecho, 393, 399-400.

[293] *See ibid*., Chávez Asencio, 2003 quote in note 2, "*Discurso del Señor D. Agustín verdugo sobre el divorcio pronunciado en la Escuela especial de jurisprudencia*", México, 1883.

[294] *See ibid*. at 417.

aparente…Así podemos decir que por más que la facultad de divorciar sea útil al marido, no lo es en general a la mujer." [295]

The Civil Code of 1870 incorporated subtle but important, innovative changes for women. It granted mothers and widows *parens patrie* rights over children and their grandchildren.[296] It also recognized wives' ownership and administrative rights over marital property.[297] It also reduced the age of women's emancipation from 25 to 21 years.[298]

However, to discourage hasty divorces, the Civil Code of 1870 also built-in restrictions that limited mutual consent divorce. Measures to protect older wives and long-term marriages were introduced. Divorce by mutual consent was thus restricted to spouses that had been married for more than two years but less than twenty.[299] The Civil Code of 1870 also restricted husbands from divorcing wives over forty-five years old.[300] Only spouses that participated in the three month period of judicial mediation sessions that were prescribed by the courts could proceed with a mutual consent divorce process.[301]

2.1. Effect of the Double Standard

Although the Civil Code of 1870 had promised to "rehabilitate" the legal status of women, it actually reintroduced, in a more organized and clear fashion the patriarchal ways of thinking. For example, the Civil Code of 1870 subjected wives to the control of husbands

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[295] *Nuevo Febrero Mexicano: Obra completa de Jurisprudencia*, Vol. I (Mexico City: M. Galván Rivera, 1850) at 47-52 cited to in *ibid.* at 507.
[296] *See* art. 165, *Código Civil de 1870.*
[297] *See* arts. 2156, 2158, 2160, *ibid*.
[298] *See* art. 415, *ibid*.
[299] *See* arts. 247 & 250, *ibid.*
[300] *See* art. 247, *ibid.*
[301] *See* arts. 250-259, *ibid*.

and it also excluded women from politics. In fact, the Civil Code of 1870 very much represented a double standard heavily criticized by women at the time. Thus, while the code required that husband sought wives' consent to transfer real property, repudiate or accept a joint inheritance, a husband could still dispose of and transfer the title of movable goods without a wife's consent.[302] Women, however, had no access to marital property without consent of their husbands. As Hermelinda Galindo, a feminist in the revolutionary era, stated about this Code:

> The wife has no rights whatsoever in the home. [She is] excluded from participating in any public matter [and] she lacks legal personality to draw up any contract. She cannot dispose of her personal property, or even administer it, and she is legally disqualified to defend herself against her husband's mismanagement of her estate, even when he uses her funds for ends that are most ignoble and most offensive to her sensibilities. [A wife] lacks all authority over her children, and she has no right to intervene in their education.... She must, as a widow, consult persons designated by her husband before his death; otherwise she can lose her rights to her children.[303]

The code also minimized the circumstances through which a husband's marital misconduct could give rise to a divorce claim.[304] While adultery committed by the wife was always grounds for divorce, a husband's adulterous behaviour was only grounds for divorce when committed in the conjugal home, when the extramarital relationship

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[302] *See* art. 2157, *ibid*.
[303] *Macías*, *1982 supra at* note at 240 at 13.
[304] See arts. 241-242, secc. I-IV, 245, *Código Civil de 1870.* This contrast to ecclesiastical marriage where adultery could give rise to divorce to wives and husbands equally. This rationale was followed by the Laws of Civil Matrimony of 1859.

escalated to cohabitation, when the lover caused a public scandal or when the lover engaged or mistreated the legitimate wife.[305]

Pre-empting feminist appeals, the legislators explained in the preamble that:

> *"La razón de esta diferencia, que á primera vista parece injusta, es la de que si bien bajo el aspecto moral la falta es la misma, bajo el aspecto social es menor la del marido. La mujer siempre introduce en la familia un vástago extraño que usurpa derechos legítimos, y disminuye las porciones que la ley ha designado. Hay sin duda mayor inmoralidad en el adulterio de la mujer, mayor abuso de confianza, más notable escándalo y peores ejemplos para la familia, cuyo hogar queda para siempre deshonrado."*[306]

Feminists disputed that the gendered differences with respect to paternity, maternity and adultery investigations by the Civil Code of 1870 endorsed a family policy that promoted polygamy over monogamy.[307] This double standard put women at a disadvantage by shielding men from accusations and making women easy targets of adultery claims.[308]Critics responded that what these feminist groups of were actually demanding were "sexual licenses" or more liberal sexual allowances.[309]

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[305] *See* arts. 241-242, *ibid*..
[306] *Ibid*. "Exposición de motivos", (preamble).
[307]*Macías 2002 supra* at note 232 at 36.
[308] See *Smith, 2006 supra* at note 234 at 36 & 100-104.
[309] *Ibid*. at 36.

While sharply criticized, these double standards prevailed to the point that they were reiterated in the 1884 revision of the Civil Code of 1870.[310] Nonetheless, continued efforts to neutralize gendered differences led to the eventual removal of the protective mechanisms in the Civil Code of 1870 that favored wives.

In the Civil Code of 1884, reformers excluded the gendered restrictions on divorce by mutual consent. For example, they eliminated the prohibition of mutual consent divorce when the marriage was over 20 years long or the wife was over 45 years old. Drawing on notions of equality, the legislators considered the justification for these measures unfounded. Moreover, the codifiers of the Civil Code of 1884 justified this removal because they did not see how divorce could be different for women who had been in a marriage less than 20 years or women who were under 40 years of age.[311] To the legislators, the restriction imposed on mutual consent divorce had not only failed to produce the desired effect but had also left spouses and their children in a state of legal uncertainty.[312]

3. The Rise, Fall and Renaissance of Unilateral Divorce

With the rise of Venenustiano Carranza to presidency in 1914, came a shift in the revolutionary movement initiated by Benito Juarez. In the addition to the Plan of Guadalupe, Carranza expressed his concern over the lack of implementation of political

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[310] *Código Civil del Distrito Federal y Territorio de Tepic y Baja California, 1884* [Código Civil de 1884/Civil Code of 1884]

[311] See *Dictamen de la Primera Comisión de Justicia*, in Macedo, *Datos,* at 14 cited to in Silvia Marina Arrom, " Cambios en la condición jurídica de la mujer durante el siglo XIX", *Memoria del II Congreso de Historia del Derecho Mexicano* (Mexico City: UNAM-Instituto de Investigaciones Jurídicas, 1981) at 508-509 [*Arrom 1981*].

[312] *Ibid.*

and social reforms that the country required.[313] Carranza, as the First Chief of the Constitutional Revolution, adopted a policy to "crystalliz[e] the political and economic reforms that the country needed, which included a "revision to the laws relating to marriage and civil status of persons".[314] Among the changes introduced by Carranza's divorce laws was the break with the revolutionary idea of civil marriage (but only as lifetime union), acquiescence to federal intervention in state civil law matters and an openness to foreign family law reform.

3.1. Marriage as a Terminable Institution

In line with this promise, President Venustiano Carranza published two federal decrees launching vincular divorce between 1914 and 1915.[315]The 1914 decree amended the Constitutional Law of December 14 of 1874 which had established marriage as an insoluble union.[316] The amendment now decreed that civil marriages could be dissolved with the mutual and free consent of the parties after three years of marriage or at any time when procreation was impossible or when grave omissions by one of the spouses made a spousal dispute irresolvable. Once dissolved, consorts could celebrate a new marriage.[317]

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[313] Jorge C. Adame Goddard, *El Matrimonio Civil en Mexico (1859-2000)* (Mexico City: UNAM-Instituto de Investigaciones Jurídicas, 2004) at 35 [*Adame Goddard 2004*].
[314] *Decreto que Adiciona el Plan de Guadalupe* (December 12, 1914) cited to in *ibid*. at 35.
[315] See *"Decreto del 29 de diciembre de 1914", 2 de enero de 1915* [Divorce Law of December 14, 1874] & *Decreto que reforma el Código Civil para el Distrito y Territorios Federales de 1884", 19 de enero de 1915 [Divorce* Law of January 19, 1915*]*. Carranza's *Vincular Divorce Laws* are a set of constitutional decree's that (1914) eliminated marriage as a lifetime union from the *Ley Orgánica de las Adiciones y Reformas Constitucionales, 14 de diciembre de 1874*. The second decree (1915) amended the Civil Code for the Federal District to include non-vincular divorce. *See Vargas, 2005* supra at note 255 at 74-75.
[316] The decree of 1915 had the effect of modifying the text of the Civil Code for the Federal District and Federal Territories of 1884 by modifying the text of article 226 to: "….divorce was the legal dissolution of the bond of marriage and leaves spouses" legally apt to celebrate a new marriage. *Montero Duhalt 1983 supra* at note 169 at 659 [translation by author].
[317] *See* Law of December 14, 1874, *ibid.*

Further to this change was one of the most important innovations of the Carranza's reforms--the inclusion of no-fault divorce.[318] In adapting the Civil Code of 1870 model of separation of bed and board based on mutual consent, Carranza's vincular divorce reforms included an option for divorce by mutual consent. The mutual consent process required spouses to present a divorce request accompanied by an agreement regarding support, custody, administration and division of communal property. After the request was made, spouses were required to attend two reconciliation sessions scheduled two weeks apart. If the spouses did not desist from their divorce request, the judge had the divorce agreement reviewed by a third state party to guarantee that the interest of spouses and children had been appropriately safeguarded and then proceeded to order the dissolution of the marriage.

In the pre-amble to the 1914 Laws of Divorce, Carranza drew on several justifications to transform marriage into an institution that was terminable at will. He pointed out that marriage for life is contrary to nature and human necessity. In fact, for Carranza it was "absurd" for spouses to be obligated to live together when a spiritual "marital bond" was no longer present or when marital conflicts were irresolvable. Carranza also promoted non-vincular divorce as a civilizing and moralizing instrument.[319] Divorce responded to

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[318] *See Chávez Asencio 2003* supra at note at 292.

[319] Divorce as a moralizing institution was also shared by female political leaders of the likes of Hermelinda Galindo. Politically protected by Carranza, Galindo took on an important feminist leadership with respect to family, religion, prostitution and politics. She was one of the first to point out the Catholic Church as an obstacle in the promotion of women's rights in Mexico. She saw that the control that the church had over women's catholic organizations and their influence as an important force. Even when women were in favour of Galindo's point of view, national sensibilities instructed them to be silent on their view of the church, such flagrant anticlericalism could only served to offend and work towards the movements. After the struggle for regulation of marriage, the legalization of divorce became the second most important issue that confronted the state and the church in Mexico. While many feminist groups agreed on Galindo's view about the importance of divorce for women, other were against it given the flagrant manner that it

the need for higher standards in conjugal relationships as shown by the legal developments in England, France, and the U.S. state of Indiana.

Carranza argued that the lack of vincular divorce laws prompted couples to live in irregular living arrangements, which were more socially prejudicial than divorce. Vincular divorce would thus also reduce the high number of *de facto* marriages and illegitimate children that had become associated to the populist classes. Divorce by mutual consent (no-fault) was also suggested as a way to avoid the judicial exposure of marital conflicts and protect spouses and their families from the social perils of a "normal" divorce process.[320] Carranza also advocated divorce to improve the condition of women.[321] Cognizant of the class-based issues underlying divorce, Carranza saw the vincular divorce as a means to embrace both the rich and poor alike.[322]

The introduction of vincular divorce became the defining cause during Carranza's tenure as President. However, it is not clear why Carranza or his collaborators took on divorce with such ardour especially since there were deep divisions with respect to the scope and degree of secularizing marriage and the family. One of the ironies is that although the "woman question" was persistently present in the debates, the events and

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discriminated against women. Galindo went against the more conservative pre-revolutionary feminist ideas and insisted that the first step in realizing gender equality in Mexico was through revisions of the civil code in divorce matters. It was through her pressure that Carranza published the innovative Law of Family Relations of 1917. See *Macías supra* at note 232 at 53-57.

[320] Mutual consent divorce, by avoiding the judicial exposure of marital conflicts, constituted an ideal medium for marital freedom while concealing the grave guilt of one of the spouses.

[321] See Silvia Marina Arrom, *The women of Mexico City, 1790-1857* (Palo Alto: Stanford University Press, 1985) at 251[*Arrom 1985*].

[322] With respect to the class based issues embedded in Mexican divorce. Non-vincular divorce could both legitimize a lifestyle that upper-class women had come to find as "perfectly natural" but also free rural and urban poor women from the condition of economic and social enslavement resulting from husband's marital misconduct. See *ibid.* especially at 98-155.

pronouncements surrounding the enactment of these laws show that these innovations had little to do with women and more with who retained authority over family matters. one scholar has argued that Carranza's embrace of more liberal divorce laws was more of a response to a request by political collaborators who had personal interest in obtaining divorce[323] than a true desire to emancipate women.

Politically, however, non-vincular divorce constituted a traumatic break with many of the traditions that underpinned Mexico's revolution and therefore, needed to be blocked as it would "result in the ruin" of those traditions and other areas it impacted upon.[324] Thus, conservatives advocated for "indissoluable marriage" as a safeguard for women and argued against vincular divorce because it discriminated against the more vulnerable spouse, who were usually women.[325]

3.1.1. Federal Intervention in Civil Law Matters

At the background of liberal-conservative tensions was also a faint but visible unease about the continued federal intervention in state civil law matters. The autonomy of private law granted to states under the "*Ley de Adiciones y Reformas Constitucionales de 1874*" had provided state legislatures exclusive authority to legislate on civil matters without having to follow constitutional mandates.[326] However, the mention of marriage as

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[323] See *Adame Goddard 2004 supra* at note 313 at 38.

[324] Speech pronounced by jurisconsult Agustin Verdigo in the National School of Jurisprudence in response to the a proposal presented by Deputy Juan A. Mateo before the Congress of the Union in 1981, cited to in Ramon Sanchez Medal, *Los grandes cambios en el derecho familiar en Mexico*, (Mexico City; Ed. Porrua, 1979) at 14 [*Sanchez Medal 1979*] .

[325] *See ibid*. Nonetheless while one of the main objectives of the revolutionary movement had been to "raise women from the degradation of colonial law the Law on Civil Matrimony of 1859 only had the effect of shifting marriage authority from the Church to the state, while maintaining the Church's institutions and values.

[326] *Adame Goddard, 2004 supra* at note 313 at 39.

a civil contract within the constitutional documents had the effect of placing state laws and legislatures under the authority of the constitution.[327] The divorce decrees only reinforced the fact that the state's exclusive hold over family law was more illusory than real.

Thus, by the time Carranza decreed the Law of Family Relations, decodifiying family matters from the Civil Code of 1884 and introducing vincular divorce, questions about the law's constitutionality were being raised. Güitrón Fuentenvilla writes about a member of the bar that challenged the constitutionality of the Law of Family Relations, given that it had been released by the executive power rather that the fully functional Congress that operated at the time. Additionally, it had appeared without any previous discussion or public consultation.[328]

3.1.2. Opening Up Shop for Migratory Divorce

There was also a sentiment that Carranza's divorce laws drew on foreign values that emerged from an important shift in Mexican-U.S. relations with Carranza's surge to Presidency. In October of 1915, the U.S gave *de facto* recognition to Carranza's government[329], at which time permission was also granted to allow the transport of troops by rail from El Paso to Douglas, Arizona to help reinforce the Carranza political movement in Sonora.[330] The break in the Villa-U.S. relationship strengthened U.S. support for Carranza and thus given that vincular divorce was already applicable in many

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[327] *Ibid*.
[328] Julian Güitrón Fuentevilla, *Derecho Familiar* (Mexico; 1972) at 128 cited to in *ibid.* at 72. An advocate in favor of federal family law, Güitrón criticizes that the derogation of the Law of Family Relations led to the disappearance of federal family law from the legal landscape.
[329] W. Dirk Raat, *Mexico and the United States: Ambivalent Vistas* (Athens: University of Georgia Press, 2004) at 111.
[330] *Ibid.* at 111.

U.S. states, Carranza's divorce decrees were thus perceived as having been influenced by the strong relationship with the US.[331]

Inspired by the migratory divorce business that had developed in the U.S., state legislatures in Mexico moved quickly to take advantage of Carranza's unexpected reforms.[332] In the U.S., state autonomy over private law, the Constitutional Full Faith and Credit Clause had had the effect of dividing the divorce reform landscape in a way that promoted forum shopping for fast and favourable divorce.[333] This autonomy as well as the inclusion of ambiguous divorce grounds like extreme cruelty, incompatibility of character and irremediable breakdown of marriage as grounds for divorce and the reduction of residency periods made states like Nevada, Arkansas, Idaho and Wyoming popular divorce tourism destinations.[334]

A key vantage of Mexican state divorce laws *vis a vis* U.S. states, was Carranza's initial inclusion of mutual consent as a grounds for divorce. Foreign divorcees did not, for example, need to feign extreme cruelty, incompatibility of character or irremediable breakdown of marriage as reasons for marital breakdown.[335] Mexican states only needed

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[331] Adame notes how in his justification in favour of vincular divorce expressed in the Laws of Divorce Carranza only cites to three French authors, but no Mexican authors. *Adame Goddard 2004 supra* at note 313 at 50.
[332] Jesús de Galindez, "El divorcio en el derecho comparado de América" (1949) 6 Boletín del Instituto de Derecho Comparado 9 at 36 [*Galindez 1949*].
[333] See generally *Estin 2007 supra* at note 22 especially at 384.
[334] See generally Lawrence M. Friedman, "Rights of passage: Divorce law in historical perspective" (1984) 63 Or. L. Rev. 649, especially at 661-664 [*Friedman 1984*]; Richard Wels, "New York The Poor Man's Reno" (1949) 35 Cornell LQ 303 specially at 303-304, Robert B. Cartwright, "Yucatan Divorces" (1932) 18 ABAJ 307 [*Cartwright 1932*]; Lindell T. Bates, "Divorce of Americans in Mexico, The" (1929) 15 ABAJ 709 [*Bates 1929*]; *Summers 1935 supra at note 289*; Basil H. Pollitt, "Quick Divorce--A Study" (1950) 39 Ky. LJ 289 [*Pollitt 1950*] and *Galindez 1949 supra* at note 332.
[335] See *Summers 1935 ibid.* especially at 312.

to reform their substantive and procedural codes to reduce or facilitate ways around the residency periods required of foreigners to access local courts.

In 1915, pioneered by Plutarco Elias Calles, the state of Sonora (bordering the U.S. state of Arizona) became the first state to implement Carranza's federal decrees within its civil code.[336] The Sonoran reforms went beyond the federal model by reducing the residency period to six months and permitting divorce even when consorts were absent from the state.[337] The process only required consort presence at the first hearing; a power of attorney permitted couples to continue their case through their lawyer.[338]

These reforms were followed by Yucatan, the home state of the First Mexican Feminist Congress, which modernized its civil code in 1916 to facilitate mutual consent divorce by creating a system of voluntary divorce regulated as an administrative process.[339] That same year the Mexican state of Campeche enacted a law that gave the governor authority to grant a divorce to out-of-state petitioners after a twenty-four hour residency period.[340]

Other states, like Chihuahua enacted reforms later--in 1932--giving courts ample jurisdiction to resolve divorce petitions by local residents.[341] The code facilitated the Chihuahua court jurisdiction via "express or tacit submission" of the parties, which was

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[336] See Lee Stacy, *Mexico and the United States* (Tarrytown: Marshall Cavendish Corporation, 2002) at 124.
[337] See *Ley de 28 de Septiembre de 1915*, in *Galindez 1949 supra* at note 332 at 36.
[338] See *Bates 1929 supra* at note 334.
[339] See *Ley sobre el divorcio de 29 de diciembre de 1914. Promulgada en el estado el 25 de enero de 1915, Estado de Yucatán*.
[340] *Ibid* .
[341] See *Galindez 1949 supra* at note 332at 36.

established when consorts designated a local judge in a written submission.[342] Proof of residency was established through the divorcees listing in the municipal resident register.[343] Similar reforms were enacted in the states of Chiapas, Coahuila, Morelos, Sinaloa and Tamaulipas.[344]

3.2. Same Day Divorce

It was Yucatan's new and improved reforms of 1923, which took centre stage.[345] Created under the liberal government of Salvador Alvarado, Yucatan's reforms authorized both reciprocal and unilateral divorce.[346] It also extended power to officers of the civil registry to receive divorce requests and to decree dissolution of the marital union.[347] Spouses who were in agreement as to custody, support and property could be granted divorce that same day.[348] Moreover, a lack of agreement between spouses did not limit a spouse's right to divorce.[349] When parties did not concur on issues or when divorce without cause was requested by one spouse, the court was allowed to decree the separation, leaving all other aspects to be resolved under a an orthodox civil process.[350] Liquidation of property and issues of spousal and child support were resolved using a set of principles that

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[342] See Michelle G. Benavides, *Smokeless Factories: The Decentering of U.S. Legal and Moral Boundaries by Mexico's Transnational Divorce Industry, 1923--1970* (Charleston: BiblioBazaar, 2011: Arizona State University, 2008) at 177-203 [*Benavides 2011*].
[343] *Ibid.*
[344] See generally *Galindez 1949 supra* at note 332.
[345] "*Ley de divorcio y reformas al Código del Registro Civil y al Código Civil del Estado / Gobierno Socialista del Estado de Yucatán*", D.O. April3, 1923 [*Ley de Divorcio de Yucatán, 1923*].
[346] Art. 2, *ibid.*
[347] Art. 4, *ibid*.
[348] Art. 6, *ibid*.
[349] Art. 7, *ibid*.
[350] Art. 8 & 9, *ibid*.

differentiated the effects when divorce was obtained unilaterally and when there was malicious conduct by the consorts.[351]

Reforms directed at shortening the divorce process for foreigners also made Yucatán a no-fault divorce pioneer and a global contender for the foreign divorce trade market.[352] Under Felipe Carrillo Puerto's government, Yucatan abolished the one year minimum period imposed on newly married couples, which meant that spouses who were in agreement could be divorced before an officer of the civil registry in only thirty days.[353] Upon the conclusion of this process, spouses were required to appear once more before the officer to confirm their intention of divorce.[354] The divorce would then be approved with the divorce decree available that same day.[355] The requirement that spouses appear personally was also revised.[356] For long distance divorces, officers of the civil registry were given power to act on the behalf of spouses.[357] Spouses only needed to appoint an agent by public instrument to represent them in divorce proceedings.[358]

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[351] Art. 9, *ibid*.
[351] The Code provided that each spouse was to recover their property. The marital partnership was divided between the shares of each spouse. Each spouse recovered their legal capacity to the remarry. But a woman could not marry until after 300 days after the temporary separation. If the defendant was the wife she was entitled to support and lodging, from the date of temporary separation but ended with her marriage, lived dishonestly, or acquired sufficient property of her own. If the defendant was the husband he was entitled to support if he could not work and had no money. Children younger than six and girls were to live with mothers, except when mothers lived dishonestly or remarried. Both spouses were required to contribute in proportion to their means in the support and education of their children until they ceased to be minors. Summary provided from the English translation in John T. Vance Jr., "Divorce Laws of Yucatan" (1924-1925) 13 Geo. L. J. 227 *supra* note at 235.
[352] See generally *Bates 1929, Cartwright 1932, Pollitt 1950, and Friedman 1984 supra* at note 334;*see also Summers 1935 supra* at note 289; and *Benavides 2011 supra* at note 342.
[353] See *Cartwright 1932 ibid.* at 710.
[354] *Ibid.*
[355] *Ibid.*
[356] Art. 31, *Ley de Divorcio de Yucatán, 1923.*
[357] *Ibid.*
[358] *Ibid.*

In 1923, Mexican and U.S. newspapers reported Puerto Carrillo's promotion of Yucatan's new divorce reforms.[359] On the 25th of February of that year, the governor of Yucatan circulated a memo to all the Mexican consulates in the U.S. informing foreigners of the types of divorce recognized by the government of Yucatan, their cost, and advising foreigners of the new thirty day residency period.[360] The cost of such a divorce could range between 60 to 125 pesos depending on whether the couple required a judge for the divorce process or whether there was an estate.[361]

3.2.1. Due Process Violations

When unilateral divorce was first implemented during the 1920's and 30's, the criticism of migratory divorce between U.S. states and the flock of U.S. consorts to Mexico for easy divorce motivated an assault by both U.S and Mexican Courts on unilateral divorce laws.[362] U.S. Courts began to declare Mexican divorce decrees invalid on the basis of

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[359] See *Smith*, *2006 supra* at note 234 at 105-106.

[360] *La Revista de Yucatán* (March 5, 1923) in Aurora Cortina Quijano, "Los congresos feministas de Yucatán en 1916 y su influencia en la legislación local y federal" (1998) 10 Anuario Mexicano de Historia del Derecho 159 at 184.

[361] *Smith*, *2006 supra* at note 234 at endnote 36 at 110.

[362] For example in one case the Mexican Supreme Court held that Yucatan divorces, granted in the absence of mutual consent and without valid cause, infringed the guarantees of the due process clause of the Mexican constitution. See "DIVORCIO" [TA]; 5a. Época; Pleno; S.J.F.; XVIII; Pág. 631 [DIVORCIO, 1926] In another case the Mexican Supreme Court invalidated divorce when notification or service was not made on a non-resident in accordance with the laws of the latter's domicile. See for example "DIVORCIO POR CAUSA DE ABANDONO DEL HOGAR" [TA]; 5a. Época; Pleno; Informes; Informe 1938; Pág. 106 [DIVORCIO POR CAUSA DE ABANDONO DEL HOGAR 1938] (This forces the plaintiff to serve the defendant according to the laws of the matrimonial domicile and not according to the easy requirements of the lIx fori). Notification of divorce by publication was barred in Morelos if the plaintiff did not know the whereabouts of the defendant but could have discovered it. See "DIVORCIO EN MORELOS" [TA]; 5a. Época; 3a. Sala; Informes; Informe 1944; Pág. 35 [DIVORCIO EN MORELOS 1944]. The Court has also held statutes that conferred on an administrative official of the Civil Registry to determine residence like those found in the laws of Yucatan, Campeche and Chihuahua as unconstitutional. See "DIVORCIO EN EL ESTADO DE CAMPECHE, INCONSTITUCIONALIDAD DE LA LEY DE", [TA]; 5a. Época; 3a. Sala; S.J.F.; XXXIX; Pág. 2548 [DIVORCIO EN EL ESTADO DE CAMPECHE 1933].

jurisdictional overreaching[363], on due process violations, or because only one or neither of the parties had resided in Mexico during divorce proceedings.[364]

In an effort to counteract the unilateral divorce movements of its own states, the Mexican Supreme Court began to declare the substantive crux of Carrillo's unilateral divorce laws and its transplants, as unconstitutional.[365]Finally in 1929, the Supreme Court declared in a non-binding judgement that Yucatan's divorce laws were unconstitutional because they violated due process rights by denying the respondent divorce party an opportunity to contest the claim for divorce by presenting evidence or being heard in any way.[366] Later, in 1931, the court overturned the 1927 Morelos divorce laws because they were sanctioned by the governor without legislative approval.[367] In 1933, the Court also declared Campeche's Divorce Law unconstitutional because granting power to justices of

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[363]See Alzman v. Muher, 23App. Div. 139, 210 N.Y. Supp. 60 (Sup. Ct. 1930) (Mandamus proceeding to compel city clerk to issue marriage license to plaintiff who offered Mexican divorce from prior marriage).In this case a divorce obtained by was held invalid because of lack of jurisdiction of the parties or over the subject matter. The court considered that because both spouses were residents of New York, they were bound to all laws of the state, and that by obtaining a Mexican divorce, the couple had violated the laws, procedures and public policies of New York.

[364] See Bonner v. Reandrew, 203 Iowa 1355, 214 N.W. 536 (1927) (Action for alienation of affections); Cf., Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935) (Mexican decree did not recite that the husband was a resident). In this case the husband had acquired residence in Yucatan in order to obtain divorce. The New York court pointed out the right to inquire into the question of domicile and because there only evidence of domicile was the decree of residence by Yucatan the divorce was held invalid. See also Golden v. Golden, 41 N.M. 356, 68 P.2d 928, 936 (1937). Even nine days residency did not constitute valid domicile, as one court said "a foreign divorce obtained through simulated residence and not in good faith is open to attack". See Ryder v. Ryder, 2 Cal. App. 426, 37 P.2d 1069 (1934).In one case the couple obtained divorce after a day trip across the U.S. Mexico border. Despite claims of jurisdictional fact of domicile or residence the decree did not hold up when the wife brought up a subsequent divorce action in New Mexico. The court said, "To permit a foreign state or nation to assume jurisdiction over residents of this state and grant a divorce on request, like a slot machine in which you deposit a fixed sum of money, press the lever and out comes a decree, is a condition which New Mexico does not yet tolerate." Golden v. Golden, 41 N.M. 356, 68 P.2d 928, 936 (1937).

[365] See supra at note 362.

[366] See DIVORCIO, 1926 *ibid*.

[367] See DIVORCIO EN MORELOS, 1944, *ibid.*

the civil registry authority to determine divorce matters went against the constitutional divisions of powers.[368]

The courts also began to scrutinize questions of domicile, when courts did not agree on the matter.[369] In one case the procedural Civil Code of Nuevo Leon and Coahuila concurred that court jurisdiction corresponded to the domicile of the abandoned spouse when abandonment was argued.[370] The court in charge of resolving contrasting interpretations designated the previous husband's domicile as the defendant's residence for the purposes of divorce even when a husband argued that the matrimonial domicile had changed as a result of his move to another town. However, the court found that the wife had not acquired a new domicile and that the husbands prior domicile reigned for purposes of divorce.[371] The resolving court also found that a conjugal domicile could not be confirmed by the certificates released by civil servants who did not document actual proof of domicile. Moreover marital domicile was not modified by mere accidental and temporary hospitalization.[372] However, when the cause for divorce was ill treatment, the marital domicile was considered as valid if it was the domicile of the defendant.[373]

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[368] See DIVORCIO EN EL ESTADO DE CAMPECHE, 1933, *ibid*.
[369] See DIVORCIO POR CAUSA DE ABANDONO DEL HOGAR, 1938, *ibid*.; see also "DIVORCIO. COMPETENCIA DETERMINADA POR EL DOMICILIO CONYUGAL"[TA]; 5a. Época; Pleno; Informes; Informe 1938; Pág. 103 [DIVORCIO. COMPETENCIA DETERMINADA POR EL DOMICILIO CONYUGAL 1938]; "DOMICILIO"[TA]; 5a. Época; Pleno; Informes; Informe 1941; Pág. 116 [DOMICILIO 1941]; "DIVORCIO, COMPETENCIA EN EL JUICIO DE"[TA]; 5a. Época; Pleno; Informes; Informe 1948; Pág. 133 [DIVORCIO, COMPETENCIA EN EL JUICIO DE 1946].
[370] See DIVORCIO POR CAUSA DE ABANDONO DEL HOGAR 1938, *ibid.*
[371] *Ibid*.
[372] DIVORCIO. COMPETENCIA DETERMINADA POR EL DOMICILIO CONYUGAL. 1938 & DOMICILIO. DOMICILIO 1941, *ibid*.
[373] DIVORCIO, COMPETENCIA EN EL JUICIO DE 1948, *ibid*.

Despite attempts by states to align divorce law with constitutional principles, the Court continued to find unilateral divorce models unconstitutional. In response to the decisions rendered by the Supreme Court in 1929, Yucatan amended its laws by withdrawing the most important elements of Carrillo's earlier laws.[374] While unilateral divorce was still permitted under the new reforms, it could no longer be granted without notification of the other partner.[375] Foreigners were also required to reside six months in Yucatan, as opposed to thirty days, in order to obtain a divorce decree.[376]

Despite these moderations of Yucatan's earlier liberal reforms, the Court declared in 1933 that the "sui generis process", put forth by Yucatan to dissolve the marriage contract and incorporate due process principles, was unconstitutional since the process still left the resolution of shared rights and obligations that arise in a shared marriage contract to the whim of only one of the parties.[377] The Court reiterated and expanded on this opinion in 1934 and 1936 declaring that Yucatan's divorce laws were unconstitutional because the parties' judicial mediation meeting could not be construed as a proper notification of a proceeding. Despite these improper notifications and counter-arguments put forth by the other party the process resulted in a decree of divorce.[378] With respect to the divorce laws of the state of Morelos, the Court found that despite the legislature's subsequent

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[374] See "DIVORCIO EN EL ESTADO DE YUCATAN, INCONSTITUCIONALIDAD DE LA LEY DE", . [TA]; 5a. Época; 3a. Sala; S.J.F.; XLVI; Pág. 3581 [DIVORCIO EN EL ESTADO DE YUCATAN, INCONSTITUCIONALIDAD DE LA LEY DE 1935]. See also "DIVORCIO EN EL ESTADO DE YUCATAN, INCONSTITUCIONALIDAD DE LA LEY DE"[TA]; 5a. Época; 3a. Sala; S.J.F.; XLVI; Pág. 372 [DIVORCIO EN EL ESTADO DE YUCATAN, INCONSTITUCIONALIDAD DE LA LEY DE 1935bis].

[375] *Benavides, 2011 supra* at note at 127.

[376] *Ley de Divorcio, Reformas al Código del Registro Civil y al Código Civil del Estado ... Socialista del Estado de Yucatán, 17 de Abril de 1926*.

[377] See DIVORCIO EN EL ESTADO DE YUCATAN, INCONSTITUCIONALIDAD DE LA LEY DE 1935 bis supra at note 374.

[378] See *ibid*.

rectification, divorces obtained in Morelos under the initial 1927 reforms were null and those obtained thereafter were not retroactive .[379]

3.3. Symbol of Married Women's Failure

Although feminist politics represented a way of integrating the concerns of women into the revolutionary program, women themselves were divided on divorce. Villa de Buentello and other moderate feminists were of the opinion that divorce worked against women whereas Hermila Galido, a close collaborator of Carranza's government espoused more liberal attitudes towards easy divorce believing non-vincular divorce would have a "moralizing effect on families and bring joy to unhappily married women".[380]

The revolutionary rhetoric of vincular divorce in Mexico triggered mostly women to seek divorce not only to obtain a legal separation from their husbands but also to access the property and money their husbands had power over. The legalization of non-vincular divorce created opportunities for women to challenge a husband’s authority and via the figure of motherhood, women gained importance within family law. The legalization of divorce and the notion of equality also drew attention to other injustices committed towards women and their children, specifically men’s lack of financial support. Divorce then became a mechanism that women could use to bring to light men who economically neglected their wives and children in favour of gambling, drinking and adultery. Divorce proceedings became an alternate mechanism to highlight this neglect while allowing for the possibility to continue the marriage. Women thus pursued divorce laws not with a

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[379] See DIVORCIO EN MORELOS, 1944 supra at note 362.
[380] Anna Macías, "Women and the Mexican Revolution, 1910-1920" (1980) 37 Americas (Acad. of Am. Franciscan Hist.) 53 at 65 [*Macías 1980*].

feminist agenda, but to attain material support from their husbands and the state. Motherhood-based claims created an opportunity for women to question husbands' behavior while leaving women's custody and support rights unchallengeable by husbands. At times women were able to effectively challenge male authority and demand that the state uphold its commitments, thus giving them greater legal flexibility in accessing resources to carry out their responsibilities as mothers and wives.[381]

Nonetheless, feminists were adamant that despite the rhetoric, Carranza's laws continued to discriminate against women.[382] Although changes had been incorporated to facilitate divorce, states preserved many of the gendered asymmetries introduced by the pre-revolutionary codes. The federally enacted CCDF-MCRMF 1928 was a prime instance of the asymmetric obligations imposed on spouses. While it stated that women and men were legally equal, the Code also required women who worked outside the home to continue to fulfill their domestic duties.[383] Women's participation in the workforce was accepted as long as they were employed in areas that were suitable to the "decorum of their sex" and continued to fulfill their domestic duties.[384]

Women's empowerment through divorce was complicated by the few options open to assert adultery against a husband and the high standard of conduct required of wives. The status accorded to mothers was not meant to empower wives "across-the-board", but only

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[381] Gregory Swedberg, "Divorce and Marital Equality in Orizaba, Mexico, 1915—1940" (2009) 34:1 J. Fam. Hist. 116 at 132 & 122[*Swedberg 2009*].
[382] *Macías 1980 supra* at note 380.
[383] See *Swedberg 2009 supra* at note 381 at 118.
[384] *Ibid.* at 131. In describing the ideal wife, Guillermo Prieto a liberal writer during the revolutionary era, states "[s]he should know how to sew, cook, sweep,..find pleasure and utility in virtue, [and] be religious, but never neglect my dinner for mass...The day she discusses politics, I'll divorce her!". *Arrom supra* at note 321 at 40.

at the fault of the father.[385]The state of Yucatan, for example, maintained the double standards incorporated by the Law of Family Relations. In the Civil Code of Durango and Tlaxcala, adultery committed by the wife was always the cause of divorce whereas for the husband adultery had to be committed in absolute flagrancy. For a wife to argue for divorce on the basis of adultery she had to prove that the husband had had adulterous relations in the conjugal home or that the adultery was a cause of scandal or disrepute of the legitimate wife. To obtain favorable rulings, wives had not only to prove the husband's marital fault but show that their own conduct was irreprehensible. Courts did not reprimand the adulterous behavior *per se*, but were called on to scold husbands for violating the façade of conjugal bliss.

Thus, expansion of women's power by means of this framework came with its own conflicting outcomes. Divorce appeared to be convenient only for men who sought divorce in order to marry a younger woman. Even when women were not at fault, divorce disadvantaged women because it was a badge of social disgrace and source of physical and moral suffering. Furthermore, the double morality embedded through state divorce laws legitimized the idea that a husband's violation of his marital vows was to be rewarded.[386] While courts emphasized a husband's material family duties, the asymmetry in the benefits reaped by husbands and wives due to their differential access to assertions of adultery and divorce empowered husbands at the expense of wives and their children.

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[385] *Arrom 1985 supra* at note 321 at 309.
[386] *See Escandón 2002 supra* at note 237 at 5.

The reaffirmation of patriarchy through the laws of divorce meant that women were at risk of losing more than men in the divorce process. Divorce entailed holding women to a higher moral standard in order to successfully use these equality mechanisms. Consequently, from the 1920's onwards the rate of men divorcing women increased dramatically, frequently leaving women without custody of children or means of support.[387] Husbands began to utilize divorce as a defensive strategy to "discredit or devalue their wives" transforming divorce into a bonus for husbands that relieved them from family responsibilities[388] Courts enabled an interpretation of family and marriage, which increasingly placed onto women greater responsibility by making allowances for a husband's illicit conduct and moreover, rewarding them for violating their marital duties. Divorce was no longer liberating for women but made them appear as failures in their marital duties and forced them to pay the price.

3.4. Downfall of Mexico's Early Twentieth Century Unilateral Divorce Laws

Admittedly, a major factor behind the downfall of Mexico's early twentieth century unilateral divorce laws was their association with corruption and economic greed. For example, in 1934 the New York Times reported the Mexican Supreme Court decisions overturning Mexican state divorce decrees but also the discovery of a local ring operation selling false divorce documents.[389] In the same period, Cossio, a famous civil law writer made negative remarks about the early unilateral divorce stating that:

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[387] See *Smith*, *2006 supra* at note 234 at 102-103.
[388] *Ibid.* at 118 and 132.
[389] *See ibid.* at 313.

> It is immoral the way in which some states of our Republic have proceeded in divorce matters, establishing real businesses at the margin of matters with such important social relevance. In this marathon have entered [the states of] Chihuahua, Morelos Yucatan, and some others, with the objective of giving all types of facilities to those who seek divorce.[390]

Disapproving of the fact that unilateral divorce laws promoted state development on the platform of impiety and corruption, Roberto Cossio alleged that states not only obtained income as a result of the elevated duties charged for intervention in easy divorce, they were also deriving income from "totally false" or simulated documents, such as local residence certificates and from publications or the dispersion of publications, which have resulted in an important part of state expenditures covered by income derived from impiety and corruption. [391]

Key factors in the demise of state radical divorce laws were two very important national jurisdictional elements that framed the Court's overturning of unilateral divorce laws on due process grouds, (1) the jurisdictional expansion of the authority of the federally enacted CCDF-MCRMF 1928 (2) the jurisdictional civil law status of foreigners.[392] The CCDF-MCRMF 1928 included a text stating that the code was to be applicable "in the Federal District, the Federal territorial in local matters and "*throughout the Republic in federal matters." Thus,* the code created a federal civil sphere, a new federal-civil law

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[390] *Galindez 1949 supra* at note at 36.
[391] *Ibid*. at 36 & 38-39.See also See *Cartwright 1932 supra* at note 334 at 307-308; *Bates1929 supra* at note 334 at 709-713, and Albert C. Jacobs, "Utility of Injunctions and Declaratory Judgments in Migratory Divorce, The" (1935) 2 Law & Contemp. Probs. 370 at 397.
[392] An element that has changed with the private law autonomy granted to Mexico City.

sphere and introduced an interpretative supremacy clause. This had the effect of indirectly using the CCDF-MCRMF 1928 as gauge to measure the constitutionality of state laws. The CCDF-MCRMF 1928 was also applied in foreigner's civil matters. The creation of the federal civil law sphere had the effect of giving the federal government its own civil code from which to steer state divorce laws and the civil law status of foreigners. The CCDF-MCRMF 1928 became the key tool for foreigners and spouses seeking to overturn state divorce decrees because the disparity between state and federal civil law invariably resulted in finding liberal divorce laws unconstitutional.

Another factor behind the downfall of Mexico's early twentieth century unilateral divorce laws was the U.S. influence on Mexican divorce reform. Mexico's quick move from separation of bed and board to unilateral divorce during the early twentieth century was greatly influenced not only by the revolutionary context of the period but also by the allure of the benefits gained by following the U.S. divorce trend. The geographic proximity to the U.S., that nation's low-cost legal services and its parallel system of private law federalism had the effect of absorbing Mexico's unilateral divorce laws in the niche market created within the U.S. However, problems with U.S. state unilateral divorce laws, fraud by consorts, and the rise of mail order divorce, motivated courts to increasingly find both Mexican and U.S. divorce decrees invalid due to jurisdictional incompetency, due process violations or because none of the parties had been resident while the divorce had been processed.[393]

[393] See supra at note 363.

4. The Shortcomings of Voluntary and Necessary Divorce

An important factor behind the renaissance of unilateral divorce in Mexico City were the shortcomings of voluntary and necessary divorce. The following section more closely examines the shortcomings of mutual consent (no-fault) divorce and necessary divorce for women. Under the options of divorce that prevail in all Mexican states and in the Federal District prior to Mexico City's pre-2008 reforms, the process of divorce is available under two options, voluntary (no-fault) and necessary divorce (fault). [394]

Necessary or fault-based divorce applies to spouses who committed adultery, participated in prostitution, incited a woman to commit a crime, committed immoral acts that corrupt children, have a chronic and incurable, contagious or hereditary disease, infertility or impotence, among other reasons. A fault-based divorce costs between USD $3000-$30,000 and the processing time for this type of divorce can vary substantially, but usually takes more than one year.[395]

The other option for divorce is voluntary divorce (mutual consent) which is available through two options: via judicial procedure or through an administrative process. Voluntary divorce under the administrative process is only allowed when spouses are older than 18 years of age, do not have children and have dissolved their marital partnership.[396] Consorts must appear before an officer of the civil registry declaring their desire to be divorced. Cost of voluntary divorces via the administrative process oscillates

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[394] The CCDF 2000 draws heavily on the CCDF-MCRMF 1928 and the Ley de Relaciones Familiares, 1917; however, since the new government for the Federal District has had power over the CCDF 2000, the code has drifted substantially from the prevailing Mexican civil code standard.

[395] *See* Gustavo Fondenvila, "Estudio de percepción de usuarios del servicio de administración de justicia familiar en el Distrito Federal" (Mexico: CIDE, 2006) online at <http://ovd.cide.edu/publicaciones/status/dts/DTEJ%2014.pdf> especially at 5 & 19-20 [*Fondenvila 2006*].

[396] Not all state codes provide for administrative divorce.

between USD $400-$600 and it can take up to 15 days to receive an order of dissolution. In this process neither spouse is entitled to support.[397]

Voluntary divorce via judicial process requires spouses to apply for a judicial divorce before a family judge. A waiting period of one year after the celebration of the marriage is required in order to submit a voluntary divorce before a court. This form of divorce cost can vary between USD $1200-$10,000 and usually takes less than a year to dissolve.[398]

However, as noted by the renowned civil law author Galindo Garfias, voluntary judicial divorce conceals "the true reason for a separation...".[399] It is important to point out that despite these three procedural options for divorce, voluntary judicial divorce accounts for more than more than 70% of divorces in Mexico.[400] Many factors explain the disproportionate use of voluntary judicial divorce; however, the most important is cost. Administrative divorces, only available to child-less spouses, are cheaper because it does not require legal representation.[401] Couples with children however can only chose between voluntary and necessary divorce. Thus while an administrative divorce costs one third of that of a voluntary judicial divorce and one percent of what a necessary divorce

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[397] *See* Julian Güitrón, "Mexico: A Decade of Family Law 1983-1993" (1994) 33 U. Louisville J. Fam. L. at 457 [*Güitrón 1994*].
[398] See *Fondenvila, 2006 supra* at note 395 *especially* at 19-20, 22.
[399] See *Güitrón, 1994 supra* at note 397 at 457.
[400] *Estadísticas de matrimonio y divorcio 1950-1994*, (Mexico: INEGI, 1994) For example in 1985 seventy percent of divorces were handled through a voluntary divorce process, this amount increased 4% in 1995. Ten percent of necessary divorced cited to abandonment, 2% percent to cruelty or mistreatment, 5% due to incompatibility of character and the remaining due to adultery and others. *See*
[401] *See Fondenvila 2006 supra* at note 395 at 25. This is very important given that fifty percent of family court users have an income that oscillates between USD 1600-120 and almost forty percent have a monthly income of no more than USD 120.

costs, voluntary divorcing is the cheapest and fastest option for divorce couples who have offspring.

4.1. Disempowering the Primary Caretaker

Both processes are riddled with legal and procedural lacunae which work against women. Under the fault-based scheme, a request for necessary divorce entails the creditor spouse the right to request provisional support on behalf of themselves (creditor spouse) and the children as well as measures to protect the family, marital property, the rights of a pregnant wife, and to obtain temporary custody of the children. This measure was but the first of a chain of procedural mechanism through which fault-based divorce advantaged innocent spouses' negotiating status in property, support and custody matters. Nonetheless, because assignation of support, custody and property within divorce rules is still approached through a fault-based model, mothers are obligated to cede their children's and their own financial security to preserve their primary caretaker rights.

The defining trait of fault-based divorce was the position of advantage that an innocent spouse could have within the process. Custody and financial matters were intimately tied to the marital fault claimed. Under fault-based divorce, innocent spouses had a right to lifetime support from the guilty spouse. The factors to be considered by the court in determining support were: the gravity of the marital fault, the economic situation of the marriage, the ability of the "debtor" spouse to pay, and the "creditor" (innocent) spouse's ability to work.

If the court finds that the divorce generated damage and losses to the innocent spouse, the court was able to award compensatory damages to the innocent spouse based on the

illegal acts of the spouse. With respect to the marital assets, these are divided up and apportioned according to the marital property agreement and precautions are taken to preserve pending obligations to spouse or children. Given that much more is at stake in this process, an innocent spouse who is also the primary caretaker has more leverage in negotiating support, property and custody.

At the other end of the spectrum is voluntary divorce. Voluntary judicial divorce requires spouses to sign and present an agreement indicating custody, support, visitation rights, and division of property. Support obtained via voluntary judicial divorce can be guaranteed for only one year.[402] However, one parent cannot deny another parent's access to their children barring health or educational reasons; any statements to the contrary in the divorce agreement are considered null and void. Thus, the agreement also has to clarify the main residence and forms of child support during and after the divorce proceedings.

Voluntary judicial divorce has the effect of legally and economically disempowering the primary caretaker, which is usually the mother. Family court users have cited problems with obtaining agreement with respect to financial and custody issues and have also expressed concern over the lack of support warranties in the use of voluntary judicial divorce. [403] This is a vital problem considering that women-initiated support claims make up almost forty percent of the family court's work.[404] While judges and the representative

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[402] *Ibid*.
[403] *Ibid.* especially at 22.
[404] *Ibid.*

of the Attorney General's office have the power to review the terms of the agreements; these are rarely subject to deep scrutiny.[405]

Also problematic is the "good will" that is assumed of the parties in voluntary divorce. For example, while an agreement must be made with respect to support, this agreement does not usually include a wage deduction order because it assumes good will on behalf of the paying parent. From the outset the process leaves room for non-compliance and increases the cost of support recovery for mothers. In practice then, voluntary judicial divorce represents two different processes for women-divorce and support. When divorce is decreed, women have to wait until non-compliance takes place in order to claim enforcement of child support agreements through a wage deduction process or property guarantee. Requiring divorcing spouses to negotiate an agreement without including more effective and guaranteed support mechanisms works against women, especially those who want to maintain their position as primary caretaker.

The goodwill assumed by each of the parties combined with the principle of reciprocity of support thus presents a significant problem for women. When women are the primary income earners and caretakers, they are compelled to accept little economic support in exchange for not allowing primary caretaker responsibilities to develop into a bargaining chip or a requirement for a father's claim for economic support. It also renders invisible the ways that fathers concoct support claims from ailing parents as a way to reduce their obligation towards their wives and children.

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[405] *Glendon 1987 supra* at note 6 at 93.

While procedural safeguards are in place to protect spouses from contractual asymmetries in negotiating custody and support agreement, no real inquiry is made on behalf of judges or the state on the terms of the agreement. This lack of scrutiny has made it more difficult for women to use divorce as a process to protect themselves from economic or physically abusive husbands while securing their status as primary family care takers. This problem is very important if one considers that in Mexico, unlike Canada and the U.S., there are no government programs designed to facilitate access to spousal or child support or offset direct child rearing expenses.

4.1.1. Limitations on Support Recovery

Women also face limitations on the recovery of support arrears. What has made fault-based divorce (as well as mutual consent divorce) a much more contrived process is the lack of predictability and assurance of support.[406] The ample discretion allocated to judges in assigning and assessing support obligations based on the principle of the parent's ability to pay and the needs of the child provides little certainty for innocent spouses. Thus, no official formulas, tables or established court criteria have been developed from which a mother can predict a child support judgment. Even when granted, court awards often do not translate into actual support. Because the civil codes ultimately group all "support" under the same rubric, negotiation of spousal and child support frequently requires that wives concede their rights as spouses in order to obtain sufficient support for their children. In addition, the Supreme Court has established as a principle that support arrears cannot be claimed unless these have accumulated during a

[406] *See ibid.*

judicial request for support payment. Given the time and cost involved in making support claims, this limitation to arrears recovery often offsets the benefits of support claims.

4.1.2. Distinctive Socio-Economic Issues Affecting Support Recovery

Feliciano notes how trade reform has increased wage inequality in Mexico.[407] Trade liberalization policies imposed a heavy cost on Mexican low income households.[408] Between 1984 and 1989 there was an increase of 4.1% of Mexican people living in extreme poverty.[409] Trade reform policies have contributed to a reduction of income among the poorest segments of the population.[410] During this period wages decreased by 2% on average for workers in the lower paying trade industries. This sector also experienced a smaller increase in full-time employment and lower average weekly working hours than non-trade sectors.[411]

Women have offset the negative economic effects of trade liberalization on men with their increased participation in remunerated labour. Between 1984 and 1992 women's participation in the industrial sector increased more than 15%.[412] This female empowerment has shifted the balance of power within families. By affecting the income capacity of those within the family, globalization has shifted gender roles both in the labour market and in the home.

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[407] See *generally* Zadia M. Feliciano, "Workers and Trade Liberalization: The impact of trade reforms in Mexico on wages and employment" (2001) 55 Indus. & Lab. Rel. Rev. 95-115.
[408] See Diana Alarcón-González & Terry McKinley, "The Adverse Effects of Structural Adjustment on Working Women in Mexico" (1999) 26 Latin American Perspectives 103 at 106-108.
[409] *Ibid.* at 106.
[410] *Ibid.*
[411] *Ibid.* at 104 & 112
[412] *Ibid.* at 208-210.

However, this benefit to women has been offset, in turn, by its consequences on the family. While trade liberalization has increased women's earning power, this has come at the expense of circumscribing the majority of opportunities in low-paying, labour-intensive jobs.[413] Many of these benefits are offset by situations where women's income opportunities have come at the expense of putting a husband or father out of work. The benefits are also counteracted when women's purchasing power comes at the expense of the overall reduction of the purchasing power of all household income earners. Women's employment has increased their probability of becoming a head of a household. Both married and single working mothers have a similar probability of leading a household.[414]

Lack of reliable work opportunities has also spurred economically motivated migration in Mexico. In 1970 only two percent of individuals born in Mexico resided in the U.S., however by the year 2000, this figure had increased to 10%.[415] This pattern of migration has had an important economic impact on Mexico. Remittances from Mexican migrants working in the U.S. represent about two percent of Mexico's GDP. This income has benefitted family members, encouraged capital accumulation and contributed to the increase of investment in small businesses.[416]

The positive effect of emigration in Mexico relies on the voluntary remittances sent by émigrés. However, this benefit is offset by the risk of a loss of income from the émigré

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[413] *Ibid.*
[414] *Ibid*.
[415] See Gordon H. Hanson, *Emigration, remittances, and labor force participation in Mexico* (Buenos Aires: Institute for the Integration of Latin America and the Caribbean, 2007) online at Inter-American Development Bank at <http://www.iadb.org/Intal/aplicaciones/uploads/publicaciones/i_INTALITD_WP_28_2007_Hanson.pdf> [*Hanson 2007*].
[416] *Ibid.* at 3.

due to abandonment, loss of contact, divorce or separation. Such a loss in income results in putting women in even more vulnerable positions as they are left to shoulder all home and child caretaking responsibilities and are increasingly financially-dependent on émigré husbands.

Another negative aspect of migration is that it has also increased wage and caretaking disparities for women.[417] Because remittances have the function of replacing the loss of income from migration, women feel that work outside the home is not necessary and may devote more time to work in the home. In fact, studies show that women living in households receiving remittances from abroad are less likely to work outside the home.[418]

Thus, when parents work under informal work schemes, do not have property or live and work illegally in the U.S. (which is increasingly the case), it is impossible or very difficult to enforce or guarantee support payments. These limits to support recovery negatively impact mothers who retain custody of their children and thus have to devise ways to offset the cost and caretaking of the absent parent.

5. The Factors Making Mexico City's Present Unilateral Divorce Laws Viable

The current adoption of unilateral divorce in Mexico is intimately connected to the expansive effect of the no-fault divorce movement in the U.S. Nonetheless, it is ironic that after the harsh criticism that U.S. courts unleashed on unilateral divorce laws and the downfall of Mexico's early attempts at unilateral divorce, this movement took flight in the U.S. but took Mexico more than eighty years to bring back. Nonetheless, the Court's

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[417] *See* Mishra Prachi, "Emigration and wages in source countries: Evidence from Mexico" (2007) 82 Journal of Development Economics 180-199.

[418] *Ibid.* at 23. What is peculiar is that the same is true for men, men who have income from foreign remittances are also less likely to work outside the home and also supply less labour hours overall.

current favour of unilateral divorce have also been influenced by the criteria adopted by U.S. courts during the 1930 and 40's invalidating Mexican divorces and by the U.S. move to unilateral divorce laws put forward by California's no-fault divorce movement. Among the main factors are the different political context and the reduced interpretative supremacy of the federally enacted civil codes with the rise of the CCDF 2000.

5.1. Different Political Context

The return of unilateral divorce represents a shift in the politics that intersect family law change. Cossio's view of the unilateral divorce movement contrasts radically with the context of Mexico City's reforms, a flagship liberal family law reform from the leading leftist PRD (*Partido de la Revolución Democrática* or Party of the Democratic Revolution) party and the fruit of a larger democratization political project. Devised in the first wave of liberal reform since the entry of the leftist PRD and the creation of Mexico City's legislature in 1998, unilateral divorce became one of the less controversial reforms enacted in the CCDF.

5.2. The Reduced Interpretative Supremacy of the Federally Enacted Civil Code

Mexico City's Civil Code has not changed the interpretative supremacy of the Federal Civil Code or its hold over foreigners in the present day. However, it has reduced the federal government’s interpretative power over private law by reviving the rhetoric of private law federalism in Mexico and by breaking the glass ceiling on equality rights set by the federally enacted civil codes.

5.3. Change to the Treatment of Women and Divorce

However, along with the new unilateral divorce laws have also resulted changes to the treatment of women and divorce. Among the changes are: (1) formal elimination of the

double standard imposed on women in divorce process; (2) limitations on migratory divorce, and; (3) constitutional protection of spouses' freedom to express their will to divorce.

5.3.1. Change to Double Standard of Wives' and Husband's Divorce Rights

In 1925, Smith cites that out of eighty-six Mexican divorces, Mexican women appeared in only twenty percent of these.[419] Similarly, of the one hundred and seventy four foreign divorces registered in Merida's book's during the same time period only twenty-five percent reported women as making the divorce request.[420] In 1926, only eighteen out of one hundred and twenty divorce requests were initiated and in the same year, only twenty-five percent of the foreign divorce requests were made by women.[421] These gendered differences meant that husbands, more than wives, used easy divorce as a way to curtail their marital obligations and avoid divorce obligations applicable in their conjugal domicile. The differential results of divorce for wives and husbands were sustained by the different implications that divorce had for women and men. Moreover, these differences were backed up by a legal tradition that presumed that the wife's domicile followed her husband's.

The double standard against which the breakup of the relationship was examined by the court in the past meant that proper notification of wives was of little consequence in granting husbands their divorce request. Nonetheless, for women this meant that wives were often victims of unfair rulings which stripped women of their legal powers leaving

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[419] *Smith 2006 supra* at note 234 at footnote 48 at 110-111.
[420] *Ibid.*
[421] *Ibid.* at footnote 54 at 110-111.

them with few personal options and even fewer options to support themselves or their families after a divorce decree. Under this logic courts that tolerated "less exacting grounds" in divorce decrees had the effect of precluding or complicating the assertion of women's marital rights against their husbands'.[422]

Currently, the message of the Mexican Supreme Court is clear in that it considers that due process rights are protected by dividing the divorce process. This division means that the initial decree can affect only the marital status of partners, providing aggrieved spouses a "sui generis" process for providing judicial notice and giving affected spouses an opportunity to be heard when economic and custody rights are at stake.[423] A drastic change in the importance given to women in divorce is evident.

5.3.2. Limits of Migratory Divorce

To prevent inter-state migratory divorce the Mexican Supreme Court has declared that married consorts are bound to the courts of their conjugal domicile or of the domicile of the abandoned consort in case of abandonment.[424] In an effort to protect Mexico City's laws from being abused by divorce tourism couples, the Court has also upheld as

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[422] See David F. Cavers, "Migratory Divorce" (1937) 16 Soc. F. 96. at 97.

[423] "DIVORCIO. SU NATURALEZA A PARTIR DE LAS REFORMAS A LOS CÓDIGOS CIVIL Y DE PROCEDIMIENTOS CIVILES PARA EL DISTRITO FEDERAL, PUBLICADAS EL TRES DE OCTUBRE DE DOS MIL OCHO., TERCER TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO"[TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXX, Septiembre de 2009; Pág. 3127.

[424] "DIVORCIO INCAUSADO, COMPETENCIA POR RAZÓN DE TERRITORIO. SEGUNDO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXXI, Septiembre de 2009, Abril de 2010, Página: 2728.

constitutional Mexico City's *de minimis* time requirements limiting the *divorcio express* to marriages that have lasted at least one year.[425]

The Mexican Supreme Court has also been careful to curtail the interpretative mechanism by which Yucatan's easy divorce schemes expanded while simultaneously opening up the constitutional limitations to this new type of divorce. Moreover, the Court has established guidelines to delineate a "constitutional" unilateral divorce. With respect to the conflict of laws that arises from legal change, the court has stated that the applicable divorce laws are those that are relevant within the time frame when the divorce claim arises not when the marriage is celebrated.[426] The Mexican Supreme Court has also upheld the rule that allows previously filed divorce cases to transfer their claims under the new laws if such a transfer does not affect economic or custody rights under the derogated divorce laws.[427]

Nonetheless, a clear incongruity is evident in the Mexican Supreme Courts' recent treatment of unilateral divorce. In two decisions rendered in 2008 and 2009, the Court upheld its reasoning protecting unilateral divorce laws based on two main arguments. First, there could be no due process violations because the decree of unilateral divorce is

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[425] "DIVORCIO SIN CAUSA. CONSTITUCIONALIDAD DEL ARTÍCULO 266 DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL, EN CUANTO EXIGE QUE EL MATRIMONIO HAYA DURADO UN AÑO. OCTAVO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXXIII, Marzo de 2011; Pág. 2323.

[426] "DIVORCIO. PARA DETERMINAR LA LEGISLACIÓN APLICABLE PARA DECRETARLO DEBE ATENDERSE A LA FECHA EN QUE SE ACTUALIZA EL HECHO QUE LO GENERA, Y NO A LA DE CELEBRACIÓN DEL MATRIMONIO"[TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXXIII, Febrero de 2011; Pág. 614 .

[427] "DIVORCIO SIN CAUSA. EL ARTÍCULO TERCERO TRANSITORIO DEL DECRETO POR EL QUE SE REFORMA Y DEROGA EL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL Y SE REFORMA, DEROGA Y ADICIONA EL CÓDIGO DE PROCEDIMIENTOS CIVILES PARA EL DISTRITO FEDERAL, PUBLICADO EN LA GACETA OFICIAL DE LA ENTIDAD EL 3 DE OCTUBRE DE 2008, NO VIOLA EL PRINCIPIO DE IRRETROACTIVIDAD DE LA LEY" [TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXXIII, Mayo de 2011; Pág. 232.

not a document constitutive of rights and obligations but a declarative instrument that indicates the rupture of the marital bond that is subject to the will of both marriage parties.[428] Second, with respect to the "secondary matters" of marriage, (economic and custody issues), due process rights were fulfilled through the inclusion of a list of rights accorded to parties. This list included the notification of the affected spouse with delivery of accompanying copies of supporting documents and a procedural phase giving an affected spouse an opportunity to accept or to counter the agreement on economic and custody matters (not the divorce itself). The Supreme Court has also enacted "constitutional" guidelines to maintain judgements in line with constitutional principles.

5.3.3. Protecting the Freedom of Consorts to Express their Will to Divorce

Until 2008, the prevailing criterion was that divorce obtained by either spouse without the consent of the other spouse was unconstitutional. However, recent cases indicate a change by the state to the relative weight accorded to individual rights compared to the interests of the state. The balance has largely shifted in favor of individual rights, allowing the parties to make decisions concerning their private lives-especially decisions relating to marriage and family life-free from unwarranted interference by the state. It privileges the competing interests between the rights to marital freedom, and economic as

[428] "ARTÍCULO 4.96 DEL CÓDIGO CIVIL DEL ESTADO DE MÉXICO. NO VIOLA LA GARANTÍA DE AUDIENCIA ESTABLECIDA EN EL ARTÍCULO 14 CONSTITUCIONAL"[TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXVIII, Diciembre de 2008; Pág. 231. "DIVORCIO POR VOLUNTAD UNILATERAL DEL CÓNYUGE. LOS ARTÍCULOS 266, 267, 282, 283, FRACCIONES IV, V, VI, VII Y VIII, 283 BIS, 287 Y 288 DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL, REFORMADO MEDIANTE DECRETO PUBLICADO EN LA GACETA OFICIAL DE LA ENTIDAD EL 3 DE OCTUBRE DE 2008, QUE REGULAN SU TRAMITACIÓN, NO VIOLAN LAS GARANTÍAS DE AUDIENCIA Y DE DEBIDO PROCESO LEGAL" [TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; Tomo XXX, Diciembre de 2009; Pág. 280.

well as custody rights and obligations. In addition, the shift in balance has given judicial authorities a key role in the distribution of assets, allocation of support and custody.

With these reforms the Mexican Supreme Court has also established fragile but important limitations on the use of "discrimination" as a tool to challenge the constitutionality of family law. In 2010, the Court declared unequivocally in isolated, non-binding case law that Mexico City's divorce reforms did not in any way "imply discrimination to any of the consorts" because under no circumstances does it allow "treatment of inferiority that translates into discrimination (on the basis of age, race, religion, politics, social position, civil status, etcetera) that provides unfair advantage to either of the consorts".[429] However, by privileging divorce and failing to acknowledge or consider how this individual right to divorce competes against basic constitutional gender equality and children's rights, the Supreme Court has too easily surrendered federal and state power in divorce matters when there are competing interests at play. In 2010, the Court upheld as inadmissible a spouses divorce countersuit because the "divorcio express" does not provide for point of legal contention.[430] The Court reasoned that the admission of a countersuit would result in a "denaturalization" of the summary form and the easy access to divorce that legislators intended with these laws.[431]

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[429] See "DIVORCIO EXPRÉS. SU REGULACIÓN NO ES DISCRIMINATORIA PARA LAS PARTES. CUARTO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXXI, Enero de 2010; Pág. 2108.
[430] "DIVORCIO SIN CAUSA. RECONVENCIÓN IMPROCEDENTE (LEGISLACIÓN DEL DISTRITO FEDERAL). OCTAVO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXXI, Enero de 2010; Pág. 2110. .
[431] *Ibid.*

The Mexican Supreme Court has also put limits on the use of the "family right" argument to protect women's family law rights. In 2009, one wife challenged the constitutionality of a Mexico City unilateral divorce decree on the grounds of violation of article four of the Constitution. Article four puts on the state an obligation to enact laws which favour the protection of the organization and development of the family. The article recognizes the rights of families to a "dignified and decent household", children's integral rights and empowers the state to enforce these rights against ascendants, tutors and guardians. In this particular case, the Supreme Court used the language of freedom of expression to protect divorce-seeking spouses. Without explicitly recognizing constitutional freedom of choice in marriage and divorce, the Supreme Court found that Mexico City's reforms did not violate a state's obligation to protect the family given that the state does not obligate spouses to remain married when the "cohabitation" with their spouses or their children is rendered impossible or when spouses lose affection for their consorts. The Court reasons that divorce is a mechanism devised by the state to dissolve the marital union and avoid instances of mistreatment or violence that can result from the cohabitation between consort that no longer wish to live together. Divorce is, therefore, not a tool to promote conjugal rupture, but a mechanism to protect the freedom of consorts to express their wish to leave the marriage and to do so by only giving formal recognition of the *de facto* dissolution of the marital union.

By giving priorityto freedom in marriage choice the Mexican Supreme Court has indirectly constitutionalized a right to divorce. With this change in criteria the Court has

affirmed the principle that a "person has no due process interest in remaining married".[432] However, the Court has neglected to deeply examine the corollary of this principle, whether marriage and the parenting and property partnership that it can arise creates "any legally recognized interest" in divorce that merits constitutional due process protection.[433] While constitutionalizing private law rights has become an expedient solution to resolving the inequities of substantive and procedural private law in Mexico[434], it does not resolve the competing constitutional interests that arise.

6. Conclusions

This chapter has contrasted the context surrounding Mexico City's present unilateral divorce laws and early twentieth century unilateral divorce laws. It has highlighted the social and economic enforcement issues that divorce creates for women and the political and historical factors surrounding the no-fault divorce movement in Mexico. The rise of Venenustiano Carranza to presidency in 1914 was a key factor in the introduction of no-fault vincular divorce in Mexico. For Carranza divorce responded to the need for higher standards in conjugal relationships and to improve the condition of women. Among the changes introduced by Carranza's was the break with the revolutionary idea of civil marriage (but only as lifetime union), the inclusion of no-fault divorce, an acceptance of federal intervention in state civil law matters and an openness to foreign divorce law models. His reforms were controversial not only for the liberal marriage morality they

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[432] Sheila Jordan Cunningham, "Jurisdiction in the Ex Parte Divorce: Do Absent Spouses Have a Protected Due Process Interest in Their Marital Status" (1982-1983) 13 Mem. St. U. L. Rev. 205 at 243 and footnote 226 at 243. This means that the court has ignored from outset the fact that there could exist a "protected interest" that can only be resolved by "remaining married to an unwilling spouse".
[433] *Ibid.* at 244.
[434] See Jimena Andino Dorato et. al., eds., "Three Latin American Dialogues between the Civil Code and the Constitution" in Jimena Andino Dorato et. al. eds., *Le Droit Civil et ses Codes: Parcours à travers les Amériques* (Montreal :Thémis, 2011) at 58-61.

endorsed but also because they raised important questions about their constitutionality. Nonetheless Mexican state legislatures quickly reformed their divorce laws to take advantage of surging divorce tourism market. Mexico was an attractive divorce destination because couples could divorce in a short time period without having to feign reasons for marital breakdown. While several Mexican states adopted reforms facilitating divorce for foreigners, it was Yucatan's reforms that became most popular. Yucatan facilitated mutual and unilateral divorce by: (1) empowering civil registry official to received and dissolve unions; (2) dividing the issue of dissolution of the union from the issues of custody, support and the property partnership; (3) reducing foreigner's residency periods to obtain divorce, and; (4) permitting long distance divorce via a power of attorney.

The amount of court claims of due process violations by spouses during this period motivated an assault by U.S and Mexican Courts of Mexico's easy divorce laws. Courts found Yucatan's unilateral divorce laws unconstitutional. Attempts by states to align divorce law with constitutional principles did not change the courts criteria.

For women, the legalization of non-vincular divorce created opportunities for women to obtain a legal separation from their husbands but also to obtain the property and money their husbands had power over. Nonetheless, feminists were adamant that despite the rhetoric, Carranza's laws continued to discriminate against women. Although changes had been incorporated to facilitate divorce, states preserved many of the gendered asymmetries introduced by the pre-revolutionary codes. The reaffirmation of patriarchy

through the laws of divorce meant that women were at risk of losing more than men in the divorce process.

Among the actors that were critical to the downfall of these laws were their association with corruption, the jurisdictional expansion in 1928 of the authority of CCDF-MCRMF 1928 and this Codes authority over the civil status of foreigners. This contrasts radically with the factors which lie behind the present renaissance of unilateral divorce. Key aspects behind the renaissance of unilateral divorce in Mexico City were the shortcomings of voluntary and necessary divorce. Both of these processes disempowered the primary caretaker and put severe limitation on mothers' support recovery. In addition there are distinctive but less visible socio-economic issues affecting support recovery, like informal work, lack of property or irregular immigration statuses which make it impossible or very difficult to enforce or guarantee support payments.

The context surrounding Mexico City's divorce laws is quite different from the one that prevailed during the 1930's and 40's. First, the new unilateral divorce laws arise in Mexico City, one of the most politically powerful Mexican jurisdictions. Unilateral divorce is fruit of a larger equality and democratization project. The enactment of the CCDF 2000 has also had the effect of diminishing the interpretive power of the FCC, which had been central in finding Yucatan's divorce laws unconstitutional.

The changes highlight the broader structural problems that women must consider in divorce. There has been a change to the treatment of divorce and women. Among the changes are: (1) formal elimination of the double standard imposed on women in the divorce process; (2) limitations on migratory divorce, and; (3) constitutional protection

of spouses' freedom to express their will to divorce. This has affected women given the limitations imposed by the Mexican Supreme Court in the use of "discrimination" and the "family right" argument to protect women's family law rights and challenge the constitutionality of easy divorce laws.

Chapter 4 : Enduring Family Law Internationalism

1. Introduction

Building on the previous sections, this chapter turns to the transnational dimension of family law in Mexico, in other words how a form of family law pluralism can also arise as a consequence of shifts in private law-making power and introduction of new stakeholders. Preoccupation about internationalization of family law stems from the increasing role that international organizations and foreign stakeholders have come to have in local law reform. Internationalization of family law is a term used here to refer to the increasing influence that private and public international law instruments, institutions and venues have had on the development of family law within Mexico's national borders. Internationalization of family law first appeared through the ratification of multilateral conventions geared at resolving problems of conflict of laws as a result of cross-border movement of peoples.[435] Within the Americas this has included legal unification efforts developed within the Organization of American States and through the Hague Conference that were mainly directed at the private law level. [436] More recently, internationalization has extended to include the indirect influence that human rights treaties, international judicial bodies and their case law have on national family laws.[437]

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[435] See *Dyer1996 supra* at note 24.
[436] *Estin 2010 supra* at note 24 at footnote 17 at 51.
[437] See *Stark 2006 & Weiner 2008 supra* at note 24.

However, clearly internationalization of family law is not straightforward. A contributing factor to the complex map of family law internationalization is the time gap of international obligations, different affected spheres and global preoccupations of private and public international arenas. In addition, these two ambits of internationalization have differentiated the strategies used to implement women's family law rights. Thus, while, both of these streams of internationalization have influenced national family law by attempting to align laws related to the family to human rights principles and to harmonize substantive and procedural private law rules with those of private international law conventions, many strategies have had to be developed to bring jurisdictions, institutions and laws in line with these principles. [438] Family law internationalization thus also refers to the sub-national and federal domestic "statutory provisions" and governmental mechanisms that have appeared to address these international obligations and implement them throughout the system.[439]

While implementation of women's international equality rights may be a common international obligation for most nations, how women's rights "move from one place to another", or one sphere to another, and the conditions under which they are "incorporated into existing relations of power" is critical to understanding not only how North-South policies and ideas, such as "neoliberalism" and human rights, influence "the kind of [pro-women] laws [and politics] that develop and the social transformations that follow", but also for understanding the broader and "translocal" set of boundaries that top-down implementation of women's family law rights is confronted with. Awareness of

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[438] See *Estin 2010 supra* at note 24 at 51.
[439] *Weiner 2008 supra* at note 24.

the devices that states have used to implement international obligations and how these devices impact the legal and political arenas sheds some light on some of the unaccounted for factors influencing noncompliance as well as unacknowledged internal soft-law compliance mechanisms. [440]

Not until recently has the study of internationalization been expanded to include how international laws actually make their way into national frameworks and the effects that international institutions and laws have on state systems. In this chapter I examine the effect that the discourse of conditionality embedded in law reform organized within themes of assimilation or harmonization can have on private law politics and women's family law rights.[441] To recover the international dimension behind the development of women's family law rights, I draw out the federal and sub-national and federal statutory provisions and internationalization mechanisms that were developed in Mexico between the 1950's and 2000 to address women's international family law rights and implement them throughout the system. I examine also their effect on traditional divisions and spheres of law-making power. Here I identify key three mechanisms, the trickle and "pincer" effect of the CCDF dual role prior to Mexico City's legal and political autonomy, the flanking effect of judicial reform and the counter-balancing effect of Mexico City's new legal autonomy.

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[440] See *González y otras ("Cotton Field") v. Mexico* (2009) Inter-Am.Comm. H.R. No. 205, Annual Report of the Inter-American Commission on Human Rights: 2009, OEA/Ser.L/V/II/ doc. 51 corr. 1; *Radilla Pacheco v. México* (2009) Inter-Am.Comm. H.R. No. 209, Annual Report of the Inter-American Commission on Human Rights: 2011 OEA/Ser.L/V/II/doc. 69.
[441] See *Merry 2006 supra* at note 24 at 100-101.

Why Mexico? As in many countries of the global south, the examination of law reform in Mexico is generally driven by the presumption that there is a gap between the "law on the books" and the operative "law in action". This perpetuates romanticized images of legal pluralism by discounting from the outset that division might exist between promoters and beneficiaries of law reform on the reform itself or about the political stakes that it might involve. This approach in turn has had the effect of discounting the different effects that internationalization, at the vertical and horizontal levels of government, can have on women's family law rights.

However, as Lopez-Ayllon has noted about Mexico, it is the "only Latin American country from North America and the only North American country in Latin America".[442] By this, Lopez-Ayllon is referring to the fact that geographically and politically Mexico is at the "crux" of two realities.[443] While Mexico shares important commonalities with its northern neighbours--and the "most important economy in the world"--(geographically, politically and economically), to the south it also shares the same economic, political and social asymmetries as its Central American neighbours. The State's authority over private law remains one of the main pillars supporting Mexico's federal form of government. However, the opening up to supranational institutions and incorporation of their principles into the legal framework has resulted in added pressure for reforms. An inquiry into the different types of pressure for liberal policies within countries like Mexico that typically apply for aid or membership draws attention to the different forms of

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[442] Sergio López Ayllón, *Las Transformaciones del Sistema Jurídico y los Significados Sociales del Derecho en Mexico. La Encrucijada entre Tradición y Modernidad* (Mexico City: UNAM, 1997) at 161 [*López Ayllón 1997*].
[443] *Ibid.*

oppositional forces that are confronted in implementing women's rights. Thus an important dimension of Mexico's family law reform is related to who has the power to define which and how women's rights policies are incorporated at the private law level. Mexico is thus a good paradigm from which to examine: (1) the different effects that international law and policy can have in a country's family law landscape; (2) the effects these can have on women's family law rights, and; (3) how global and national geo-political disparities can influence women's family law.[444]

This chapter proceeds in three sections. Part one examines how international law has been implemented and particularly how women's family law rights have made their way into the Mexican legal system, distinguishing the process up to the 1980's and after Mexico's entry into GATT. Part two examines the effect that internationalization of family law from the 1990's to the year 2000 with a discussion of the different types of challenges confronted by Mexico in the implementation of women's family law rights, and their effect on women. Part three, through the example of abortion reform, illustrates how internationalization of family law in Mexico has heightened the symbolism of family law reform.

2. Implementation of International Law in Mexico

During the 1980's, prior to Mexico's turn towards the liberal economic model, international treaties were received with little fanfare or problems within the legal system. They were always considered part of supreme law, but were rarely applied directly

[444] See *Merry 2006 supra* at note 24.

internally.[445] This was in part due to the fact that in the past Mexico's economic development had operated on a nationalist agenda with an important state-directed substitution policy, but this policy ended with the collapse of the international oil market and the balance of payments crisis in Mexico in 1981.[446] With the change in Mexico's economic policy came reforms to reduce the state's intervention in the economy, liberalize trade and markets and open the legal system to bring national laws into line with international obligations.[447]

In Mexico, the recognition of international treaties falls under federal jurisdiction; implementation is also within this jurisdiction.[448] In accordance with the 1787 U.S. Constitutional model, treaties ratified and approved by the federal Senate become part of internal law and are considered supreme law.[449] Under the Kelsinian view of Mexican law, treaties cannot contradict the Constitution but prevail over all laws organized below

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[445] Sergio López Ayllón & Hector Fix-Fierro, "¡Tan cerca, tan lejos! Estado de Derecho y cambio jurídico en México (1970-1999)" (2000) 33 Boletín Mexicano de Derecho Comparado 503 at 187 (*López Ayllón & Hector Fix-Fierro 2000*].

[446] See *ibid.* at 187 and Juan Carlos Moreno-Brid et.al., "Economic development and social policies in Mexico" (2009) 38 Economy and Society 154 especially at 156-157 [*Juan Carlos Moreno-Brid et.al. 2009*].

[447] See *Moreno-Brid et.al. 2009 ibid.* at 157.

[448] Article 133 of the Mexican Constitution of 1917, as reformed in 1934: "This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it, that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States." Translation obtained from Ricardo Méndez Silva, "Treaty Making, Genealogy and the Constitution Today" (2005) 4 Mexican Law Review <http://info8.juridicas.unam.mx/cont/mlawr/4/arc/arc7.htm>. For a commentary on a proposal to incorporate the state's direct voice in treaty ratification processes see also Jaime Cárdenas Gracia, "México a la Luz de los Modelos Federales" (2004) 37 " Bol. Mex. Der. Comp. 479 .

[449] See also Héctor Fix-Zamudio, "El derecho internacional de los derechos humanos en las Constituciones latinoamericanas y en la Corte Interamericana de Derechos Humanos" (2004) Revista Latinoamericana de Derecho 141 at 146.

the level of the Constitution.[450] Thus, because the Constitution establishes that all treaties are supreme law, individual states are obliged to incorporate them within their jurisdiction. In practice this means that treaties relating to family matters, such as children or women, would implicitly prevail over all state and federal laws.

However, implementation of international law in the area of family law in Mexico has rarely developed in such a straightforward way. One reason is that a normative overlapping occurs when the subject matter of international treaties falls under state jurisdiction. In theory, this overlapping would require the national congress to seek the state's consent. However, it has been argued that state submission is achieved in the process of ratification, which requires the Senate to approve all international treaties concluded by the President of the Republic.[451] Another factor is that within private law there is an absence of direct top-down mechanisms of international law implementation. To bring national laws into line with international obligations, the federal government has instead adopted mechanisms like constitutionalization of private law rights, the CCDF-MCRMF 1928 (as a template and yardstick of private law rights) and other measures like

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[450] See art. 133, Constitución Política de México. The article states that "[t]his Constitution, and the Laws enacted by Congress which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, by the President of the Republic, with the Senate's consent shall be the supreme Law of the Union. The Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding". Constitución Política de los Estados Unidos Mexicanos, The Political Constitution of the Mexican United States, translated by Carlos Pérez Vázquez (Mexico City: UNAM, 2005) online at Instituto de Investigaciones Jurídicas: <http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf > [*The Political Constitution of the Mexican United States,UNAM 2005*). See also the landmark case presented by the Air Controllers' Union which resolved the long-standing ambiguity of the hierarchy of international treaties *vis-à-vis* the Constitution and the federal laws. "TRATADOS INTERNACIONALES SE UBICAN JERARQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN SEGUNDO PLANO RESPECTO DE LA CONSTITUCION FEDERAL". Amparo en revisión 1475/98,Tesis de Pleno LXXVI/99 [TRATADOS INTERNACIONALES, 1998].

[451] *López Ayllón & HectorFix-Fierro2000 supra* at note 445 at 186.

the empowerment of the judiciary and of human rights activism. However, all of these moves have resulted in greater federalization of private law.

2.1. Internationalization of Women's Family Law Rights

While there had been prior discussions about recognizing women's voting rights since 1857, and proposals had been made in 1917 and 1937, women's enfranchisement at the federal and state levels occurred in 1953, under the government of Adolfo Ruiz Cortinez.[452] In 1947 women had obtained voting rights at the municipal level through amendments to article 115 of the Constitution.[453]

However, there were different driving forces behind the 1974 reforms. There was pressure from feminist groups to further women's citizenship. Valadez also considered that the inclusion of family rights had been motivated by multiple pressures of an international nature that wanted Mexico to adopt a definite demographic policy.[454] At the time, Mexico was among the countries with the highest demographic increase in the world.[455] However, conservatives were against birth control policies.[456] Sanchez Medal argued that the reforms had been created as a way to intervene in the intimate lives of

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[452] Beatriz Bernal Gómez, "La mujer y el cambio constitucional en México: El decreto de 31 de diciembre de 1974" in Jorge Capizo & Jorge Madrazo, eds., *Memoria del Tercer Congreso Nacional de Derecho Constitucional 1983* (Mexico City, UNAM, 1984) at note 3 at 284 [*Bernal Gómez 1984*].
[453] See, *DECRETO que adiciona el párrafo primero de la fracción primera del artículo 115 de la Constitución Política de los Estados Unidos Mexicanos*, D.O.F. February 12, 1947.
[454] See Diego Valadés, "La Constitución Reformada" in *Los Derechos del Pueblo Mexicano; México atraves de sus Constituciones* (Mexico City: Porrua, 1979) at 44 [*Valadés 1979*].
[455] *Ibid*.
[456] See *Bernal Gómez, 1984* supra at note 452 at 300-301.

couples, suppress the principle of "*debito conyugal*", or conjugal obligation, and liberalize extra-marital relationships.[457]

Whatever the reason, it was clear that reforms had a more symbolic than practical objective. Scholars criticized the ambiguous language and intention of the reforms. They argued that civilly, politically, administratively and culturally women had had the same rights as men. To conservative scholars Valadez and Medal, since the equality of men and women had already been enshrined as a principle, specific constitutional protection was unnecessary.[458] Carpizo considered that article 34, which recognized all Mexican citizenship rights, already established the principle of gender equality.[459] According to Carpizo, it was quite another problem that the article had been interpreted restrictively, leaving women excluded from the umbrella "of all Mexicans".[460] According to Valadez, the statement added to the Constitution recognizing that men and women were equal before the law was contrary to the nature of each gender, because as has been shown the "absolute equality between both could never exist".[461]

Nonetheless, an overriding factor behind the 1974 Constitutional reforms recognizing women's and men's equality before the law was partially based on Mexico's signature of the UN Declaration on the Elimination of Discrimination against Women in 1967.[462] The approval of the proposal enabling women's enfranchisement in 1953 was strongly

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[457] *Sanchez Medal 1979 supra* at note 324 at 52-56.
[458] See Ignacio Burgoa, *Las Garantías Individuales* (Mexico City, Porrúa, 1981) at 270.
[459] See Jorge Carpizo, Estudios Constitucionales, (Mexico City: UNAM, 1980) at 305.
[460] *Ibid.*
[461] See *Valadés 1979 supra* at note 454.
[462] See *DECRETO que Reforma y Adiciona los Artículos 4o., 5o., 3o y 123 de la Constitución Política de los Estados Unidos Mexicanos, en relación con la Igualdad Jurídica de la Mujer* [DECRETO Reformar artículos 4,5, 3, y 123 Constitucional, 1974].

motivated by the adoption of Inter-American and UN treaties relating to the suppression of the trafficking in women and to their civil and political rights.[463] Prior to the 1950's Mexico had adopted several international treaties dealing with women's status. The earliest conventions were those relating to the struggle against the trafficking in women and girls. This was followed by a convention focused on improving women's nationality and harmonizing their private law rights, but it intersected with obligations focused on improving women's work, civil and political rights.[464] Two days before the launch of the World Conference of the International Year of Women in 1975, the federal congress issued two decrees relating to gender equality that reformed and added changes to the federal Constitution, four federal laws and three codes.[465] The reforms not only established that "women and men were equal before the law", but that the constitution

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[463] See *Bernal Gómez 1984* supra at note 452 at 285-286.

[464] See *International Convention for the Suppression of the Traffic of Women and Children*, 30 September 1921, 9 L.N.T.S. 415, became binding to Mexico on 21 may 1956 (D.O.F. 25 January 1936); *International Convention for the Suppression of the Traffic in Women and Children*, concluded at Geneva on 30 September 1921, as amended by the Protocol signed at Lake Success, New York, on 12 November 1947, 53 U.N.T.S 49); *International Convention for the Suppression of the Traffic in Women of Full Age*, 11 October 1933, 150 L.N.T.S. 431, became binding to Mexico on 2 July 1938 (D.O.F. 21 June 1938); *International Convention for the Suppression of the Traffic in Women of Full Age*, concluded at Geneva on 11 October 1933, as amended by the Protocol signed at Lake Success, New York, on 12 November 1947, 53 U.N.T.S. 49, became binding for México on 12 November 1947, (D.O.F. 19 October 1949); *Convention concerning the Employment of Women on Underground Work in Mines of all Kinds*, 30 May 1937, 45 I.L.C. , binding on Mexico 21 February 1939 (D.O.F. 21 April 1938); *Inter-American Convention on the Granting of Civil Rights to Women*, 02 May 1948, 23 O.A.T.S., became binding on México 11 august 1954 (D.O.F. 16 November 1954); *Inter-American Convention on the Granting of Political Rights to Women*, 02 May 1948, 3 O.A.T.S., became binding on Mexico 24 mar 1981 (D.O.F. 29 April 1981).

[465] See *DECRETO Reformar artículos 4,5, 3, y 123 Constitucional, 1974* supra at note 462 at 20.*DECRETO que Reforma y Adiciona los Artículos 4o., 5o., 3o y 123 de la Constitución Política de los Estados Unidos Mexicanos, en relación con la Igualdad Jurídica de la Mujer* [DECRETO Reformar artículos 4,5, 3, y 123 Constitucional, 1974] & *DECRETO de Reformas y Adiciones a diversos artículos de la Ley General de Población. Ley de Nacionalidad y Naturalización. Ley Federal del Trabajo, Ley Federal de los Trabajadores al Servicio del Estado, Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, Código de Procedimientos Civiles para el Distrito Federal y Código de Comercio* (D.O.F. December 31, 1974).

protected the "organization and development of the family".[466] The reforms also recognized that individuals possessed the freedom to decide on the number and spacing of descendants in a responsible and informed manner.[467]

Measures directed at improving women's nationality rights and unifying private law were important to women's equalization efforts because they tackled the sophisticated rhetorical mechanisms by which discrimination against women was grounded on complex legal and jurisdictional grounds. In the private law arena, the Inter-American Convention on the Nationality of Women (IACNW) became a watershed treaty for the engagement of women's rights within family law because it was the first effort at engaging equality between men and women in the context of family law conflicts and the first international legal effort geared at improving the "private law" status of "women through international action."[468] It led to the adoption of conflict of law rules that were grounded on equality principles, which changed the nature and obligations of marriage and in turn led to the elimination of important foundational jurisdictional principles (such as the domicile of the wife having had to correspond to that of the husband) that had the effect of discriminating against women in family law process. [469] Equalization of the right to establish a marital domicile empowered women to object to having to live under the

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[466] See *ibid*. DECRETO Reformar artículos 4,5, 3, y 123 Constitucional, 1974 at 20.
[467] *Ibid*.
[468] See generally Carol Miller, "Geneva – the key to equality": inter-war feminists and the league of nations" (1994) 3Women's History Review 219 at 226 [*Miller 1994*] and Manley O. Hudson, "The Hague Convention of 1930 and the Nationality of Women" (1933) 27 AJIL117 .
[469] Art. 171, CCDF-MLRMF 1928 (as amended by reforms published in the D.O.F., December. 31, 1953, December 12, 1983 and January 7, 1988).

same roof with in-laws or in inadequate living space.[470] It also legally enabled wives to challenge husbands' use of forum shopping[471] as a way to obtain a quick divorce and circumvent alimony or support payments. [472]

The gaps in parallel citizenship rights left by the I.A.C.N.W. were engaged with in the subsequent publication of the UN Convention on the Nationality of Married Women (U.N.C. N.M.W.), which developed the principle of respecting a woman's nationality or her right to change her nationality.[473] This convention dealt with many of the issues that had been left out of the Inter-American convention by providing principles and rules to resolve the conflict of nationality laws that could develop as a consequence of women's loss and gain of marital status.

2.2. Divisions over the Methods Best to Protect Women's Interests

Nonetheless, from the outset there were divisions between states and women themselves over the methods that would best protect women's interests. Opposing views were evident between Latin American and Anglo-American feminists who were divided not with respect to equality in principle, but with the wording of the language of the Convention on the Nationality of Women.[474] Likewise, while most governments supported the

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[470] See Convention on the Nationality of Women, 26 December 1933. O.A.S.T.S.4 at 1; D.O.F. 7 April 1936 (entered into force in Mexico on 27 January 1936).

[471] Forum shopping refers to the situation "[w]hen multiple courts have concurrent jurisdiction over a plaintiff's claims, the plaintiff may forum shop, or choose the court that will treat his or her claims most favorably"."*Forum Shopping*", WEX Legal Dictionary and Legal Encyclopedia online: Cornell University Law School Legal Information Institute < http://www.law.cornell.edu/wex/>

[472] See Manuel F. Chávez Asencio, *La Familia en el Derecho: Derecho de Familia y Relaciones Jurídicas Familiares* (Mexico D.F.: Editorial Porrúa, 2003) at 138-139 [*Chávez Asencio 2003*].

[473] Convention on the Nationality of Married Women, 29 January 1957, 4468 U.N.T.S. (entered into force in Mexico on 3 January 1979, D.O.F. 25 October 1979).

[474] The Women's Consultative Committee on Nationality for The Hague Conference was opposed to the proposal by the Inter-American Commission of Women. They were of the opinion that "the provision of 'no distinction based on sex' would prove to be inadequate to women because it would give 'rise to laws

principle of equal nationality rights, the legal, social and political problems that arose from recognizing husbands' and wives' different nationalities in practice proved to be almost irreconcilable given their larger legal implications. For example, it was not until almost twenty years after the ratification of the I.A.C.N.W that Mexico amended its federal Constitution and the Law of Nationality, changing spouses' nationality rights so as not to automatically "impose" Mexican nationality on spouses.[475] This was because upon the signing of the U.N. Convention, Mexico had made the reservation that it would not apply the Convention in cases where a foreign woman married a Mexican man. At the time, article 30 of the Federal Constitution and article 20 of the Law of Naturalization and Nationality of 1934 provided that foreign wives became "naturalized" Mexicans when marrying a Mexican man and establishing their domicile in Mexico.[476] From the Mexican government's point of view, the inclusion of such a generous law that afforded foreign women quick access to nationality rights was emancipating. Prior to its inclusion foreign wives were tied to the marriage for five years in order to access nationality rights. Because divorce could entail their expulsion from the country, prior laws that did not grant wives automatic nationality rights put them at a disadvantage with respect to

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that required either the husband or wife to change their nationality'". This would work against certain women because "tradition... would dictate that the woman would lose her nationality". The idea that "the principle of the unity of the family was [already] considered paramount to the emancipation of women" and that Latin American feminist thinkers were of the opinion that there was a manipulation of the Commission by northern feminists at the expense of the Hispanic representatives' contribution made more coordinated action difficult. In 1934, American feminist Doris Stevens, chair of the Inter-American Commission of Women, expressed her desire that Europe, Asia and Africa would follow the Pan American Equality Rights Treaty extending "equality to women by one continental stroke". *Miller1994 supra* at note 468 at 227-231; see also Ana Lau Jaive, "En la búsqueda en la igualdad de derechos para las mujeres" (2009) 5 "Temas de Mujeres online at (Revista de Centro de Estudios Históricos e Inter-Disciplinarios Sobre las Mujeres: Facultad de Filosofía y Letras de la Universidad Nacional de Tucumán) at 8 < http://www.filo.unt.edu.ar/centinti/cehim/temas_5.pdf#page=17>.

[475] Article 30 of the *Mexican Constitution of 1917* was changed to include the condition of satisfaction of "fulfillment of other requisite" as a condition to be granted the Mexican nationality.

[476] *Ley de Nacionalidad y Naturalización* (D.O.F. January 20, 1934).

custody and property: thus, this long period put foreign wives at the mercy of their Mexican husbands.[477]

3. Mechanism Erected to Tranversalize Women's Rights

Mexico's turn to the liberal economic model during the 1980's and 90's thus also intersected with a fundamental shift in state policy towards international law.[478] As Lopez-Ayllon notes, economic liberalization had the effect of requiring Mexico to open its legal system through the ratification of international treaties, especially in the areas of trade, environment and human rights.[479] Mexico's endeavour to enter the global market in the 1970's thus crystallized its internationalization efforts.[480] Particularly important

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[477] Moreover, women's automatic nationality rights were a step above the treatment afforded to Mexican wives and their foreign husbands. From early on, Benito Juarez had inserted an article to punish foreigners who sought marriage to a Mexican woman for personal or economic gains. The limitation on foreign husbands and couples from automatic nationality rights was justified by the state's special interest in protecting itself, women and the family patrimony from unions of convenience.[477] This policy was in line with the nationalistic aspiration of the time, when the government sought to increase the population by avoiding problems of lack of nationality and placing reservations on the types of connections to acquire nationality.[477] Nonetheless, the special treatment afforded to women hinged on restricting foreign husbands from the same right, which had the effect of derailing a more balanced equalization of nationality rights in Mexico until 1974. For example while men were recognized as automatically transmitting their nationality in the 1917 federal constitution, it was only in 1969 that a Mexican woman was recognized as transmitting her Mexican nationality to a child born outside Mexico and that husbands were included in the spouses accorded "automatic" nationality rights. Art. 30, *Mexican Constitution of 1917 (*reforms published in D.O. Dec. 26, 1969).

[478] *López Ayllón & Fix-Fierro 2000 supra* at note 188.

[479] *Ibid.* at 164.

[480] It had already made important inroads in liberalizing its economic policy prior to the signing of NAFTA. During the presidency of José Lopez Portillo (1976-1982) Mexico negotiated terms for the entry into the General Agreement on Tariffs and Trade (GATT). While it was not allowed entry until 1986, during this time Mexico undertook other important measures to reduce tariff and non-tariff barriers with its major trade partners. Given the opposition to Mexico's entry into GATT, President de la Madrid attempted in 1984 to negotiate an agreement with the United States that would allow Mexico to access the benefits of gas in the US without having to join. In 1985 the US and Mexico signed an understanding on subsidies and countervailing duty, and in 1987 they also signed an understanding concerning framework principle procedures the consultation required trait in this relation finally in 1989 the then President of Mexico, Salinas met with President Bush to sign the understanding regarding trade and investment facilitation. As a result of these negotiations President Salinas began to relax many of the administrative and regulatory obstacles to or interest investment in Mexico. This culminated with the signature of the North American Free Trade Agreement (NAFTA). For a legal perspective on Mexico's economic liberalization See Lee

were the number of treaties that directly affected individuals, for example in the area of criminal justice, labour, private law, taxation and human rights.[481] With respect to women's rights, in 1981 alone, Mexico ratified and published three international treaties directly related to women's rights.[482]

This was what prompted the Mexican government in 1974 to amend a number of articles and implement a number of constitutional laws to align national legislation with international principles.[483] As a result almost seventy percent of the constitutional reforms that took place from 1982 to 1996 had to do with pillar executive and judicial state institutions and more than seventy percent of the bulk of federal legislation was

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Axelrad, "NAFTA in the Context of Mexican Economic Liberalization" (1993) 11 Int'l Tax & Bus. Law 201.

[481] November 22, 1969 ratified by Mexico on January 9, 1981. Those instruments favouring women were the U.N. Convention on the Political Rights of Women, the U.N. Pact of Civil and Political Rights , the U.N. Convention of the Nationality of Married Women , and the Inter-American Convention of Human Rights.

[482] This was followed by a ratification of a steady stream of international instruments related to women and family matters. Mexico incorporated the U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (D.O.F. May 12, 1981), the Inter-American Convention on the Political Rights of Women (D.O.F. April 28, 1981) and the U.N. Convention on the Political Rights of Women and Elimination of all Forms of Discrimination against Women (D.O.F. April 29, 1981). It also ratified the Convention Belem Do Para in 1998. During Mexico's phase of unilateral divorce law during the 1930's there was also an important movement for the recognition of women's rights at the private law level. In 1933, Mexico incorporated the Inter-American Convention on the Nationality of Women (D.O.F. April, 7, 1936), U.N. Convention on the Nationality of Married Women (D.O.F. October 25, 1979), Inter-American Convention on Women's Political Rights (D.O.F. November 16, 1954). For example in 1991, Mexico ratified the U.N. Convention of the Rights of the Child, which was followed by the ratification of the Convention Belem Do Para in 1998. The U.N. Convention on the Rights of the Child, (D.O.F. January 25, 1991) .Mexico also ratified the Inter-American Convention Belem Do Para (D.O.F. January 19, 1999) in 1999. There was also an important movement for the recognition of women's rights at the private law level. In 1933, Mexico incorporated the Inter-American Convention on the Nationality of Women (D.O.F. April, 7, 1936), U.N. Convention on the Nationality of Married Women (D.O.F. October 25, 1979); Inter-American Convention on Women's Political Rights (D.O.F. November 16, 1954).

[483] See "*DECRETO que Reforma y Adiciona los Artículos 4o., 5o., 3o y 123 de la Constitución Política de los Estados Unidos Mexicanos, en relación con la Igualdad Jurídica de la Mujer*" [DECRETO Reformar articulos 4,5, 3, y 123 Constitucional, 1974] & "*DECRETO de Reformas y Adiciones a diversos artículos de la Ley General de Población. Ley de Nacionalidad y Naturalización. Ley Federal del Trabajo, Ley Federal de los Trabajadores al Servicio del Estado, Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, Código de Procedimientos Civiles para el Distrito Federal y Código de Comercio*", D.O.F. December 31, 1974.

new.[484] These reforms had the effect of diminishing the pre-existing overriding power of the executive but also affected human rights, the National Congress and the judicial and executive structures. The reforms also empowered state governments and added new and more complex legal and institutional structures to put into place these international obligations.[485]However, with Mexico's shift in favour of the liberal economic model also came a: (1) recentralization of private law through the reinforcement of the CCDF as a model law and; (2) the empowerment of human rights actors and the judiciary. This in turn had a paradoxical effect of the development of women's family law rights.

3.1. Federal Template of Private Law Rights

During this period the Mexican legal system was significantly changed through the transplantation of international laws within the CCDF and its diffusion at the federal and state levels. Thus, in the area of women's rights, the CCDF-MCRMF 1928 undertook a comprehensive reform to align women's equality rights as recognized in article one of the Constitution in 1953.[486] Given the power the federal government had over the CCDF-MCRMF 1928, the celebration of the International Year of Women in 1975 marked the beginning of a long stream of women-centred reforms that originated from within the

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[484] *López Ayllón 1997 supra* at note 442 at 187, 211-212 & 222; see also *López Ayllón & Hector Fix-Fierro 2000 supra* at note 445 at 164. While Mexico ratified more than three hundred treaties between 1972 and 1995, more than half of these treaties were incorporated during the negotiations and after the signature of the North American Free Trade Agreement (NAFTA) between Canada, the U.S. and Mexico (1990 to 1995). Of these treaties, forty-nine were related to cooperation, thirty-five to criminal justice, eighteen to trade and commerce, thirty-two to the environment, four to human rights treaties, two to intellectual property rights and ten to labour.

[484] The term "transversalize" used here is a term adopted from article 5, subsection II of the (General Law for the Equal Opportunities between Women and Men *Ley General para la Igualdad de Oportunidades entre Mujeres y Hombres*[GLEOWM](D.O.F. 2 August 2006, which defines it as a process that guarantees the incorporation of gender perspectives within legislation, public policy, administrative activities, economic and cultural activities and takes into account the implications of the incorporation of gender perspectives within the public and private spheres.

[485] *López Ayllón 1997 supra* at note 442at 175 & 187.

[486] Amendment *Mexican Constitution of 1917*, (D.O.F., January 9, 1954).

CCDF-MCRMF 1928, in other words at the hands of the federal government, to be implemented at the state level. In the implementation of Mexico's international women's rights commitments the federally enacted civil code underwent substantial reforms in 1983, 1992, 1994, 1997 and 1998.[487]

The CCDF-MCRMF 1928 was reformed to require both spouses to live together in the conjugal home, as opposed to the previous legislation which required women to live with the husband. It also recognized women's right to oppose men's work when it damaged the moral fabric or structure of the family, whereas previously only men had had a say over women's work.[488] These reforms also permitted married women to recognize children born from before marriage without permission of their husband; previously, such children could live in the conjugal home only with the authorization of the husband. [489]

In 1975 the CCDF-MCRMF 1928 was reformed to require both consorts' judicial authorization to celebrate contracts with each other, when previously only women required this authorization.[490] It also included the idea of responsible paternity by which both spouses had a say over the number and spacing of progeny, the right of conjugal consorts and their descendants to support, the notion of equal economic participation of a consort in the family home and dual responsibility over the management of the home and education of the children. [491] For example the fault that established a right to divorce for men if a wife gave birth to a baby conceived from a person not the husband was

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[487] See *Chávez Asencio 2003 supra* at note 472 at 83-105.
[488] *Aguilar Gutiérrez & Dérbez Muro 1960 supra* at note 256 at 28.
[489] *Ibid.* at 48.
[490] Art. 174, CCDF-MLRMF 1928 (as amended up until 1975).
[491] Art. 165, 168, and 169 *ibid.*

equalized to include husbands.[492] It also changed the presumption through which male descendants over the age of five were put under the care of the mother in cases of nullification of marriage, recognizing the mutual right over the custody and care of children.[493]

In 1983, concubines were incorporated among those having the right of inheritance.[494] Some states even followed by recognizing concubines' support rights.[495] Important reforms with respect to divorce also took place. A new claim for necessary divorce was added to fault-based divorce. Regardless of the causes of separation, consorts separated over two years had a right to invoke "necessary divorce".[496]Subsequent reforms also reduced the high standard of proof and the time frame of adultery-based divorce claims by permitting adultery to be shown through "indirect" methods and took into account continuous commission of adultery.[497] This opened up the possibility of using any method, including" scientific proof", for proving paternity and renovated the statute of limitations on new and recurring adultery claims.[498]

Despite the CCDF-MCRMF 1928's leadership in recognizing women's family law rights during the 1950's and 60's, many states continued to follow the rules established by the previous 1920 Civil Code for the Federal District. In undertaking family law reform

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[492] *Chávez Asencio 2003 supra* at note 472 at 468.
[493] Art. 259 CCDF-MLRMF 1928 (as amended up until 1975).
[494] Art. 1602 and 1635, *ibid*.
[495] See supra at 95.
[496] Art. 233, s. XVIII, in CCDF-MCRMF 1928, in *Chávez Asencio 2007 supra* at note 205 at 83.
[497] Amparo Directo 414/1954, Sexta Época, Vol. XIV, Cuarta Parte, p.9; Amparo Directo 2181/1959, Sexta Epoca., Vol. XXXIIII, Cuarta Parte, p. 69; Anparo Directo 7226.1960, Sexta Epoca, Vol. LII, Cuarta Parte, p. 10 in *ibid.* at 467.
[498] *Chávez Asencio, 2003 supra* at note 472 at 467-468.

many states thus deviated from the federal model, and others simply ignored for quite some time the CCDF-MCRMF 1928 and Mexico's international commitments. For example, eighteen pre-1974 state civil codes maintained the gendered rules that subjected women to the power of the husband, and there were others that assigned women the obligation to take care of the home, the children and the husband.[499] Thus, discriminatory laws, which were thought to have been eliminated through the influence of the federally enacted civil code, continued to be applied by the states. One woman working for an NGO stated:

> "When abroad, the Mexican government signs all possible conventions, those existing, and those not even existing. The Mexican government is very skilled in human rights issues, but internally nothing happens. There is no interest, the government has no intention. One thing is what occurs abroad, in the exterior, but here, treaties and convention are not honoured."[500]

However, pro-women family law reform was neither exclusive to the federal government nor region specific. With respect to marriage, in the 1950-60s, all codes maintained the restriction that prohibited women from remarriage until three hundred days had passed after separation from the previous marriage. The only exception was Campeche, which was more liberal because it permitted women to remarry after thirty days of separation by

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[499] *Aguilar Gutiérrez & Dérbez Muro 1960 supra* at note 256 at 28. The states were Aguascalientes, Campeche, Coahuila, Chiapas, Chihuahua, Durango, Guerrero, Hidalgo, Jalisco, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, San Luis Potosí, Sinaloa, Tabasco and Veracruz. Up to 1995 there were state codes that continued to hold that upon disagreement between consorts, the opinion of the husband would prevail.

[500] Sonia Frias Martinez, *Gender, the state and patriarchy: Partner violence in Mexico* (Austin; University of Texas, 2008) at 186.

providing a medical certificate stating that the Aschhein Zondeck or Friedman pregnancy test had been performed and that it was negative.[501]

In addition both federal and state legislators were at a crossroads with respect to concubinage; radical differences developed between federal and state codes. While it was evident that a great number of unions involved concubinage, to provide express rights to the concubine and her offspring implied fortifying irregular unions and lessening and weakening state marriage.[502] As a consequence, whereas states like Campeche, Jalisco, and Tamaulipas during the 1950-60's continued to restrict concubines' inheritance rights through the maintenance of the CCDF-MCRMF 1928, other states like San Luis Potosi, Veracruz, Sonora and Morelos went beyond the federal civil code model by recognizing unmarried conjugal partners' support and mutual inherence rights. [503]

The CCDF-MCRMF 1928 has traditionally been a geographical template for reform. States felt pressured to undertake reforms already approved within the federally enacted civil code. The constitutional recognition of women's and men's equality in 1974 triggered a nationwide harmonization process to eliminate gender discrimination within the all state codes. While all states ultimately incorporated women's rights within their civil codes, the forms and levels of formal commitment differed among states because of the local invisibility of international law given the federal-state overlap, the foundational interest in maintaining the status quo and power of marriage law. Nonetheless, the use of the federal template as a model law had the effect of its becoming a means to impose the

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[501] *Aguilar Gutiérrez & Dérbez Muro 1960 supra* at note 256 at 25.
[502] *Ibid.* at 52-53.
[503] *Ibid*. at 52.

federal government's private laws within the states and charted the way to a parallel system of women's family law rights.

The differences that began to develop between the federal and state government in regard to women's equality rights within family law nonetheless perpetuated the notion that modernity was synonymous with the federal government while the local government was enmeshed in patriarchy. Between 1928 and 1974, within the CCDF-MCRMF 1928, concubines acquired rights to support if need could be shown, and investigation of paternity was allowed. This contrast to other state codes which had already incorporated important women's family law rights long before the CCDF-MCRMF 1928, but they were either unacknowledged or played down in the judicial and academic literature. For example, the Civil Code for the State of Morelos of 1945 stated that the obligation to give economic support corresponds first to married consorts, but that concubines also had the right to claim for support when the requisites of law were fulfilled. A full twenty-five years before its inclusion in the federally enacted civil code, the Civil Code of Tlaxcala in 1976 had already enshrined marriage-like mutual support rights for concubines. The Civil Code of Tlaxcala recognized that unmarried partners owed each other support on the same terms and in the same quantities as married consorts.[504] It also gave concubines priority in payment of support rights with respect to married consorts.

3.1.1. Taking Advantage of the States' Lack of Real Private Law Autonomy

[504] While the Tlaxcala state legislature highlighted the importance of concubinage unions in the familial landscape, it reaffirmed the objective of the state to encourage concubines to marry. For its justifications, the code stated that concubinage is many times the result of a conjugal union oficialized under religious law which does not achieve the state of civil marriage due to the ignorance or indolence of the parties.

What effect did the reinforcement of the CCDF-MCRMF 1928 as a model of reforms have on women's family law rights? The dichotomization of women's rights on the basis of the federal-state division obscured the effect on state family law reform of the top-down (federal-state) pressure to follow the federal civil code model. It also affected how this process intersected with issues that did not exist at the federal legislative level, like a state's autonomy, local partisan struggles and contextualized controversies relating to the social role of women, family and marriage.[505]

From the viewpoint of the states, the technologies of power that had been mobilized by internationalization were being used by the federal government "to take advantage of the legal system's lack of [real] autonomy" at the sub-national level.[506] Because international pressure to implement treaties tended to focus on the CCDF-MCRMF 1928, the typology of reform established by the federal government reiterated the idea that rights reform was to be implemented to appease international obligations but without much discussion of the long-term implications of internationalization at the federal and state levels.

Internationalization thus appeared more as a rhetorical ploy to justify the federal government's claim over private law than as an effort to protect women. An example of this is how implementation of the 1991 Convention on the Rights of the Child and the 1992 Inter-American Convention on the Conflict of Laws in Relation to International Adoption of Minors only first appeared in the federally enacted civil code in 1998, almost

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[505] It is difficult to find such inclusive accounts in the legal literature with respect to state-level family law reform. But a look at the tensions that intersected in the development of family violence during this era draws attention to the legal, political and identity issues that intersected in state family law reform.

[506] Yves Dezalay & Bryant G. Garth, *The internationalization of palace wars: lawyers, economists, and the contest to transform Latin American states* (Chicago: University of Chicago Press, 2002) at 56 [*Dezalay & Garth 2002*].

seven years after the publication of these treaties. [507] More than transforming women's rights, internationalization created a shift in politics and law-making power in Mexico.[508]

The technologies of power that had been mobilized by internationalization were perceived by states as being used by the federal government "to take advantage of the legal system's lack of [real] autonomy" at the sub-national level. [509] This had two important effects for family law: (1) it reinforced a two tiered system of family law (the top level comprised of rights recognized at the federal level and the lower level of rights recognized at the state level), and; (2) it challenged certainties with respect to the proper place of international law in the national political and legal landscape.

It contrast to the typical Kelsenian pyramid made up of a single tiered structure (consisting of the constitution, constitutional laws and international laws, federal laws, state constitutions and state laws) this system is integrated by two sets of family law rights (federal and state) operating in tandem but not always in agreement with each other. The federal pyramids of rights is constituted by the allocation of power enumerated in article 73 of the Constitution (including the implicit powers). The state or "local pyramid" is comprised of the rest of the matters not attributed constitutionally to the Federation.

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[507] Jorge Alberto Silva, " El impacto de los convenios internacionales sobre la legislación interna mexicana relativa a la adopción internacional de menores" (2003) 4 Revista de Derecho Privado at 165-168. Silva's description of some of the key measures taken by the federal government to implement international adoption at both the federal and state levels are illustrative of the difficulties of the federal-state divisions of power and the complex political context that internationalization policies produce at the national level.
[508] See *López Ayllón 1997 supra* at note 442 at 212.
[509] See *Jiménez García 2003 supra* at note 16 at *30*.

The dual system of private law federalism that prevailed in practice became the focus of discussion for the first time. As a result the authority of the federal government to involve itself in the civil law arena came up for debate before the Supreme Court in 1993.[510] In binding case law the Court stated that while it was true that no article of the Constitution expressly gave the federal congress power to enact the CCDF-MCRMF 1928, implicit powers to legislate in private law matters could be found in articles 14, 16 and 17 of the Constitution.[511] Moreover, article 73 of the original text of the Mexican Constitution of 1917 Constitution had contained rules for the appointment of magistrates and judges for the Federal District and the possibility of creating a law to regulate the Federal District's judiciary. This prompted scholars to argue that the CCDF-MCRMF 1928 and its predecessors (Civil Codes of 1870 & 1884) lacked constitutional legitimacy.[512]

Internationalization and the long reach of the federal government power had also cast doubt on the proper place of international law within Mexico's legal system. Article 133 of the *Mexican Constitution of 1917* establishes that international treaties "made, or which shall be made, by the President of the Republic with Senate's consent" are to be supreme law and that all state judges are bound to apply them, even if they are contrary to state laws or constitutions.[513] On the basis of this principle, international treaties are self-executing and are thus "laws" in the full sense of the word.[514] However, doctrinal

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[510] See *Jiménez García 2003 supra* at note 16 at 30.
[511] *Ibid*.
[512] *Ibid*.
[513] Art. 133, *The Political Constitution of the Mexican United States*,*UNAM 2005* supra at note 450.
[514] *See* Apéndice 1985, segunda sala, parte III, contradicción de tesis 421, p. 751. In relation to the Paris Convention for the Protection of Intellectual Property the Court stated that "according to article 133 of the Constitution... [the convention] has the category of Supreme Law of the Union: requiring competent authorities to abide them...".

interpreters have observed that certain dispositions of international law do require activation by a subsequent legislative act.[515]

During the 1980's the Supreme Court maintained the position that international treaties and federal laws had the same hierarchy.[516] This meant that "international treaties could not be used as criteria to determine the constitutionality of a law nor vice versa".[517] In case of conflict between treaties and laws grounded on the Federal Constitution, the supremacy clause did imply a preferential application of international treaties *vis-à-vis* constitutionally grounded federal laws.[518] In practice these criteria had the effect of shielding national laws and government acts from international obligations.

In the late nineties, the treatment of international law within the Court began to take a different turn. Changing its previous criteria, the Court found that the laws created by treaties ratified and published in the Federal Official Reporter "should be understood as incorporated into national law" in terms of article 133 of the Constitution, and were for this reason "of obligatory observance and of direct application".[519] The Court began to

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[515] See *López Ayllón 1997 supra* at note 442 at footnote 44 at 188 and Olga Sánchez Cordero de García Villegas, *La Constitución y los Tratados Internacionales. Un Acercamiento a la Interpretación Judicial de la Jerarquía de las Normas y la Aplicación de los Tratados en la Legislación Nacional* (Culiacán: Supremo Tribunal de Justica del Estado de Sinaloa, 1999) at 4.

[516] "LEYES FEDERALES Y TRATADOS INTERNACIONALES.TIENEN LA MISMA JERARQUIA NORMATIVA", Amparo en Revision 2069/91. (30 de junio de 1992).

[517] "TRATADOS INTERNACIONALES. EL ARTICULO 133 CONSTITUCIONAL, ULTIMA PARTE, NO ESTABLECE LA OBSERVANCIA PREFERENTE SOBRE LAS LEYES DEL CONGRESO DE LA UNION EMANADAS DE LA CONSTITUCION FEDERAL" Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito, Amparo en Revisión 256/81. (9 de julio de 1981); "TRATADOS INTERNACIONALES Y LEYES DEL CONGRESO DE LA UNION EMANADAS DE LA CONSTITUCION FEDEAL. SU RANGO CONSTITUCIONAL ES DE IGUAL JERARQUIA." Séptima Época, tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito. Semanario Judicial de la Federación, Tomo 151-156, Sexta parte, pagina. 196.

[518] *Ibid.* .

[519] Contradiccion de Tesis 3/92, session de 2 de marzo de 1994. In this case this meant that the Protocol on the Uniformity of Power of Attorney, not the local public notary law, civil codes or Commerce Code

approach invocations of application of international law as a conflict of law issue as opposed to a hierarchy of law problem.[520] In 1998, the National Union for Air Transit Controllers (*Sindicato Nacional de Controladores de Transito Aéreo*), grounding their claim on Agreement 87 of the International Labour Organization (ILO) relating to union rights, asserted through an *Amparo* proceeding, the unconstitutionality of a federal worker law that limited to one the number of unions that each government dependency could register.[521] The Court reasoned that because the right to free association was a constitutionally protected right, the rights found in the ILO Agreement prevailed over the federal law.[522] By recognizing that international treaties prevailed over federal law, the Court had begun to overturn the longstanding criteria that rendered international treaties almost unenforceable internally.

3.2. Empowerment of Human Rights Actors

Given the changes to the "size, function and relations between the different powers", liberalization of the economy gave international law and external agents a much greater weight within Mexico's legal system than ever before and made both part of the national framework.[523] As a result, new specialized tribunals, national human rights institutions, ombudsmen and independent regulating bodies appeared within the legal framework.[524]

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should be used to examine the formal validity of a power of attorney conferred by a foreign company that is to have effect within Mexico.

[520] See *López Ayllón 1997 supra* at note 442 at 190. Lopez-Ayllon notes that the recognition of different spheres of applicability assured the legislative "harmonic coexistence" of international law with national laws.

[521] "TRATADOS INTERNACIONALES SE UBICAN JERARQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN SEGUNDO PLANO RESPECTO DE LA CONSTITUCION FEDERAL". Tesis de Pleno LXXVI/99, Amparo en revisión 1475/98. (Octubre 28, 1999)

[522] *Ibid.*

[523] *López Ayllón 1997 supra* at note 442 at 187.

[524] *López Ayllón & Fix-Fierro 2000 supra* at note 445.

These institutions also became consequential in enabling justice and have grown to influence and induce national policy for the protection of vulnerable groups.

Internationalization not only expanded the players and interests for competing legal and political reform, it also changed the federal architecture by changing and sanctioning new entities and policies empowered by their capacity to criss-cross the different scales that family law governance intersected. These institutions became consequential in enabling justice and have grown to influence and induce national policy for the protection of vulnerable groups. For example with respect to women's rights, the 1981 ratification of the U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) resulted in the creation of two new government institutions to transversalize women's rights.[525] In 1996 President Ernesto Zedillo published the National Program for Women, or "*Programa Nacional de la Mujer 1995-2000*" (PRONAM), and in 1998 established the "*Comisión Nacional de la Mujer"*, or National Commission of Women, as an organ of the *Secretaria de Gobernación* to put in place "mechanisms" within the government to coordinate actions and programs to implement CEDAW.[526] PRONAM's activities intersected with the areas of women's health and education.[527] Replaced by the National Women's Institute (Instituto Nacional de las Mujeres, INMUJERES) in 2001 under the presidency of President Vicente Fox, the new "decentralized" women's rights entity was given a budget "almost ten times the size of

[525] See *Decreto por el que se aprueba el Programa Nacional de la Mujer 1995-2000* (D.O.F., August 21, 1996).
[526] See *Decreto que crea la Coordinación General de la Comisión Nacional de la Mujer* (D.O.F. August 31, 1998).
[527] *Ibid.*

PRONAM's" and was empowered to make policy recommendations.[528] Its work included helping to streamline U.N. obligations in the area of children's rights within Mexican judicial practice, undertake work to protect the rights of indigenous women, eliminate trafficking in women and violence against women, modernize labour legislation, lobby for equal pay for women and access to adequate health and education for poor women and "incorporate a gender approach into public spending and budgeting".[529] As Lopez Ayllon notes, given the changes to the "size, function and relations between the different powers" liberalization of the economy had the effect of giving international law and external agents a much greater weight within Mexico's legal system than ever before, making both part of the national framework.[530]

3.2.1. Problems with the Mechanism Used to Implement Women Rights

What effect did the empowerment of human rights actors have on women's family law reforms landscape? It changed the mechanisms used to implement women's rights, modified the political and legal architecture of women's family law rights and radicalized political division over reform.

An important issue was the mechanism used to implement women's rights, in other words the way that gender rights were "transversalized".[531] An example of this is the *de facto*

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[528] Victoria E. Rodríguez, *Women in Contemporary Mexican Politics* (Austin: University of Texas Press. 2003) at 123.
[529] Fox's designation of the head of INMUJERES, for example, came with considerable criticism because its director, Patricia Espinosa, was opposed to abortion and the institution had been constituted predominantly by women from the PAN party. See *Dezalay & Garth 2002 supra* at note 506 at 42.
[530] *López Ayllón 1997 supra* at note 442 at 187.
[531] The term "transversalize" used here is a term adopted from article 5, subsection II of the General Law for the Equal Opportunities between Women and Men (Ley General para la Igualdad de Oportunidades entre Mujeres y Hombres, (D.O.F. 2 August 2006) [LGIPMH] which defines the terms as a process that guarantees the incorporation of gender perspectives within legislation, public policy, administrative

and *de jure* effects of the main law governing the instrumentalization of CEDAW implementation, the General Law for Equal Opportunities between Women and Men (*Ley General para la Igualdad de Oportunidades entre Mujeres y Hombres [LGIPMH]*) decreed in 2006.[532] Atypical of federal law templates, this law begins with a combined federal-state-federal district-municipal jurisdictional framework for operation.[533] For example, among the strategies undertaken to "transversalize" CEDAW obligations was the creation of the National Program for the Equality of Women and Men (*Programa Nacional para la Igualdad entre Mujeres y Hombres* [PROIGUALDAD]. PROIGUALDAD was a project geared at "[i]mpulsing the harmonization of national legislation in line with international obligations ... in coordination with the three powers of the federal entities and the mechanism for the advancement of women".[534] Identifying clearly what the actual limits of gender policy mainstreaming power are has been problematic as well. An example of this is how harmonization of laws appears to be the most important compliance action taken by the "National System for the Equality Between Women and Men" (*Sistema Nacional para la Igualdad entre Mujeres y Hombres* [SNIMH]) according to Mexico's 2010 CEDAW report. This activity or objective is barely mentioned, however, in the *LGIPMH* and is buried as a subsection underneath the very general heading of right to equal access to social rights for women and men. Moreover, state-level equality laws like that of Sonora, do not mention harmonization of laws with international treaties as a

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activities, economic and cultural activities and takes into account the implications of the incorporation of gender perspectives within the public and private spheres.

[532] "*Ley General para la Igualdad de Oportunidades entre Mujeres y Hombres" (* D.O.F August 2, 2006) [LGIPMH] .

[533] I say atypical because the law sidesteps the fact that an important part of the issues that relate to implementation CEDAW are in fact of state jurisdiction.

[534] UNCEDAW, 52nd Sess., UN Doc. CEDAW/C/MEX/7-8 (2010) at 1.

state-level undertaking. Thus, while states may retain *de jure* legislative private and criminal rights within their territory, it is the federal government that now hold most of this *de facto* power.

Also problematic has been the asymmetry between the powers afforded to the different levels of government. For example, to coordinate and harmonize laws in line with CEDAW, the *LGIPMH* created three institutions to instrumentalize gender policies across the national structure: the SNIMH, the PROIGUALDAD and the Observance in the Area of Equality Between Women and Men (*Observancia en materia de Igualdad entre Mujeres y Hombres*).[535] The harmonizing aims have been combined with a working agenda between federal public administration, state-level women's rights institutions and non-government organizations.[536] This system falls under the supervision of the National Commission for Human Rights (NCHR) and is coordinated by INMUJERES, both federal entities.[537] While this multi-scaled framework introduced by CEDAW obligations recognizes the different jurisdictional competencies of the federal, state and municipal levels, it nonetheless extends to the federal government and certain political circles wide powers of policy making and coordination, which in effect override sub-federal powers.[538] The technologies used to infiltrate equality rights into the different spheres and levels of governance under these structures required jurisdictionally tangled and sometimes politically contradictory structures that empowered some jurisdictional players

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[535]Art. 18, LGIPMH. See also UNCEDAW, 52nd Sess., UN Doc. CEDAW/C/MEX/7-8 (2010) at 3.
[536] UNCEDAW, 52nd Sess., UN Doc. CEDAW/C/MEX/7-8 (2010) at 2.
[537] UNCEDAW, 52nd Sess., UN Doc. CEDAW/C/MEX/7-8 (2010) at 3
[538] See art.7-13 *GLEOWM supra* at 484; see also INMUJERES's "PROIGUALDAD" project otherwise titled the *Programa Nacional para la Igualdad entre Mujeres y Hombres 2009*-201 (D.O.F. 18 August 2009).

at the expense of others. Thus, the discourse of democratization and human rights impacted governance by becoming a powerful technology to scrutinize previously restricted areas.[539]

Problematic was also how both governmental and non-governmental feminist associations implemented gender policies. Institutions and agents using the discourse of democratization, human rights and social policies became central in servicing the state with "short term courses on leadership, or conducting surveys on the efficiency of poverty eradication programs for the Mexican government, the World Bank or other institutional agencies".[540] As a result, the extension of status rights to human rights activists modified the political and legal architecture, which in turn exacerbated gender politics.

Cos-Montiel accounts for how gender mainstreaming in Oaxaca was successful owing to the gender training of local government officials "who had the knowledge on the nuts and bolts of the intricate governmental bureaucracy".[541] The officials were selected not only because they could help improve the outcome of gender policy but also because they "could make political gains from" its use.[542] While they were labelled "women's allies" by their co-workers, these otherwise powerless officials suddenly "started to enjoy importance—and popularity" from their "regular meetings with the governor and

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[539] *Ibid*.
[540] Verónica Montecinos, "Feminists and Technocrats in the Democratization of Latin America: A Prolegomenon" (2001) 15 International Journal of Politics, Culture, and Society 175 [*Montecinos, 2001*].
[541] Francisco Cos-Montiel, "Macro or Microstreaming Gender Economics? Engendering Economic Policy in Mexico", paper presented at the International Conference Engendering Macroeconomics and International Economics, University of Utah, Salt Lake City June 20-22, 2004, at 18, online at < http://network.idrc.ca/uploads/user-S/11480925361Engendering_Economic_Policy_in_Mexico.doc.>
[542] *Ibid.*

international officials".[543] By becoming gender advocates, officials "had [a political] incentive to integrate a gender perspective into their work to gain access to 'new spaces'".[544]

Both governmental and non-governmental feminist organizations were criticized for their use of gender politics as a way to "legitimate new political positions within the state" through the use of feminist NGOs as "gender experts" rather than women's advocates as well as their playing into the hands of neoliberal patriarchal forces through the "institutionalization" of the women's movement.[545] As one author notes, while the state "became [more] accessible to some women (middle-class professionals and gender experts), and some policy proposals received attention", it also marginalized other feminisms.[546] Living with the persisting problem of "insufficient funding, staff, and legitimacy within the state bureaucracy" now women's groups were accused by their own peers of demobilizing "autonomous women's organizations', "co-opting or ignoring women's groups" and increasing the economic and mobilization gap between "working-class women (the clients of government-sponsored programs) and those with the professional credentials required to compete successfully for state funding".[547] As a result, while internationalization was being applauded with aplomb internationally, from the local political perspective, the rhetoric of rights shifted human rights promotion from "giving voice to the demands of working and marginalized urban poor" to becoming the

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[543] *Ibid.*
[544] *Ibid.*
[545] See generally *Montecinos 2001 supra* at 540.
[546] *Ibid*. especially at 188.
[547] *Ibid*.

tool for the political elite and international and government-financed outsourcing institutions.[548]

3.3. Empowering the Judiciary

Internationalization of private and public law spheres and borrowing of common law sourced institutional reforms in Mexico changed the face of the Mexican civil law system. Judicial reform granted the Supreme Court power to act as a constitutional court, and its decisions were strengthened by making them binding on the rest of the judiciary.[549] The reforms, in line with the common law system of *stare decisis*, amplified the authority of the court by according it power to unify federal court interpretations and give certain court decisions more precedential weight.[550] In the area of family law for

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[548] *Ibid*.

[549] For a very practical description of the systems of binding case law in Mexico *See* Jose Maria Serna de la Garza, "The Concept of Jurisprudencia in Mexican Law", (2009) I:2 *Mexican Law Review* 131-145. The Supreme Court as a constitutional court has authority to resolve disputes brought to it under two different proceedings, "*controversia constitucional*" (or constitutional controversy) and "*acción de inconstitucionalidad*" (action of unconstitutionality). Under the first option, the different levels and branches of government, at the both the federal and state levels, can defend their jurisdictional sphere of competence against other organs or branches based on a claim of a constitutionally recognized competence. Under the second option, the Supreme Court is empowered to exercise abstract control of the constitutionality of laws and treaties approved by both federal and state legislatures. However, this mechanism of abstract constitutional control of statute laws can only be exercised by legislative minorities, the Federal Attorney General, political parties and the National Commission on Human Rights, and only for a period of up to 30 days after their ratification.

[549] As Garza points out, there is a dual system of case law in Mexico: the system of *tesis, a* non-binding source of case law and *jurisprudencia,* a form of binding case law. *Tesis* are non-binding case law that has been given by the Supreme Court working in Chambers, the Collegiate Circuit Courts or the Electoral Tribunals. *Tesis* are not authoritative, but do have persuasive force. *Jurisprudencia* is case law that has been given by the Supreme Court working *en banc* or in Chambers, the Collegiate Circuit Courts or the Electoral Tribunals. Its binding effect depends on the system from which it was derived. The difference between *tesis* and *jurisprudencia* as authoritative sources is their respective gradations within the system. Under the Mexican case law system binding or persuasive case law can only be given by the federal courts and can have binding authority only within the judicial branch. *Jurisprudencias* and *tesis* are decisions which are interpretations of the Constitution, federal and state statutes/rulings and of international treaties. *Ibid.*

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example, the opinion of the Mexican Supreme Court has become particularly important given the increasing binding force that judge-made law has gained in Mexico.

3.3.1. Consequential in Shaping Women's Family Law Rights

What effect did the empowerment of the judiciary have on women's family law reform? Internationalization in turn has transformed courts into a powerful tool from the late 1990's up to the present to advance women's family law rights. During this period the Mexican judiciary became especially consequential in shaping women's family law rights policy, especially in the controversies surrounding recognition of equality rights within the civil codes. [551]

Tribunals. *Tesis* are not authoritative, but do have persuasive force. *Jurisprudencia* is case law that has been given by the Supreme Court working *en banc* or in Chambers, the Collegiate Circuit Courts or the Electoral Tribunals. Its binding effect depends on the system from which it was derived. The difference between *tesis* and *jurisprudencia* as authoritative sources is their respective gradations within the system. Under the Mexican case law system binding or persuasive case law can only be given by the federal courts and can have binding authority only within the judicial branch. *Jurisprudencias* and *tesis* are decisions which are interpretations of the Constitution, federal and state statutes/rulings and of international treaties. *Ibid.*

[551] The empowerment of the judiciary became especially consequential in recent legal changes recognizing support and property rights in favour of concubine partners and measures protecting married women's economic and non-economic contributions at divorce even when a separation of property agreement is at stake. See art. 267, secc. VII, CCDF 2000, supra at note 10. This article nullifies to some extent the division of property at divorce when it can be shown that the claiming spouse was responsible for child and homecare work, and no real properties were acquired or were of substantially lesser value than those of the other spouse. See also art. 288 CCDF 2000, *ibid.* which guarantees support rights to spouses who have dedicated the majority of their time to child or homecare work. A recent court decision has given a broader interpretation to article 267 sec. VII by extending it to spouses who stayed at home but did not have children, and where caretaking was the main but not only responsibility. See "COMPENSACIÓN DE "HASTA EL CINCUENTA POR CIENTO" DE LOS BIENES ADQUIRIDOS DURANTE EL MATRIMONIO COMO CONSECUENCIA DEL DIVORCIO EN EL RÉGIMEN DE SEPARACIÓN DE BIENES (ARTÍCULO 267, FRACCIÓN VI, DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL, VIGENTE A PARTIR DEL CUATRO DE OCTUBRE DE DOS MIL OCHO). ELEMENTOS DE PROCEDENCIA" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; XXXI, Febrero de 2010; Pág. 2803.This has now become binding case law. See also "DIVORCIO. COMPENSACIÓN EN CASO DE. INTERPRETACIÓN DE LA FRACCIÓN VI DEL ARTÍCULO 267 DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL, VIGENTE DEL 4 DE OCTUBRE DE 2008 AL 24 DE JUNIO DE 2011" [J]; 10a. Época; 1a. Sala; S.J.F. y su Gaceta; Libro VIII, Mayo de 2012, Tomo 1; Pág. 716.

The Court's power has become most visible in the criminalization of marital rape, behaviour that up to 2005 was treated only as "*an inappropriate exercise of a right...*".[552] In 1994, the Court argued that "*In order to resolve over the current issues, we must first take into account the objectives of the institution of marriage, in which the procreation of the species is found; thus it is logical to deduce that the spouses should always provide for sexual relations when this (act) is performed in a normal manner…*". At the time, the decision of the Court went against all criminal codes that defined rape. This language and reasoning supported the dismissal of wives or ex-wives claiming rape by their spouses.[553] What is most incongruous is that this idea of marital obligation subsisted despite reforms in the early twentieth century eliminating the requisite of procreation as one of the objectives of marriage.[554]In a surprising turn of events, the Supreme Court in 2005 reversed this interpretation of marital obligation and stated that "*when spouses obtain copulation by violent means, whether physical or moral*" the crime of rape is

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[552] "*VIOLACION ENTRE CONYUGES, SINO DE EJERCICIO INDEBIDO DE UN DERECHO. NO CONFIGURACION DEL DELITO DE"*. Octava Época, Semanario Judicial de la Federación, Instancia: Primera Sala, Tomo: XIII-Mayo, Tesis: 1a./J. 10/94, Página: 78.

[553] Doctrinaire interpreters of Mexican family law had long ago established an implicit conjugal obligation of "debito conyugal" (conjugal debt). This subjective duty consists of the obligation that spouses have to each to other to have sexual relations when either of them "demands or asks". This obligation was/is considered to be part of the biological and legal requirements needed to preserve the status of the "family" as a subject of public order. To this way of thinking, perpetuation of the species is "the main" objective of marriage, and thus the "conjugal debt" is a necessary element in the realization of the implicit/explicit objective. Manuel Chávez Asencio, "El Deber Jurídico Familiar" (1981) 13 Jurídica 331 at 352-352.

[554] The principle of "*debito conyugal*" or conjugal obligation nonetheless prevailed through prototypes of article 147 of the FCC supra at note 14**,** which states that "*Any condition contrary to the perpetuation of the species or of mutual assistance between spouses shall be considered to not be put forth*", and family law treatises. Thus, the Supreme Court, in an effort protect the institution of marriage within the Mexican tradition, which was made up of implicit obligations founded on its Roman Catholic beliefs, had gone beyond the law and even against it to define and state its objectives.This is despite the fact that, due to promotion of laws for the protection of domestic violence, some states, like Puebla, had even provided additional sanctions when rape was committed by a spouse or family member.

committed.[555] The Supreme Court found that there was no legal justification for not charging a husband for the crime of rape committed against his wife.

Nonetheless, the strengthening of the federal courts have helped chip away at persisting forms of sex-based discrimination within the civil codes while many times upholding women's privileges in certain family law realms. In 2005 the Court found that articles of the procedural codes which impose on wives an additional requirement in a request for separation than that which is required of husbands violates the principles of gender equality.[556] Articles that require married women to obtain judicial authorization to celebrate a contract with her husband and restrict married consorts from contracting are discriminatory because they imply a "discriminatory treatment in detriment to wives" that puts her in position of disadvantage with respect to her husband.[557] Laws that regulate the economic relationship of consorts through "*Sociedad Legal*" and establish that married women can only administer the marriage estate with the consent of the husband violate

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[555] "*VIOLACIÓN ENTRE CÓNYUGES, DELITO DE*". [J]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; XXIII, Febrero de 2006; Pág. 615. *Cff*. "*DIVORCIO. LA NEGATIVA DEL DÉBITO CARNAL AUN CUANDO NO SE CONSIDERA COMO CAUSA DE AQUÉL, CONSTITUYE UNA CONDUCTA OFENSIVA QUE POR SU GRAVEDAD PUEDE ACTUALIZAR LA CAUSAL DE INJURIA GRAVE (LEGISLACIÓN DEL ESTADO DE OAXAC*A)", Amparo directo 595/2004. 14 de enero de 2005. [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; XXII, Diciembre de 2005; Pág. 2668; "*MATRIMONIO, INCUMPLIMIENTO DE LOS DEBERES DEL. CUMPLIMIENTO FORZOSO INEXIGIBL"*, Amparo directo 977/81. Carlos Posada Amador. 21 de abril de 1982, [TA]; 7a. Época; 3a. Sala; S.J.F.; 157-162 Cuarta Parte; Pág. 93 [translation by author]. In this case the court found that while the married consorts have a conjugal duty to each other, judicial measures are not the "adequate mechanisms" to obtain compliance; thus, that is why incompliance with conjugal duties is best served by remedying it with divorce.

[556] See "*IGUALDAD JURÍDICA ENTRE EL VARÓN Y LA MUJER. EL ARTÍCULO 167, PÁRRAFO PRIMERO, DEL CÓDIGO DE PROCEDIMIENTOS CIVILES DEL ESTADO DE NUEVO LEÓN (VIGENTE HASTA EL VEINTIOCHO DE ABRIL DE DOS MIL CUATRO), VIOLA ESA GARANTÍA CONSTITUCIONAL*". Amparo en revisión 568/2004. [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; XXII, Octubre de 2005; Pág. 2361

[557] See "COMPRAVENTA. LOS ARTÍCULOS 170 Y 2131 DEL CÓDIGO CIVIL DEL ESTADO DE MICHOACÁN, VIGENTES HASTA EL VEINTIDÓS DE SEPTIEMBRE DE DOS MIL CUATRO AL EXIGIRLE A LA MUJER CASADA AUTORIZACIÓN JUDICIAL PARA CONTRATAR CON SU CÓNYUGE, VIOLAN LA GARANTÍA DE IGUALDAD JURÍDICA"[TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; XXII, Agosto de 2005; Pág. 1859.

the constitutional equality guarantees.[558] In 1998 the Court found that article 282 of the CCDF-MCRMF 1928, which privileged the mother with respect to the custody and care of children under age seven, was in line with the constitutional principles of gender equality.[559]

4. The New Symbolism of Family Law Change

Given the greater stakes at play, together these developments have heightened the symbolism of family law change in Mexico. The potential for a full-fledged war over family issues in Mexico has not passed unperceived, neither by the Supreme Court, nor by the federal government or state legislatures. An example of the increased tensions over family law change in Mexico is how the question of abortion reform has already become a powerful political and regional divider.

Previous attempts at profound liberalization of reproductive rights had been attempted by the State of Chiapas, only to be drowned in political turmoil. In December 1990 the governor, Jose Patricio Gonzalez Garrido, presented an initiative of reforms to the Chiapas Criminal Code whereby substantial reforms to abortion were provided.[560] The reforms were approved but were never put into force, and the proposal was put in

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[558] SOCIEDAD LEGAL. EL ARTÍCULO 220 DEL CÓDIGO CIVIL PARA EL ESTADO DE HIDALGO, VIGENTE HASTA EL 8 DE NOVIEMBRE DE 1983, QUE ESTABLECE QUE LA MUJER CASADA SÓLO PODRÁ ADMINISTRARLA POR CONSENTIMIENTO DEL MARIDO O EN AUSENCIA O IMPEDIMENTO DE ÉSTE, VIOLA LA GARANTÍA DE IGUALDAD JURÍDICA. Amparo directo en revisión 1184/2003. [TA]; 9a. Época; 1a. Sala; S.J.F. y su Gaceta; XVIII, Diciembre de 2003; Pág. 87.

[559] See "CUSTODIA DE MENORES. EL ÚLTIMO PÁRRAFO DEL ARTÍCULO 282 DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL, QUE LA CONCEDE A LA MADRE RESPECTO DE LOS HIJOS MENORES DE SIETE AÑOS, ES ACORDE CON LO PREVISTO POR EL ARTÍCULO CUARTO CONSTITUCIONAL" [TA]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo VIII, Agosto de 1998; Pág. 845.

O[560] In this proposal, termination of a pregnancy was permitted during the first 90 days of pregnancy in the case of agreement between a couple and in the case of single mothers. These reforms were presented as an option within the context of family planning methods.

"temporary suspension" because of the political disputes that it caused both locally and nationally.[561] Four years later, under a new governor, a new code was implemented in which the sections relating to abortion were more restrictive than those in the previous code and provided for harsher sanctions on abortion in certain circumstances.

After the failed attempts in Chiapas, public discussions on decriminalizing abortion were revived with the story of Paulina. Paulina, a thirteen-year-old girl from the state of Baja California became pregnant after being raped by a burglar who had entered her home.[562] Despite having the right according to the Criminal Code to access legal abortion and having obtained the necessary authorization from the justice department, delays by officials and anti-abortion groups caused Paulina to decide to give birth to a baby boy.[563] Paulina's story had a national impact until 2002, when non-governmental organizations filed a complaint before the Inter-American Commission of Human Rights (IACHR) of the OAS against Mexico. The complaint was never decided by the IACHR because a settlement was reached between Paulina and the Government of Baja California in 2006. In this unprecedented case, the agreement provided for damages, public acknowledgement of responsibility by the Government of Baja California and other compensations of a social and economic nature.[564]

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[561] Candelaria Rodríguez, "El primer intento por despenalizar el aborto en México fue en Chiapas en 1990", CIMAC Noticias, TUXTLA GUTIERREZ, Chiapas, AGO 10, 2000 (http://www.cimac.org.mx/noticias/00ago/00081007.html)
[562] See *Paulina del Carmen Ramírez Jacinto v. Mexico* (2007), Inter-Am.Comm. H.R. No. 21/07, Annual Report of the Inter-American Commission on Human Rights: 2007, OEA/Ser.L/V/II.130.
[563] *Ibid.*
[564] *Ibid*.

In contrast, in the interim between the beginning of the Paulina case and the agreement, the state of Guanajuato was in the midst of a reform of abortion restrictions, but in the other direction. In August 2000, the legislature of the state of Guanajuato approved a series of reforms that resulted in denying women the possibility of abortion in cases of rape; these reforms were approved in a majority PAN legislature.[565] However, after a national dispute on these conservative reforms, they were vetoed by the then governor, Ramon Martin Huerta. At the time of the proposed reform, Guanajuato was the home state of the president, Vicente Fox; but politically, Guanajuato was considered the "symbolic capital of Catholic Mexico".[566] However, the veto was stalled due to the local and national discussions relating to abortion. The most conservative state was anticipating the results from the most liberal of the quasi-states, the Distrito Federal.

In response to the controversy, in 2000 Mexico City eased its ban on abortion by adding several new exceptions, including preserving the woman's health, and by reducing the prescribed prison terms.[567] The new head of government of the Federal District, Rosario Robles of the "leftist party" PRD, presented a proposal for abortion that would decriminalize abortion in cases of rape and reduce the sanctions on women who illegally aborted.[568] This law, called the "*Ley Robles*", was approved by the legislature of the

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[565] Sonia del Valle, "Exigen manifestantes que el gobernador guanajuatense vete las reformas sobre aborto", *CIMAC Noticias* .(24 August, 2000), online CIMAC Noticias : (http://www.cimac.org.mx/noticias/00ago/00082401.html)

[566] See Daniel Newcomer, "The Symbolic Battleground: The Culture of modernization in 1940's Leon, Guanajuato" (2002) 18 Mexican Studies 61.

[567] *Decreto por el que reforman y adicionan diversas disposiciones del Código Penal para el Distrito Federal y el del Código de Procedimientos Penales para el Distrito Federal*" (G.O.D.F. August, 24, 2000).

[568] Art. 332, 333 and 334, ``*Código Penal para el Distito Federal* (Penal Code for the Federal District or CPDF)`, prior to its as amendment by the decree abrogating the Criminal Code of 1931 in Mexico City, (G.O.D.F. July, 16, 2002).

Federal District but was challenged on grounds of unconstitutionality before the Supreme Court.

In January 2002, the Supreme Court upheld the validity of the reforms and declared the constitutionality of the "*Ley Robles*".[569] While the decision of the Court was a victory for rape victims, the right to abortion conferred at such a high level perhaps left the Court with little manoeuvring space for considering the more central issue of "right to life". This was the first time the Supreme Court had resolved an issue of constitutionality concerning abortion. The only female Supreme Court Justice, Olga Sanchez Cordero, was involved in the decision resolving the constitutionality of the reforms. At the beginning of the Court discussion she stated, "*The subject we are analyzing today, has nothing to do with ethical, moral, religious, or political morals, this is an eminently juridical subject*".[570]

In this 2002 case the Court reasoned that despite the lack of explicit language protecting the unborn, the Constitution as well as international treaties, federal and local laws protect "the right to life of all individuals", including the "product of conception".[571]

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[569] "ABORTO. EL ARTÍCULO 334, FRACCIÓN III, DEL CÓDIGO PENAL PARA EL DISTRITO FEDERAL, NO TRANSGREDE LA GARANTÍA DE IGUALDAD, PUES NO AUTORIZA QUE SE PRIVE DE LA VIDA AL PRODUCTO DE LA CONCEPCIÓN" [TA]; 9a. Época; Pleno; S.J.F. y su Gaceta; XV, Febrero de 2002; Pág. 415.

[570] Sonia del Valle, "SCJN valida despenalización de aborto por eugenesia", *CIMAC Noticias* (January 29, 2002) , online CIMAC Noticias <http://www.cimac.org.mx>.

[571] See "DERECHO A LA VIDA. SU PROTECCIÓN CONSTITUCIONAL"[J]; 9a. Época; Pleno; S.J.F. y su Gaceta; XV, Febrero de 2002; Pág. 589; see also "DERECHO A LA VIDA DEL PRODUCTO DE LA CONCEPCIÓN. SU PROTECCIÓN DERIVA DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, DE LOS TRATADOS INTERNACIONALES Y DE LAS LEYES FEDERALES Y LOCALES" [J]; 9a. Época; Pleno; S.J.F. y su Gaceta; XV, Febrero de 2002; Pág. 588.

Nevertheless, the access to abortion found in the CPDF does not decriminalize abortion; it only impedes the application of the punishment in certain circumstances.[572]

On April 24, 2007, in one of the most important legislative changes relating to women and the family, a surprising vote of Mexico City's legislative assembly decriminalized abortion in the first 12 weeks.[573] Mexico City's criminal code and Health Law were reformed in order to put into effect these changes.

When, in 2008, the Court upheld Mexico City's reforms decriminalizing abortion during the first three months of pregnancy, it did so not by ruling on the constitutionality of abortion, but instead on jurisdictional merits of the city's criminal code. Associating abortion with questions of federalism, the court found that states have authority to legislate in criminal matters as they see fit and that the federal-state shared competency over health gives states ample attributes to legislate in local and general health matters. The jurisdictional argument came full circle when in October 2008 the state of Sonora blazed the trail by protecting within its state constitution "life from fecundity to death". Seventeen states followed Sonora with similar statements in their state constitutions. On the basis of the same jurisdictional grounds the Court upheld state reforms defending the criminalization of abortion.

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[572] See "ABORTO. REQUISITOS PARA QUE SE CONFIGURE LA EXCUSA ABSOLUTORIA PREVISTA EN EL ARTÍCULO 334, FRACCIÓN III, DEL CÓDIGO PENAL PARA EL DISTRITO FEDERAL"[TA]; 9a. Época; Pleno; S.J.F. y su Gaceta; XV, Febrero de 2002; Pág. 417; see also "ABORTO. LA HIPÓTESIS PREVISTA EN EL ARTÍCULO 334, FRACCIÓN III, DEL CÓDIGO PENAL PARA EL DISTRITO FEDERAL, CONSTITUYE UNA EXCUSA ABSOLUTORIA"[J]; 9a. Época; Pleno; S.J.F. y su Gaceta; XV, Febrero de 2002; Pág. 416.

[573] *Decreto por el que se reforma el Código Penal para el Distrito Federal y se adiciona la Ley de Salud para el Distrito Federal*, (G.O.D.F., April 26, 2007).

5. Conclusions

In this chapter I have showcased how women's family law rights made their way into the Mexican legal system up to the 1980's and their effect on women and the political and legal landscape. Centring on human rights, part two illustrated how women's family law rights were tabled after Mexico's entry into GATT and the effect on women and the political and legal landscape. This was followed by an outline and discussion of the different types of challenges confronted by Mexico in the implementation of women's family law rights, the devices states have used to overcome these obstacles and their effect on women. The final section illustrates how internationalization of family law in Mexico and its shifting effect on traditional divisions and spheres of law-making power has introduced new developments in women's family law rights.

The complex effects that internationalization of women's rights has had on the political and legal landscape reveals the bittersweet flavour that the women's rights legacy can leave behind. In the case of Mexico, it has added an international dimension to the orthodox mechanisms of legal change. While these procedures have helped fortify women's rights through the avenues of constitutionalization and the harmonization process, they have also created and reinforced divisive political stances on women's politics, more out of concern for the implicit shifts in power that these entail than for the perpetuation of the secondary status of women.

Chapter 5 : The Politics of Family Law Partition in Quebec and Mexico

1. Introduction: Uncommon Laws but Common Divisions

A problem in the background of family law reform in Canada stems from the fact that neither government (federal or provincial) nor either legal tradition (civil or common law) has full authority over marriage. For this reason, resolution of family matters by courts and legislatures unavoidably involves a crisscrossing of the jurisdictional borders of Canadian federalism and bijuralism.

Nonetheless, family law reform in Canada and Mexico share this connection. Since 1932 the Mexican federal government has made use of provisional constitutional powers to formally legislate in private law matters, enacting its own substantive and procedural codes.[574] Like Canada, the shared jurisdiction over legislative power between the federal and state governments in Mexico has also been indirectly crafted as a way to circumvent excessive federal-state concentrations of power. Akin to the linguistic and juridical tensions surrounding private law governance in Canada, the historical trajectory towards this shared power over private law has not gone uncontested in Mexico. At present, the historical trajectory towards the dual power over private law is not a settled matter in either country. Competition over private law authority is thus a common concern in both Mexico and Quebec.

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[574] See Chapter Reconfiguring Gender through Divorce Landscapes, subsection 4. Renaissance of Unilateral Divorce, part A. Interpretative Supremacy Clause at 153.

Both Canada and Mexico are governed under a federal model. A federal form of government means that some powers are reserved for the federal government, others for the sub-national units, and others are exercised concurrently. In addition, power to create, apply and enforce is allocated to the respective organs. In Canada, the British North American Act (BNA Act), by dividing jurisdiction over marriage matters, resulted in reducing provinces' sphere of private law authority.[575] It also created an overarching federal jurisdiction based on the basis of "peace, order and good government" that had the effect of giving primacy to federal law at the expense of provinces' private law authority. [576] In contrast, under the "federal pact" (article 124 of the Mexican Constitution), states have residual powers to legislate in civil and criminal matters.[577] Under this federal model, matters of private law were to be solely under state jurisdiction. Civil codes are emblematic of the state sovereignty acquired under the Mexican federal system of government.

Despite their common civil law heritage, Mexico and the province of Quebec could be held to constitute an idiosyncratic comparison. Their respective national systems and their civil codes stem from very different historical and geo-political foundations. In addition, both jurisdictions have a completely different approach to cohabitants' rights. However, there are important parallels between Mexico and Quebec: (1) how centralization and decentralization politics affects family law, (2) the political importance that private law autonomy has for sub-federal units and, (3) the subtle but important

[575] *Constitutional Act, 1867.*
[576] *Ibid.* s. 91, §92 (12 & 13).
[577] Art. 124 The powers not explicitly vested in the federal officers by this Constitution shall be implicitly vested in the States [translated by Perez Vázquez, C., on line at Infojus UNAM at <http://goo.gl/4hYIH>, consulted October 22, 2012.

jurisdictional politics at play in family law reform. Thus even if there do not appear to be significant commonalities between Mexico and Quebec, the federal lens is a useful framework for identifying and examining common issues at play in Mexican and Canadian family law reform.

As has been shown in the previous chapters on Mexico the extension of political and legal control through the policy and practice of, (1)colonization, (2)federalization, (3)constitutionalization, and (4) internationalization affects state's legal organization and understanding of the family and family law rights. This in turn determines the stakes at play and the issues that arise from family law change. Similar politics are at play when federal systems allow federal units the liberty to govern themselves in private law matters. Authority over private law becomes an important point of contention between federal and sub-federal authorities.

A comparative reading of the jurisdictional tensions in the background of women's family law rights in Mexico and Quebec is a way to consider the importance of the geo-political dimensions behind family law reform on a wider scale and as a way of uncovering the transnational patterns behind women's family law reform challenges in federalized jurisdictions.

Although federalism is a political mechanism to counteract concentrations of power, it is not clear to what extent national governments should be empowered at the national and sub-national levels. Nor is there a set formula for allocation of authority or setting out the liberties for sub-national divisions to confront local issues. This is complicated by the increasing reality that the context in which governance occurs can extend across different

levels of government and “jurisdictions” and can operate on a “supranational and global scale”. Thus, an awareness of the geo-political and jurisdictional politics in the background of reform can highlight the higher stakes involved in framing family law reform disputes.

Another important dimension in exploring family law reform within the context of the NAFTA region relates to who has the power to define which and how women's rights policies are incorporated at the private law level. A common pillar between NAFTA jurisdictions is the power that sub-national jurisdictions (states/provinces) have over private law and the different ways that family law has become a matter of federal/state concurrence in jurisdictional issues. This is because in all three jurisdictions, states or provinces have authority to regulate important, if not most aspects of private law; however, the ways each nation allocates this "shared" authority over family law differs. For instance, whereas authority over family law is constitutionally attributed to states, as in the case of Mexico and the U.S., this same power is distributed concurrently between the federal and provincial governments in Canada.

Nevertheless, as occurs in Mexico and in the U.S., despite the states’ sole authority over family law, harmonization efforts, Supreme Court decisions and other federal measures have made family law an area of concurrent jurisdiction. Thus, many of the problems in the background of family law reform in these jurisdictions stem from the fact that none of the governments (federal, state or provincial) or a single "legal tradition" (civil, common law or international human rights law) has full authority over all family law matters. However the way each of these governments parcels out family law subject matter

between the federal and the sub-national governments changes the private law scope of family law and the political intersections that change encompasses within each jurisdiction. The multiple stakeholders in private law governance in the NAFTA federalized jurisdictions make more complex the rhetorical and legal strategies used to wield power. Thus the consideration of the geo-political dimensions behind family law reform on a wider scale is a way to uncover transnational patterns behind women's family law reform.

This chapter undertakes a historical review of the interplay between federalist politics and family law reform in the development of cohabitant rights in Quebec as a way to analyse the effect that jurisdictional tensions between federal and sub-national units have had on the development of cohabitants' rights. The jurisdictional tensions in the background of family law reform in Mexico serve as a lens to observe how cohabitants' rights in Quebec have become entwined in the federal and sub-national government's competition for marriage authority, a struggle that is complicated by a jurisdiction's political aspirations and its management of its legal and political distinction within a larger power. The chapter does not purport to undertake an exhaustive study of Canadian federalism or of Canadian or Quebec family law reform. Instead it uses the jurisdictional politics in the background of Quebec's treatment of *de facto* marriage as a window to compare and draw lessons from jurisdictional politics influencing women's family law rights in both Mexico and Canada. A reading of cohabitant rights in Quebec through a political lens showcases how: (1) the way family law reform debates are framed can obscure complex barriers to reform; (2) private law is used as political leverage between political groups to pressure for unity or counteract subversiveness; (3) legal reforms that imply or are organized

within themes of assimilation or harmonization can deploy strong partisan sentiments. From a comparative standpoint this chapter underscores: (1) that family law reform can be an important gauge of the lesser known political forces at work in the incorporation of women's rights in private law; (2) the pitfalls of top-down approaches to women-centred law reform and of comparative law framing; (3) how denial of women's rights can take on a cultural patina when analysed outside of the historical and political context.

After this first section, this chapter is divided into five further sections. Section two explores the Lola v Eric[578] case as an entry point to explore the jurisdictional politics at play in the struggle for status rights for conjugal cohabitant in Quebec, outlining the connection between the Mexican and Canadian family law reform context. Section three traces the rights and politics at play in Lola's 2009 Charter challenge, and draws out how this cohabitants' rights case rekindles federalism and national unity issues in Canada. Section four explores the history of Quebec's defence of its political and legislative autonomy. Section five analyzes points that emerge from a comparative reading of the politics and play in cohabitants' (and concubinage) rights in Quebec and Mexico. Section six concludes with a summary of the lessons revealed for feminist comparative engagements.

[578] See *Droit de la famille – 091768, 2009* QCCS 3210 [Droit de la Famille, 2009] rev'd (2010) 102866 QCCA – 1978[Droit de la Famille, 2010], rev'd [2013] SCC 5 [hereinafter Droit de la Famille, 2013] Referred to in the media as the case of Lola v. Eric, these are not the real names of the people involved].

2. Lola: Rekindling Political Controversy over Private Law Power

The unsettled character of private law authority in Canada is made evident by the recent events surrounding the Quebec (Attorney General) v. A case in Quebec.[579] The case involved a former Brazilian model (Lola) and a thirty-two- year-old local billionaire (Eric) who left the relationship after living together for ten years and having three children.[580] After having been granted shared custody, use of the family home, support and additional cost payments for the three children by the Quebec Superior Court, Lola sought support payments and division of property for herself.[581] Lola challenged the constitutional validity of articles of the Civil Code of Québec , under the federal-provincial divisions of power and under section 15 (1) the Canadian Charter of Rights and Freedoms.[582] The Superior Court denied Lola's claim.[583] In doing so the first instance court affirmed that the Quebec law, which specifically barred de-facto spouses from claiming alimony, was appropriate and not discriminatory.[584] The court reasoned that the differences of rights between married and cohabitant partners reflect the result of the right of choice of individuals to get married or not.[585] With respect to the treatment from the state, the court found that Quebec's policy was not discriminatory, but based on a

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[579] See *ibid.*
[580] *See ibid. See* also Sue Montgomery, "Billionaire's ex fighting for single moms: lawyer *See*ks $50 million"; "Case could affect unmarried couples" The Gazette, (January 21, 2009); Sue Montgomery, "Woman takes on rich ex in court; Unmarried Quebec couples don't have same legal protection as elsewhere in Canada" The Gazette (January 20, 2009); Andrew Chung, "Union libre, 'but only for the man'; Quebecers living common law have no rights if they separate, a discrepancy facing court test", Toronto Star (January 18, 2009); Catherine Solyom, "Mystery billionaire's case gives hope to poorer single parents in Quebec", Montreal Gazette, January 23, 2009; Sue Montgomery, "Quebec law says just child support has to be paid to non-marrieds; Quebecers are increasingly rejecting formal marriage", Canwest News Service (January 21, 2009).
[581] *Ibid, Droit de la famille*, 2009 at para 1 & 23.
[582] *Ibid, Droit de la famille*, 2009 at para. 3.
[583] *Ibid.* at para. 297-299.
[584] *Ibid*. at para. 298.
[585] *Ibid. Droit de la famille*, 2009.

"considered policy decision regarding the appropriateness of regulating private relations within this type of union" and was in accord with the Charter's respect for liberty.[586] On appeal, consistent with *Miron v Trudel*[587] and against the opinion of the first instance court, the Court of Appeal declared section 585 of the Civil Code of Québec (which grants reciprocal support rights only to married spouses) invalid because it discriminated between married and de-facto spouses.[588] The Supreme Court reversed on the charter argument.[589]

3. The Jurisdictional Politics of Conjugal Cohabitation

Set within a storyline like that of a Mexican *telenovela*, Lola's 2009 Charter challenge for support and property rights in Quebec refreshed the debate on the appropriate limits of local and federal government authority in private law matters. At the time, Quebec remained the only Canadian province not to provide any statutory recognition to *de facto* marriages. In contrast to Quebec, the common law provinces and the federal government had for some time recognized marriage-like status rights in favour of *de facto* marriage partners. British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia,

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[586] *Ibid.* at para. 279.

[587] *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418. This case arose out of an issue related to uninsured-motorist coverage and loss of income accident benefits. The plaintiff argued that the interpretation of the term "spouse" in the Ontario Standard Automobile Policy confining it to married spouses violated s. 15(1) of the Charter and was not saved under s. 1. The Ontario Court of Appeal dismissed the claim that the Insurance Act was discriminatory under the Canadian Charter of Rights and Freedoms. On appeal, the Supreme Court of Canada held that marital status was an analogous ground of discrimination within s. 15(1) of the Charter, and that the exclusion of unmarried heterosexual cohabitants from the accident benefits available to married spouses violated s. 15(1) and was not saved under s. 1 of the Charter.

[588] *Droit de la famille*, 2010 *supra* note 578 at para. 164. However with respect to the division of family property, the Quebec Court of Appeal upheld the Superior Court's decision by declaring that in this matter "freedom to choose whether or not to marry is paramount". The court left the Quebec government one year to review its position. In response, Quebec declared its intention to appeal the decision to the Supreme Court of Canada.

[589] The Supreme Court case is examined below.

Ontario, Saskatchewan and the Yukon have all provided unmarried conjugal cohabitants with statutory mutual support rights and obligations.[590] Some of these statutory recognitions stemmed from the Supreme Court and provincial courts finding that the exclusion of unmarried consorts from the support rights accorded to married partners violated s. 15.1 of the Charter.[591] The Northwest Territories and, by extension, Nunavut have also extended property rights to unmarried cohabitants.[592]

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[590] For British Columbia *see* Family *Relations Act*, R.S.B.C. 1979, c. 121, ss. 1(c) and 57; for Manitoba *see* Family *Maintenance Acts* R.S.M. 1987. c. F20, ss 4(3), 14(1) and (2).; for New Brunswick *see Family Services Act*, S.N.B. 1980, c. F-2.2, s. 112(3); for Newfoundland *see Family Law Act*, S.N. 1988, c. 60, s. 35(c); for Nova Scotia *see Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss. 2(m) and 3; for Ontario *see Family Law Act*, R.S.O. 1990, c. F.3, ss. 2(1) and 4; for Saskatchewan *see Family Maintenance Act*, S.S. 1990, c. F-6.1, ss. (1) and 4 for the Yukon *see Family Property and Support Act*, R.S. Y. 1986, c. 63, s. 35. .). The Northwest Territories, and by extension Nunavut, became the first jurisdiction to amend its family law statutes to provide cohabitants with property rights. The definition of spouses has been expanded, giving marriage rights to "a person who ... has lived together in a conjugal relationship outside marriage with another person, if (i) they have so lived for a period of at least 2 years, or (ii) the relationship is one of some permanence and they are together the natural or adoptive parents of a child". This definition applies to all parts of the Territories' Family Law Acts, including property and family home, and creates from early on in the cohabitant relationship a scheme for equal economic partnership. Berend Hovius, "Abstract for Property Rights for Unmarried Cohabitants in Canada", (March 1, 2006), online :SSRN: http://ssrn.com/.

[591] For the recognition of support rights in Alberta see *Rossu v. Taylor*, 1998 ABCA 193, [1999] 1 W.W.R. 85. For the recognition of property rights in Saskatchewan see *Watch v.Watch*, 182 Sask.R. 237. An important influence on *Watch* was the Supreme Court decision in in Miron *v.* Trudel, whereas the decision of the Nova Scotia Court of Appeal in *Walsh v. Bona* [2000] N.S.J. No. 117 affected the legislation in Nova Scotia. For a recent extensive analysis of the development of cohabitant rights in Canada, see A. Mohs, *Choice v. Equality: The Legal Recognition of Unmarried Cohabitation in Canada* (LL.M Thesis, Faculty of Graduate Studies, University of British Columbia, 2010) [unpublished], specially at 24-44. As a result of the response to the decision of a Saskatchewan court in 1999 stating that the exclusion of unmarried consorts in the provisions of the Matrimonial Property acts, 1997 violated section 15.1 of the Charter, Saskatchewan in 2001 became the first province, but second Canadian jurisdiction to amend its marital property laws to include property rights to unmarried conjugal unions that have cohabited for at least two years. The provinces of Manitoba, Nova Scotia and Quebec have also extended property rights but only to registered unmarried unions. To date, Quebec only affords property and support rights to registered civil unions. For Saskatchewan see *Family Property Act*. Chapter F-6.3 of the Statutes of Saskatchewan, 1997 (effective March 1, 1998) as amended by the Statutes of Saskatchewan, 1998, c.48; 2000, c.70; 2001, c. 34 and 51; and 2010, c.10. 2001, c.51, s.11. For Manitoba see *Common-Law Partners' Property and Related Amendments Act*, S.M. 2002, c. 48; for Nova Scotia *The Matrimonial Property Act*, R.S.N.S. 1989, c. 275; and for Quebec see *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6.

[592] *Family Law Act*, S.N.W.T. 1997, c. 18; *Family Law Act* (Nunavut), S.N.W.T. 1997, c. 18 (as adopted pursuant to the Nunavut Act, S.C. 1993, c. 28, s. 29; as amended S.C. 1998, c. 15, s. 4.)

However, the politics of federalism were implicated from the start of Lola's Charter challenge. As part of her suit Lola challenged different aspects of Quebec's legal treatment of *de facto* unions. She challenged the validity of Quebec's definition of marriage in terms of federal laws as well as the jurisdictional competence of Quebec to define marriage and exclude *de facto* spouses from marriage rights under the federal-provincial divisions of power.[593] She also challenged the constitutionality of articles of the Civil Code of Québec that could exclude *de facto* spouses from the rights accorded to married consorts at the dissolution of a relationship, under section 15 (1) of the Canadian Chapter of Rights and Freedom.[594]

In response, the first instance court dismissed the claim that any definition of marriage that excludes *de facto* unions violated section 15(1) of the Charter. In making its determinations the court grounded its decision on both jurisdictional and constitutional merits. It recognized the shared federal-provincial power over marriage but reiterated the provinces' unique power under s. 92(13) of the Constitution Act of 1867 "to regulate conjugal unions that do not constitute marriage", an authority which extends to civil and *de facto* unions.[595] The court found that provincial governments had the exclusive power to enact laws relating to the solemnization of marriage under s. 92(12) and to impose rules to govern property and civil rights, which includes enacting rules that affect the validity of marriage beyond those of religious celebration.[596]

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[593] *Droit de la famille*, 2009 QCCS 3210 supra at 578 at para. 3.
[594] *Ibid*. para. 3(d)
[595] *Ibid*. at para. 180-184.
[596] *Ibid*. at para. 180-182.

Federalist animosities became front and centre, however, when the first instance court issued warnings about the jurisdictional implications of using the Canadian Charter of Rights and Freedoms in favour of *de facto* spouses in Quebec. The court stated that to extend *de facto* Quebec spouses marriage-like rights under section 15 of the Charter would necessarily imply "broaden[ing] the federal power over marriage" and diminishing existing "provincial jurisdiction over civil rights".[597] It also set a limit to the federal government's aims in legislating marriage matters even when equality rights were at stake. It declared that even when "neither level of government has the power to adopt a complete and exhaustive definition of marriage", a federal law changing the definition of marriage to include *de facto* unions would be "*ultra vires"* of federal legislative jurisdiction.[598] The federal government's exercise of its shared power over marriage through the Civil Marriage Act was not intended to be construed as a tool to convert *de facto* unions into marriages; to do so would "impinge on the conditions of solemnization that were validly imposed by the province of Quebec".[599]

On appeal, Lola abandoned the jurisdictional claim, but the Court of Appeal still overturned the decision of the first instance court. The Court found the Quebec legislature's failure to include *de facto* spouses in article 585 of the C.C.Q. to be an unreasonable violation of the Charter's equality clause.[600] The Court reasoned that the obligation of support in Canada and within Quebec civil law has a recognized "important

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[597] *Ibid.* at paras. 185-189.
[598] *Ibid*. at para. 185 & 188.
[599] See i*bid*. at para. 162, 189.
[600] *Droit de la famille 102866*, 2010 QCCA 1978, rev'g in part [2009] QCCS 3210 at para. 36.

social objective".[601] This objective corresponds to the "circumstances of financial dependence" that arise in families “like those formed by *de facto* unions".[602] The Court explained that the type of conjugal union, whether *de facto* union, civil union, or marriage, does not change the situation of economic inter-dependence and the need for support of one of the partners that can arise during and after a relationship breaks down.[603] To fail to allow *de facto* spouses "to claim support" avoids taking into account the main purpose of support rights, which is to "enable a person unable to meet his or her basic needs", especially after a separation.[604] The Court considered this omission in article 585 of the C.C.Q. be an unreasonable violation of subsection 15(1) of the Charter.[605]

The federalism issue in the Lola case came full circle in 2013 when the Supreme Court of Canada overturned the Court of Appeal’s decision and found articles 401 to 430, 432, 433, 448 to 484 and 585 of the Civil Code of Québec to constitute a reasonable limit to subsection 15(1) of the Charter.[606] In a closely divided 5-4 ruling the Supreme Court judges agreed that the relevant articles of the Civil Code of Québec infringed s. 15(1), but only a minority found this violation to be unreasonable under s. 1 of the Charter.[607] The judgment took four different positions on the constitutionality of the absence of marriage-like rights for *de facto* unions. One group of judges reasoned that pertinent articles of the Civil Code of Québec were not discriminatory in that they expressed the Quebec

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[601] *Ibid*. at paras. 100-105.
[602] *Ibid.* at paras. 100, 121-122.
[603] *Ibid*. at para. 108.
[604] *Ibid*. at paras. 108, 114 and 148.
[605] *Ibid*. at paras. 149 & 155.
[606] *Quebec (Attorney General) v. A*, 2013 SCC 5.
[607] *Ibid.*

legislature's policy choice to regulate *de facto* unions on the basis of principles of individual autonomy and freedom.[608] A second opinion concluded that the difference in treatment between common law spouses and married or civil union spouses was discriminatory.[609] A third group of judges concluded that the difference in treatment between common law spouses and married or civil union spouses is discriminatory under the terms of the Canadian Charter, but that among the various protections afforded to married spouses, only the right to spousal support affected the fundamental rights of the vulnerable spouse.

The fourth and defining position was that of Chief Justice McLachlin. Like the second and third groups, McLachlin agreed that Quebec's dual regime made discriminatory distinctions that limited *de facto* spouses' full enjoyment of their equality rights.[610] However, she found this limit to be reasonable and justifiable.[611] What is notable about Chief Justice McLachlin's vote is that she reintroduced (but with a reverse outcome) the federalism argument. Chief Justice McLachlin explained that regard was needed for a legislature's latitude in dealing with complex "social issues" and the "constitutional responsibility" that each province has "to legislate for its population".[612] In her reasoning she underscored the importance of preserving the value of federalism in relation to the matter of cohabitant rights: "[t]he fact that Quebec has chosen a different policy than other provinces in keeping with its own history and social values does not make the law

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[608] *Ibid*. at paras. 267, 276-281.
[609] *Ibid*. at paras. 363, 367-381.
[610] *Ibid.* at para. 423.
[611] *Ibid*. at paras. 382. 399. 408-409.
[612] *Ibid*. at paras. 449.

unconstitutional."[613] Chief Justice McLachlin argued that the Quebec policy falls within a range of "reasonable alternatives for maximizing choice and autonomy in the matter of family assets and support".[614] The distinction between married, civil union and *de facto* spouses in the Civil Code of Quebec is "rationally connected to the state objective of preserving the autonomy and freedom of choice of Quebec spouses".[615] As Chief Justice McLachlin reasoned, "[w]ithout [this scheme of differentiation], the ... choice between a regime ...would be absent".[616]

4. Semblance of the Political Past

The fact that "provincial autonomy" continues to be a valuable political symbol in Canadian Charter claims underscores the necessity of understanding the complex legal-historical context in which Lola's constitutional claim developed.[617]

Vipond has noted how questions about provincial sovereignty or autonomy in Canada "remain as central to political discourse today" as they were at the time of confederation.[618] The political aspect of the Lola case has been obscured by the general tendency to see the Charter and Charter challenges merely as ways to "protect civil rights

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[613] *Ibid*. at para. 415.
[614] *Ibid*. at para. 447.
[615] *Ibid*. at para. 438.
[616] *Ibid*. at para. 438.
[617] See generally Robert C. Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada" (1985) 18 CJPS 291 & 294 [*Vipond 1985*]. As Vipond notes, one of the challenges of thinking of certain themes in terms of provincial autonomy rights in Canada has been the way federalist discourse has tended to "artificially separate the constitutional from the political instead of bringing them together". While this division was helpful in securing provinces a strong presence in Canadian federalism, it did little to "explain fully why the provinces should have their autonomous place" or shed light on the "purposes to be served by [provinces'] autonomy".
[618] *Ibid.* at 290.

and liberties".[619] While correct, this narrow view of family law Charter litigation fails to take into account the important federalism and "national unity" issues that arise with Charter challenges and their link to Canada's past strategies of "nation-building".[620] This is important because, prior to the enactment of the Charter, constitutional challenges to policy required that they be framed in terms of "jurisdictional disputes" between the federal and the provincial levels of government.[621] This type of framing of disputes meant that jurisdictional politics were often co-opted to advance policy issues that could have otherwise been presented in non-jurisdictional or territorial ways.[622]

While the Charter has removed the necessity to argue policy under the disguise of federalism, regional and local interests continue to constitute an important element in the background of Charter challenges. For instance, one of the major impacts of the Charter has been its centralizing effect on "Canadian federalism and political process".[623] One example is the indirect "constitutionalizing" of family law by way of the Supreme Court's application of the Canadian Charter of Rights and Freedoms to family law cases.[624] Besides the Supreme Court's authority to void or overturn provincial laws, its decisions have also had a harmonizing effect on policy areas that previously belonged solely to provinces.[625]

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[619] See F. L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" (1987) 20 CJPS 31 [*Morton 1987*].
[620] *Ibid.* especially at 44 at note 52 & see also *Vipond 1985 supra* at note 617 at 277 & 282.
[621] See *Morton 1987 ibid.* and see also *Vipond 1985 ibid at* 267-294.
[622] *Morton 1987 ibid.* at 45.
[623] *Ibid.* at 44.
[624] See Lisa M. Kelly, Bringing international human rights law home: An evaluation of Canada's family law treatment of polygamy" (2007), 65 U. Toronto Fac. L. Rev. 1 at 16-19.
[625] *Morton 1987 supra at* note 619 at 44.

Charter cases involving controversial policy issues like abortion, indirect systemic discrimination, Sunday closing laws, financing of denominational schools and minority language education rights have "crosscut" and "displaced" the "regional cleavages" from which many of the restrictive policies arose.[626] An example of the complex regional politics that can be involved in Charter cases is the use of the legislative override clause in section 33 of the Charter by provincial governments to insulate their legislation from Charter challenges.[627] While the use of the legislative override power had been limited in other provinces, a few weeks after the enactment of the Constitutional Acts in1982, Quebec passed a bill to insert a notwithstanding clause overriding the Act and to making it encompass both past and future Quebec statutes.[628] While it is believed that this measure has not had "much practical effect on the freedoms of the people of Quebec", it has nonetheless had important "repercussions for Canadian unity".[629]

The sensibilities embedded in Quebec's stance on regulation of cohabitation go beyond its representational value in civil law. It is a position that is embedded in the province's own struggle for cultural and political autonomy. Within Canada's borders, Quebec is the only civil law province. This sets Quebec's law apart from that of the federal government and the remaining common law provinces. Moreover, changes to Quebec's civil codes have generally been embedded within its broader struggle for political independence. Thus, by bringing into play Quebec's and the federal's government's shared authority in

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[626] *Ibid.* at 45.
[627] *Ibid.* at 45-47.
[628] "An Act respecting the constitution Act, 1982" (S.Q. 1982, c. 21).
[629] *Morton 1987 supra at* note 619 at 46.

marriage and family matters, the Quebec (Attorney General) v. A case rekindled political controversy regarding private law power.

In order to understand the status of cohabitants' rights in Quebec, it is important to acknowledge how the regulation of informal marriage resurrects the divisions of law, language and culture in the background of Canadian federalism and Quebec's status as the sole civil law jurisdiction. The following section traces the divisions of law, language and culture that reside in the background of Canadian federalism and Quebec's status as the sole civil law jurisdiction.

5. Quebec's Political and Legislative Autonomy: An Important Chapter in the History of Canadian Federalism

Prior to and after Canada's confederation the measures to reinforce national unity often had the effect of impinging on Quebec's laws, values, and politics. For example, the Proclamation of 1763, which formally created Quebec as a new British colony, recognized the rights of worship of Catholics and respected the Church's authority in French Canada. Nonetheless, from the perspective of French Canadians, the cession of New France to the British was understood as a deliberate act to steer French-speaking Roman Catholics to becoming English-speaking Protestants.[630] While the proclamation of 1763 was worded as preserving the authority of the Catholic Church and its normative values within the territory, this reservation did not extend to formal legal matters. The proclamation eliminated the formal authority held by the French-speaking community

[630]Section IV of the Treaty of Paris, February, 1763, read, "Canada with all of its dependencies" was ceded to "his Britannic Majesty in full right." Wallace states that not only was this section read as an intention to assimilate French Canadians into British law and customs, it was also read as wording geared at prompting increased immigration of English-speaking protestants through land grants. *See* William Stuart Wallace, ed., *The Encyclopedia of Canada, Vol. IV*, (Toronto: University Associates of Canada, 1948) at 36-38.

over private law matters. It put an end to the application of the *ancien droit* and other forms of local ordering and introduced an English system of governance.

The imposition of English laws and institutions in Quebec was subsequently overturned by the Quebec Act of 1774. The Act: (1) extended Quebec's geographical borders, (2) recognized the free exercise of the Roman Catholic faith, (3) created a governmental structure that integrated participation of Quebec's French community, and (4) reinstated authority over private law matters to the French-speaking community.[631] However, this extension of Quebec's private law authority shifted once again with the Constitutional Act of 1791.[632] Drafted in order to accommodate the English- speaking community living within the expanded borders of Quebec, the act strengthened the sovereignty of the provincial governments but also resulted in: (1) diminishing the territorial and political significance of the Quebec Act[633] and, (2) creating an established (Protestant) Church within Quebec's former territory.

The governmental structure established by the Constitutional Act of 1791 stirred up discontent among the citizens of Upper and Lower Canada. Abuse of government authority and the absence of a publicly elected legislative council triggered insurgent movements within the two territories. The insurgencies prompted the suspension of the 1791 Act, which was replaced by the Act of Union of 1840, which reunited and renamed the region Quebec. The 1840 Act of Union combined the territories of Lower and Upper

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[631] *Quebec Act*, 1774, 14 George III, c. 83 (U.K.). In return, the British authorities preserved authority to designate the governor and to legislate in criminal matters.
[632] *Constitutional Act*, 1791 31 Geo. III, c. 31 (U.K.).
[633] The Act of 1791 divided the territory of Quebec into two distinct jurisdictions (Lower and Upper Canada) and reinstated English law and institutions in the western half of the territory (Upper Canada)

Canada into one, renamed it the United Province of Canada and created a new system of government with equal representation from each section.[634]

5.1. Subtext behind the Reunification

Nonetheless, the report produced by the commission investigating the reasons behind the rebellions cemented a subtext behind the reunification. In a famous passage Lord Durham states,

> "I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws and institutions until we first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada in the hostile divisions of French and English."[635]

Lord Durham's report on the rebellions exposed many of the invisible borders at the root of Canada's regional divisions. Lord Durham took a particularly harsh tone against Lower Canada, where he stressed the superiority of the British law, commerce, culture and society in contrast to the culture of the French.[636] As for the prevailing laws in Lower Canada, Lord Durham states, "[t]he laws itself is a mass of incoherent and conflicting laws, part French, part English, and with the line between each very confusedly drawn."[637]

5.2. Re-Distribution of Power

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[634] Unofficially Upper Canada became known as Canada West and Lower Canada as Canada East.

[635] John George Lanbton Durham & Charles Prestwood Lucas, *Lord Durham's report on the affairs of British North America*: (Sir Charles Prestwood Lucas ed: Clarendon Press, 1839) [hereinafter, The Durham Report] at 16.

[636] Lord Durham stated: "[t]hey remain an old stationary society, in a new and progressive order... they [cling] to ancient prejudices, ancient customs, and ancient laws, not from any strong sense of their beneficial effects, but with the unreasoning tenacity of an uneducated and unprogresssive people." *Ibid.* at 30-31

[637] *Ibid*. at 16.

The B.N.A. Act however reduced the legal autonomy created by the Quebec Act by separating the jurisdiction over marriage between the federal and provincial governments. This re-distribution of power deeply encroached on Quebec's remaining authority over "property and civil rights".[638] Section 91(26) gave the federal government power to legislate on marriage and left to the provinces authority to regulate issues of "solemnization of marriage". Section 91 had a greater impact on Quebec, given that its central system of law was "one of private law".[639] On the base of this division, the federal government enacted laws that modified or displaced many of Quebec's civil code provisions.

Federal intervention in private law matters was not restricted to family law matters. Almost one third of the exclusive subdivision of the B.N.A. Act granted the federal government authority over private law matters that had previously fallen under provincial jurisdiction.[640] Section 91 also created an overarching federal jurisdiction based on the basis of "peace, order and good government".[641]

The authority of the province of Quebec to "hold and enjoy their Property and Possession, together with all Custom and Usages relative thereto, and all other their Civil Rights" did not translate to full private law authority as established in the Quebec Act.[642] While the Quebec Act provided Quebec legislative autonomy in private law matters, this

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[638] *Ibid*.
[639] *Ibid*.
[640] *Ibid.*
[641] *Ibid.* s. 91, §92 (12 & 13).
[642] *Quebec Act (1774)*, 14 George III, c. 83 (UK) s.VIII

authority was not exclusive.[643] In addition, the division of legislative power between the federal and provincial authorities under the Quebec Act was not "exhaustive".[644] This resulted in the federal government indirectly assuming power over Quebec in a manner that went "beyond the minimum required for operation of a federal union".[645]

5.3. Reinvigorating the Issue of Quebec's Differences

Enactment of the Constitutional Act of 1982 marked a turnaround for Canadian federalism. The Act broke Canada's remaining link with Britain and implemented a constitutional reform mechanism that took provinces' say into account. It also incorporated the Canadian Charter of Rights and Freedoms and a "notwithstanding" provision that authorized provinces to temporarily forestall submission to the Charter.[646] Still, the Act of 1982 did not modify the division of powers that had been the focus of a long-standing debate between the federal and provincial governments.[647] Nor did it incorporate any requirement of popular sovereignty for its enactment or its reform.[648] Moreover, by incorporating the Charter, the courts had been empowered to strike down federal or provincial legislation on grounds different from that of violation of federal-provincial divisions of power. As a result, provincial governments were required to " tailor their public policies to conform to national standards... as interpreted by the court",

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[643] Catherine Valcke, "Quebec civil law and Canadian federalism" (1996) 21 Yale J. Int'l. L. 67 at 88.
[644] *Ibid.* at 89.
[645] *Ibid.* at 93.
[646] The Act repatriated the Constitutional Act of 1867. Sec. 38-49, Constitutional Act of 1982. The formula calls for the consent of Parliament plus the legislatures of at least two-thirds (seven) of the provinces, which, among them, contain at least fifty percent of the Canadian population. The notwithstanding provision allows legislatures to override sections 2 or 7 though 15 of the Charter of Rights and Freedoms for a period of five years, which is renewable, providing that they invoke the clause.
[647] See James Bickerton & Alain-G. Gagnon, *Canadian Politics* (University of Toronto Press, 2009) at 105 [*Bickerton & Gagnon 2009*].
[648] *Ibid.* at 105. The mechanism for reform requires legislative consent and not just signatures of the first ministers. But it did not, however, require direct popular consent.

meaning that provincial governments "could no longer claim to be supreme within their respective jurisdictions".[649]

The new constitution took effect despite its rejection by the Quebec Premier and the Quebec National Assembly.[650] Subsequent efforts to incorporate Quebec into the constitution through the Meech Lake Accord and the Charlottetown Accords, negotiated between 1987 and 1991, failed.[651]

The Quebec government of René Lévesque viewed the Act as a "massive and unconstitutional" encroachment of Quebec's political autonomy. While this measure did not have much "practical effect"[652] the repatriation of Canada's Constitution in 1982 reinvigorated the issue of Quebec's differences from the English speaking provinces, and also the extent of federal-provincial legislative power under the Acts that formed Canadian federation and subsequent constitutional developments. Thus by defending its political and legislative autonomy, Quebec's rejection of the Act constitutes an important but neglected chapter in the history of Canadian federalism.

6. Comparative Political Lens

A comparative reading of the development and status of cohabitant rights in Quebec through a political lens showcases three important points of how: (1) the way family law reform debates are framed can obscure complex barriers to reform; (2) private law is used as political leverage between political groups to pressure for unity or counteract

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[649] *Morton 1987 supra at* note 619 at 174.
[650] See *Bickerton & Gagnon 2009 supra* at note 647 at 104.
[651] *Ibid.* at 107.
[652] *Morton 1987 supra at* note 619 at 46.

subversiveness; (3) legal reforms that imply or are organized within themes of assimilation or harmonization can deploy strong partisan sentiments.

6.1. Bipolarization of Family Law Reform

For example, at the time of the Lola case, Quebec remained the only Canadian province not to recognize statutory *de facto* marriages. Instead of redirecting attention to the double-sided effect of the neutralization policies of the 1970's, the discussions surrounding the Lola case called attention to regional divisions with respect to marriage-like status rights in Canada.[653] Little notice was paid to the effect that the phasing out of the status and gender asymmetries embedded in the Quebec Civil Code had on cohabitants in Quebec or to preoccupations that had been expressed by the Quebec legislature about the contrary effects that application of common law institutions to Quebec's civil law frameworks could have.

The 1980 code had eliminated any reference to concubinage.[654] The neutralization policies of the 1970's had begun to phase out the status and gender asymmetries

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[653] Women-centred reforms before the Civil Code of Québec 1980 included amendments enacted in 1876 and 1888 regarding the legal capacity of separated women as to bed and board and that admitted wives as legal heirs of a deceased spouse. In 1931, rules relating to the legal capacity of married women were changed and married women were removed from the framework of rules applied to minors or those suffering a mental incapacity and the recognition of full legal capacity.

[654] Civil Code of Lower Canada, CCLC, art. 768, which stated that "[g]ifts *inter vivos* made in favour of the person with whom the donor has lived in concubinage, or of the incestuous or adulterine children of such donor, are limited to maintenance." This restriction limited concubines from giving and receiving unilateral transfer of goods, with the exception of those intended for "maintenance". This prohibition of gifts *inter vivos* between cohabitants was reasoned on the idea that this freedom of disposition of personal property in favour of informal conjugal partners would put the bulk of the lawful family inheritance at risk. *See* André Cossette, "Le concubinage au Québec" (1985-1986) 88 La Revue du Notariat 42 at 45 [*Cossette 1985-1986*].

embedded in the Quebec Civil Code.[655] Abolition of the institution of concubinage left unmarried women with neither the legal rights of wives nor those of concubines.[656]

Despite multiple proposals to incorporate cohabitants into the civil code framework, the Quebec legislature continuously retreated because of its policy of not submitting these relationships to the legal constraints of marriage. [657] There were also arguments by lawyers denouncing cohabitation contracts as illegal and contrary to public order.[658] Nonetheless, at the background of Quebec's discussions were also concerns about the effect that neutralization and incorporation of the principle of equality had had on Quebec's family law institutions. Changes relating to the capacity and status of married women, incorporated through preceding piecemeal legislation, had not produced an important change in local spousal dynamics.[659] Moreover, misgivings were expressed on the "contrary" effects of application of "common law" derived remedies to civil law

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[655] Women-centred reforms before the Civil Code of Québec 1980 included amendments enacted in 1876 and 1888 regarding legal capacity of women separated as to bed and board and that admitted spouses as legal heirs of a deceased spouse. In 1931, rules relating to the legal capacity of married women were changed and married women were removed from the framework of rules applied to minors or those suffering a mental incapacity and gained the recognition of full legal capacity.

[656] *See Cossette 1985-1986 supra* at note 654 at 45.

[657] *Ibid.*, see also *Crépeau 1973 supra* at note 18 especially at 394.

[658] Roy also notes the political background through which Quebec's policy choice took place, making reference to opinions submitted to legislators who asked for "respect of non-married couples' desire to keep their choice of lifestyle distinct from marriage". This perspective was reinforced by opinions of the *Conseil du statut de la femme* in 1991and the *Barreau du Québec* and the *Chambre des notaires* in 2002. *Roy 2002 supra* at note 18 at foot note 6 at 9.

[659] *See* Claire L'Heureux-Dube, "Quebec Experience: Codification of Family Law and a Proposal for the Creation of a Family Court System, The" (1983) 44 La. L. Rev.1575 at 1585-1589. Heureux-Dube notes that some of the provisions proposed in order to protect consorts, property and children were shared obligation of contributions toward household expenses, the presumption of paternity of the *de facto* husband, and the obligation of support during the cohabitation between consorts. However, now the only reference to shared responsibilities of cohabitants or rights is found in reference to residential leasing agreements in Art. 1938; see also John E.C. Brierley & Roderick A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery , 1993) at 79-80 [*Brierly & Macdonald 1993*].

frameworks. [660] However, this absence of recognition of cohabitation became something of a Quebec cultural icon.[661]

Something similar occurs in Mexico due to the generalized assumption that state codes closely model the federal code and that the federal code fully represents the status of women's family law rights in Mexico. The bipolarization of women's rights along the federal-state divide makes it difficult to uncover how this border itself serves as a barrier to women-centred reforms. It thus underscores how family law divisions can also overshadow dissent within more sensitive political and jurisdictional arenas. This issue is important given that many of the problems encountered in understanding the challenges of women-centred family law reform in Quebec stem from the fact that private law issues are bipolarized in a way that coincides with the French-English linguistic division. The division of women rights strategizing in this manner not only reinforces this division but makes it more difficult to identify and understand other important barriers to women-centred reform.

6.2. Private Law as a Political Leverage

Resnik has noted how "the formulations of new structures [generated by multi-scaled federalist arrangements]" generate "opportunities for alternative allocation of power".[662] The "gaps in governance" generated by these complex structures are thus crevices from

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[660] S*ee Crépeau 1973 supra* at note 18 at 931.
[661] Referring to the iconic symbolism of the civil codes and its institutions in Quebec and its relation to family law institutions like cohabitation, see *ibid.* specially at 394 and also *Roy 2002 supra* at note 18 at foot note 9-11.
[662] *Resnik 2001 supra* at note 22 at 676.

which new and old "power-seekers" can gain or maintain political and legal footing.[663] An example of this is how private law is frequently used in Canada and Mexico as political leverage between conservatives and liberals or as a way for the federal government to pressure for unity or counteract subversive movements. Sub-national jurisdictions also use family law to protect themselves against the federal government's encroachment on local territorial, legal and political rights. As the previous pages have highlighted, private law authority can serve as a map to chart something more than just political boundaries. In Quebec, efforts that were perceived as centralizing, controlling and/or harmonizing Quebec law caused reactions that sought to protect the civil law, which was believed to encompass an important part of Quebec's French cultural identity. In pre-revolutionary Mexico the requisite of formality to recognize marriage unions served as a veil to distract attention from struggles over the sanctity of marriage and as a tool to steer racial, social and politically favourable conjugal alliances. During the Mexican revolutionary period, struggles over private law authority served as a political vehicle to justify the abolition of Church power and authority in New Spain.

6.3. Legal Assimilation or Harmonization can Deploy Partisan Sentiments

A critical reading of Quebec's take on cohabitants draws attention to how denial of women's rights can take on a cultural patina when analysed outside of the historical and political context for legal-jurisdictional private law autonomy. Justifications for the lack of harmonization of Quebec's family laws in line with those of common law Canada have taken on a cultural flavour. Drawing on its French civil law legacy and arguments about

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[663] *Ibid.*

its society's distinctiveness, lack of recognition of cohabitants' rights has become a cultural stamp of Quebec and Canadian civil law.[664] This example therefore highlights the importance of taking into account family law developments in their broader political context.

Efforts that were perceived as centralizing, controlling and/or harmonizing Quebec law caused reactions that sought to protect the civil law heritage, which was believed to encompass an important part of Quebec's French identity. The political alliances made to preserve Quebec's civil law legacy tended to work against the concerted development of women-centred code reform.[665]

For example, state code projects in Mexico have become an important political symbol of juridical autonomy. Nonetheless, the federal-state divide is often more illusory than real. Through an ample interpretation of the federal government's implied powers under article 73, it enacted federal civil and criminal codes as a way to regulate those areas that are regulated by the civil codes but that fall under the aegis of the federal government, an area that seems to be constantly growing.

It is not only important to acknowledge the power disparities between the rights enforcers and the rights implementers but also the historical legacy in which these struggles are embedded. This is because the geo-jurisdictional politics that take place in the background of family law reform may constitute an important force for change or an impasse in the development of women's family law rights. In Mexico, states' reluctance

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[664] See Benoît Moore, "Culture et droit de la Famille: de l'institution a l'Autonomie Individuelle" (2009) 54 McGill LJ 257.

[665] See generally *Brierly & Macdonald 1993 supra* at note 659 especially at 535-537.

in following the CCDF-MCRMF 1928 in the incorporation of women's rights in marriage and concubinage rights during the 1940's and 50' was sign of sub-national governments' opposition to the federal government's encroachment on states' private law autonomy.

The implications for women are clear. When there are asymmetries between the agents involved in rights making and those involved in rights implementing the discourse of conditionality can change the power issues at stake in the implementation of gender policies. Thus, for example, change to Quebec's Civil Code has been embedded within its broader struggle for political independence. Civil Code reform projects acquired an emblematic importance for the national survival of Quebec culture in the broader identity-based struggle between common law and civil law Canada. Thus, even if there do not appear to be important differences among the sub-national groups, it is important not to devalue the fact that the type of power that sub-federal governments exercise within the federal political architecture is in many cases dependent on the struggles over family law reform.

7. Conclusions: Lessons for Feminist Comparative Engagements

The comparative reading of the jurisdictional politics behind the development of cohabitant rights reveals the important effects of historical legacies and federalism on women's family law rights. When federated structures (juridical and jurisdictional) and their borders are built around ethnic or linguistic divisions, this increases possibilities for conflicts. Historical developments like colonialization, federalization, constitutionalization and internationalization can also modify the stakes of reform and the techniques used to achieve this power. However, even when federated structures are not

built around ethnicized or linguistic divisions, it is a mistake to assume that jurisdictional and juridical borders have a benign effect on law reforms.

Chapter 6 :Conclusions: Challenging the Path Dependencies of Comparative Family Law

1. Introduction

This thesis has used the complex context behind Mexico City's family law reforms between 2000-2009 as a entryway and paradigm from which to explore the historical and contemporary importance of jurisdictional politics in the development of women's cohabitant and divorce rights in Mexico and Quebec. The case study chapters examined different but interconnected jurisdictional struggles intersecting the regulation of concubinage and divorce in Mexico and concubinage in Quebec. Chapter two examined the political importance of the status of marriage and the regulation of informal conjugal unions that occurred within a wide historical period——from the colonial period on one end, to Mexico City's concubinage reforms in the year 2000. Through this approach it reconnected the ethnic, class and gendered underpinnings of the marriage vs. clandestine marriage division during the colonial era as a defining precursor to the stacked system of conjugality that currently operates within the Mexican civil codes. Chapter three built upon the chapter on concubinage rights in Mexico by highlighting how the reintroduction of unilateral divorce by Mexico City rekindles the importance of pre-existing jurisdictional tensions between moderate conservatives and the discourse of women's rights. However it used a different jurisdictional lens to examine the effect that national legal harmonization efforts had on divorce reform and stressed the gendered effects of

divorce after the 1930's, which now make unilateral divorce a viable, gender-equitable option. Chapter four shifted the scale of analysis to include the effect that supra-national institutional and human rights laws have had on contemporary family law architecture and reforms. It discussed how internationalization of family law introduced new perspectives in the development of women's family law rights and uncovered the fallacy of the federal-state, private-public division of family law. Through a comparative reading of the development of cohabitants' rights in Quebec *vis-à-vis* Mexico, chapter five underscored how the historical and political division at the background of family law reform remains relevant today and the different effect that the discourse of nationalism can have on the development of women's cohabitation rights.

To conclude I would like to highlight the lessons learned from examining jurisdictional politics in the development of women's cohabitant and divorce rights in Mexico and Quebec, examine the contribution these results have made to feminist and comparative family law scholarship, examine the theoretical factors behind the lack of scholarly engagement on the jurisdictional-political dimension of family law; and propose a framework to draw out the political dimensions of family law reform.

2. Recapitulation of Lessons Learned

As the case studies highlight, jurisdictional struggles do make up an important component of divorce reform in Mexico and conjugal cohabitation regulation in Mexico and Quebec. Factors surrounding the multiplicity of struggles and their overlapping in these family law ambits are related to the fact that these jurisdictions are former colonies, federalized states and are also engaged in the internationalization process. As a result of these

processes there are compound legalities intersecting the development of women's family law rights.

Benton and Merry have correctly noted how the large-scale transfer of laws and multiplication of authorities made informal marriage in New Spain a rich forum for jurisdictional disputes. Because colonialization presented opportunities to reduce the influence of colonial institutions that were impinging on colonial powers, realignment of conjugal borders became a Crown tool to "subsume" the competing legal authority of the Church and to stake political claims in New Spain.[666] Reforms to the formalities of marriage were put in place to redefine conjugal relations that protected the economic enterprises of the colonies and assured continuity or enhancement of status and wealth among colonial families. The marital process was thus transformed into a tool to bolster political authority and re-draw conjugal boundaries in the new colonial setting, and it left a lasting legacy on the legal treatment of married and unmarried partners in the Mexican civil codes.

The influence of this legacy is visible in the importance that authority over marriage came to have for Mexico's statehood project and the marginal status given to unmarried unions in the civil codes. During the post-colonial independence era, marriage and family law authority became a symbol of ideological and political independence. Divergent views over the morality and political convenience of recognizing concubinage unions became evident in the regional and legal disputes in early twentieth century Mexico on the regulation of concubines. These struggles in turn had an important impact on both

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[666] *Benton 1999* supra at note 21 at 564.

political and women's rights. Regulation of concubines in the CCDF-MCRMF 1928 introduced issues of the perpetuation of hierarchical family systems rooted in colonial ideology. There were also concerns over the civil and financial effects of recognizing and legitimating concubines and their offspring and the effect this would on married women's rights and family inheritance.

Legalization of vincular divorce in Mexico in 1914, recognition of concubinage and the broad powers of the CCDF-MCRMF 1928 showcased the malleability of federal-state partitions when larger political interests came into play. The examples highlight that even family law is no longer a merely local matter and that the private sphere and federal-state law "boundaries" are "permeable" when "sufficiently weighty interests are at stake".[667] Political leadership could be established by devolving the Church authority's over marriage and family. While family law was a state matter, federal intervention was necessary to "protect" women and promote women's rights. Embedded in this discourse in favour of women, however, were personal and political ambitions. Illicit unions could be protected by giving married men a status right to their adulterous unions. Political gains could be made from equalizing religious marriage to civil marriage. Economic rewards could be achieved by liberalizing divorce and offering it to everyone. In Quebec political and jurisdictional private law borders were expendable when national unity was at stake. None of these objectives followed the public-private divide, much less the strict federal-state divisions of power.

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[667] *Cahn 1993 supra* at note 22 at 1125.

Mexico's turn to the liberal economic model during the 1980's and 90's had the effect of requiring the country to open up its legal system through the ratification of international treaties. Initially women's rights were considered part of supreme law, but they were rarely applied directly internally. To bring national laws in line with international obligations the federal government adopted soft-law type mechanisms which resulted in greater federalization of private law. Because more than seventy percent of the bulk of federal legislation was new, structures were created that could cross the necessary jurisdictional and legal boundaries to implement international obligations. The change to the treatment of women's rights perpetuated and amplified the crossover of jurisdictional divisions. More than transforming women's rights, internationalization created a shift in politics and law-making power in Mexico. The push of the federal template as model law looked like a device to impose the federal government's private laws on the states. The schism between the federal and state governments, the lack of sub-federal compliance to international human rights treaties and notable divergence from the new federally enacted civil code model created a parallel system of family law within Mexico. Within the constitutional arena, this new competition for power called into question the way internal laws "assimilated" international treaties and how these mechanisms of "adoption and adaptation" of international law themselves became law- making mechanisms. But they also amplified the power of the courts to shape women's family law rights policy. Internationalization thus created a complex environment of struggle for legal reform in which the politics of the past silently framed the new complex legal and institutional structures in order to implement these international obligations. Contemporary supra-national institutions and non-state rights actors have changed the political architecture for

women. How these structures influence and are influenced by gender claims is multifaceted, given the historical contingency behind the formation of state law and the power that law itself has to "certify" and validate positions of power. To understand transnational processes more fully requires that they be read through the lens of the legal and political "remnants" left by colonial takeovers, the factors behind independence and aspiration for self-government and self-rule.

3. Contributions to Feminist and Comparative Family Law Scholarship

Jurisdictional politics should be relevant to feminist endeavours because they shed light on a broader range of political concerns with which family law can intersect.[668] They also yield insight into little known catalysts or events that have affected the development of women's family law reform. Methodologically, this indicates that a wider net must be cast in the examination of factors in the background of or driving reform. However, this more expansive approach involves deconstructing the political and jurisdictional divisions that make family law appear far removed from larger political and legal processes.

One of the most important lessons learned from this project is that attention to the political or jurisdictional dimensions of family law reform helps to expose the myth that family law is, as Bradley notes, "merely private law" and the fallacies that accompany this presumption. This short-sightedness about family law fails to see how federal laws or laws from areas like labour, social security and criminal law form an important part of the

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[668] See generally David Bradley, "Family Law" in Jan M. Smits, ed., *Elgar Encyclopedia of Comparative Law (*Cheltenham: Edward Elgar Pub., 2006).

regulation of families and how this kind of power as it affects family law can in turn impinge on local private laws.

3.1. Uncovering the Family Law Modernization Canon

From a comparative law standpoint, the jurisdictional dimension of family law rights highlights how the premises of the family law modernization theory or canon operate in the same way as the family law canon. As stated in the introduction, I argue that:

> [T]he problem with the family law assimilation thesis lies in its close relationship with the law and development school of thought. By endorsing images of consensus, unity and uniformity with respect to family law reform this approach exacerbates the rights paradigm through which human rights, powerful jurisdictions, transplantation and central governments form the axis of reform. As a result it severely downplays the complex legal and jurisdictional issues behind top-down legal change.[669]

3.1.1. Unpacking the Family Law Modernization Way of Thinking

Modernization of family law is generally characterized by the process of instituting secular, liberal and egalitarian family laws, which move from recognizing family changes as a matter of public regulation to considering them as private contracts for which the state functions as a coordinator. The minimized presence of the state is illustrated by the progressive withdrawal of state regulation from family law and by an increase in non-regulated kinds of family behaviour. With industrialization, the role of the state changes to one in which it seeks to coordinate and uphold the principles of equality and non-

[669] Quote taken from Chapter 1, 4.Canonical Understandings about Family Law Change supra at 31.

discrimination as well as the institutions of family and law, simultaneously and perhaps paradoxically.[670]

Family law modernization is also a counter referent to "traditional" family law.[671] The process of modern law is the result of Enlightenment ideas on the secularization of the state and rationalization of law.[672] In contrast, traditional law is characterized as the development of law rooted in Roman and Germanic law, subsequently influenced by the Christian Church and later adopted and secularized in the Enlightenment by the rise of the nation state.[673] Modern family law thus embodies the way that family law is dichotomized through two prototypes, traditional family law and modern family law.[674]

In addition, the concept of modernization is also used to underscore a generalized pattern of legal reform towards secular, egalitarian and individualistic family laws. It refers to legal changes in the area of family law moving towards those of the developed countries.[675] The process of modernizing family laws in "developing" countries is characterized as beginning within the modern era, as the Enlightenment movement set out to impose, improve or civilize family behaviour, which was many times contrary to

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[670] Harold Joseph Berman, *Law and revolution: the formation of the Western legal tradition* (Cambridge: Harvard University Press, 1983) at 38-39 [*Berman 1983*]; see also Aleck Chloros et al., eds., *International Encyclopedia of Comparative Law, Vol. IV Persons and Family* (Boston: Martinus Nijhoff Publishers, 2007) at 6-7 [*Chloros 2007*].
[671] See *Glendon 1989 supra* at note 6 at 16-22.
[672] See *Berman 1983* at at 35-36 & 38-39 and *Chloros 2007 supra* at note 670.
[673] Berman 1983 *ibid.* at 23-34.
[674] See *Glendon 1989 supra* at note 6 at 16-22.
[675] See Anne Peters & Heiner Schwenke, "Comparative Law beyond Post-Modernism" (2000) 49 I.C.L.Q. 800 at 806-810 [*Peters & Schwenke 2000*].

and/or developmentally behind the family patterns considered desirable by other groups.[676]

3.1.1.1. Tracing the Lines of the Principles of Comparative Law

The legal patterns on which the family law modernization thesis was built made certain assumptions about the beginnings, direction, destination and consequences of movements in family laws, many of which are rooted in comparative law's disciplinary principles.[677]

The order and direction embedded within comparative family law is entrenched in its disciplinary principles. Since the early 1900's comparativists have stated that one of the functions of comparative law is to "trace the evolution of various societies and finally of Mankind through a series of definite stages".[678] Legal comparisons need to take into account "how and how far [legal precepts] attain their ends and the ends of law in the time and place".[679] This aim implied that comparative law was a means to evaluate and implement 'International Common Law' consisting of rules which are applicable to the needs of such communities as have attained the same standard of civilization.[680] Thus, comparative law became a "recognized instrument for the development of law".[681]

When analysts first approached comparative law within the “law and development” perspective, problems with it became evident. This approach to the study of law consisted

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[676] *Chloros 2007 supra* at note 670 at 10-13.
[677] *Twining 2004 supra* at note 125 at 3-4.
[678] Jerome Hall, *Comparative law and social theory* (Baton Rouge: Louisiana State University Press, 1963) at 17 [*Hall 1963*].
[679] Roscoe Pound, “What may we expect from comparative law?” (1936) 22A.B.A.J. 56 at 59 [*Pound 1936*].
[680] Harold Cooke Gutteridge, *Comparative law : an introduction to the comparative method of legal study & research* (Cambridge, England: University Press, 1946) at 5-6 [*Gutteridge 1946*].
[681] *Ibid.* at 16.

of seeing the development of law as a response to certain social problems. At its start, the prevailing view in the law and development approach was that law reform could be instrumental in effecting change in society.[682] While other reformers were assumed to be adopting the higher role of arbiter of legal rules, as impartial observers with no set agenda, the law and development movement implied having a certain perspective on the law and promoting or selling it to others as a form of "better" and "more progressive" law.

Criticism of this approach centred on two issues. The first was that this approach implicitly meant identifying law as compatible with some ideal. The second was that the evaluation of law in the context of the ideal was always solution-seeking in the sense that any reform of law was intended to move it closer to the ideal. This philosophy of legal improvement and the view of law as something that needs fixing narrowed the comparative law perspective and resulted in the assumption that every law that was to be changed was inherently bad, that social ills could be changed through law; that there should be certain goals for law and that these should be universal and uniform; and that once law was changed law and society were better just by having achieved this change.

3.1.1.2. Comparative Law as an Instrument for Development

Evolutionary philosophies had an important impact on the discipline of comparative law. For example, the idea that law is influenced by geography has been a long-standing governing principle of comparative law. For both Montesquieu and Zweigert, geo-political and geo-cultural factors were an important part of the "heuristic principles" by

[682] John Henry Merryman, "Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement" (1977) 25 Am. J. Comp. L. 457 at 462 [*Merryman 1977*].

which comparative law situated laws. [683] Montesquieu believed that geography was indicative of the spirit of a nation's law. Geo-physical and topological factors like climate, fertility of the soil, the size and geographical position of a country influenced the spirit of a nation's laws, and the differences between nations were circumscribed by geo-political borders.[684] Likewise, Zweigert considered geo-political factors like economic development to strongly attest to differences between laws of different legal families.[685] For these comparative scholars, geography and its boundaries determined comparability, "not only for a country but also for its culture and law".[686]

One of the most controversial aspects of the "evolutionary aims of comparative laws" was its effect in charting legal-cultural borders.[687] In 1900, at the Congress of International Comparative Law held in Paris, comparativists stated that one of the functions of comparative law was to "trace the evolution of various societies and finally of Mankind through a series of definite stages."[688] Thus much of the information on which legal taxonomies came to map the world's laws drew on the chronological and cultural templates constructed by evolutionists. These legal maps were often related to notions of race, geography, social progress or evolution.

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[683] See especially Bernhard Grossfeld, "Geography and law" (1984) Michigan Law Review 1510 at 1512 [*Grossfeld 1984*].
[684] As Montesquieu stated, "[l]es lois politiques et civiles de chaque nation . . . doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir a une autre." *Esprit des Lois*, Book I, Chap. 3 (Des lois positives) in *Kahn-Freund 1974 supra* at note 1at 6.
[685] Konrad Zweigert & Hein Kœtz, *Introduction to comparative law*, 3rd rev. ed. (Oxford: Oxford University Press, 1998) at 36.
[686] *Grossfeld 1984 supra* at note 683 at 1512.
[687] H. Patrick Glenn, "Aims of Comparative Law" in M. Smits, J.M. ed., *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006), specially at 67-69 [*Glenn 2006*].
[688] *Hall 1963* supra at note 678 at 17.

In an effort to distance themselves from these evolutionary perspectives, mainstream Western comparative law subsequently adopted more complex approaches using a combination of several factors in order to classify laws. These included a country's historical background, its development, mode of thought in legal matters, legal ideology, distinctive institutions, the prevailing formal legal sources and their treatment. Nonetheless, notions of legal systems, legal families or cultures tended to reinforce indirectly many of the evolutionist inferences about cultures and progress.

Comparative law came to be viewed as a potential for the development of law and legal uniformity. [689] Inherent in this philosophy was the idea of progress: the belief in the "inevitability of social betterment". [690] It assumed that society was somehow always "moving towards a better state of earthly affairs"[691], that "law [was] the answer to the needs of society"[692] and that all legal change could be explained in terms of this forward movement of society.

This approach to the study of law consisted of seeing the development of law as a response to certain social problems. At its start, the prevailing view of the law and development approach was that law reform could be instrumental in effecting change in society.[693] Issues like "access to justice", "legal effectiveness" and the search for solutions to social problems were characteristic of this approach. This had the effect of promoting an approach that consisted in the comparison of rules and institutions in terms of their

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[689] *Gutteridge 1946 supra* at note 680 at 6-7 & 16; *Merryman 1977 supra at note 682* at 461.
[690] *Merryman, ibid.* at 462.
[691] *Ibid.* at 461.
[692] *Peters & Schwenke 2000 supra* at note 675 at 810.
[693] *Merryman 1977 supra* at note 682 at 462.

"objectively identifiable functions". To avoid imposing value connotations, this approach stripped institutions like the family and marriage from their political and moral associations and focused inquiry on social actions as part of the problem-solving process. This approach enabled morally and politically charged institutions to be studied scientifically without being cluttered by their "emotional context" or "naturalistic" views.[694]However, this also resulted in a decontextualized and neutralized image of these institutions and the factors behind their changes.

This early comparative approach presumed that communities had similar problems stemming from similar circumstances and that there could be an equivalent successful solution for both.[695] It entailed accepting the premise that "modern civilization creates essentially the same problems everywhere." [696] The result of comparison therefore consisted in measuring "how and how far [legal precepts] attain their ends and the ends of law in the time and place".[697]

3.1.1.3. The Sequences and Orientations Embedded within Comparative Family Law

The idea of legal improvement gave mainstream Western comparative law a distinctive sequence and orientation due to its descriptive and predominantly private law focus on "legal doctrine" and "positive law and official legal systems of nation states", on

[694] *Hall 1963* supra at note 678 at 108.
[695] *Peters & Schwenke 2000 supra* at note 675.
[696] *Ibid.* at 618
[697] *Pound 1936 supra* at note 679.

"Western" jurisdictions in Europe and the U.S. and on the civil law-common law dichotomy.[698]

The taxonomies embedded within comparative law exhibited certain predispositions in the examination of patterns of legal change. As William Twining notes, comparisons tended to make assumptions about the beginnings, the direction, destinations and consequences of movements of laws. They perpetuated the idea of state centralism; in other words, they saw the law as a "single, unified and exclusive hierarchal normative ordering depending from the power of the state".[699] Patriarchal images of legal change were endorsed. Patterns of legal change were traced between a "parent" system and a "dependent (e.g. colonial) or adolescent (e.g. 'transitional') legal system". Lastly, these transfers were devoid of any political connotations and were merely technical in nature.

3.1.1.4. The Distorting Effect on Family Law Discourse

Within family law this meant that comparisons were undertaken with the assumption that there should be certain universal goals within families, that all laws to be changed were inherently bad, that social ills could be changed through law, and that once laws were changed, law and society would be better off. However, this solution-seeking reasoning also implied that the law in actual practice was perpetually incompatible with the "development" ideal. Nevertheless, from a socio-legal perspective this approach perpetuated the idea that modern family law was somehow preordained both in its form and its outcomes. It assumed that there was some innate form of family, that family as a

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[698] *Twining 2004 supra* at note 125 at 4. See also Upendra Baxi, "The Colonialist Heritage" in Pierre Legrand and Roderick Munday ed., *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), especially at 49.

[699] John Griffiths, "What is Legal Pluarlism?" (1986) J. Legal Pluralism & Unofficial L. 1 at 4.

social unit was “progressing”, and that legal change in the area was obviously forward moving and this type of change would bring families and laws closer to an ideal form.

The strong link between modern family laws and legal convergence also encouraged the idea of family law modernization as one symbolizing protection of women’s rights. This had the effect of exacerbating the rights paradigm by which family laws were chronologically, politically and geographically ordered. As Twining notes, while "imperialism, and neo-imperialism form an important part of the picture", this patronizing assumption does not fully represent all patterns of legal change.[700] This patriarchal image of legal change tended to be accompanied by a "formalistic and technocratic top-down perspective" approach to reform that inherently "underestimates the importance of informal processes of interaction".[701]

Thus, for instance, the over-use of powerful states as points of departure and templates for examining family law change resulted in discounting from the start the extent to which pro-women reforms were historically or politically rooted or necessarily a development arising from legal importation. It also took for granted that women's equality rights had been fully realized for all women in "northern" jurisdictions but were somehow lacking elsewhere.

The predominant focus in the literature on central governments as axes of reform has also resulted in downplaying or disregarding the political and jurisdictional connotations

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[700] *Twining 2004 ibid*. at 23.
[701] *Ibid.*

behind women's family law rights.[702] Inherent in comparisons that saw the principal instigators and actors behind family law change mainly as governments and the object of transference as formal laws was the opinion that implementation of women's rights was an uncomplicated top-down, one-stop reform process.[703] The assumption of centralism in women's rights reforms helped to perpetuate images of consensus, unity and uniformity with respect to controversial reforms, but it also overstressed the power of legal transplantation or internationalization of law. However, this kind of political downplaying had the effect of viewing the adoption of equality rights commitments benignly as only transplantation of "legal rules and concepts". This discounted from the outset that family law change could involve complex legal and jurisdictional issues.[704]

3.1.1.5. Implications Embedded in the Perpetuation of Family Law Tropes

While this issue may appear as merely academic on the surface, there are nonetheless important practical implications involved with a change in paradigm in an area like family law. Governments require information about the reputation of a legal strategy as well as the "factors" that need to be taken into account when opting for one or another model or option.[705] This information also influences if, when and how judges "treat foreign precedents and other sources as persuasive authority".[706] Opposing stakeholders also require information on how to counteract or reduce "the impact" of unwanted legal

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[702] *Ibid*. at 3.
[703] *Ibid.*, especially at 3.
[704] *Ibid.*
[705] *Ibid*. at 10.
[706] *Ibid*.

change.[707] International institutions and their agents as well want to know the issues and success rate of reforms "involving importation or imposition of foreign models".[708]

By contrast, the perpetuation of explanations of family law change based on constructed images of the state's romantic commitment towards gender equality or "technical solutions to shared problems" have an important role in expanding the evolutionary and developmental canons on jurisdictions and women.[709] Sacco notes for example how the propositions, reasons and conclusions about a legal system made by judges and scholars constitute part of the broader structures of legal systems and affect the way rules are explained, understood and interpreted.[710] Through their use of ideas found in philosophy, politics, ideology or religion, lawyers use justifications that can acquire an "official character" in the system and exert an influence on the false understanding of even the simplest operational rules. They can depict decisive images of why and how legal change comes about in these jurisdictions. H. P. Glenn has suggested that there may even be larger vested interests embedded in these tropes.[711] Glenn argues that all jurisdictions have interactions and influence from different legal systems and traditions, but that this "mixed character" may nonetheless be hidden by a jurisdiction's own state architecture and institutions, by the discursive borders set by "taxonomic comparative law methodology" which establishes distinct "families of law" or by "nationalist

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[707] *Ibid*.
[708] *Ibid*.
[709] See *ibid*. *e*specially at 28.
[710] *Sacco 1991 supr*a at note 124 at 5, 7, 24, 31-32.
[711] See H. Patrick Glenn, "Persuasive Authority" (1986) 32 McGill LJ 261 especially at footnote 2 at 265; *Glenn 2006 supra* at note 687 especially at at 60-63 and H. Patrick Glenn, "Comparative Law and Legal Practice: On Removing the Borders" (2000) 75 Tul. L. Rev. 977 at 96 [*Glenn 2000*].

historiography", all of which may have some form of "vested interest" in maintaining certain legal systems' "distinctiveness" or likeness.[712]

More problematic is the dangerous "distorting influence" that these tropes can have on women's rights, a legal system and family law discourse. Comparisons can undermine much of the “legal capital” of these systems, reinforcing a type of "folklorism" about laws, peoples and places of a region.[713] These perceptions can bind the limits of operation of a system and manipulate the broader organization of "legal space" at a more global level. [714] This can define, shape and build up many of the boundaries that limit understanding between states and within regions beyond the nation-state level.[715]

Conclusions drawn from the comparative family law literature can also have an impact on the choices and strategies available at the local level to achieve legal change. For example, perspectives that focus on consensus, unity and uniformity in family law reform dangerously dichotomize and inflate the changes that have occurred in family law over time and space. The presumption of achieved equality has the potential to wrongly perpetuate the idea that "family law no longer supports social inequality" and need no longer worry about women or the "status of historically subordinated" groups .[716] This can influence women's law reform by relieving legislatures and state courts from

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[712] See Glenn, H.P., "A Western Legal Tradition?" (2010) 49 Sup. Ct. L. Rev. 201, especially at 605-609.
[713] *Esquirol 2008 supra* at note 127 at 77.
[714] *de Sousa Santos 1987* supra at note 23 at 291.
[715] In the realm of legal education, this project proposes a re-dimensioning of the reading of law and legal process as part of the critical engagement with family law developments within the civil law traditions of the NAFTA members.
[716] *Hasday 2004 supra* at note 120 at 827 & 830.

contending with the issue of women's inequality or in repositioning in a more persuasive manner those very institutions that law reform sought to remove.[717]

These conclusions can also influence the choice of law reform strategies available when proposing legal change and affect the type of law reform issuing from international organizations and foreign governments. For example, within the Americas, the tendency to assume that "advanced" family law change consists in moving from civil towards "common law" models has reinforced the U.S.-Mexico border as the symbol of division between developed and underdeveloped worlds. The assumption of the "foreignness" of rights development has obscured the political and historical contingency of women's rights in the region and the parallel effect on rule creation, adjudication and enforcement at the local and national levels. The assimilation thesis has thus served to construct and reinforce many of the evolutionary and developmental dichotomies through which many of the North-South family law divisions have been constructed. A biased understanding of legal differences can become counter- productive to the overall objectives of law reform projects by permitting the development of a kind of family law that might be counterintuitive to women.[718]

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[717] See *ibid.* at 827.

[718] For example in countries of the civil law tradition where nations are more apt to "change…governments and constitutions more willingly than" their civil codes, code reform projects symbolize an important event within civil law nations. Code reform projects thus intersect with broad cultural, ideological, political and economic issues that affect the outcome and interpretation of the result obtained. The ample normative potential of civil codes illustrates the broader political dimension that law reform at the private law level involves, which is a process that is perhaps less perceptible through the orthodox common law case -by - case law reform processes. Critical engagement with these legal tropes can be central in challenging these unwritten dogmas and bring a "sensitive[ty] to cultural perspectives" in questions of law reform. Awareness of the different discursive politics embedded in private law reform can be critical to the success of women's rights groups' campaigns for legal change.

Awareness about these issues is important within the feminist and comparative family law literature because it (1) challenges "cultural" characterizations of family law that legitimize or reinforce women's discrimination, (2) removes the veil of neutrality from comparative family law; evidencing the complicity of family law scholarship in perpetuating these images, and (3) demonstrates why "scholars and policy makers" need to be more aware of the law models and "discourses" adopted to address family law reform change.[719]

3.2. The "Politics of Location" in Feminist Comparative Engagements

However, as Smart notes, feminist approaches also need to reframe problems of law reform by recognizing issues as *problems of law* not just as problems of the modernization of law.[720]

One way to break away from this pattern of thinking within family law is to give greater consideration to the "politics of location" of feminist engagements. U.S. feminists working on women's issues in India have called attention to the theoretical and political question regarding situatedness and identity when studying foreign places through frameworks informed by Anglo-American feminist perspectives. Cautious of the questions of cultural legitimacy and bias that these approaches entail, scholars have argued for awareness of the "politics of location" or "positionality" in undertaking work on women issues.[721]

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[719] *Leckey 2009 supra* at note 140 at 70.
[720] See Carol Smart, *Feminism and the Power of Law* (New York: Taylor & Francis, 1989).
[721] See Chandra Talpade Mohanty, "Feminist encounters: locating the politics of experience" (1995) Social postmodernism: Beyond identity politics, specially at note 8 at 74; Caren Kaplan, "The Politics of Location as Transnational Feminist Critical Practice" in Grewal, I. & C. Kaplan, *Scattered Hegemonies:*

This approach insists on taking into account "who you are, who you write about, and who your audience is" and locating the geographical historical, cultural and political specificities involved. [722] Doing so requires greater attention to how the locations and issues from which comparisons are born shape the way legal change is understood and the way it is portrayed. Also further and deeper inquiries have to be made on (1) the unintentional ways in which the framing, language, positionality and situatedness of comparativists and the comparative endeavour perpetuate a region's legal, linguistic, and cultural divisions and (2) new comparative frameworks from which to challenge the geographical historical, cultural and political borders embedded in legal comparisons within the region.

Postmodernity and Transnational Feminist Practices (University of Minnesota Press, 1994) specially at 137-138.; see also Brenda Cossman, "Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project" (1997) Utah L. Rev. 525 especially at 526.

[722] *Ibid.* at 530.

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LEGISLATION

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