

# CHALLENGING THE CENTRALIST DOCTRINE IN MEXICAN FAMILY LAW: AN ANALYSIS OF THE EVOLUTION OF STATE AUTHORITY OVER CIVIL LAW MATTERS AND ITS IMPACT ON THE REGULATION OF COHABITATION AND DIVORCE

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*ABSTRACT. This article addresses the need for debate about the concepts of federalism, centralization, decentralization and sovereignty within the context of Mexican comparative and family law. Until recently, private law and family law scholars have generally dismissed the issue of federalism within Mexico, largely because of the belief that Mexico is not “really” federalist given its strong tendency toward political and legal centralism. Despite this preconception—and the fact that Mexico does have a highly centralized federal system—a deeper analysis shows that states and sub-national jurisdictions have played a critical role in shaping the contours of family law and influencing the state-federal relationship. This article argues that the centralist doctrine that so permeates scholarly works on private law in Mexico—if not addressed and revised both for the past and present—risks undermining attempts at understanding legal change and improving Mexican family law.*

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KEY WORDS: *Federalism, decentralization, private law sovereignty, comparative law, family law.*

RESUMEN. *Este artículo es evidencia de la necesidad de situar debates de federalismo, descentralización, centralización y soberanía en el contexto de derecho comparado y derecho familiar. Hasta hace poco, académicos de derecho privado y familiar han desestimado la cuestión del federalismo. Esta desestimación se ha basado en la creencia generalizada de que en México no existe un verdadero federalismo dado el alto grado de centralismo político y jurídico que ha primado en el país. Sin embargo, un análisis más a fondo muestra que, a pesar del sistema federal centralizado, los estados y jurisdicciones sub-nacionales han jugado un papel igualmente importante a la hora de definir la política sobre derecho familiar y las relaciones entre federación y estados. Este trabajo argumenta, que la doctrina de centralismo que tanto permea la forma en que pensamos sobre derecho privado en México es una narrativa peligrosa que —de no ser abordada o revisada de alguna manera, en términos del pasado o del presente— puede socavar esfuerzos para entender el cambio jurídico y mejorar el derecho familiar en México.*

PALABRAS CLAVE: *Federalismo, descentralización, soberanía en derecho privado, derecho comparado, derecho familiar.*

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## I. INTRODUCTION

In 2000, Mexico's family law took an unprecedented turn: the Civil Code for the Federal District was amended to grant nearly full marriage rights to concubinage unions.<sup>1</sup> This was followed by similar amendments between 2006 and 2009 that legalized civil unions, same-sex marriage and adoption by same-sex partners, unilateral divorce and abortion.<sup>2</sup> With these reforms, Mexico broke new ground in the realm of equal rights.

Often neglected by commentators in this area are the complex layers of political, jurisdictional and legal change which gave rise to this new wave of family law rights in Mexico. Unsurprisingly, most of these reforms were influenced by political events.<sup>3</sup> As capital of the nation, the area called the

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<sup>1</sup> Código Civil para el Distrito Federal [C.C.F.D.] [Mexico City Civil Code], *as amended*, Diario Oficial de la Federación [D.O.], 25 de mayo del 200 (Mex.)

<sup>2</sup> Decreto de Ley de Sociedad de Convivencia para el Distrito Federal [L.L.T.F.D.] [Decree of the Law of Living Together for the Federal District], *as amended*, Gaceta Oficial del Distrito Federal [G.O.D.F.], November of 2006. *See* Decreto por el que se reforma el Código Penal para el Distrito Federal y se adiciona la Ley de Salud para el Distrito Federal [Decree by which the Penal Code of the Federal District is amended and additions are made to the Health Law of the Federal District], México, *Gaceta Oficial del Distrito Federal*, April 26 of 2007; *See also* 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 [Decree by which provisions of the Civil Code and the Procedural Civil Code of the Federal District are amended and abolished], México, *Gaceta Oficial del Distrito Federal*, October 03 of 2008; *See also* 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 [Decree by which diverse provisions of the Civil Code and the Procedural Civil Code of the Federal District are amended], México, *Gaceta Oficial del Distrito Federal*, December 29 of 2009.

<sup>3</sup> Up until the 1986 reforms, the Federal District had been governed indirectly by the President of the Republic, who delegated his authority to a federally-appointed Head of the Federal District Department, referred to as the *Regente* (Regent). The imposition of a representative selected by the federal government and not by the city's inhabitants was a source of constant and often bitter resentment among Mexico City residents. The 1996 Constitutional Reforms, introduced by presidents Carlos Salinas and Ernesto Zedillo, altered the federal government's power structure by substituting the Regent with the newly-created "Jefe de Gobierno del Distrito Federal" (Government Head of the Federal District), which was to be chosen through popular election. The first popular election of this new political figure took place in 1997, when the position was won by Cuauhtémoc Cardenas, head of the leftist *Partido Revolucionario Democrático* (Democratic Revolutionary Party, referred to as "PRD"). Cuauhtémoc Cardenas became a candidate in the 2000 presidential election, won by Vicente Fox of the *Partido de Acción Nacional* (National Action Party, known as "PAN"). These changes gave a powerful platform to the PRD, which used it to make key political and legislative gains on a national level.

Federal District (*Distrito Federal*)—at the heart of the Mexico City metropolitan area—was under the authority of the federal government until 1997. This jurisdiction included private law matters.<sup>4</sup> The National Congress was authorized to legislate for the Mexico City; appoint its judiciary; and divide and distribute the City's internal divisions, including civil and criminal legislation. In effect, the nation's President was authorized to unilaterally appoint (and remove) the Federal District's two main executives, the local governor and attorney general.<sup>5</sup>

This situation changed abruptly in 1997 when the federal Constitution was amended to give residents of Mexico City a “mixed system of distribution of competence”.<sup>6</sup> In essence, it granted independence to the DF, transferring authority from the federal government to the City's executive, judicial, and legislative branches.<sup>7</sup> This transition included the granting of legislative authority in both civil and criminal matters.

In 2000, Mexico City enacted a new civil code<sup>8</sup> that changed in subtle yet significant ways the regulation of family law. In a sense, these changes illustrate the main idea of this article, i.e., that the interaction of federalism, centralization and other forms of hybrid jurisdictional authority have had a major impact on family law. As Daniel Elazar noted, “after many years being neglected as a proper political study, federalism has become a major issue in

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<sup>4</sup> Constitución Política de los Estados Unidos Mexicanos [Const.], as amended México, Diario Oficial de la Federación [D.O.], art. 122, section C, first requisite, subsection V, 5 de febrero de 1917 (Mex.); See Estatuto General del Distrito Federal [G.S.F.D.] [General Statute of the Federal District] as amended, art. 52-66, 26, Diario Oficial de la Federación [D.O.], Julio de 1994.

<sup>5</sup> *Id.*

<sup>6</sup> JOSÉ MARÍA SERNA DE LA GARZA, EL SISTEMA FEDERAL MEXICANO. UN ANÁLISIS JURÍDICO 50 (Instituto de Investigaciones Jurídicas UNAM 2008).

<sup>7</sup> Graciela S. Jasa, *Family Law Reform in Mexico City: The Contemporary Legal and Political Intersections*, THE INTERNATIONAL SURVEY OF FAMILY LAW, 267, 270-271 (2013).

<sup>8</sup> *Id.*, at 71. See Reforms to Constitución Política de los Estados Unidos Mexicanos [Const.], as amended México, Diario Oficial de la Federación [D.O.], art. 122, 22 de agosto de 1996 (Mex.) At the inception of the legal independence of Mexico City, both the federal government and Mexico City had the exact same civil codes (the Código Civil Federal [Federal Civil Code] [CCF]) that remained applicable for the Federal District. However, the 1996 constitutional reforms gave the Federal District executive, judicial, and legislative independence from the federal government, which included the power to legislate in civil and criminal matters. In the year 2000, the Legislative Assembly for Mexico City, published a number of reforms to the Código Civil para el Distrito Federal 2000 that were mainly directed at reorganizing and redefining the family. See Decreto por el cual se derogan, reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal en materia común y para toda la república en materia federal y el Código de Procedimientos Civiles para el Distrito Federal [Decree abolishing, amending and adding diverse provisions of the Civil Code for the Federal District applicable in local matter and throughout the Republic in federal matters and the Procedural Civil Code for the Federal District] [DCCFDRPCCFD], as amended Gaceta Oficial del Distrito Federal [G.O.D.F.], 25 de mayo de 2000 (Mex.).

world affairs and political science...”<sup>9</sup> Given the strong disposition of federal laws and governance, it is more important than ever for scholars to study the underlying basis of these interactions in order to better understand how jurisdiction shapes family law.<sup>10</sup>

To better appreciate these issues, this article has taken a comparative approach. At this point it should be noted that Mexican legal scholars and practitioners have until recently given short shrift to the issue of federalism,<sup>11</sup> as they were convinced that Mexico has never “really” been federalist given its strong centralist tendencies.<sup>12</sup> This interpretation is not without merit,<sup>13</sup> as centralism is firmly-rooted in Mexico’s early social, political, and legal history and, as a consequence, is deeply ingrained in the thinking of legal scholars.<sup>14</sup> For this reason, academics have tended to strongly emphasize the similar-

<sup>9</sup> Daniel Elazar, *Federalism: Aftermath of the 1980s and Prospects for the 1990s*. *International and comparative federalism*, 26 *POLITICAL SCIENCE & POLITICS*, 190 (1993).

<sup>10</sup> See JOEL A. NICHOLS, *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTITIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION*, (Cambridge University Press 2011). Nichols undertakes a similar approach to the examination of change in marriage and divorce laws but with a focus on the “conflicts between civil law and religious norms in the arena of family law”.

<sup>11</sup> Federalism as viewed by the States may be split into two distinct approaches: revisionism of Mexico’s early political history and the more recent “new federalism” literature. The first group includes the works of Nettie Lee Benson, Timothy Anna, and Jesus Reyes Heróles who have shown that before Mexico’s first federalist phase in 1824, the country was not as unified as the centralists/conservatives have claimed, as the provinces considered themselves both “independent” and “sovereign” in all matters within their borders. Since the late 1990’s, the State’s view of federalism has been strongly influenced by Peter Ward and Alicia Hernández Chávez. These works have drawn attention to governance changes among the levels and branches of government in the 1990’s to reforms to reduce the centralization of legal and political power in key areas. While these inquiries have helped academics to better understand how federalism/regionalism has impacted political and social processes, none have directly connected the issue of states’ residual rights, the federal pact and family law. See: ALICIA HERNÁNDEZ CHÁVEZ, *¿HACIA UN NUEVO FEDERALISMO?* (Fondo de Cultura Económica 1996); José Natividad González Parás & ARMANDO LABRA, *LA GOBERNABILIDAD DEMOCRÁTICA EN MÉXICO* 97-128 (Instituto Nacional de la Administración Pública 2000).

<sup>12</sup> See JORGE CARPIZO, *Sistema Federal Mexicano*, in *LOS SISTEMAS FEDERALES DEL CONTINENTE AMERICANO*, (FCE-UNAM ed., 1972). Jorge Carpizo describes Mexican federalism as the struggle between two extremes, the “idea” versus the “reality” of federalism in Mexico. See also Mecham Lloyd, *Mexican Federalism: Fact or Fiction?*, 208 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE*, (1940); See also STEPHEN ZAMORA, *MEXICAN LAW* 120 (Oxford University Press 2004).

<sup>13</sup> FELIPE TENA RAMÍREZ, *DERECHO CONSTITUCIONAL MEXICANO* 110-111 (Porrúa 1998); See also IGNACIO BURGOA, *DERECHO CONSTITUCIONAL MEXICANO* 421 (Porrúa, 1989); See also JORGE CARPIZO, *Sistema Federal Mexicano*, in *LOS SISTEMAS FEDERALES DEL CONTINENTE AMERICANO*, (FCE-UNAM ed., 1972); See also Luis Aguilar Villanueva, *El federalismo mexicano: funcionamiento y tareas pendientes*, 58 *REVISTA MEXICANA DE SOCIOLOGÍA*, (1996).

<sup>14</sup> Jorge Carpizo, *Sistema Federal Mexicano*, 81 *GACETA MEXICANA DE ADMINISTRACIÓN PÚBLICA ESTATAL Y MUNICIPAL*, 128-131 (1981).

ity and centralization of the nation's civil laws rather than their diversity. In truth, the states' authority to regulate private legal matters has been largely symbolic, superseded by three key factors: (a) the centralized power exercised by the Federal District over state jurisdiction;<sup>15</sup> (b) the national and state-level political monopoly held by the *Partido Revolucionario Institucional* ("PRI") for over 70 years;<sup>16</sup> and (c) the "uniformizing effect" that federal civil legislation has had on Mexico's 31 state codes.<sup>17</sup>

Despite this dismissal, this federalist debate has been around since the early 19<sup>th</sup> century, a perennial struggle between national civil law and state law.<sup>18</sup> As a result, the interpretation of civil law switched often during the 19<sup>th</sup> century,<sup>19</sup> at which time the debate was revived by comparative legal scholars in order to unify the civil laws in Mexico by centralizing private law codification.<sup>20</sup> Comparativist supporters of centralism (i.e., substantive, procedural, civil and criminal law) argued that legal unity would enhance political unity.<sup>21</sup> Labelling the Mexican federalist system as "artificially diverse," many scholars argued that the unity of private law would not affect federalism given

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<sup>15</sup> Jorge Vargas, *Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments*, 28 THE INTERNATIONAL LAWYER, 659-658 (1994).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 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, the basis of which Benito Juárez, then governor of Veracruz, requisitioned the drafting of a civil code: *Bases Orgánicas de la República Mexicana de 1843*, 14-06-1843. 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", MANUEL CHÁVEZ ASCENCIO, LA FAMILIA EN EL DERECHO: DERECHO DE FAMILIA Y RELACIONES JURÍDICAS FAMILIARES (Porrúa 2007).

<sup>19</sup> See Ma. del Refugio González, *Notas para el estudio del proceso de la codificación civil en México (1821-1928)*, in LIBRO DEL CINCUENTENARIO DEL CÓDIGO CIVIL, (Instituto de Investigaciones Jurídicas ed., 1978).

<sup>20</sup> See FERNANDO SERRANO MIGALLÓN, LOS MAESTROS DEL EXILIO ESPAÑOL EN LA FACULTAD DE DERECHO 145 (Porrúa, 2003); See also Jorge Carpizo, ESTUDIOS CONSTITUCIONALES, 143-144 (Porrúa-UNAM, 1999).

<sup>21</sup> During the twentieth century, debate for a centralized civil code was fomented by comparative scholars, who were convinced of the benefits of one federal civil code that applied to all states. Supporters of a centralized code argued that Mexico's private law diversity was incoherent from historical, social, and cultural perspectives. They cited the example of the United States where adoption of the U.S. federal system had, in effect, "disintegrated" the nation's former political, religious, linguistic, economic, legal, and social unity. Moreover, the diversity of private law that existed was deemed more "formal" than real, given the continued influence of Spanish law within civil codes and the widespread adoption of federal codes in 1870, 1884 and 1928 by state legislatures. Scholars believed that the centralization of private law would not affect federalism.

that unification would only consolidate the already existing unity that underpinned most state codes.<sup>22</sup> As stated in the Proposal for a Uniform Civil Code by the Institute of Comparative Law: “*La unificación legislativa en nada afecta el sistema federal, porque no se toca su esencia: la descentralización política, ni tampoco se disminuye la descentralización administrativa.*”<sup>23</sup> [Legislative unification does not at all affect the federal system, because it does not touch its essence: the political decentralization nor does it diminish administrative decentralization.] Critics were quick to claim otherwise.<sup>24</sup>

This article makes three assumptions: (a) “real federalism” has never existed in Mexico, as most state civil laws are alike; (b) states often copy verbatim the federal civil code; and (c) states have been happy to share residual civil law powers with the federal government as a baseline to further the conversation on Mexican family law federalism. In doing so, it examines how family law governance in Mexico changed during the 19<sup>th</sup> and 20<sup>th</sup> centuries (with emphasis on the period following independence) and analyzes how cohabitation and divorce laws were impacted by changes in the application of family law. Despite Mexico’s highly centralized system, the states have played a greater role than centralist assumptions suggest, both in terms of their influence over family law and state-federal relations. This article argues that the centralist doctrine that permeates private law thinking in Mexico—if not revised both for the past and present—seriously undermines attempts to understand legal change and improve Mexican family law.

This article is divided into five sections. Part one analyzes how centralist assumptions regarding civil law have obscured the complex history of family governance in Mexico. Part two examines how these assumptions have understated the diverse roles played by states in shaping concubinage and divorce laws for women during the early 19<sup>th</sup> century. Part three and four separately examine how these assumptions have diminished numerous family laws and policies enacted in the early 20<sup>th</sup> century in matters of concubinage and divorce. Part five concludes by explaining why a reassessment of family law governance is vital to current efforts at reform. It also considers ways in which a comparative law perspective helps this reassessment.

## II. LOCAL CODES AS SYMBOLS OF FEDERALISM: 1820-1830

Until federalism and the separation of powers were formally adopted in the Constitution of 1917, Mexico’s system of governance formally shifted six different times. During the early period of the nation’s struggle for independence, it was assumed that centralist traditions, both republican and monar-

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<sup>22</sup> Javier Elola, *El Estudio de Derecho Comparado, Instrumento de la Unificación Jurídica Internacional*, 32 BOLETÍN DEL INSTITUTO DE DERECHO COMPARADO, 4-9 (1958).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

chical, would continue in force.<sup>25</sup> After the nation broke relations with Spain, Mexican courts continued to apply Spanish colonial law in private legal matters, a situation which continued throughout the 19<sup>th</sup> century.<sup>26</sup> The Constitution of Apatzingan of 1814 confirmed this doctrine by deeming old laws valid until the enactment of new ones. The Constitution of Cadiz of 1821 reaffirmed this same principle. The result was that in private legal matters, Spanish law held sway. This situation did not change until the enactment of Mexican civil codes.

It should be noted that legal uniformity—even at this time—was a vital concern. Article 258 of the Constitution of Cadiz of 1821 stated that its provisions were to be applied “one and the same throughout the monarchy, without prejudice of the variations” that could result from their application by local courts. The Constitution of Apatzingan of 1814, influenced by the Constitution of Cadiz of 1812, preserved the centre’s political control. In 1821, Mexican states including Oaxaca, Zacatecas, Guadalajara (state of Jalisco) and Guanajuato sought self-governance. Some areas formed regional councils with the intent of separating and, as independent states, joining a federation with other Mexican provinces. Many entered into inter-provincial treaties as a stepping-stone towards the establishment of a federation.

The move to create a federal republic sparked political ambitions of autonomy by the states. As Nettie Lee Benson noted in 1823, rather than being a “united country”, Mexico was a made up of “virtually autonomous provinces.”<sup>27</sup> The first organic law in Mexico, drafted by Ignacio Rayon, helped provinces retain their administrative autonomy within a centralist state.

Given the need for political reconstruction and recovery from economic hardships caused by internal wars, the power held by the Mexican provinces at this time resembled more a confederacy than a federalist union. The autonomy enjoyed by local politics during this period led regions and provinces to first reject all proposals that entailed centralization of political powers, but most subsequently accepted radical federalist claims. For example, the enactment of both Santa Anna’s Veracruz Plan of 1822 and the Casa Mata Plan helped facilitate the establishment of the Federal Republic. The Casa Mata

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<sup>25</sup> Mecham Lloyd, *The origins of federalism in Mexico*, 18 THE HISPANIC AMERICAN. HISTORICAL REVIEW, 164 (1938).

<sup>26</sup> In addition, doctrinaires continued to use Spanish laws and institution to interpret private law. The idea of granting federal authority over traditionally local matters—for the sake of uniformity—were also included in the first constitutional documents. However, none of the initial constitutional documents (The Constitution of 1824, the Seven Constitution of 1836, and the Constitution of 1857) had provisions that gave the federal government jurisdiction over private law; or indicated which laws prevailed in these matters; or the order in which they applied. In 1856, the Provisional Organic Statute of the Mexican Republic was enacted as a result of emergency conditions it included a residual clause in favour of the federal government that gave to the President all rights that were not expressly reserved to the states.

<sup>27</sup> Nettie Lee Benson, *The Plan of Casa Mata*, 25 THE HISPANIC AMERICAN. HISTORICAL REVIEW, 45-55 (1945).



Plan also called for the establishment of a new federal Congress; and granted administrative control of the provinces to provincial deputations. Provinces quickly adhered to the Plan, declaring their authority over political and economic affairs until a new central government was formed. By 1822, Nueva Vizcaya, San Luis Potosi, Zacatecas, Guadalajara, Guanajuato, Michoacan, Mexico, Puebla, Vera Cruz, Oaxaca, Yucatan, Sonora and Sinaloa and the Eastern Interior Provinces had created their own provincial deputations.

In May 1823, attempts by the first restored Congress to structure a highly centralized federal government were vehemently rejected by the provinces. While this occurred, the federal government weakened and transferred many governmental functions to state agencies. As a result, municipalities became the basis of Mexico's political infrastructure. The central government, ruled by General Agustín de Iturbide, was confined to Mexico City, while each province declared its independence by establishing its own provincial government.

Yucatan became the first entity to establish an independent government and declare itself a federation. In 1823, Yucatan's delegation called for the election of a local official to govern the state until the National Congress had formed the federal government. Other provinces followed suit, including the delegation of Guadalajara, which in May 1823 suspended enforcement of all national law until the demand for a federation was enforced. The Act vested chief authority in the provincial delegation and called other states to follow their lead. In July 1823, Zacatecas declared independence from the Mexican Republic, and in the following years, several other states sought complete political autonomy. For obvious reasons, these ambitions were not welcomed by the central government.

During the Constitutional Congress of 1823-1824, the issue of whether Mexico City or the provinces had legislative authority in matters of civil law generated considerable tension. Given the nation's colonial past, it was expected that Congress would follow the model based on codes in the Cadiz Constitution. The opposing sides held their respective views: the liberals advocated federalism and argued that the central authorities needed to respect state sovereignty. Conservatives, on the other hand, contended that only a strong central government could establish uniformity and impose nation-wide order in civil law matters.

After the congressional session of October 1824, Juan Cayetano, a representative from Jalisco, sent a letter to the *Aguila Mexicana* newspaper to report a discussion he had held with a certain representative regarding a proposal to grant the states authority to enact their own civil codes. During this discussion, Cayetano said that states were sovereign independent entities with the power to enact legislation in civil and criminal matters. According to Cayetano, the Congress had no role in creating civil or criminal codes, which was "manifestly counter to the liberty and sovereignty" of the states.

The tensions between nationalists, federalists, and centralists culminated with the Constitution of 1824 which<sup>28</sup> established—for the first time—a federal system divided into national and state governments, each with their own legislative, judicial and executive branches.<sup>29</sup> The Constitution empowered states by recognizing them as free and sovereign, with the right to elect their own president and vice president.<sup>30</sup> In addition, each state was considered free, independent, and sovereign regarding their internal affairs<sup>31</sup> and federal congresses held more authority than the executive branches.<sup>32</sup>

Federalists had the upper hand with regard to legislative authority in matters of civil law. Although more than one proposal contained clauses that prescribed a national civil code,<sup>33</sup> the final text of the 1824 Constitution failed to include any such provision.

Although the Constitution of 1824 gave Congress the power to harmonize laws in states and territories with regard to certificates, registries and court procedures, states were authorized to enact civil codes on the basis of their own constitutions.<sup>34</sup> During this period, the state of Oaxaca (1827) passed its own code; Zacatecas (1829) published a draft for consideration; and Jalisco published part one of its own civil code. The Constitution of 1824, however, failed to include any viable formula to divide powers between Mexico City and provincial governments.<sup>35</sup> While liberals and conservatives debated whether the nation was better off with a centralized and/or single national civil law system, the *de facto* reality was federalism and state sovereignty, which meant that each state had to enact its own codes.

After Congress proclaimed federalism, nineteen states were included (i.e., Chiapas, Chihuahua, Coahuila and Texas, Durango, Guanajuato, Mexico, Michoacán, Nuevo Leon, Oaxaca, Puebla, Queretaro, San Luis Potosi, Sonora and Sinaloa, Tabasco, Tamaulipas, Veracruz, Jalisco, Yucatan, and Zacatecas) and four areas were designated “territories” (Alta California, Baja California, Colima, and Santa Fe de Nuevo Mexico). Seventeen of the nineteen states enacted constitutions by the end of 1826; and except for Jalisco and San Luis Potosi, every state had abandoned its radical federalist claims.<sup>36</sup>

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<sup>28</sup> *Id.* at 113.

<sup>29</sup> TENA *supra* note 13 at 110.

<sup>30</sup> ANNA TIMOTHY, *FORGING MEXICO: 1821-1835* 167 (University of Nebraska Press, 2001).

<sup>31</sup> *Id.* at 128-131.

<sup>32</sup> *Id.* at 34.

<sup>33</sup> GONZÁLEZ *supra* note 19 at 113-114.

<sup>34</sup> Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* México, Diario Oficial de la Federación [D.O.], art. 145, 4 de noviembre de 1884 (Mex.)

<sup>35</sup> *Id.* art. 157-162. Contained a set residual powers in favour of departments (states), a formula that was readopted in the Constitution of 1917. Consideration of a federal formula began only in 1842 and was included since then in several constitutional drafts. One major disagreement was whether states were sovereign and free in all matters not covered by the constitution.

<sup>36</sup> LLOYD *supra* note 25 at 172.

During this first phase of federalism, state governments gained significant political power.

### 1. *States' Regulation of Family Law on the Basis of Revolutionary Principles*

Inspired by the separatist movement, new state legislatures moved quickly to take advantage of their administrative autonomy by enacting their own civil codes. Committees were created by state governments to enact civil statutes to help resolve pressing political and legal issues. At this point, there was wide diversity regarding Church-State relations. Although four states (Oaxaca, Zacatecas, Jalisco and Guanajuato) formally enacted their own codes, only Oaxaca completed and published its Code. While ultimately two states finished their projects during this period, they remained valid for only a short duration.

Given the political climate, the states' regulation of family law coincided with key revolutionary aims.<sup>37</sup> Every state except for Zacatecas maintained the Church's primacy in family law matters.<sup>38</sup> The Civil Code of Oaxaca and draft codes proposed in Zacatecas, Jalisco and Guanajuato were the first to incorporate revolutionary principles at a family law level, including the separation of Church and State and the abolition of patriarchal colonial laws.<sup>39</sup> Given anti-centralist and anti-clerical sentiments, the states also pressed for more egalitarian and secular family institutions, which helped pave the way for the formal recognition of concubinage unions and the children born of such unions, as well as the legalization of civil divorce.<sup>40</sup>

### 2. *Zacatecas: Weakening of the Church's Power and Authority over Marriage*

The most radical legislative proposal was that of Zacatecas, which aimed at reducing the Church's authority over marriage.<sup>41</sup> Discussion regarding this

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<sup>37</sup> It was through one of the Laws of Reform, the Ley de Matrimonio Civil del 23 de julio de 1859 [Law of Civil Matrimony of 1859] that marriage was removed from the church's jurisdiction. Article 1 of the law defines marriage as a civil contract and establishes the state as the single legitimizing institution. This law also recognized divorce as a "temporary separation" of spouses that did *not* leave either party free to remarry (art. 4, 20, 21 26).

<sup>38</sup> GONZÁLEZ *supra* note 19 at 118.

<sup>39</sup> *Id.*

<sup>40</sup> Despite the anticlerical sentiments of the era, the Church remained inextricably involved in regulating and administering family law. The State of Mexico was considering a draft Criminal Code that persecuted non-Catholic behaviour and punished crimes "against the Church". See CECILIA ADRIANA BAUTISTA GARCÍA, LAS DISYUNTIVAS DEL ESTADO Y DE LA IGLESIA EN LA CONSOLIDACIÓN DEL ORDEN LIBERAL, MÉXICO 1856-1910, (El Colegio de México A.C., 2012).

<sup>41</sup> GONZÁLEZ *supra* note 19 at 118.

civil code began as early as 1824, but it wasn't until 1828 that a special commission developed and published a draft for discussion. The legislation was then amended and resubmitted for review in 1829 but never approved.<sup>42</sup> The two proposals were notable given the local inclination towards a radical interpretation of federalism; in effect, it became one of the first states to declare political autonomy.<sup>43</sup> From 1827 to 1829, a movement arose in Zacatecas to give state law precedence over religious law. The change of marriage from religious sacrament to civil ceremony, and the removal of the Church's jurisdiction over family matters, amounted to a rejection of centuries of Church doctrine.<sup>44</sup> The first proposal of 1827 stripped religious authorities of any authority over marriage, and described matrimony in purely contractual terms.<sup>45</sup> It recognized local municipalities' power to formalize marriage<sup>46</sup> and invalidated unions that were not established in accordance with civil statutes. In effect, religious marriages would not be legally acknowledged by the state.<sup>47</sup> The state was thereby empowered to revoke church-ordained marriages that failed to satisfy civil law requisites, as well as punish religious figures that authorized such unions.<sup>48</sup>

In the end, this draft law was never approved, and a later proposal in 1828 reversed the legislature's goals of secularization. In the 1828 version, the Church regained rights over marriage; and unless they explicitly contravened civil law, parishes retained authority to formalize marriage.<sup>49</sup> Although this statute established a civil marriage registry, it also issued warnings about subsequent attempts to secularize civil laws. Additional laws were passed to complement religious laws over family and marriage.<sup>50</sup>

### 3. Oaxaca: Shift toward Gender Equality and Parent-child Relations

The state of Oaxaca, the first Latin American jurisdiction to enact a civil code, was also an important crucible of the liberal family law movement born during this period. In 1825, Oaxaca's government published a state constitution that authorized its legislature to enact both civil and criminal statutes. This

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<sup>42</sup> Aguedam Venegas de la Torre, *Los avatares de una justicia legalista: el proceso de codificación en Zacatecas de 1824 a 1835*, 13 SIGNOS HISTÓRICOS 55 (2011).

<sup>43</sup> *Id.* at 46.

<sup>44</sup> *Id.* at 68.

<sup>45</sup> José Enciso Contreras, *El Proyecto de Código Civil Presentado al Segundo Congreso Constitucional del Estado Libre de Zacatecas*, 1829, REVISTA MEXICANA DE HISTORIA DEL DERECHO, 236 (2011).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> GONZÁLEZ *supra* note 19 at 118.

<sup>50</sup> *Id.*

first code was published in three parts: volume 1 in 1827, volume 2 in 1828, and volume 3 in 1829. The Civil Code of Oaxaca recognized the role played by religious law regarding matrimony, non-vincular divorce (otherwise known as the separation of bed and board) and the legitimacy of Catholic marriages.<sup>51</sup> Although its secularizing provisions were not as extreme as proposals in other states (e.g., Zacatecas),<sup>52</sup> Oaxaca's Civil Code represented an important shift in favour of gender equality and parent-child relations. The principles embodied in this document, in fact, went far beyond any provision proposed over the course of the next three decades for the federal civil code, including the lowering of the age of emancipation to 21 for both men and women.<sup>53</sup> Oaxaca's civil code also prohibited parents from receiving usufruct rights over minor children's independently-earned income;<sup>54</sup> this was important because Mexican elites were using restrictive colonial laws to control the marriage of heirs. While the code still required parental consent for marriage, it applied only to men under the age of twenty-five and women under twenty-three.<sup>55</sup>

In regard to gender equality, the state's Civil Code integrated both orthodox and progressive principles. While preserving males' dominant rights (e.g., when parents disagreed, the father's decision took precedence),<sup>56</sup> it also extended women's rights (e.g., women were allowed to enter into legal business contracts without their husband's permission).<sup>57</sup> While paternal rights were previously reserved to men, the state's code permitted women over the age of fifty to legally adopt minors and act as their guardian. It also protected widows' paternal and guardianship rights upon remarriage.<sup>58</sup>

The civil codes of both Zacatecas and Oaxaca granted parents with only one child testamentary freedom over half the estate, which could be lowered to one-fourth if there were three or more children. This right allowed fathers to bequeath, if they so wished, part of their estate to their illegitimate offspring or concubines.<sup>59</sup> The code also granted rights over parental property to both "natural" and "illegitimate" offspring through the guise of support.<sup>60</sup>

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<sup>51</sup> Fernando Alejandro Vázquez Pando, *Notas para el Estudio de la historia de la codificación del Derecho Civil en México, de 1810 a 1834*, 4 JURÍDICA. ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA, 395 (1972).

<sup>52</sup> *Id.*

<sup>53</sup> GONZÁLEZ *supra* note 19 at 115.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> For a broader explanation of the incorporation of testamentary freedom and how it impacts 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*, 10 JOURNAL OF FAMILY HISTORY, 313-314 (1985).

<sup>60</sup> Francisco García González, *Liberalismo y Familia en Zacatecas Durante el Siglo XIX*, 8 VINCULO JURÍDICO, (1991).

Notably, the code granted the administration of inheritances received by illegitimate children to the beneficiaries.<sup>61</sup>

The innovative civil laws introduced by both Zacatecas and Oaxaca were controversial from several standpoints. First, the mere mention of concubines in civil codes was, in the opinion of many conservatives, “morally wrong and contrary to the legal institution of marriage.”<sup>62</sup> According to these commentators, increasing testamentary freedom and granting inheritance rights to illegitimate children threatened the very foundation of family. Most liberals, however, held that concubines were an integral “part of the fabric of Mexican culture, customs and social mores”.<sup>63</sup> They also argued that by refusing to recognize concubinage, far too many women and children were left without any legal protection.<sup>64</sup> Debate over the extent of the reform aggravated ideological differences and eventually led to small but notable disparities between state civil codes and the “customs and uses” of local communities regarding concubinage.

### III. DUAL FEDERAL-STATE FAMILY LAW SYSTEM: 1835 TO 1916

The autonomy of Mexican states in family law matters lasted only a short time. Until the publication of the Civil Code of 1870, no statute remained in effect long enough to fully abrogate colonial era law. This situation was exacerbated by the Court’s elusiveness with regard to its jurisdiction over state civil law and its continued reliance on Spanish statutes long after Mexico had enacted its own codes. No charter authorized during this period —the Constitutions of 1824, 1836 or 1846— stipulated which government had jurisdiction over civil law, what laws took precedence and the order in which they were to be applied. Commentators continued to rely upon Spanish laws and institutions to adjudicate matters of civil law.

In May 1835, the first republic was replaced by a central republic under the leadership of Santa Anna.<sup>65</sup> By 1836, a new constitution —the Seven Laws (*Siete Leyes*) Constitution— established a unitary government which stripped states of their economic and political autonomy and reduced them to mere departments.<sup>66</sup> This move toward centralist government was the first of many before Mexico consolidated as a federal republic in 1917. In fact, the nation wavered between centralism and federalism until 1867; only after

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<sup>61</sup> *Id.*

<sup>62</sup> Jorge Vargas, *Concubines under Mexican Law; with a Comparative Overview of Canada, France, Germany, England and Spain*, 12 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS, 53-54 (2005).

<sup>63</sup> *Id.*

<sup>64</sup> Ley de Relaciones Familiares [L.R.F.] [Family Relations Act] as amended, Diario Oficial de la Federación [D.O.], 12 de Abril 12 de 1917.

<sup>65</sup> TIMOTHY *supra* note 30 at 260.

<sup>66</sup> CONTRERAS *supra* note 46 at 229.

the French Intervention was the federalist Constitution of 1857 readopted. During these centralist periods, many powers formerly assumed by the states were abrogated, and the federal government began to codify and harmonize civil law.

During the first period of centralism, from 1835 to 1846, the federal government intended to make all codes —civil, criminal, and commercial— uniform for the whole nation. This intent failed, as a national code was never enacted.<sup>67</sup> Two private compilations of the civil law were enacted,<sup>68</sup> both drawing on Spanish law and differing with respect to treatment of the Church, jurisdiction in family law matters and non-vincular divorce.<sup>69</sup>

The federal system was recovered between 1846 and 1853, at which point the only state to resume codification of civil law was Oaxaca. The governor of Oaxaca, Benito Juárez, later proposed reforms to the code that were published in 1837 and concluded in 1852. Although this was supposed to take effect in April 1853, the coup by Santa Anna resulted in revocation of the federal decree that authorized the state's Civil Code.<sup>70</sup>

Santa Anna's regime, which lasted between 1853 and 1855, ushered in a new phase of centralism. Constitutional documents enacted at this time suspended the state and territorial legislatures and authorities, and reestablished the territorial divisions that existed prior to federalism. These documents declared the federal authorities' intent to establish a unified civil, criminal, and commercial code that was to be applied throughout the nation. As a result, Oaxaca's approval of its Civil Code was declared null and void.

After Santa Anna was removed from power in 1855, federalism returned for a third time; in 1857, the Federal Constitution of the United Mexican States was enacted.<sup>71</sup> It should be noted that the type of federalism in effect at this time was more centralist than that of the first and second federalist phases. Despite the reinstatement of states' legislative rights in civil law matters, the federal government took full responsibility for reinvigorating codification efforts. During this period, President Juárez commissioned the drafting of the civil code to Justo Sierra, a renowned Mexican legal scholar. This code was finally concluded in 1860 and, one year later, decreed by Federal Congress to take effect in the Federal District and federal territories. All states were invited to adopt it.

The Civil Code commissioned by President Juárez during this third federalist period never went into effect in either the Federal District or territories during his tenure. This same code, however, served as the foundation for the

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<sup>67</sup> MARÍA DEL REFUGIO GONZÁLEZ, *EL DERECHO CIVIL EN MÉXICO 1821-1871 APUNTES PARA SU ESTUDIO* (Instituto de Investigaciones Jurídicas, UNAM, 1988).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 100.

<sup>71</sup> CARPIZO *supra* note 12 at 85.

nation's first national civil code (called the Imperial Civil Code, 1865-1866) that later took effect during the French Intervention between 1863 and 1866.<sup>72</sup>

In response to President Juárez's default on debts to European governments, France, Britain and Spain sent naval forces to demand repayment. While both Britain and Spain negotiated, France sent naval forces to Veracruz in 1861, driving President Juárez and his government into retreat.<sup>73</sup> In late 1862, Napoleon III—with the support of Mexican conservatives—sent the Archduke Maximilian of Austria as “Emperor of Mexico.”<sup>74</sup>

Contrary to many conservatives' expectations, Maximilian did not “overturn” the liberal policies introduced by the Juárez regime.<sup>75</sup> The emperor refused to suspend the Reform Laws that returned church lands and even levied forced loans against it.<sup>76</sup> Maximilian also improved the country's legal framework<sup>77</sup> by drafting a new constitution (which provided for a hereditary monarchy, religious toleration, equality under the law, and the elimination of debt peonage) and enacted the first two volumes of the Imperial Civil Code based on Justo Sierra's draft.<sup>78</sup> Based on French statutes, this was the nation's first truly centralist civil code, including commercial and notarial provisions.<sup>79</sup>

Despite these liberal reforms, however, Mexican liberals were not impressed. In the end, Maximilian—a foreigner sent by a European ruler to serve as “emperor”—alienated both liberals and conservatives.<sup>80</sup> To make matters worse, French support began to wane in 1865.<sup>81</sup> Despite efforts to retain his authority—aided by conservative factions and European volunteers—Maximilian lost his final battle in Queretaro, where he was taken prisoner and sentenced to death by Benito Juárez.<sup>82</sup>

#### IV. SIMILARITIES: 1868-1885

In 1867, after Maximilian was removed from power, a federalist structure was reinstated, but this time in a more centralized manner. The codes, tribunals

<sup>72</sup> GONZÁLEZ *supra* note 68 at 106.

<sup>73</sup> JULIETTE LEVY, *THE MAKING OF A MARKET: CREDIT, HENEQUEN, AND NOTARIES IN YUCATAN, 1850-1900* 36 (Pennsylvania State University Press, 2012).

<sup>74</sup> BURTON KIRKWOOD, *THE HISTORY OF MEXICO*, 104-107 (Palgrave Macmillan, 2005).

<sup>75</sup> LEVY *supra* note 74 at 37.

<sup>76</sup> KIRKWOOD *supra* note 75.

<sup>77</sup> BEATRIZ BERNAL GÓMEZ, *México y las leyes liberales de Maximiliano de Habsburgo*, 11 *HECHOS Y DERECHOS* (2012).

<sup>78</sup> GONZÁLEZ *supra* note 68 at 107.

<sup>79</sup> FRANCISCO VALDÉS UGALDE, *AUTONOMÍA Y LEGITIMIDAD: LOS EMPRESARIOS, LA POLÍTICA Y EL ESTADO EN MÉXICO* 81 (Siglo XXI, 1997).

<sup>80</sup> Bonnie G. Smith, *THE OXFORD ENCYCLOPEDIA OF WOMEN IN WORLD HISTORY* 331 (Oxford University Press, 2008).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*



and judicial structures established by the states to handle civil law matters after 1870 differed in many respects to those enacted during the first federalist phase.

In contrast to prior attempts, the federal government finally succeeded in enacting a civil code in the Federal District and the territories.<sup>83</sup> In 1867, the National Congress appointed a committee to draft an organic code for Mexico City and Baja California. A major aim of the Civil Code of 1870 was to codify the Laws of Reform of 1859, 1861 and 1862, thereby ending the confusion caused by continued application of colonial law in regard to civil registries and matrimony.<sup>84</sup> This code, however, ended up encroaching on states' civil law sovereignty.

The timing of this statute was pivotal in shaping the harmonization of civil laws during this period. Few states had enacted civil codes prior to enactment of the Civil Code of 1870; only Veracruz and the State of Mexico succeeded in publishing their own statutes prior to the federal government.<sup>85</sup> The states' delay in enacting their own civil codes, combined with federal pressure to move quickly, resulted in the adoption by most states of the Civil Code of 1870 with few if any modifications.<sup>86</sup> Zacatecas, for example, was already in the process of drafting a new code, and the State of Mexico published its code several months earlier than expected.<sup>87</sup> States that adopted the code with few modifications included Chiapas, Hidalgo, Michoacan, Morelos, Queretaro, Sinaloa, Tamaulipas and Sonora.<sup>88</sup> Campeche and Tlaxcala adopted the code but incorporated more substantial changes. States that adopted the 1870 Code without any modifications whatsoever included Guanajuato, Puebla, Durango, Guerrero, San Luis Potosi and Zacatecas.<sup>89</sup>

Worth mentioning is that while the Civil Code of 1870 went a long way in harmonizing Mexican civil laws—including legislation enacted by states which had pioneered civil law during the revolutionary era—there remained small but important differences between the federal and state codes. This was particularly true in matters regarding legal parentage, inheritance by children born out of wedlock and non-vincular divorce.<sup>90</sup>

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<sup>83</sup> The increased involvement of the federal government in the regulation of the family since the late 1800's had important implications for families, and particularly women, in areas such as regulation of concubinage and divorce. The federal government's exercise of its powers with respect to the home of the power of the union (the Federal District), foreigners and the Civil Code of 1932 have all weakened the principle of family law federalism and have transformed family law.

<sup>84</sup> Eduardo Baquero Rojas, *El derecho de familia en el Código Civil de 1870*, 83 *REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO* 379-380 (1971).

<sup>85</sup> GONZÁLEZ *supra* note 68 at 109.

<sup>86</sup> GONZÁLEZ *supra* note 68 at 111.

<sup>87</sup> GONZÁLEZ *supra* note 68 at 109.

<sup>88</sup> *Id.*

<sup>89</sup> GARCÍA, *supra* note 61 at 111.

<sup>90</sup> Pablo Macedo, *El Código Civil de 1870, Su importancia en el derecho mexicano*, 3 *JURÍDICA ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA* 244-245 (1971).

In matters of legal parentage, the Code of 1870 and the codes of Veracruz, Tlaxcala, Mexico and Oaxaca all distinguished between legitimate children (those born within marriage), illegitimate children and those born from adulterous relationships.<sup>91</sup> These codes also categorized children based on whether their parents were married or unmarried; kids that were born to unmarried parents who later married and recognized legal parentage were considered legitimate but categorized as “legitimized.”<sup>92</sup> Illegitimate children were classified based on the barriers to marriage between the parents. “Natural” children were those whose parents: (a) married and “legitimized” their offspring;<sup>93</sup> (b) were involved in an “incestuous” relation; or (c) involved one partner who was already married.<sup>94</sup> These codes also contained the same registration rules for legitimate children (those born within marriage) and natural, illegitimate and adulterous children. (and provided for forced heirship).<sup>95</sup>

Despite these similarities, the codes differed regarding ways in which illegitimate children could be legitimized. For example, in both the Civil Code of 1870 and the 1885 code for Tlaxcala, parents could legitimize a child by means of an explicit declaration of parentage in either the marriage ceremony and at any time during the marriage.<sup>96</sup> The Code of Veracruz of 1868, however, gave newlywed parents only three months to declare parentage; while the Code for the State of Mexico gave newlyweds up to three years.<sup>97</sup> Another difference involved the retroactivity of parentage declarations: in both the Civil Code of 1870 and code for Tlaxcala of 1885, the declaration of legal parentage took effect on the date on which the parents married, whereas in the Civil Code for the State of Mexico of 1870, recognition is applied retroactively starting from the time of the child’s birth.<sup>98</sup> These differences were significant because children’s inheritance rights were based on whether their parents had satisfied the requisites of legitimization and/or registration, which varied depending on where a child was born or her parents domiciled.

Differences also existed with respect to the inheritance rights of natural, illegitimate and adulterous children. The Code of 1870 and the codes for the states of Veracruz, Tlaxcala, and Oaxaca all impose the figure of forced inheritance in favour of the family.<sup>99</sup> Differences also existed with regard to how inheritances were apportioned, as this depended upon the classification of the illegitimate children. Under the Civil Code of 1870, legitimate offspring

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<sup>91</sup> See Código Civil para el Distrito Federal 1870 [C.C.F.D.] [Mexico City Civil Code], as amended, art. 79, 80, 82, 83, 85, 314, 354-356, 359, 381.

<sup>92</sup> *Id.*, art. 354-256 & 359, 381.

<sup>93</sup> *Id.*, art. 224, 255-257, 286.

<sup>94</sup> *Id.*, art. 354-356.

<sup>95</sup> *Id.*, art. 117-119 & 150-156.

<sup>96</sup> *Id.*, art. 232 & 236.

<sup>97</sup> *Id.*, art. 354-356.

<sup>98</sup> *Id.*, art. 359.

<sup>99</sup> *Id.*, art. 3373.

had a right to four-fifths of the estate, whereas illegitimate children were only entitled to two-thirds and adulterous children one-half. When both illegitimate and legitimate children were involved, the entitlement of the former was reduced and adulterous children received solely alimentary support.<sup>100</sup> Inheritance rights in the Civil Code of Veracruz of 1868 did not distinguish between legitimate and illegitimate, recognizing the right of illegitimate children to alimentary support in the absence of legitimate or legitimized children.<sup>101</sup> By so doing, illegitimate children of all categories were stripped of their inheritance rights. While the Code of the State of Mexico was largely similar to that of Veracruz, its inheritance rules for natural children differed.<sup>102</sup> Although the Civil Code of the State of Mexico gave illegitimate children the same inheritance allowance as the Code of 1870, this right was diminished when other legitimate heirs were involved, such as a surviving spouse, parent, grandparent, brother or sister. The Civil Code of Tlaxcala was more generous with illegitimate children, as it granted them four-fifths of the estate without additional legitimate heirs,<sup>103</sup> and inheritance rights even when legitimate heirs were involved.<sup>104</sup> These different approaches to the inheritance rights of illegitimate heirs gave major importance to where the parent(s) were domiciled.

Despite widespread diffusion of the Civil Code of 1870, states differed in their policies towards adultery and the rights of heirs born of these unions. The Civil Code of Veracruz of 1868 and the Civil Code of 1870 were highly typical, as both were based on the liberal principles of the Laws of Reform. Each code recognized the secular basis of matrimony and established protocols for the registry and formalization of birth, death and marriage. In this way, marriages were treated as contracts rather than religious sacrament.<sup>105</sup> Important differences remained, however, with respect to concubinage and heirs born of such illicit unions. In the Civil Code of Veracruz of 1868, adultery and “public concubinage” committed by husbands (a) gave their wives the right to solicit non-vincular divorce;<sup>106</sup> (b) prohibited recognition of any children born outside of marriage; and (c) permitted paternity challenges when evidence existed that the children were born to a woman

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<sup>100</sup> *Id.*, art. 3373 & 3465.

<sup>101</sup> *Id.*, art. 955-956, 1118-1124.

<sup>102</sup> *Id.*, art. 1031 & 1034-1037.

<sup>103</sup> *Id.*, art. 2762.

<sup>104</sup> *Id.*, art. 2759.

<sup>105</sup> MARÍA DEL REFUGIO GONZÁLEZ, ¿CIENT AÑOS DE DERECHO CIVIL?, UN SIGLO DE DERECHO CIVIL MEXICANO. MEMORIA DEL II COLOQUIO NACIONAL DE DERECHO CIVIL 26 (Instituto de Investigaciones Jurídicas-UNAM, 1985); *See also* JORGE FERNÁNDEZ RUIZ, JUÁREZ Y SUS CONTEMPORÁNEOS 198 (Instituto de Investigaciones Jurídicas-UNAM, 2006).

<sup>106</sup> Código Civil del Estado de Veracruz [C.C.E.V.] [Veracruz Civil Code], art. 228, 1868 (*Mex.*).

held as a concubine in public.<sup>107</sup> In contrast, the Civil Code of 1870 did not include such draconian restrictions on the inheritance rights of children born of illicit unions. Concubines were only mentioned in this code with regard to a wife's claims of adultery as grounds for non-vincular divorce<sup>108</sup> in the following situations: (a) adultery committed in the marital home; (b) adultery committed outside the home with a concubine; or (c) "scandalous" adultery. Similar to the Civil Code of Veracruz, the Civil Code of 1870 restricted estate claims made by illegitimate heirs, but did not ban them categorically as in the Code of Veracruz.<sup>109</sup>

Major differences between these codes also existed with respect to non-vincular divorce. Liberals and conservatives had always differed with regard to divorce which, under the Law of Civil Matrimony of 1859, was understood as either (a) "temporal" separation that did *not* dissolve the marital bond; or (b) "a separation of bed and board."<sup>110</sup> Liberals contended that reforms to facilitate non-vincular divorce would improve the quality of marriage unions and provide greater family stability;<sup>111</sup> whereas conservatives argued that any changes to facilitate divorce would harm and degrade women by taking away the protection and security of marriage. From a conservative perspective, vincular divorce represented a move in favour of the "divorcist" movement endemic to the United States and represented a sharp departure from the views of the Catholic Church and Benito Juárez, both of whom considered marriage to be an indissoluble union.<sup>112</sup>

To discourage hasty divorces, the Civil Code of 1870 circumscribed mutually-agreed to separations of bed and board, and introduced measures to protect older wives and long-term marriages. Separation by mutual consent was thus restricted to spouses who had been married between two and twenty years. The Civil Code of 1870 also prevented the separation of husbands from wives over the age of forty-five. In fact, divorces by mutual consent were only permitted if the spouses agreed to attend mediation sessions for three months as prescribed by the courts. Many feminists argued that the gender-based differences with regard to paternity, maternity and adultery promoted polygamy over monogamy. For example, the Code of 1870 discriminated against women by restricting divorce for adultery committed by the husband *under certain conditions*; whereas adultery of any kind remained a valid justification if committed by the wife. This double standard put women at

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<sup>107</sup> *Id.*, art. 318 & 323.

<sup>108</sup> Código Civil para el Distrito Federal 1870 [C.C.F.D.] [Mexico City Civil Code], *as amended*, art. 240, section 1, 241-242, 245, (*Mex.*).

<sup>109</sup> GONZÁLEZ, *supra* note 106 at 25.

<sup>110</sup> SILVIA MARINA ARROM, *Cambios en la Condición Jurídica de la Mujer Mexicana en el Siglo XIX*, in MEMORIA DEL II CONGRESO DE HISTORIA DEL DERECHO MEXICANO 493-518 (UNAM, 1981).

<sup>111</sup> See Lionel Summers, *The Divorce Laws of Mexico*, 2 LAW AND CONTEMPORARY PROBLEMS, 301 (1935).

<sup>112</sup> CHÁVEZ, *supra* note 18 at 417.

a disadvantage by shielding men from accusations and making women easy targets of adultery claims. Conservative critics condemned feminist groups for demanding “sexual license” and permissivity.

This gender-based approach to adultery subjected wives to unscrupulous husbands’ abuse, while shielding men for similar actions. Fortunately, not all states followed this reasoning: Veracruz’s civil code, for example, did not contain any explicit gender-based restrictions. It did, however, include the same provision as the Civil Code of 1870 that allowed judges to refuse a divorce when a spouse had “incited” adultery. Tlaxcala’s civil code did not allow gender to restrict divorce for adultery; and the State of Mexico prohibited either spouse from soliciting divorce for adultery when both partners were involved in extramarital affairs.

Not all states followed the federal model. Under the Civil Code of 1870, any of the following were considered valid causes for divorce: (a) adultery by one of the spouses; (b) intent to prostitute the wife; (c) corruption of minor children; (d) abandonment of the conjugal domicile for over two years; (e) cruel treatment; (f) incitement of violence; or (g) commitment of a crime. The codes of both Veracruz and Oaxaca included provisions that castigated extramarital affairs in much broader terms. In Veracruz, for example, either an extramarital affair that is made public or even an *accusation* of adultery could give rise to divorce. In Oaxaca, any violation of the marriage oath was considered to be valid grounds for divorce. Both states added additional causes for divorce, including incurable and hereditary contagious chronic diseases.

One factor behind these widely divergent family law statutes was the constitutional “ambiguity” of the federal government’s civil code. Under the Constitution, the federal government lacked explicit power to pass civil legislation, as there was an implicit understanding that states had exclusive jurisdiction in civil law matters. Only in the Federal District and territories did the federal government retain full and exclusive legislative powers. In addition, the nation’s move toward independence empowered the executive branch to limit the Church’s influence, thereby broadening its influence over family law. In light of these changes, family institutions became secularized, marriage became a civil act.<sup>113</sup> As a result of these developments, the scope of federal jurisdiction in family law matters re-surfaced as a contentious issue.

Another major factor was the ideological battle between both liberals and conservatives, and federalists and centralists regarding Church-State relations, women’s rights, divorce, and concubinage. The Laws of Reform had laid the groundwork for liberal reform by first removing the Church from matrimony. By granting the federal government power over religious worship, Juárez secularized all civil acts, including marriage. Although the Civil Matrimony Act of 1859 declared marriage to be indissoluble, it permitted non-

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<sup>113</sup> JORGE ADAME GODDARD, *EL MATRIMONIO CIVIL EN MÉXICO 13-14* (UNAM-Instituto de Investigaciones Jurídicas, UNAM, 2004).

vincular divorce.<sup>114</sup> Although the reform shifted jurisdiction for marriage from the Church to the State, it ended up perpetuating both Church authority and conservative values. Despite its intent of “rehabilitating” the legal status of women, some felt that the 1870 Civil Code reintroduced—in a more organized and modern way—the laws, attitudes and values of colonial times.<sup>115</sup>

### 1. *The Civil Code of 1884*

During this period, the Code of 1870 was reformed to become the Civil Code of 1884, which remained in force until enactment of the Civil Code of 1928. Many scholars contend that, given only minor changes, the Civil Code of 1884 was nearly identical to the Civil Code of 1870.<sup>116</sup> Despite this critique, however, the Civil Code of 1884 instituted such changes as recognition of testamentary freedom and separation of property for legally married spouses.<sup>117</sup> These changes were significant, as testamentary freedom had the effect of diluting wives’ negotiating power and permitting asset transfer to non-conjugal consorts and children of unions deemed untenable under the 1870 Code. In effect, the Civil Code of 1884 tried to harmonize civil laws by resolving many disparities between the Civil Code of 1870 and codes enacted by the states. One example is the inclusion of additional causes of divorce for adultery, conjugal violence and terminal illness, all included in the civil codes of Veracruz, Mexico, Tlaxacala and Oaxaca.

Despite these changes, liberals and conservatives continued their long-running dispute regarding divorce. At this time, there were many public debates regarding the negative consequences of divorce on women. As one author (of the *New Mexican February*) stated:

We know how fleeting the beauty of a woman can be, just because she is of the same age [as a husband is enough for decline, other causes are pregnancy, birthing and the work of child rearing which takes a terrible toll on women. As a result women experience substantial inequality with respect to husbands,

<sup>114</sup> Article 20 (Ley de Matrimonio Civil de 1859) stated that divorce (non-vascular) was to be temporal and that it cannot in any way be construed as allowing the parties to enter into a new marriage while one of the divorced parties was alive. Art. 21 stated the legitimate causes for divorce would be “adultery of wife if not connived at by husband, adultery of husband if public and continuous, false accusation of adultery by husband against wife, perversion of wife by husband, thus defeating end of matrimony; incitement to commit a crime, excessive cruelty, grave and contagious disease, and insanity to the extent that the other feared for his or her life”.

<sup>115</sup> ANNA MACÍAS, *AGAINST ALL ODDS: THE FEMINIST MOVEMENT IN MEXICO TO 1940* 13 (Greenwood Press Group, 1982).

<sup>116</sup> RODOLFO BATIZA, *LAS FUENTES DEL CÓDIGO CIVIL DE 1928. INTRODUCCIÓN, NOTAS Y TEXTOS DE SUS FUENTES ORIGINALES NO REVELADAS* 13 (Porrúa, 1979).

<sup>117</sup> José Arce y Cervantes, *La Libre Testamentación en el Código Civil y sus Antecedentes Históricos* in *LIBRO DEL CINCUENTENARIO DEL CÓDIGO CIVIL 20* (Instituto de Investigaciones Jurídicas-UNAM, 1978).

who as a result of their physical strength and freedom from the burdens of [pregnancy and child rearing, could consider separating from their wives and obtaining a wife's consent to do so only in appearance... As useful as the right to divorce is to husbands, it is of questionable value to *women*.

In the Civil Code of 1884, reformers excluded gender-based restrictions in cases of mutually-agreed to divorce. They also eliminated the prohibition of divorce by mutual consent if the marriage exceeded 20 years or the wife was over 45 years old. Drawing on notions of equal rights, legislators failed to see how divorce was different for women in marriages that lasted less than 20 years or for women under 45 years old.<sup>118</sup>

Important similarities existed between the 1884 Code and the state codes that were modeled after it. In every code, most of the events that triggered legitimate divorce were similar: (a) the husband's proposition that a wife prostitute herself; (b) attempts by consorts to corrupt the children; (c) a plot involving corruption or prostitution; (d) abandonment of the conjugal home without cause; and (e) false accusation against a spouse. Despite these similarities, however, variations existed that reflected a real divergence in values. In Tlaxcala and the State of Mexico, for example, punishment for a crime or a husband's violence against his wife were considered adequate cause for divorce. These causes were not recognized, however, in other states. There was also division regarding whether gambling, drunkenness, incurable disease or the infraction of marital bonds should be considered legitimate causes for divorce. At the time of the 1884 Code, these were all deemed valid causes in Oaxaca and Veracruz, but not in the civil codes of Tlaxcala and the State of Mexico. More importantly, states differed with regard to mutual consent: while the Civil Code of 1884 and the codes of Oaxaca and Veracruz deemed mutual consent a legitimate cause, this was not the case in Tlaxcala or the State of Mexico.

## V. ATTEMPT AT NATIONALIZING AND CENTRALIZING CIVIL DIVORCE

When Venenustiano Carranza became president in 1914, several policies inspired by the Mexican revolution and enacted by Benito Juarez were revoked. In addition to the Plan of Guadalupe, Carranza expressed impatience regarding the lack of implementation of much-needed political and social reforms.<sup>119</sup> Carranza, as the First Chief of the Constitutional Revolution, adopted a policy to "crystallize the political and economic reforms required by the country, including 'revision of laws regulating marriage and the civil status of individuals'".<sup>120</sup> Changes introduced by Carranza included (a)

<sup>118</sup> ARROM, *supra* note 60 at 508-509.

<sup>119</sup> GODDARD *supra* note 114 at 35.

<sup>120</sup> *Id.*

rejection of the revolutionary idea of civil marriage (but only as a lifetime union); (b) acceptance of federal intervention in state civil law matters; and (c) an openness to foreign family law reform. The autonomy granted to states in civil law matters under the “*Additions and Constitutional Law Reforms 1874*” had provided state legislatures exclusive authority to legislate without having to follow constitutional mandates.<sup>121</sup> Classifying marriage as a civil contract under the federal Constitution, however, placed state laws and legislatures under the authority of the federal government.<sup>122</sup> Between 1914 and 1915, President Carranza published two federal decrees launching vincular divorce.<sup>123</sup> The 1914 decree amended the Constitutional law passed in December 1874 that established marriage as an insoluble union.<sup>124</sup> The amendment now decreed that civil marriages could be dissolved with the mutual and free consent of the parties under the following circumstances: (a) after three years of marriage; (b) when procreation was impossible; or (c) when irreconcilable differences arose because of grave omissions by a spouse. Once the marriage was dissolved, the former spouses could officially remarry.

One of Carranza’s most innovative reforms was no-fault divorce. By adopting the Civil Code of 1870’s model of mutually-agreed separation of bed and board, this reform permitted husband and wife to divorce on the basis of mutual consent. In effect, spouses were required to submit a divorce request accompanied by an agreement for support, custody and the division and administration of communal property. After submission of this request, both husband and wife had to attend two reconciliation sessions scheduled two weeks apart. If reconciliation was not possible, a divorce agreement was submitted for review by a third party to ensure that the interests of spouses and children had been properly safeguarded. At that point, the marriage could be officially dissolved.

The introduction of vincular divorce became a signature reform of Carranza’s presidency. As it amounted to outright rejection of key tenets of Mexico’s revolution, many believed it would “result in the ruin” of many of those principles.<sup>125</sup> For this reason, conservatives advocated “indissoluble

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<sup>121</sup> *Id.*, at 39.

<sup>122</sup> *Id.*

<sup>123</sup> Carranza’s *Vincular Divorce Laws* (1914) are a set of constitutional decrees that 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.

<sup>124</sup> 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 provides spouses” the legal right to enter into new marriages.

<sup>125</sup> Speech pronounced by jurisconsult Agustin Verdigo in the National School of Jurisprudence in response to the proposal presented by Deputy Juan A. Mateo before the Congress of



marriage” and opposed vincular divorce because it discriminated against vulnerable spouses, in most cases the wife.<sup>126</sup>

One scholar has argued that Carranza’s embrace of liberal divorce laws was more of an appeasement of political allies who sought divorce from their own spouses than a true desire to emancipate women.<sup>127</sup> Despite the importance of the “female question” throughout the debate regarding the enactment of these laws, the real issue had little to do with women and everything to do with authority over family law matters.

Underlying the debate between liberals and conservatives lay genuine tensions regarding continued federal intervention in state civil law matters. By the time Carranza decreed the Law of Family Relations, which eliminated family law matters from the Civil Code of 1884 and introduced vincular divorce, questions about the law’s constitutionality had already been raised. Güitrón Fuentenvilla writes about a member of the bar that challenged the constitutionality of the law because it had been released by the executive branch rather than the national Congress. To make matters worse, it had been promulgated without any prior discussion or public consultation.<sup>128</sup> These decrees only confirmed that the states’ sole jurisdiction in family law matters was more illusory than real. Many also felt that these changes were based on “foreign values” that resulted from a strengthening of Mexico-U.S. relations when Carranza took office.<sup>129</sup>

### 1. *Yucatan and the Foreign Divorce Trade Market*

Inspired by the foreign divorce trade market that had developed in the U.S., Mexican state legislatures moved quickly to take advantage of Carranza’s reforms.<sup>130</sup> Suddenly it was unnecessary to allege cruelty, incompatibility or irreconcilable differences as justification for divorce; mutual consent was deemed to be valid grounds by Mexican courts.<sup>131</sup> All Mexican states lacked to attract foreigners seeking divorce was to figure out how to reduce residency requirements.

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the Union in 1981, cited in Ramón Sánchez Medel, *Los grandes cambios en el derecho familiar en México* (Porrúa, 1979), at 14.

<sup>126</sup> *Id.*

<sup>127</sup> GODDARD *supra* note 114 at 38.

<sup>128</sup> Güitrón was highly critical of the derogation of the Family Relations Act which, according to him, led to the disappearance of federal family law from the legal landscape.

<sup>129</sup> In his justification of vincular divorce in the Laws of Divorce, Adame notes that Carranza cited three French but no Mexican authors.

<sup>130</sup> Jesús de Galindez, *El divorcio en el derecho comparado de América*, 6 BOLETÍN DEL INSTITUTO DE DERECHO COMPARADO 36 (1949).

<sup>131</sup> SUMMERS *supra* note 112 at 312.

In 1915, pioneered by Plutarco Elias Calles, the state of Sonora (bordering the U.S. state of Arizona) became the first Mexican state to implement Carranza's federal decree as part of its civil code.<sup>132</sup> The Sonoran reforms went beyond the federal model by reducing the foreign residency period to six months. In addition, spouses were only required to attend the first hearing, allowing the case to continue by means of a power of attorney.

These reforms were followed by those of Yucatan, home of the First Mexican Feminist Congress. In 1916, the state reformed its civil code by classifying mutually-agreed to divorce as an administrative procedure. That same year, the state of Campeche enacted a law that gave the governor authority to grant divorces to out-of-state petitioners after only a twenty-four hour residency period. In 1932, Chihuahua and other states enacted reforms to amplify the courts' jurisdiction to resolve local divorce petitions.<sup>133</sup> The code granted jurisdiction to Chihuahua courts by means of the parties' "express or tacit submission" in writing to a local judge;<sup>134</sup> proof of residency was established through the divorcee's listing in the municipal registry.<sup>135</sup> Soon thereafter, Chiapas, Coahuila, Morelos, Sinaloa and Tamaulipas enacted similar reforms.<sup>136</sup>

In 1923, Yucatan enacted a reform that went beyond those of any other state.<sup>137</sup> By reducing the courts' role and deemphasizing marital misconduct, Salvador Alvarado —the state's liberal governor— helped transform divorce into a summary administrative procedure.<sup>138</sup> Civil registry officials were authorized to grant same-day marriage dissolutions<sup>139</sup> to spouses who had already agreed on custody, child support and the division of property.<sup>140</sup> Under the state's law, even spouses who failed to reach mutual agreement could seek divorce, as marriages could be effectively terminated by unilateral intent.<sup>141</sup> (Note: although the courts were authorized to grant separation, substantive issues were still re-

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<sup>132</sup> See STACY LEE, *MEXICO AND THE UNITED STATES* 124 (Marshall Cavendish Corporation, 2002).

<sup>133</sup> GALINDEZ *supra* note 131.

<sup>134</sup> See MICHELLE BENAVIDES, *SMOKELESS FACTORIES: THE DECENTERING OF U.S. LEGAL AND MORAL BOUNDARIES BY MEXICO'S TRANSNATIONAL DIVORCE INDUSTRY, 1923—1970* 177-203 (Biblio Bazaar, 2011).

<sup>135</sup> JASA *supra* note 7 at 283.

<sup>136</sup> GALINDEZ *supra* note 131.

<sup>137</sup> Decreto de la Ley de divorcio y reformas al Código del Registro Civil y al Código Civil del Estado / Gobierno Socialista del Estado de Yucatán [D.L.D.R.C.R.C.C.E] [Decree of Laws of Divorce and reforms to the Code of the Civil Registry and the Civil Code of the State/ Socialist Government of the State of Yucatan], *as amended*, Diario Oficial de la Federación [D.O.], 3 de abril de 1923 (Mex.)

<sup>138</sup> *Id.*, art. 2.

<sup>139</sup> *Id.*, art. 4.

<sup>140</sup> *Id.*, art. 6.

<sup>141</sup> *Id.*, art. 7.

solved through a civil process).<sup>142</sup> Issues regarding the division of property and financial support for spouse and child were decided on the basis of whether the divorce was unilateral and if malicious conduct was involved.<sup>143</sup>

Reforms aimed at expediting the divorce process for foreigners made Yucatan a no-fault divorce pioneer and global contender for the foreign divorce trade market.<sup>144</sup> Under Felipe Carrillo Puerto's government, Yucatan abolished the one-year minimum period imposed on newly-married couples, which meant that spouses could be officially divorced after only thirty days.<sup>145</sup> After this 30-day period, only one more appearance was required before a civil registry officer to confirm the spouses' intent,<sup>146</sup> at which point a divorce decree was issued that same day.<sup>147</sup> This requirement was later modified to permit long-distance divorce, which was handled by civil registry officers appointed by the spouses to act on their behalf.

Several Mexican and American newspapers were later enlisted to promote Yucatan's new divorce laws. In February 1923, the Yucatan governor circulated a memo to all Mexican consulates in the U.S. to inform Americans of the types of divorce recognized by the Yucatan government, their cost, and information regarding the new thirty-day residency period.<sup>148</sup> Costs ranged between 60 and 125 pesos, depending on whether a judge was needed or if there was an estate.

## 2. *The Undoing of Mexico's early 20<sup>th</sup> Century Unilateral Divorce Laws*

A major factor behind the downfall of Mexico's early 20<sup>th</sup> century unilateral divorce laws was their reported link to corruption. In 1934, when the

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<sup>142</sup> *Id.*, art. 8 & 9.

<sup>143</sup> *Id.*, art. 9. The Code provided that each spouse was to recover their property. The marital partnership was divided between the shares of each spouse and each spouse recovered their legal capacity to then remarry, but a woman could not marry until 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 it ended with her remarriage, or if she 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. Girls and children younger than six 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.

<sup>144</sup> Lindell Bates, *The Divorce of Americans*, 15 AMERICAN BAR ASSOCIATION JOURNAL, 709 (1929).

<sup>145</sup> Robert Cartwright, *Yucatan Divorces*, 18 AMERICAN BAR ASSOCIATION JOURNAL 307 (1932).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Aurora Quijano, *Los congresos feministas de Yucatán en 1916 y su influencia en la legislación local y federal*, 10 ANUARIO MEXICANO DE HISTORIA DEL DERECHO 184 (1998).

*New York Times* reported the Mexican Supreme Court's decision to overturn state statutes, it mentioned a local ring that sold false divorce documents.<sup>149</sup> At that time, Roberto Cossio, a well-known Mexican civil law commentator, published scathing remarks about these early laws:

The way in which some Mexican states exploit the issue of divorce is immoral, as they put economic interests over such a socially sensitive matter. Recently the states of Chihuahua, Morelos, Yucatan and others have jumped into the fray, all competing to expedite divorce procedures.<sup>150</sup>

Mr. Cossio claimed that Mexico's unilateral divorce laws promoted economic development on the basis of immoral behavior and corruption, alleging that states sought profits not only from excessive taxes but also from the use of fraudulent documents, including phony residence certificates, (and from publications or the dispersion of publications that resulted in an important part of state expenditures covered by income derived from impiety and corruption).<sup>151</sup>

Another factor behind the undoing of Mexico's early 20<sup>th</sup> century divorce laws was U.S. influence on Mexican divorce law. Mexico's abrupt shift from separation of bed and board to unilateral divorce was influenced not only by the Revolution but also by U.S. reforms in family law matters. Geographic proximity to the U.S., the relatively low cost of legal services and a similar system of civil law federalism had the effect of absorbing Mexico's unilateral divorce laws in the niche market created within the U.S. Problems with American unilateral divorce laws, however, motivated courts to later invalidate these statutes.<sup>152</sup>

In sum, two federal statutes that undergirded the Supreme Court's rejection of unilateral divorce on due process grounds were also key factors in the demise of liberal state divorce laws: (1) jurisdictional expansion of the federal statute *Civil Code for the Federal District in local matters and for the entire Republic in federal matters*, 1928, and (2) the civil law status of foreigners as a result of the enactment of this new law.<sup>153</sup> Article 1 of the CCDF-MCRMF 1928 included text stating that the code was to apply "in the Federal District and territories in local matters, and 'throughout the Republic in federal matters.'" Thus, the code created a federal-civil sphere, a new federal-civil law sphere and introduced an interpretative supremacy clause.<sup>154</sup> The CCDF-MCRMF 1928 immediately became a gauge by which to measure the constitutionality of state laws, both for locals and foreigners. In effect, the creation of a federal-civil law sphere gave the federal government its own civil code by which to

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<sup>149</sup> *Id.*, at 313.

<sup>150</sup> See GALINDEZ *supra* note 131.

<sup>151</sup> *Id.*, at 36 & 38-39.

<sup>152</sup> JASA *supra* note 7 at 284.

<sup>153</sup> An element that has changed with the private law autonomy granted to Mexico City.

<sup>154</sup> JASA *supra* note 7 at 284-285.

influence state divorce laws and regulate the civil law status of foreigners. The CCDF-MCRMF 1928 also became an important legal tool wielded by foreigners to overturn state divorce decrees. This disparity between state and federal civil law resulted in the abrogation of many liberal state divorce statutes on constitutional grounds.

### 3. *Violations of Due Process*

When unilateral divorce was first enacted in the 1920's and 30's, widespread criticism of "cross-border" divorce made-easy motivated a major overhaul in unilateral divorce laws.<sup>155</sup> For their part, U.S. courts began to invalidate Mexican divorce decrees because of due process violations or lack of jurisdiction. The Mexican Supreme Court also began to holding the substantive crux of Carrillo's unilateral divorce laws, and its transplants, as unconstitutional.<sup>156</sup> In 1929, the Supreme Court finally declared in a non-binding judgment that Yucatan's divorce laws were unconstitutional because they violated due process rights by denying the respondent party an opportunity to contest the claim by means of submitted evidence or oral testimony. In 1931, the court overturned divorce laws that were enacted in the state of Morelos without legislative approval. In 1933, the Court also held Campeche's divorce statute to be unconstitutional, as the powers granted to civil registry officials went against the constitutional division of power.

[The courts also began to scrutinize questions of domicile when courts disagreed on the matter. In one case involving abandonment, the codes of civil procedure of both Nuevo Leon and Coahuila granted jurisdiction on the basis of the abandoned spouse's domicile. The presiding court designated the previous husband's domicile as the defendant's residence, even when a husband argued that the matrimonial domicile had changed as a result of his move to another town. The court, however, found that the wife had not acquired a new domicile and that the husband's prior domicile was legally valid. The resolving court also found that a conjugal domicile could not be

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<sup>155</sup> *Id.*, at 283-284.

<sup>156</sup> *Id.*, at 284. For example, in one case, the Mexican Supreme Court held that Yucatan divorces granted in the absence of mutual consent and without valid cause infringing due process requirements set forth in the Mexican constitution.

In another case, the Mexican Supreme Court invalidated divorce when notification was not properly given to a non-resident in accordance with the laws of the latter's domicile. See, for example: Informe 1938, *Semanario Judicial de la Federación*, Quinta Época, p. 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 *lex fori*. Notification of divorce by publication was barred in Morelos if the plaintiff did not know the whereabouts of the defendant but had the means to find out.

The Court struck down as unconstitutional statutes that allowed Civil Registry officials to determine residence, such as those set forth in the laws of Yucatan, Campeche and Chihuahua.

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. However, when the cause for divorce was ill-treatment, the marital domicile was considered valid if it was the domicile of the defendant.

Despite attempts by states to align divorce law with the federal Constitution, the Supreme Court continued to find unilateral divorce unconstitutional. In response to rulings by the Court in 1929, Yucatan amended its laws by withdrawing the most important elements of Carrillo's earlier statutes. While unilateral divorce was still permitted under the new reforms, it could no longer be granted without notification of the other partner. Foreigners were also required to reside in Yucatan for six months (as opposed to thirty days) before they could solicit divorce. In 1933, the Court declared null and void any decree obtained through Yucatan's "sui generis process" (which had incorporated due process principles) because of its unilateral determination of rights and obligations. The Court reiterated and expanded on this opinion in 1934, 1936 and 1944, declaring that the statutes of both Yucatan and Morelos were unconstitutional (and their divorce laws null and void) because the process did not properly consider notification or counter-arguments made by the opposing spouse.

#### *4. Trends opposed to Marriage Equality: 1932-1940's*

Among the notable changes to the CCDF-MCRMF 1928 was the influence of equal rights on the civil code and modifications that favored unmarried cohabitants. Although the new code did not formally legitimize concubinage unions, it established criteria by which women involved in these relationships could be granted inheritance rights.<sup>157</sup> For instance, cohabitation required that a woman show that she had lived in a marriage-like relationship and/or bore a child from the relationship. Any claim of another concubinage relationship, however, would automatically nullify her cause of action. The new code also included criteria to help determine the concubine's inheritance rights with respect to the rights of blood relatives. These reforms were important because they legitimized informal conjugal unions once considered illicit under colonial law. They also eliminated the requirement that a woman "prove herself" as morally or sexually competent to be considered a "wife"; and punishment in case the relationship had not been publicly known. By granting cohabitant unions semi-civil law status, these reforms: (a) opened the doors for concubine wives and their offspring to claim inheritance rights; and (b) paved the way for future judiciary and legislative reforms.

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<sup>157</sup> As article 1602 stated "Tienen derecho a heredar por sucesión legítima: I.-Los descendientes, conyugue, ascendientes, parientes colaterales dentro del cuarto grado, y en ciertos casos la concubina."

Many states refused to recognize concubines' inheritance rights in the same way as the CCDF-MCRMF 1928. This opposition led to disparities in state codes regarding the proper limits of "marriage;" it also led to delays by Guanajuato, Puebla, Zacatecas, Campeche, Jalisco, Morelos, Sonora and Tamaulipas in recognizing the inheritance and support rights of concubines.<sup>158</sup> While some states like Jalisco flatly refused to acknowledge the existence of concubines or continued to grant them second-class legal status, other states such as Tamaulipas, Veracruz, Hidalgo and Sonora passed codes that were even more progressive than the CCDF-MCRMF 1928.

## VI. DIVERGENCE BETWEEN FEDERAL AND STATE CODES

Unlike the CCDF-MCRMF 1928, the Civil Code of Veracruz required only three years of cohabitation to qualify as concubinage and recognized both female and male partners' inheritance rights. There were also other significant disparities: whereas the CCDF-MCRMF 1928 granted concubines two-thirds of their offsprings' inheritance shares, in Veracruz they were granted full rights. In Yucatan, concubines were granted the same inheritance rights as those of wives. Although the Civil Code of Hidalgo, similar to the CCDF-MCRMF 1928, denied inheritance rights to partners when more than one concubine was involved, this restriction was relaxed when concubines had given birth to a child of the direct inheritor. In the state of Hidalgo, inheritance rights were granted to all concubines who had borne children.

### 1. *Equality between Married and Cohabiting Partners*

Disparities also existed with regard to concubines' support rights. Unlike the CCDF-MCRMF 1928, the civil codes of Tamaulipas and Sonora granted these rights. The civil codes for Tamaulipas and Sonora went beyond the CCDF-MCRMF 1928's provisions by extending equal rights to both female and male concubines. In Tamaulipas, married and unmarried partners were treated as equals. Likewise, the civil codes of both Oaxaca and Tamaulipas placed the burden on the state to provide economic support to minors and invalids in case of parental death resulting from a public sector work accident, even if this involved offspring of concubinage.

Although the CCDF-MCRMF 1928 served as a *general* model for support payments and obligations, the 1940 code for Tamaulipas also stipulated how support payments were to be calculated and paid. Support could not exceed 30% of the supporter's normal income; and payments were required on a monthly basis. In 1940, Tamaulipas redefined marriage as a "continuous

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<sup>158</sup> ANTONIO AGUILAR GUTIÉRREZ, PANORAMA DE LA LEGISLACIÓN CIVIL EN MÉXICO 40-42 (UNAM, 1960).

union, cohabitation and sexual relation of a single man and a single woman”, in effect eliminating the need for a civil ceremony. These changes made it the only state to equate marriage and cohabitation.

## 2. *Constitutional Limits on Marriage Equality*

Despite changes in state codes that favored concubinage unions, in 1944 the Supreme Court issued an important ruling regarding Tamaulipas’ efforts to equate concubinage and marriage. Although this case was non-binding, it influenced the types of legal venues available to concubines to enforce their marriage rights. In essence, the Court declared Tamaulipas’ elimination of civil proceedings as a prerequisite to marriage was unconstitutional. It held that while the Constitution provided states with the power to legislate over the civil status of individuals and regulate how marriages are celebrated and registered, these rights were limited by Juarez’s 1874 decree, whose provisions were binding on every state. The principles established by Juarez included: (1) civil marriage was a monogamous union, and that bigamy and polygamy were considered punishable crimes (secc. VII); (2) the partners’ voluntary will to marry was legally binding and 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) was permissible under exceptional circumstances (secc. IX); (4) civil marriage could not take effect for individuals who were considered incapable of realizing the aims of marriage (secc. X); and (5) religious rites were unnecessary, and “blessings” from religious authorities had no legal effect. According to the Court, legally-sanctioned marriage required that spouses declare their free intent before civil authorities. Any state law that granted marriage rights without this requisite was considered unconstitutional.

This 1944 case did more than just reaffirm civil formalities. By framing the concubinage versus marriage debate within the context of the *Reform Laws*, the Court denied marriage rights for concubines in a way that both reinforced the separation of Church and State and asserted the federal government’s jurisdiction over family law. With this case, the Court offered a glimpse of how it would address any state statute that equated concubinage with marriage; or any attempt to contravene the basic principles of federal law. By curtailing the states’ jurisdiction in marriage-related matters, the court also preempted the use of marriage and concubinage to further individual states’ political agendas, quashing conservative expectations that religious marriage could again be considered equal to civil marriage. By placing a limit on concubinage rights in Mexican state civil codes, this case helped assure the second-rate status of concubines. It also sent a strong message to legislatures that while states had the power to regulate certain elements of matrimony, full validation required that they be celebrated pursuant to the Constitution. It also



implied that any state code that tried to equate marriage with concubinage would be considered unconstitutional.

## VII. CONCLUSION

Limitations on the federal government's regulatory authority in family law matters in Mexico still remains in flux. Recent Supreme Court decisions regarding the decriminalization of abortion,<sup>159</sup> state protection over the unborn's right to life,<sup>160</sup> and same-sex marriage<sup>161</sup> indicate a trend towards greater respect of state jurisdiction and civil law pluralism (including certain limits on federal power).<sup>162</sup> The Supreme Court's recent ruling on Mexico City's decriminalization of abortion during the first twelve weeks of pregnancy, for example, upheld the reforms not on constitutional grounds but on the legal merits of the city's criminal code.<sup>163</sup> With regard to federalism, the Court found that Mexico City, like any other state, had ample authority to regulate criminal matters. In effect, it held that the federal and state governments' shared competency over health-related matters, thereby giving states wide discretion to regulate both local and general health issues.<sup>164</sup>

This issue arose again in October 2008 when the state of Sonora passed a constitutional amendment that protected "life from fecundity to death".<sup>165</sup> Seventeen states followed suit by enacting nearly identical provisions in their state constitutions.<sup>166</sup> The Supreme Court upheld similar constitutional challenges in Baja California and San Luis Potosí on the grounds that the division of powers contained in Articles 73 and 124 of the federal Constitution did "not grant the federal government exclusivity" regarding protection of the

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<sup>159</sup> Suprema Corte de Justicia de la Nación, Engrose Acción de Inconstitucionalidad 146/2007 (Summary of the documents of the Action of Unconstitutionality 146/2007, resolved by the Plenary of the Supreme Court of Justice of the Nation, in public session on 24 and 25 of August of 2008), at 128-152.

<sup>160</sup> *Id.*

<sup>161</sup> Acción de Inconstitucionalidad 2/2010 (Action of Unconstitutionality of 2/2010), Pleno de la Suprema Corte de Justicia de la Nación, *Semanario Judicial de la Federación y su Gaceta*, tomo XXXII, diciembre de 2010, at 911.

<sup>162</sup> *Id.*

<sup>163</sup> ACCIÓN DE INCONSTITUCIONALIDAD *supra* note 160.

<sup>164</sup> *Id.*

<sup>165</sup> Francisca Pou, *El aborto en México: el debate en la Suprema Corte sobre la normativa del Distrito Federal*, ANUARIO DE DERECHO HUMANOS, 137 (2009).

<sup>166</sup> Informe Gire, *Aborto Legal y Seguro*, México, Gire, 2013, available at <http://informe.gire.org.mx/caps/cap1.pdf>

unborn.<sup>167</sup><sup>168</sup> This deference to state authority in private and family law matters has been affirmed with regard to same-sex marriage, when the Court has repeatedly underscored the need to challenge the centralist doctrine.

In 2010, the Supreme Court upheld the constitutionality of Mexico City's same-sex marriage reforms, granting marriage, adoption, inheritance and other economic and social rights to same-sex partners.<sup>169</sup> By doing so, the Court held that state laws need not be constitutionally "uniform."<sup>170</sup> According to the Court, the Mexican equivalent of the Full Faith and Credit Clause in Article 121 section I of the Constitution that empowered Federal Congress to prescribe how legal acts, registries, and judicial orders are to be proven, did not imply that Federal Congress had "freedom to establish the validity and the effects of the acts "that article 121 section one refers to."<sup>171</sup> Contrasting Mexico's federalism to that of the United States, the Court stated that this rule in fact "impedes... Congress... in the name of the Federation, to establish what it thinks is adequate."<sup>172</sup> As the Court explained, in the Mexican federal system "states are free and sovereign in all matters relating to their internal administration, but have a limited independence that is subject to the Federal Pact (articles 40 and 41)."<sup>173</sup> The Court's main point was that "the article in question [permitting same-sex marriage] was not unconstitutional... [just because] it may have repercussions in other states, as occurs with any other acts of the Civil Registry." The Court explains this new approach to federalism in family law matters by claiming that "it is because of our federal system that we have substantial normative production, that will not be, nor are required to be constitutionally uniform... just because one [state] regulates a civil institution in one way does not mean that the rest have to do it in the identical or similar manner, just like another [state] cannot be limited or restricted from legislating differently than the others."<sup>174</sup>

The comparative approach articulated by the Court in this ruling illustrates how —despite Mexico's highly centralized federal system— the states play a significant role in defining the contours of family law and the state-

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<sup>167</sup> See Supreme Corte de Justicia de la Nación, Voto particular que presenta el ministro José Fernando Franco González Salas en relación a la acción de inconstitucionalidad 11/2009, resuelta por el Pleno de la Suprema Corte de Justicia de la Nación, en sesión pública del miércoles 28 de septiembre de 2011, 15-17, (Individual opinion of Justice José Fernando Franco González Salas in regard to a ruling of unconstitutionality 11/2009, resolved by the Plenary of the Supreme Court of the Nation, in public session on Wednesday, 28th of September of 2011).

<sup>168</sup> *Id.* at 16-17.

<sup>169</sup> ACCIÓN DE INCONSTITUCIONALIDAD *supra* note 160.

<sup>170</sup> *Id.*, at 295.

<sup>171</sup> *Id.*, at 293.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*, at 294.

<sup>174</sup> *Id.*, at 295.

federal relationship. Despite their limited powers, states have exerted influence over family law policy and federal-state relations through issues like concubinage and divorce, which involve the exercise of residual constitutional powers. Unfortunately, the pervasiveness of the centralist doctrine in Mexico has helped obscure its complex history, including the diverse roles played by states in shaping family law, and the diverse laws and policies that arose at the federal level during the 19<sup>th</sup> and early 20<sup>th</sup> centuries regarding concubinage and divorce. It also highlights the somewhat ambiguous role played by the federal government in family law matters.

In sum, it is important to challenge centralist assumptions that have, at times, overwhelmed proper consideration of Mexican civil law. Why? Because consensus, unity and uniformity do not fully account for how Mexican civil law actually evolved. Uniformity, for example, has played an oversized role in many studies that purport to explain changes in family law. This is true, I think, because comparative legal scholars have historically underplayed differences and glazed over important legal and jurisdictional issues that may explain such differences.<sup>175</sup> This article underscores how the use of federalism to examine the evolution of Mexican family law — and the complex levels of governance that this implies — can influence both its implementation and debates regarding much-needed reform.<sup>176</sup> Given the prevalence of federal notions of law and governance, it is critical for comparative scholars to understand how these political structures actually work and how interactions between them have shaped critical legal reform. By taking into account the overlap of federal and state jurisdiction in matters of family law, comparative scholars are advised not to disregard on-the-ground facts by placing too much emphasis on “model federations.” Instead, they should be aware of the complexities of multi-jurisdictional governance and the cumulative effects of small (yet not insignificant) legal and political changes that have historically impacted family law and policy.<sup>177</sup>

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<sup>175</sup> See Patrick Glenn, *Aims of Comparative Law* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, (Edward Elgar eds., 2006).

<sup>176</sup> Reimann, Mathias, The progress and failure of comparative law in the second half of the twentieth century, 50 AMERICAN JOURNAL OF COMPARATIVE LAW 671-700 (2002).

<sup>177</sup> SMITH, GRAHAM, FEDERALISM: THE MULTIETHNIC CHALLENGE 1-15, 294-296 (Longman, 1995).