

Mexico

FAMILY LAW REFORM IN MEXICO CITY: THE CONTEMPORARY LEGAL AND POLITICAL INTERSECTIONS

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Résumé

La ville de Mexico (le District fédéral de Mexico) a entrepris de profondes réformes en droit de la famille, et spécifiquement dans le sens de l'égalité et des droits de la femme. Les changements entraînent des droits accrus pour les concubins, la création d'un contrat d'union civile et même du mariage et de l'adoption pour couples de même sexe, du divorce unilatéral ainsi que la dépenalisation de l'avortement. Ces réformes légales représentent un progrès important pour l'intégration du principe d'égalité dans la législation familiale.

Cependant, ces réformes ont été adoptées dans un contexte juridique et politique complexe. Ainsi, pour comprendre ces réformes, il est important de les replacer dans leur contexte.

I INTRODUCTION

The recent private law autonomy endowed on the Federal District (Mexico City) has marked a watershed for gender-equitable family law reform in Mexico. Among the changes have been almost full marriage rights for concubinage unions, the institution of civil unions, same-sex marriage and same-sex adoption, unilateral divorce and decriminalisation of abortion. The Federal District's family law reforms are notable not only for their radical liberal flavour but also because of the new federal context in which they arose; they are the fruits within a larger ideological, political and legal democratisation political project. They showcase two important Mexican family law issues: (1) the complex historical, legal and jurisdictional issues that are at play in family law changes given Mexico's system of federalism; and (2) the important implications that power over private law has in the Mexican family law reform landscape.

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Recently, scholars have described the different ways that women's rights have been influenced by jurisdictional politics. For example, scholars writing on federalism have noted the different state and federal boundary issues that family law reform has uncovered within the United States and Canada and the strong political components and jurisdictional questions at play behind a rights-based approach to family law reform.¹ Others have drawn attention to the different problems of 'interlegality' that have materialised from efforts to simultaneously unify family laws through adoption of international laws.² However, little is known of how the politics of that federalism and internationalisation have played out for women's family law rights in Mexico.

¹ See generally Ann Laquer Estin 'Federalism and Child Support' (1998) 5 *Va J Soc Pol'y & L* 541 (provides a picture of family law as one constituted by multiple 'overlapping layers' or of 'state and federal authority', as opposed to one divided by the federal state division); Ann Laquer Estin 'Family Law Federalism: Divorce and the Constitution' (2007) 16 *Wm & Mary Bill Rts J* 381 (by way of divorce reform the author underscores the increasing nationalisation of family law through improved federal and state coordination); Ann Laquer Estin 'Sharing Governance: Family Law in Congress and the States' (2008) 18 *Cornell JL & Pub Pol'y* 267 (highlights the shift in the location of political and legal authority of the family in the states and its implication to US federalism); Judith Resnik 'Categorical federalism: Jurisdiction, gender, and the globe' (2001) 111 *Yale LJ* 619 (offers an reappraisal of what an unbounded federalism could mean for women); Judith Resnik 'Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism' (2007) 57 *Emory LJ* 31; Naomi R Cahn 'Family Law, Federalism, and the Federal Courts' (1993) 79 *Iowa L Rev* 1073 (examination of the effect that double stranded federalism has for women) and Jill Vickers 'A Two-Way Street: Federalism and Women's Politics in Canada and the United States' (2010) 40 *Publius J Federalism* 412 (comparison of how federalism has shaped abortion politics differently in the US and Canada).

² From a supranational law lens see generally Barbara Stark 'When globalization hits home: international family law comes of age' (2006) 39 *Vand J Transnat'l L* 1551 (showcases the different supranational sources influencing family law internationalisation and their effect on women and families); Adair Dyer 'The Internationalization of Family Law' (1996) 30 *UC Davis L Rev* 625–646ff (noting the top-down and bottom-up effect of family law internationalisation in the area of children's rights); from a supranational and federalism perspective, see Ann Laquer Estin 'Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States' (2010) 62 *Fla L Rev* 47 (draws attention to the hybrid nature of family law internationalisation and the different scales of governance it intersects in the area of children's rights); Merle H Weiner, 'Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States over the Last Fifty Years' (2008) 42 *Fam LQ* 619 (underscores the domestic laws that have developed at state and federal level in the United States to take into account family law disputes with transnational dimensions, that incorporate international laws into domestic family affairs, and the international forums created to address litigants' family law issues); Judith Resnik 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry' (2005) 115 *Yale LJ* 1564 (highlights the different ways international laws have made their way into the United States despite opposition to foreign and international law); from a legal pluralism perspective, see generally Sally Engle Merry 'Colonial and Postcolonial Law' in *The Blackwell Companion to Law and Society* (Oxford: Blackwell Publishing Ltd, 2008); Sally Engle Merry 'Anthropology and international law' (2006) 35 *Ann Rev Anthropol* 99; from a comparative law lens, see generally Keebet von Benda-Beckmann 'Globalisation and legal pluralism' (2002) 4 *Int'l LFD Int'l* 19 and Brian Z Tamanaha 'Understanding legal pluralism: past to present, local to global' (2008) 30 *Sydney L Rev* 375.

This chapter is divided into two main sections. First, Part II explores the political changes that took place in Mexico City between 1990 and 2000 that gave way to watersheds for gender-equitable family law reform in Mexico and the disparities between Mexican family law at state and federal level that Mexico City's family law changes have created. Secondly, Parts III–VI explore the legal changes that took place in Mexico City's family law³ relating to concubinage, cohabitating partnerships, same-sex marriage and unilateral divorce.

II LEGAL AND POLITICAL CONTEXT AGAINST THE BACKGROUND OF MEXICO CITY'S FAMILY LAW REFORMS

Mexico is a country divided into 32 sub-federal entities, 31 of which are full sovereign states and one which functions as a Federal District (*Distrito Federal* or DF). The Federal District is commensurate with that of Mexico City, which is the nation's capital. As one of the world's largest cities, Mexico City is not only the nation's capital and home of the powers of the union; it has a political and geographical scope of more than 15 delegations and 38 municipalities.

As the seat of the power of the union, the area encompassing Mexico City was under the authority of the federal government until 1997, authority that extended to private law matters.⁴ The Congress of the Union had general licence to legislate for Mexico City (Federal District), designate its judiciary and the power to divide and distribute the District's internal divisions.⁵ In addition, the President of the Republic was empowered to designate and remove at will the two main heads of Mexico City's executive power, the local governor and Attorney-General.⁶

The imposition of a representative selected by the federal government and not by the city's citizens was a source of constant and often bitter resentment among the inhabitants of Mexico City.⁷ There was also deep-seated concern

³ Family law is an umbrella term used here to refer to legal changes within Mexico City's (substantive and procedural) civil law and the interpretations adopted by the Mexican Supreme Court of the rights contained therein.

⁴ Article 44 of the *Constitución Política de los Estados Unidos Mexicanos, 1917* (as amended by *Diario Oficial de la Federación* (DOF) 25 October 1993) (Mexican Constitution of 1917).

⁵ See Mexican Constitution of 1917, art 73(VI).

⁶ See Mexican Constitution of 1917, art 73(VI)(3a). Up until the 1986 reforms, the Federal District was 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). Federal Congress also had power to legislate in private law matters in Mexico City.

⁷ For commentary and analysis relating to the problems of centralisation of power in Mexico see Guillermo Boils Morales 'México: una ciudad sin gobierno democrático' (1987) 3(1) *Mexican Studies/Estudios Mexicanos* 195; Enrique Serna 'Giros negros: La opulenta México' *Letras Libres* (August 2002) 68; Luis Maeda Villalobos 'El centralismo hace daño a la nación' *El Siglo de Torreón* (8 November 2003). For a review of the political changes against the background of Mexico City's democratically elected governor, which spurred political

over the legislative-political effect of the federal government's power.⁸ The extent of federal government power over local matters was multiplied by the dual jurisdiction that the *Código Civil para el Distrito Federal en Materia Común y para Toda la República en Materia Federal, 1928*⁹ (Civil Code for the Federal District in Local Matters and for the Whole Republic in Federal Matters, 1928, hereinafter CCDF 1928) had in regulating private law matters both in Mexico City and at a federal level.¹⁰ The CCDF 1928 had indirectly permeated the 'federal pact' that gave states exclusive authority over civil and criminal matters, by serving as a model and rule from which to interpret civil law.¹¹ This arrangement in turn had an overriding effect on state family law by stifling law reform within states and the Federal District and endorsing the presumption that state civil codes were virtual copies of the federal model.

The jurisdictional independence of Mexico City came about as part of the national 'democratic transition' that took place within the Federal District between 1986 and 2000. This process was characterized by three elements: the establishment of a multi-party governing system, the creation of a democratically elected executive authority for the Federal District and the formation of a quasi-state government system. Mexico City's longstanding legal and political arrangement with the federal government changed with the 1997 constitutional reforms introduced by Presidents Carlos Salinas and Ernesto Zedillo. Operatively it has given the constituents of Mexico City (Federal District) a special regime, a 'mixed system of distribution of competence'.¹² This system is made up of three levels of governance:

pluralism, greater decentralisation and collaboration between the executive, legislature and judiciary at federal and local level see Victoria E Rodríguez 'Recasting federalism in Mexico' (1998) 28 *Publius: The Journal of Federalism* 235 and Peter M Ward, Victoria E Rodríguez 'New federalism, intra-governmental relations and co-governance in Mexico' (1999) 31(3) *Journal of Latin American Studies* 673.

⁸ If the seat of the power of the union was changed and Mexico City became a state, it would take the name 'Valley of Mexico State'. See Diane E Davis and Martha Donís 'Protesta social y cambio político en México' (1988) 50 *Revista Mexicana de Sociología* 89 (discusses the partisan tensions against the background of resistance towards the Federal District's autonomy).

⁹ *Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal, 1928* (DOF 7 January 1926, 3 January 1928 and 30 August 1928) (Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928). The Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 code was initially enacted through four separate decrees publishing different parts of the code in the official federal reporter *Diario Oficial de la Federación* (DOF).

¹⁰ The Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 code was applicable in the Federal District in local matters and throughout Mexico in federal civil law matters until the enactment of the CCDF 2000 and the *Código Civil Federal* (Federal Civil Code or FCC) in 2000 (DOF 29 May 2000).

¹¹ See Miriam Castillo 'Jefe de Gobierno capitalino, Ebrard exige autonomía legislativa para mejora en derechos humanos, Ciudad de México, Serias deficiencias en las investigaciones del caso Paulette, opina Álvarez Icaza' *Milenio* (20 April 2010) available online at www.milenio.com/cdb/doc/noticias2011/562a77fdb11ec7137554a9298bab480c (accessed June 2013).

¹² José María Serna de la Garza *El Sistema Federal Mexicano: Un Análisis Jurídico* (Mexico City: Instituto de Investigaciones Jurídicas UNAM, 2008) at 57.

- (a) a regime of ‘express’ powers reserved for the Congress of the Union;¹³
- (b) subject matter not expressly conferred upon the Legislative Assembly of the Federal District but reserved for the Congress of the Union;¹⁴ and
- (c) a regime with express and limited designations of power for the Legislative Assembly of the Federal District to exercise according to the Statute of the Government of the Federal District.¹⁵

These reforms substituted the federal government’s power to designate the Regent in exchange for a newly created authority, the *Jefe de Gobierno del Distrito Federal* (Head of Government of the Federal District), to be appointed through popular election.¹⁶ The changes also provided the Federal District with executive, judicial, and legislative independence from the federal government, including power to legislate in civil and criminal matters.¹⁷ As a result, Mexico City was granted an autonomous government, similar to that of the states with authority to elect its own chief of government and delegation leaders, establish and elect a legislative assembly of its own and legislate in civil and criminal law matters, akin to that of the federated states.

Initially, both the Federal government and Mexico City had the exact same civil codes because the new government provisionally adopted the text of the existing Federal Civil Code (FCC).¹⁸ However, beginning in 2000, the Legislative Assembly for Mexico City, using its newly acquired legislative powers, published a number of family law reforms to the Civil Code for the Federal District 2000 (CCDF 2000) which created striking differences between the new CCDF 2000 and its predecessor, the FCC.¹⁹ Given the liberal nature of the civil code reforms in Mexico City, the new CCDF 2000 created an important liberal force in terms of recognition of rights within Mexican civil codes.

III MARRIAGE AND DIVORCE-LIKE RIGHTS OF CONCUBINES

The reforms of the CCDF in 2000 broadened cohabitant rights through the inclusion of concubinage in the types of bonds created through affinity.²⁰ Through this explicit recognition of family status, cohabitation between a

¹³ Mexican Constitution of 1917, art 122(A)(II–V).

¹⁴ Mexican Constitution of 1917, art 122(A)(I & c).

¹⁵ Mexican Constitution of 1917, art 122(C), first requisite (V).

¹⁶ The growth of the PRD political position in national politics has been due to this new jurisdictional forum from which it successfully brought about discussion and changes in both the political and legislative realms.

¹⁷ Mexican Constitution of 1917 (as amended by DOF 22 August 1996), art 122.

¹⁸ See above n 10.

¹⁹ Ibid.

²⁰ CCDF 2000, art 294. Kinship by affinity (*parentesco de afinidad*) is that which is acquired by marriage or concubinage between a woman or a man and their respective blood relatives.

woman and a man now has legal consequences that create support rights, succession rights and a presumption of paternity regarding children.²¹

Concubinage is not defined directly in the CCDF 2000, nor in the FCC. Which unions constitute concubinage unions requires determining the extent to which a relationship fulfils the requirements established by the Code. There are three main elements that a concubine must show to establish concubinage:²² (a) consorts should not have another established claim of concubinage; (b) consorts must show that they are single and legally able to contract marriage (not married); (c) consorts must show they have cohabitated continually for at least 2 years or have had a child together. While initially concubinage meant only a female in the CCDF 1928, this changed with the reforms in 1983, which included *concubinos* or male concubines as inheritance rights bearers.²³

Prior to the CCDF 2000, unwed concubine consorts in Mexico City²⁴ had a presumption of paternity towards children born within the union if the children were born 180 days after initiating the relationship or less than 300 days after the union had ceased.²⁵ Concubines also had support obligations towards their descendants and mutual support rights between consorts if they had cohabitated for 5 years or had born children together.²⁶ Consorts also had mutual inheritance rights provided there was only one surviving concubine and not several.²⁷ However, in contrast to the treatment afforded to married spouses, concubines were not recognised as creating a lawful family affinity.²⁸ This resulted in concubine consorts being left without the same affiliation and inheritance rights as those afforded to married spouses.²⁹

²¹ CCDF 2000, art 291 quater.

²² CCDF 2000, art 291 bis.

²³ CCDF 1928, art 1635.

²⁴ Within Mexico City at both local and federal civil law level.

²⁵ Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 (above n 10) (as amended by DOF 27 December 1983), art 383.

²⁶ Ibid, arts 302–303. The Mexican state of Tlaxcala offered concubines the same rights. This contrasts with the civil code for the Mexican state of Morelos which only gave support rights in favour of female concubines. The state of Tlaxcala gave support rights only upon the death of one of the concubines and only when the surviving spouse observed good conduct, did not marry, was unable to work and had no property to call their own. Flavio Galván Rivera 'El Concubinato Actual en Mexico' *Medio Siglo de la Revista de la Facultad de Derecho* (Mexico City: UNAM, 1991) at 556.

²⁷ Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928, art 1635.

²⁸ One exception was the Civil Code for the State of Tlaxcala and Puebla which recognised concubines as having a legal family affiliation with their concubine spouse and families. Galván Rivera 1991, above n 26 at 558.

²⁹ It also restricted concubines from formally adopting their partner's family name as their own, a right permitted married wives in some states. Galván notes that arts 97–99 of the Civil Code for the State of Hidalgo permitted women upon marriage to adopt a name to use when married and that they could either conserve their maiden family name or add to their own last name that of their husband. In practice however, both married and unmarried wives frequently informally adopted their husbands' family name with or in substitute of their own, a practice that remains (ibid).

Justification for cohabitation reforms in Mexico City in the year 2000 was reasoned from the viewpoint that the distinction between concubines and married spouses was discriminatory. Thus, in aiming to equate concubinage to marriage, the concubinage union was recognised as a family institution with its own status rights.³⁰ The reforms introduced the notion of recognition of economic and non-economic contributions, and support and division of property principles.³¹ In contrast to the CCDF 1928 the new CCDF 2000 does not establish a *de minimis* cohabitation period for concubines to have a right to support.³² Although support obligations are only enforceable after dissolution of the relationship,³³ they can be granted for a period of time equal to that of

³⁰ The reforms do not adopt a definition of concubinage *per se*. However, by outlining the requisites for recognition of rights and obligations of concubines, the reforms indirectly define the institution. Thus chapter eleven of the CCDF 2000 relating to concubinage, states that a concubinage relationship results from a reciprocal relationship of obligations and rights between female and male concubines, if and only when they both are devoid of legal impediments to contract marriage, have cohabited together continually for a minimum of 2 years or when a child has been born from the relationship. The code establishes that a relationship of concubinage can only be established between two persons, and that multiple concubinages will annul all actions for concubinage. See CCDF 2000, art 291 bis, above n 10.

³¹ Federal Civil Code, art 164: 'Spouses shall jointly make their financial contributions for the maintenance of the home, their food requirements, those of the children, as well as for their education as provided by law, without restriction of the distribution of the burden in accordance with their mutual agreement and their income-producing abilities. If either is disabled for remunerative employment and without assets, the other spouse shall carry the full burden of expenses. The rights and obligations created by a marital relationship shall always be equal between the spouses and independent from their respective economic contributions for the maintenance of the home.' Article 308 of the Civil Code for the Federal District details what is considered support. Support (*alimentos*) comprises: 'I. The food, clothing, dwelling, medical attention, hospitalization and, when appropriate, pregnancy and birth expenses; II. In addition, regarding minors, the expenses for their education and for providing them with a trade, art or profession adequate to their personal needs; III. With regard to persons with some kind of physical incapacity or those declared in state of interdiction, what is necessary to accomplish, within feasible means, their training or rehabilitation and their development; and IV. Regarding elderly people (*adultos mayores*) who lack economic capacity, in addition to whatever is needed for their geriatric care, and effort should be made for them to receive support, incorporating them into the family.'

³² CCDF 2000, art 291 quater & quintus, above n 10. See also Manuel F Chávez Asencio 'Comentarios al Código Civil para el Distrito Federal' (2000) 30 *Jurídica: Anuario del Departamento de Derecho de la Universidad Iberoamericana* 357 at 369–374.

³³ CCDF 2000, art 291 quintus. Initially courts interpreted, in non-binding case-law, that if a support request came after one of the concubines had moved out of the family home, the request was deemed inexistent. However, the court reading of the law change in 2010, recognised that concubines have a right to request support after the dissolution of the relationship if they can show that they lack the income and property to sustain themselves. This support will only be given for a period equal to that of the duration of the relationship and will proceed if the request is formulated within a one-year period after the dissolution of the relationship. See '*Alimentos en el concubinato. La obligación de proporcionarlos existe solamente cuando el vínculo subsiste*', [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXI, June 2005; p 757; '*Concubinato. Los derechos que produce entre los concubinos solo duran mientras la relación subsista*', [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo VII, June 1998, p 626; '*Concubinato. El derecho a alimentos es exigible aunque la vida en común de los concubinos haya cesado*', [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXXII, September 2010; p 1216; '*Alimentos. Es un derecho limitado al mismo lapso que duro el matrimonio, que cuando no hay conyugue culpable en el divorcio necesario, porque la causal de divorcio prevista en la fracción IX*

the relationship if one of the requesting concubines does not have any personal income or assets. In addition, a concubine who has shown ‘ingratitude’, is involved in another concubine relationship, or is married cannot claim support. Concubines who have been full-time home and family caretakers are however assumed to require support.³⁴

Concubines now have a family status which gives consorts a share of the family patrimony.³⁵ In practice this right recognises that concubines and their offspring are entitled to have their assets protected from liens or unauthorised selling until the partnership is dissolved or ends.³⁶ The CCDF 2000, however, did not provide concubines with direct rights over property acquired during the union.

Notably, Mexico City’s concubinage reforms have indirectly contributed to case-law recognising property rights in favour of concubine spouses and furthered legal enactments in other states that have further narrowed the gap between the rights of concubines and married spouses. For example, in 2007 the Collegiate Circuit Courts delivered binding case-law which denied a former concubine the division of property rights resulting from the dissolution of her concubinage relationship.³⁷ The court found that a concubinage relationship does not generate a division of property rights according to the terms of divorce for married partners.³⁸ The court argued that, even when reforms to the CCDF sought to provide equal protection to concubinage with respect to children and in favour of female concubines, it also sought to render homage to the institution of marriage, because it considered marriage to be the ‘legal and moral manner’ of constituting a family.³⁹ The court found that while the institutions may be similar, they are ‘abstractly and ethically different’ and

del artículo 267 del Código Civil para el Distrito Federal se asemeja más al divorcio voluntario, [J]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXIX, February 2009; p 1661.

³⁴ ‘*Concubina. Goza de la presunción de necesitar alimento*’, [TA]; 9a. Época; TCC; SJF y su Gaceta; Tomo XXXII, September 2010; p 1215.

³⁵ CCDF 2000, art 724.

³⁶ CCDF 2000, art 727. The figure of family patrimony law under Mexican law provides for certain assets to be legally protected from any encumbrance or lien as a way to ensure that food and housing for all family members is protected. To invoke this right in Mexico City, a filing must be made with a family law judge who will authorise the creation of the family patrimony and registration in the Office of the Public Registry if all the requisites are fulfilled. Family patrimony can consist of both moveable and real property but is limited to the family home, furnishing for domestic use, farm land, industry or commerce worked by the family and tools used for this family business. The title to the property included in the family patrimony transfers to family members, creating a de facto co-proprietorship between the family members included in the registration. See CCDF 2000, arts 723, 725, 731–732.

³⁷ See ‘*Concubinato. No genera el derecho a la indemnización a que se refiere el artículo 289 bis del Código Civil para el Distrito Federal*’, AMPARO DIRECTO 619/2006, Registro No 19871, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, Tomo: XXV, January 2007, p 2222 (‘*Concubinato 619/2006*’).

³⁸ Concubinato 619/2006.

³⁹ Ibid.

claims for the division of property rights relating to divorce are only applicable to those who have a marriage certificate, something that is absent from concubinage relationships.⁴⁰

However, in 2008 the court gave a non-binding decision that has indicated a substantive change in the reading of property rights of concubines. The court specifically examined the lack of a specific property regime associated with concubinage relationships. It stated that when the division of concubine rights and property results from the products that arose from the joint collaboration of concubines, the criteria for determining the division of property should be based on the rules for de facto partnerships.⁴¹ The court reasoned that while there might not be express consent to the partnership, the nature of concubinage as a family institution suggests that concubines tacitly agree to combine their resources and efforts for a common objective: the constitution of a family nucleus.⁴² While there might not be explicit consent to the partnership, tacit consent is deemed to have been given on behalf of the partners through the act of cohabitation. Contributions can be non-economic or economic, and contributions of property imply transmission of property to the partnership.⁴³ As such, the court found that division of property rights between concubines is to be determined by the rules of partnership under civil law.⁴⁴

Diffusion of the CCDF 2000 in different state codes has also resulted in the expansion of concubinage rights through formal recognition of marriages celebrated under religious and indigenous laws and the creation of registration schemes and divorce provisions applicable to concubinage.⁴⁵ The *Ley para la Familia de Hidalgo* (The Family Law of Hidalgo, FLH) has created a de facto marriage regime and set up divorce-like proceedings for the dissolution of these de facto marriage relationships.⁴⁶ In contrast to the development of the scheme of civil unions for both heterosexual and same-sex couples in Mexico City⁴⁷ and Coahuila,⁴⁸ the FLH has introduced a mechanism to ‘officialise’ or ‘judicialise’ the concubinage relationship.⁴⁹

⁴⁰ Ibid.

⁴¹ ‘*Concubinato. La inexistencia de un régimen patrimonial, no impide la liquidación de los bienes y derechos adquiridos por el trabajo común de los concubinos, mediante las reglas de la sociedad civil*’, [TA]; 9a. Época; TCC; SJF y su Gaceta; XXVIII, September 2008; p 1219.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ See arts 330–340, especially 331(II) of the *Código Civil para el Estado Libre y Soberano de Baja California* (BOEBCS, 10 July 2000). See also arts 10, 105–113 of the *Código Familiar para el Estado de San Luis Potosí* (POESLP, 18 December 2008).

⁴⁶ See generally arts 143–147 of the *Ley para la Familia de Hidalgo* (The Family Law of Hidalgo or FLH) (POEH, 5 November 2007). The law explicitly seeks to equalise both institutions (art 145).

⁴⁷ See *Ley de Sociedad de Convivencia para el Distrito Federal* (Law for Cohabiting Partnerships for the Federal District) (GODF, 16 November 2006).

⁴⁸ See arts 147, 195–1–195–8, 262(VII), 364(XX), 385–1 of the *Código Civil para el Estado de Coahuila de Zaragoza* (POEZ 25 June 1999, as amended by reforms published in POEZ 12 January 2007). The reforms included a civil union scheme labelled ‘Civil Pact of Solidarity’ (*Pacto de Solidaridad*). The pact is defined as ‘a contract celebrated by two individuals, of age,

The FLH states that a concubinage relationship will be considered equivalent to marriage when it is the result of a peaceful, publicly held and permanent relationship between an unmarried woman and an unmarried man, continuous for more than 5 years,⁵⁰ and when both parties have held themselves out as married in terms of duties, rights and obligations.⁵¹ There are two methods through which concubines can officialise or transform their relationship into marriage: through registration or through judicial declaration. Under Hidalgo's law, registration of a concubinage relationship can originate from a request by one or both concubines, through a request from a child of the relationship, or through the Public Attorney.⁵² When only one of the concubines requests registration of the relationship (or neither of them in the case of a request by a child), concubines have 30 days to oppose the registration.⁵³ The second method through which concubinage can be made equal to marriage is through a judicial declaration of concubinage status. These reforms have created a judicial right of action for the determination of 'de facto marriage' status.⁵⁴ Based on the result of either of these processes, the law accords concubines de facto marriage status.

Hidalgo's law establishes that concubinage can end in the case of death of one of the parties, abandonment by one concubine of the other for more than 6 months,⁵⁵ or by mutual agreement. In the latter case the parties must present an agreement relating to custody, support and division of property that meets 'the same requisites for voluntary divorce'.⁵⁶ Upon dissolution of the concubinage relationship, the assets within the relationship are divided under a separation of property regime according to the rules for marriage. Hidalgo's law has also incorporated the fault-based scheme of necessary divorce for dissolution of the registered concubinage relationship.⁵⁷ Thus, concubines can unilaterally request dissolution of the relationship showing fault. Unless the parties have signed a separation of property agreement, the dissolution of the relationship and division of assets will be governed by the rules of *sociedad conyugal* or marriage governed by a community property agreement.⁵⁸ By treating concubinage as a de facto marriage, and by regulating the instances

of different or same gender, or who organize their lives their life in common. Those who celebrate [this union] are considered civil companions. Civil companions owe each other help and mutual assistance, consideration and respect as well as a duty of mutual gratitude and will have the obligation to act with common interest and right to support' (POECZ, 12 January 2007).

⁴⁹ See FLH, art 145(III), above n 46 and arts 3, 27 and 450 of the *Código de Procedimientos Familiares para el Estado de Hidalgo* (COFEH 2007), POEH, 9 April 2007.

⁵⁰ The requisite of 5 years required to declare a concubinage relationship contrasts with the CCDF, which through the reforms reduced cohabitation requirements from 3 years to 2.

⁵¹ FLH, art 143, above n 46.

⁵² FLH, art 145.

⁵³ FLH, art 145.

⁵⁴ COFEH 2007, art 2, above n 49.

⁵⁵ FLH, art 146(III), above n 46. It is for a term of more than 6 consecutive months, when abandonment is without just cause and when there are no children born from the relationship.

⁵⁶ FLH, art 146(III).

⁵⁷ FLH, art 147.

⁵⁸ FLH, art 147.

under which a concubinage relationship ends as well as the economic effects of the termination of the relationship, FLH goes a step further than the CCFD. Thus it incorporates notions of civil law divorce into the dissolution of a concubinage relationship. A similar scheme has been adopted in the Civil Code of Queretaro, where in defining the rights and obligations of concubines, the Code cites articles that regulate married spouses.⁵⁹

IV COHABITATING PARTNERSHIPS (*SOCIEDAD DE CONVIVENCIA*)

In November 2006, the Legislative Assembly for Mexico City approved a law whereby recognition was given to relationships not borne out of filiation or civil bond: *Ley de Sociedad de Convivencia* (Law for Coexisting Partnerships, hereinafter referred to as LSC).⁶⁰ This law establishes the possibility of a de jure relationship called a cohabitating partnership (CP) between individuals of either the same or different gender who are not married or cohabiting with anyone else.⁶¹

The law provides for a public registry of cohabitation partnerships and partners register at the legal affairs office (*Dirección General Jurídical*) of the delegation where they are domiciled.⁶² Similarly to civil marriage, partners need to fill out and sign a form with personal information, stating their common domicile, their intention to live together to help each other mutually and permanently,⁶³ and an agreement relating to their property partnership. If an agreement about property is not submitted, it is assumed that partners retain their pre-existing property status. Registration is not required but is necessary for the union to have effect against third parties.⁶⁴

Cohabiting partnerships create cohabitation and support obligations between partners.⁶⁵ However, support is only granted when one of the partners lacks the income and property necessary for their own sustenance.⁶⁶ Support will only be granted for a period equal to half of the time that the union lasted and must be requested within one year of the dissolution of the union.⁶⁷ Cohabiting partnerships create rights to exercise tutelage but no obligation in the event of a declaration of legal incapacity.⁶⁸ Inheritance and property rights are governed by the agreement stipulated by the partners and have effect for third parties only if the cohabitating partnership has been registered according to the terms

⁵⁹ See art 276 of the *Código Civil del Estado de Queretaro*, POEQ, 22 November 1990 as amended by reforms published in POEQ, 23 March 2007.

⁶⁰ See *Ley de Sociedad de Convivencia para el Distrito Federal*, above note 47.

⁶¹ *Ley de Sociedad de Convivencia para el Distrito Federal*, art 2.

⁶² *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 6–10.

⁶³ *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 6–7.

⁶⁴ *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 2–3.

⁶⁵ *Ley de Sociedad de Convivencia para el Distrito Federal*, arts 5, 13–14.

⁶⁶ *Ley de Sociedad de Convivencia para el Distrito Federal*, art 21.

⁶⁷ *Ley de Sociedad de Convivencia para el Distrito Federal*, art 21.

⁶⁸ *Ley de Sociedad de Convivencia para el Distrito Federal*, art 15.

of the law. Support obligations and the process for cohabitating partnerships are governed by the same rules applied to concubines.⁶⁹ The union dissolves upon a declaration or repudiation by one of the partners, the unjustified abandonment of the partnership domicile for more than 3 months, concubinage or marriage by one partner with another person, acting in malice or upon death.⁷⁰ If the union was registered, the law requires that parties must notify the dissolution of the union in the office where the partnership was registered.⁷¹ The office in turn is required to notify the other partner except in the case of death.

The difference between cohabitating partnerships, marriage and concubine partnerships are multiple: first and most importantly cohabitating partnerships are a legal arrangement provided outside the normal framework of the codes. This has both a symbolic and legal significance. In the tradition of Mexican family law and civil law traditions in general, all arrangements relating to family are primarily provided for in the codes. Therefore, the fact that the cohabitating partnerships are regulated outside of the codes implicitly means that they are not 'family' per se: operatively this means that these unions do not enjoy the status benefits afforded to members and institutions regulated under the Civil Code.

Another important difference is that, in the discourse of the LSC, cohabitating partnerships are set out as a legal bilateral obligation between two adults of different or the same gender to establish a home together with an objective to cohabit and help each other. The emphasis is on cohabitation and economic responsibility between the parties and there is a lack of emphasis on the sexual relationship and procreation inherent in marriage. As such, cohabitating partnerships do not provide adoption rights, the children who are born within the relationship are not deemed children of the partnership, and recognition of parentage by partners of the same gender is not provided for in the CCDF or the LSC.

Essentially, the LSC provides for an institution which sits outside of the explicit and implicit normal framework of the family, which is not in the Civil Code and which seeks to protect the economic relationship between cohabitating partners by recognising inheritance rights, common property rights and support obligations (obligations more in the area of contract than of family law).

What is notable about Mexico's LSC is that it was an important step in making the legal issues surrounding same-sex unions visible, and in opening up the possibility of legalisation of same-sex marriage and adoption in Mexico City.⁷² Following Mexico City's reforms on civil unions, in 2007 the state of Coahuila (bordering Texas) enacted the *Pacto Civil de Solidaridad* or Civil Solidarity Pact

⁶⁹ *Ley de Sociedad de Convivencia para el Distrito Federal*, art 5.

⁷⁰ *Ley de Sociedad de Convivencia para el Distrito Federal*, art 20.

⁷¹ *Ley de Sociedad de Convivencia para el Distrito Federal*, art 24.

⁷² See Part V, below.

(CSP).⁷³ Coahuila's CSP law differs to Mexico City's CP law in that civil unions are integrated into state civil code and the CSP rules on formality, legality,⁷⁴ property and support rights closely mirror those relating to marriage. It recognises CSP unions as constituting a lawful family affinity.⁷⁵ Formalisation of the union takes place before an officer of the civil registry⁷⁶ and partners can choose between the same marital property models allowed for married consorts.⁷⁷ It builds in the same presumption of shared property when partners do not submit a separate property agreement and the possibility of this arrangement changing during the life of the union.⁷⁸ It also adopts divorce-like rules.⁷⁹ However, adoption by CSP unions or individuals in a CSP union is prohibited.⁸⁰

V SAME-SEX MARRIAGE

In December of 2009, Mexico City published reforms to the substantive and procedural civil codes, allowing the celebration of same-sex marriage.⁸¹ The amendment suppressed the reference to 'man' and 'woman' within the definition of marriage.⁸² The article defining marriage now states:⁸³

⁷³ 'Decreto 209', *Periódico Oficial del Estado de Coahuila* (POEC, 12 January 2007).

⁷⁴ *Código Civil de Coahuila* (as amended by the reforms published in the POEC, 12 January 2007), arts 385–8 and 385–9.

⁷⁵ *Ibid*, arts 385–4 and 714.

⁷⁶ *Ibid*, art 385–3.

⁷⁷ *Ibid*, arts 385–10 and 385–11.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*, arts 385–12–386–16.

⁸⁰ *Ibid*, art 385–7. This restriction was declared unconstitutional in 2011. See '*Interés superior del niño tratándose de adopción por matrimonios entre personas del mismo sexo*' [J]; 9a. Época; Pleno; SJF y su Gaceta; Tomo XXXIV, August 2011; p 872. The court has also declared that same-sex couples right to adoption is not 'automatic', but subject to the same review terms as those of heterosexual unions. See '*Matrimonio entre personas del mismo sexo. La posibilidad jurídica de que puedan adoptar no debe considerarse como una autorización automática e indiscriminada (Artículo 391 del Código Civil para el Distrito Federal)*', [J]; 9a. Época; Pleno; SJF y su Gaceta; Tomo XXXIV, August 2011; p 876.

⁸¹ GODF, 29 December 2009.

⁸² Article 237 of the CCDF 2000 as amended by GODF, 29 December 2009. It is curious to note that the Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928, like many other Mexican state civil codes which applied to Mexico City up until 2000, did not have a definition of marriage per se. Marriage as such was defined indirectly through the article on marital age and marriage nullity, property regimes of married couples and causes for divorce. Marriage between two people of the same gender was not formally restricted. However, in Mexico, marriage is a contract that historically has always been assumed to be between a man and a woman, and any other act against this is considered illegal. Prior to the Cod Civil Dist Fed Mat Com and Rep Mat Fed, 1928 the Law on Family Relations decreed on 1917, by Don Venustiano Carranza, abolished the 1884 Civil Code. Article thirteen of this law stated that 'marriage is the civil contract between one only man and one only woman, that unite in a dissolvable bond of marriage to reproduce and help each other during life'. Paradoxically, when concubines were extended marriage-like rights in 2000, this same group of reforms modified the definitions of marriage. Among the reforms was the inclusion of definition of marriage as that of one man and one woman. It also eliminates the mention of marriage as a civil contract and it eliminates procreation as the main objective of marriage. While this reform was of no consequence to

'Article 146: Marriage is the free union of two persons for the achievement of a community of life, where both [consorts] will encourage respect, equality and mutual assistance. [Marriages] should be celebrated before a judge of the Civil Registry and in accordance with the formalities that this present Code stipulates.'

The reforms also made the text on marital age and marriage by minors gender-neutral.⁸⁴ Modifications to the wording of concubinage rights were also made, opening up the possibility of concubinage between same-sex partners.⁸⁵ The decree also republished an unmodified version of the article that stipulated the adoption rights of couples who were married or living in concubinage. This article was republished to underscore that same-sex partners, like heterosexual partners, have a right to adopt.⁸⁶

The reforms of the CCDF can be better understood when we look at the history of proposals for the recognition of same-sex marriage in Mexico City and the resulting LSC. The current law is the result of several years of struggle in the recognition of lesbian, gay, bisexual and transgender (LGBT) rights in Mexico,⁸⁷ which started in Mexico City and could not have come about without the 'independence' of the Federal District, its own legislative powers in civil law matters and the incorporation of new definitions. There had been discussions between LGBT groups and the Legislative Assembly members for the Federal District for the proposal of a law recognising same-sex unions since 1999. In 2000 the PRD (*Partido de la Revolución Democrática*, Party of the Democratic Revolution), the country's largest left-wing party, also had its own interest in presenting a proposal for the legal recognition of same-sex couples but this was never formally introduced.⁸⁸ The law that was finally accepted in Mexico City in 2006 had already been presented by LGBT groups in 2001, but had been postponed for consideration due to political struggles within the Assembly. A notable aspect of Mexico City's same-sex marriage reforms is that they have indirectly opened up the possibility of immigration, residency and nationality rights also to foreign same-sex married spouses.⁸⁹ It indirectly

heterosexual partners, it was strategically crafted to block the road to same-sex marriage through court interpretation. At the time, US states were undertaking constitutional reforms to prohibit marriage between same-sex partners. For a historical review on the changing definition of marriage in Mexico see José Antonio Sánchez Barroso 'El concepto de matrimonio en la Constitución. Análisis Jurídico a partir de las Reformas al Código Civil para el Distrito Federal de 2009' (2011) 256 *Revista de la Facultad de Derecho de México* 277.

⁸³ CCDF 2000.

⁸⁴ CCDF 2000 (as amended by GODF), art 237.

⁸⁵ Article 291 bis.

⁸⁶ For a review of the effect of the legislative decree recognising same-sex marriages in Mexico City see Eli Rodríguez Martínez 'Los matrimonios homosexuales en el Distrito Federal. Algunas consideraciones en torno a la reformas a los Códigos Civiles y de Procedimientos Civiles' (2010) 128 *Boletín Mexicano de Derecho Comparado*.

⁸⁷ See Mirka J Negroni 'From movement Demands to legislation: Organizing in the LGBT Community in Mexico City' in Yolanda C Padilla *Gay and Lesbian Rights Organizing: Community-based Strategies* (Harrington Press, 2004) 208. Also co-published in 2004 16(3) *Journal of Gay & Lesbian Social Services*.

⁸⁸ Ibid.

⁸⁹ See art 39 of the *Ley General de Población* (General Law of Population); art 20(II) of the *Ley de Nacionalidad* (Law of Nationality).

recognises married or concubinage same-sex partners with spousal labour Social Security (*Seguro Social*) beneficiary rights⁹⁰ and the possibility of accessing formal international adoption avenues.⁹¹

VI UNILATERAL DIVORCE

In 2008, both the substantive and the procedural civil codes were substantially modified in order to remove the structures and institutions of fault-based divorce and incorporate the values of no-fault divorce procedures into Mexico City's legislation. In place of voluntary judicial divorce and necessary divorce it established a process for unilateral divorce. The reforms that incorporated the *Divorcio Express* or unilateral divorce eliminated the option and process for necessary divorce and the 21 justifying faults, and also eliminated voluntary divorce via judicial procedure.⁹² The legislation requires those seeking divorce to either apply for administrative voluntary divorce or unilateral divorce.

Under the new reforms, divorce is understood as a process that dissolves the marital bond, leaving spouses legally able to marry again.⁹³ A process for unilateral divorce can originate from one or both spouses when they request it before a judicial authority. Spouses are not required to state a reason or cause for this request if and when one year has passed since the celebration of the marriage.⁹⁴ In order for a spouse to request unilateral divorce, the CCDF requires them to present a request in the first instance before a civil court or a family court, accompanying the request with an agreement that regulates the consequences inherent in the dissolution of the marital bond.⁹⁵ The agreement proposed by the interested spouse should resolve issues relating to custody and support of minor children, spousal support, use and distribution of the marital home and its contents, administration of any marital assets, and compensation required based on the marital property regime.⁹⁶ Along with the divorce request, the requesting spouse must remit the proposed agreement and evidence

⁹⁰ *Ley del Seguro Social* (Law of Social Security), art 5(XII).

⁹¹ *Código Civil Federal*, arts 410E and 410F.

⁹² This reform eliminated art 273 of the CCDF 2000 which had provided an additional option of divorce, voluntary divorce via judicial procedure.

⁹³ CCDF 2000, art 266 (GODF, 3 October 2008).

⁹⁴ *Ibid.*

⁹⁵ CCDF 2000, art 266 and arts 25, 272-A, 272-B of the *Código de Procedimientos Civiles para el Distrito Federal* (Code of Civil Procedure for the Federal District, CPCDF 2000).

⁹⁶ CCDF 2000, art 267. This article outlines that the divorce agreement must designate the person that will have care and custody of minor children; and the mode under which the non-custodial parents will exercise visitation rights, maintain respect for mealtimes, rest and school. It must specify the form, place and dates of payment of support for children, as well as the form of warranty that will guarantee fulfilment of this obligation. The agreement must designate the spouse that will use the marital home, as well as its moveables, and give an indication of how the assets of the marriage will be administered during the divorce process, until they are liquidated, showing also the marriage property agreement and an estimate of the assets. If spouses have celebrated a marriage under a division of property scheme, this document must show the compensation that the spouse who was dedicated to working in the home and caring for children has a right to, up to 50% of the value of combined assets. This

that demonstrates the basis of the divorce agreement.⁹⁷ The other spouse will be notified of the divorce request and can respond by either accepting the terms of the agreement or counterproposing with a new agreement. This new agreement must be accompanied by evidence to establish the request. When the parties are in agreement on the terms and the judge is satisfied that they fulfil the requirements of the law, the judge will decree the dissolution of the marital bond and formally approve the agreement.⁹⁸

However, lack of agreement over the terms of divorce between the spouses will not affect the outcome of the process. If the counteragreement put forward by the companion spouse is not accepted and the spouses do not come to an accord, the court will go ahead and decree the dissolution of the relationship, noting that issues relating to property, custody or support are to be resolved through an incidental process.⁹⁹ This decree dissolving the marital bond is not appealable.¹⁰⁰

During the incidental process the court will schedule a meeting to promote agreement between the spouses. If this fails, the court will then open the evidentiary phase of the process, which consists of an oral evidentiary presentation by the parties before the court.¹⁰¹ If, despite attempts at conciliation, spouses cannot reach an agreement, the judge will proceed to give a judgment concerning these issues.

What has been the court's reaction to unilateral divorce? It is important to note that unilateral divorce laws are not new to Mexico. Inspired by the migratory divorce business that developed in the United States and Mexico between 1914 and the 1940s, there was a surge of new laws directed at facilitating divorce. In 1914, President Venustiano Carranza published two federal decrees launching vincular divorce.¹⁰² The decrees amended constitutional laws sanctioning civil marriage only as an insoluble union and established that civil marriages could be dissolved with the mutual and free consent of the parties after either 3 years of marriage, at any time when procreation was impossible or when grave omissions by one of the spouses made a spousal dispute irresolvable.¹⁰³

also covers a spouse who for some reason did not acquire property in their own name or having acquired it, whose property is notably of inferior value than that of the other spouse.

⁹⁷ CCDF 2000, art 255(X).

⁹⁸ CPCDF 2000, art 287, above note 95.

⁹⁹ Ibid.

¹⁰⁰ CPCDF 2000, 265 bis and CCDF 2000, art 287.

¹⁰¹ CCDF 2000, arts 290 and 299.

¹⁰² *See Decreto del 29 de diciembre de 1911, El Constitucionalista, Veracruz, num 4, 2 de enero de 1915* (Law of 14 December 1874) and *Decreto que reforma el Código Civil para el Distrito y Territorios Federales de 1884, 19 de enero de 1915* (Law of 19 January 1915). Carranza's *Vincular Divorce Laws* are a set of constitutional decrees that in 1914 eliminated marriage as a lifetime union from the *Acta Orgánica de 1874*. The second decree (1915) amended the Civil Code for the Federal District to include non-vincular divorce. Also see Jorge A Vargas 'Concubines under Mexican Law; with a Comparative Overview of Canada, France, Germany, England and Spain' (2005) 12 Sw JL & Trade Am 45 especially at 74–75.

¹⁰³ The decree of 1915 modified the text of art 226 of the Civil Code for the Federal District and Federal Territories of 1884 to: 'divorce was the legal dissolution of the bond of marriage and

State reforms of the 1920s and 1930s took these changes up a notch by reforming the substantive and procedural code in order to reduce or facilitate ways around residency periods, eliminating the necessity of the presence of both parties or the consent of both married consorts. In the Mexican state of Sonora (bordering Arizona), divorce required consort presence only at the first hearing; a power of attorney permitted couples to continue their case through their lawyer.¹⁰⁴ Campeche enacted a law that gave the governor authority to grant a divorce to out-of-state petitioners after a 24-hour residency period.¹⁰⁵ Similar reforms were enacted in the states of Chihuahua, Chiapas, Coahuila, Morelos, Sinaloa and Tamaulipas.¹⁰⁶

Most notable, however, were Yucatan's reforms which authorised both reciprocal and unilateral divorce.¹⁰⁷ These expedited divorce by extending power to officers of the civil registry to receive divorce requests and to decree dissolution of the marital union.¹⁰⁸ Spouses who were in agreement as to custody, support and property could thus be granted divorce that same day.¹⁰⁹ Moreover, a lack of agreement between spouses did not limit a spouse's right to divorce.¹¹⁰ When parties did not concur on issues or when divorce without cause was requested by one spouse, the court was allowed to decree the separation, leaving all other aspects to be resolved under an orthodox civil process.¹¹¹ Liquidation of property and issues of spousal and child support were resolved using a set of principles that differentiated between the effects of when divorce was obtained unilaterally and when there was malicious conduct by the spouses.¹¹²

leaves spouses' legally able to celebrate a new marriage. Sara Montero Duhalt 'Evolución legislativa en el tratamiento a los hijos extramatrimoniales (México independiente)' in José Luis Soberanes Fernández (ed) *Memoria del III Congreso de Historia del Derecho Mexicano* (Mexico City: UNAM, 1983) at 438.

¹⁰⁴ See Lindell T Bates 'The Divorce of Americans in Mexico' (1929) 15 ABAJ 709.

¹⁰⁵ Ibid.

¹⁰⁶ See generally Jesús de Galindez 'El divorcio en el derecho comparado de América' (1949) 6 *Boletín del Instituto de Derecho Comparado* 9.

¹⁰⁷ 'Ley de divorcio y reformas al Código del Registro Civil y al Código Civil del Estado/Gobierno Socialista del Estado de Yucatán' 3 April 1923 (Ley de Divorcio de Yucatán, 1923), art 2.

¹⁰⁸ Ley de Divorcio de Yucatán, 1923, art 4.

¹⁰⁹ Ley de Divorcio de Yucatán, 1923, art 6.

¹¹⁰ Ley de Divorcio de Yucatán, 1923, art 7.

¹¹¹ Ley de Divorcio de Yucatán, 1923, arts 8 and 9.

¹¹² Ley de Divorcio de Yucatán, 1923, art 9. The code provided that each spouse was to recover their property. The marital partnership was divided between the shares of each spouse. Spouses recovered their legal capacity to remarry. But a woman could not marry until 300 days after the temporary separation. If the wife was the defendant, she was entitled to support and lodging, from the date of temporary separation. This ended if she married, lived dishonestly, or acquired sufficient property of her own. If the defendant was the husband, he was entitled to support if he could not work and had no money. Children younger than 6 and all girls were to live with mothers, except if their 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 the children ceased to be minors. Summary provided from the English translation in John T Vance Jr 'Divorce Laws of Yucatan' (1924–1925) 13 *Geo L J* 227 at 235.

However, criticism of migratory divorce between US states and the number of US spouses flocking to Mexico for easy divorce motivated an assault by both US and Mexican courts on Mexican unilateral divorce laws.¹¹³ US courts began to declare Mexican divorce decrees invalid on the basis of jurisdictional overreaching,¹¹⁴ on due process violations, or because one or neither of the parties had resided in Mexico during divorce proceedings.¹¹⁵ In an effort to counteract the unilateral divorce movements of its own states, the Mexican Supreme Court overturned state divorce laws on the grounds that they: (1) were sanctioned by the governor without legislative approval; (2) violated due process rights by denying the respondent divorce party an opportunity to contest the claim for divorce by presenting evidence or being heard in any

¹¹³ For example, one case in the Mexican Supreme Court held that Yucatan divorces, granted in the absence of mutual consent and without valid cause, infringed the guarantees of the due process clause of the Mexican constitution. See '*Divorcio*', Amparo administrativo en revisión 2326/25. Rendón de Matence Laura, 24 de marzo de 1926, [TA]; 5a. Época; Pleno; SJF; XVIII; p 631 (Divorcio 1926). In another case, the Mexican Supreme Court invalidated divorce when notification or service was not made on a non-resident in accordance with the laws of the non-resident's domicile. See eg '*Divorcio por causa de abandono del hogar*'. Competencia 58/37. Suscitada entre el Juez Segundo de letras del ramo Civil de Nuevo León Monterrey y Primero de lo Civil de Saltillo, Coahuila. [TA]; 5a. Época; Pleno; Informes; Informe 1938; 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 could have discovered it. See '*Divorcio en Morelos*', Amparo civil en revisión 3970/29. Chanfreau de Bixler Julieta. 31 mayo de 1930. [TA]; 5a. Época; 3a. Sala; Informes; Informe 1944; p 35 (Divorcio en Morelos, 1944). The court has also held that statutes that conferred on an administrative official of the Civil Registry the authority to determine residence like those found in the laws of Yucatan, Campeche and Chihuahua as unconstitutional. See '*Divorcio en el estado de Campeche, inconstitucionalidad de la ley*', Amparo civil en revisión 3799/28, De la Peña de Berlanga Amelia, 29 de noviembre de 1933, [TA]; 5a. Época; 3a. Sala; SJF; XXXIX; p 2548 (Divorcio en el estado de Campeche, 1933).

¹¹⁴ See *Alzman v Muher*, 23 App Div 139, 210 NY Supp 60 (Sup Ct 1930) (mandamus proceeding to compel a city clerk to issue a marriage license to a plaintiff who offered Mexican divorce from a prior marriage). In this case the court found that the divorce was held to be invalid because of lack of jurisdiction of the parties or over the subject matter. The court considered that because both spouses were residents of New York, they were bound to all laws of that state, and that by obtaining a Mexican divorce the couple had violated the laws, procedures and public policies of New York.

¹¹⁵ See *Bonner v Reandrew*, 203 Iowa 1355, 214 NW 536 (1927) (Action for alienation of affections); cf *Wells v Wells*, 230 Ala 430, 161 So 794 (1935) (Mexican decree did not recite that the husband was a resident). In this case the husband had acquired residence in Yucatan in order to obtain divorce. The New York court pointed out the right to inquire into the question of domicile and, because the only evidence of domicile was the decree of residence by Yucatan, the divorce was held invalid. See also *Golden v Golden*, 41 NM 356, 68 P2d 928, 936 (1937). Even 9 days residency did not constitute valid domicile, as one court said 'a foreign divorce obtained through simulated residence and not in good faith is open to attack'. See *Ryder v Ryder*, 2 Cal App 426, 37 P2d 1069 (1934). In one case the couple obtained divorce after a day trip across the US/Mexico border. Despite claims of jurisdictional fact of domicile or residence, the decree did not hold up when the wife brought up a subsequent divorce action in New Mexico. The court said: 'To permit a foreign state or nation to assume jurisdiction over residents of this state and grant a divorce on request, like a slot machine in which you deposit a fixed sum of money, press the lever and out comes a decree, is a condition which New Mexico does not yet tolerate.' *Golden v Golden*, 41 NM 356, 68 P2d 928, 936 (1937).

way;¹¹⁶ and (3) granted authority to justices of the civil registry to determine divorce matters which went against the constitutional divisions of powers.¹¹⁷

Despite attempts to align divorce law with constitutional principles, the court continued to find unilateral divorce models unconstitutional.¹¹⁸ Finally, the court unequivocally declared in 1933 that the *sui generis* process, put forth by Yucatan to dissolve the marriage contract and incorporate due process principles, was unconstitutional since the process still left the resolution of shared rights and obligations that arose in a shared marriage contract to the whim of only one of the parties.¹¹⁹ The court reiterated and expanded on this opinion in 1934 and 1936, declaring that Yucatan's divorce laws were unconstitutional because the parties' judicial mediation meeting could not be construed as a proper notification of a proceeding because, despite improper notifications and counterarguments put forth by the other party, the process resulted in a decree of divorce.¹²⁰

Thus, until 2008, the prevailing view in Mexico was that divorce obtained by either spouse without the consent of the other spouse was unconstitutional. The return of unilateral divorce in Mexico therefore represents a radical departure from the criteria adopted by the Supreme Court in the early nineteenth century. Nonetheless, a clear incongruity is evident in the court's favour of mutual consent to unilateral divorce. In two decisions rendered in 2008 and 2009, the court upheld its reasoning protecting unilateral divorce laws based on two main arguments. First, there could be no due process violations because the decree of unilateral divorce is not a document constitutive of rights and obligations but a declarative instrument that indicates the rupture of the marital bond that is subject to the will of both marriage parties.¹²¹ Secondly,

¹¹⁶ See *Divorcio 1926 and 1944*, above n 113.

¹¹⁷ See *Divorcio en el estado de Campeche, 1933*, above n 113.

¹¹⁸ In response to the decisions rendered by the Supreme Court in 1929, Yucatan amended its laws by withdrawing the most important elements of Carrillo's earlier laws. See '*Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de*'. Amparo civil en revisión 3727/34. Seidel Elías. 14 de noviembre de 1935. [TA]; 5a. Época; 3a. Sala; SJF; XLVI; p 3581 (*Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de, 1935*). '*Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de*'. Amparo civil directo 2601/33. Villanueva de Triay Rosario. 5 de octubre de 1935. [TA]; 5a. Época; 3a. Sala; SJF; XLVI; p 372 (*Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de, 1935 bis*). New '*Ley de Divorcio*', DO, 17 April 1926. 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 6 months in Yucatan, as opposed to 30 days, in order to obtain a divorce decree.

¹¹⁹ See *Divorcio en el estado de Yucatán, inconstitucionalidad de la ley de, 1935 bis*, *ibid*.

¹²⁰ *Ibid*.

¹²¹ '*Artículo 4.96 del Código Civil del Estado de México. No viola la garantía de audiencia establecida en el artículo 14 Constitucional*', Registro No 168382, Localización: Novena Época Instancia: Primera Sala Fuente: Semanario Judicial de la Federación y su Gaceta XXVIII, Diciembre de 2008, Página: 231 Tesis: 1a. CXII/2008 Tesis Aislada Materia(s): Constitucional, Civil; '*Divorcio por voluntad unilateral del conyugue. Los artículos 266, 267, 282, 283, fracciones IV, V, VI, VII Y VIII, 283 bis, 287 Y 288 del Código Civil para el Distrito Federal, reformado mediante decreto publicado en la Gaceta Oficial de la entidad el 3 de octubre de 2008, que regulan su tramitación, no violan las garantías de audiencia y de debido proceso legal*', Amparo directo en revisión 1475/2008. 15 de octubre de 2008. Unanimidad de cuatro

with respect to the ‘secondary matters’ of marriage, ie economic and custody issues, due process rights were fulfilled through the inclusion of a list of rights accorded to parties. This list included the notification of the affected spouse by delivery of accompanying copies of supporting documents and a procedural phase giving an affected spouse an opportunity to accept or to counter the agreement on economic and custody matters (not the divorce itself). Currently, the message of the court is clear in that it considers due process rights to be protected by dividing the divorce process. This division means that the initial decree affects only the marital status of partners, providing aggrieved spouses with a *sui generis* process for providing judicial notice and giving affected spouses an opportunity to be heard when economic and custody rights are at stake.¹²² This is evidence of a drastic change in the importance given to women in divorce.

The court has also enacted constitutional guidelines in order to keep judgments in line with constitutional principles. For example, the court has been careful to curtail the interpretative mechanism by which Yucatan’s easy divorce schemes expanded, while simultaneously opening up the constitutional limitations to this new type of divorce. To prevent interstate migratory divorce, the court has declared that married spouses are bound to the courts of their conjugal domicile or, in the case of abandonment, to the domicile of the abandoned consort.¹²³ In an effort to protect Mexico City’s laws from being abused by divorce tourism couples, the court has upheld as constitutional Mexico City’s *de minimis* time requirements limiting the *divorcio express* to marriages that have lasted at least one year.¹²⁴ With respect to the conflict of laws that arises

votos. Ausente: José de Jesús Gudiño Pelayo. Ponente: José Ramón Cossío Díaz. Secretaria: Dolores Rueda Aguilar; Registro No. 165810, Localización: Novena Época, Instancia: Primera Sala, Fuente: Semanario Judicial de la Federación y su Gaceta, XXX, Diciembre de 2009, Página: 280, Tesis: 1a. CCXXIII/2009, Tesis Aislada, Materia(s): Civil.

¹²² ‘Divorcio. Se naturaliza a partir de las reformas a los Códigos Civil y de Procedimientos Civiles para el Distrito Federal, publicadas el tres de octubre de dos mil ocho. Tercer Tribunal Colegiado en Materia Civil del Primer Circuito, Amparo directo 216/2009. 1o. de julio de 2009. Unanimidad de votos. Ponente: Víctor Francisco Mota Cienfuegos. Secretario: Erick Fernando Cano Figueroa, Registro No. 166441, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, XXX, Septiembre de 2009, Página: 3127, Tesis: I.3o.C.752 C, Tesis Aislada, Materia(s): Civil.

¹²³ Divorcio encausado [divorce without cause], competencia por razón de territorio. Segundo Tribunal Colegiado en Materia Civil del Primer Circuito, Amparo directo 27/2010. Antonio Eroles Santamaría. 16 de marzo de 2011. Cinco votos. Ponente: Arturo Zaldívar Lelo de Larrea. Secretaria: Ana María Ibarra Olguin, Registro No. 164796, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, XXXI, Abril de 2010, Página: 2728, Tesis: I.2o.C.45 C, Tesis Aislada, Materia(s): Civil, Amparo en revisión 1869/2009. 9 de marzo de 2011. Cinco votos. Ponente: José Ramón Cossío Díaz. Secretario: Jesús Antonio Sepúlveda Castro. Competencia 3/2009. Suscitada entre el Juzgado Tercero de lo Familiar del Tribunal Superior de Justicia del Distrito Federal y el Juzgado Segundo de Primera Instancia del Distrito Judicial de Veracruz, Veracruz. 8 de enero de 2010.

¹²⁴ ‘Divorcio sin causa [divorce with cause]. Constitucionalidad del artículo 266 del Código Civil para el Distrito Federal, en cuanto exige que el matrimonio haya durado un año’. Octavo Tribunal Colegiado en Materia Civil del Primer Circuito, Amparo directo 738/2010. 24 de noviembre de 2010. Unanimidad de votos. Ponente: Abraham S. Marcos Valdés. Secretario:

from legal change, the court has stated that the applicable divorce laws are those that are relevant within the time frame when the divorce claim arises, not when the marriage is celebrated.¹²⁵ The court has also upheld a rule that allows previously filed divorce cases to transfer their claims under the new laws if such a transfer does not affect economic or custody rights under the former divorce laws.¹²⁶

With these reforms the court has also established fragile but important limitations on the use of discrimination as a tool to challenge the constitutionality of family law. The court has put limits on the use of the 'family right' argument to protect women's family law rights. In 2009, one wife challenged the constitutionality of a Mexico City unilateral divorce decree on the grounds of violation of art 4 of the Constitution. Article 4 puts an obligation on the state to enact laws which favour the protection of the organisation and development of the family.¹²⁷ Without explicitly recognising constitutional freedom of choice in marriage and divorce, the court found that Mexico City's reforms did not violate a state's obligation to protect the family given that the state does not obligate spouses to remain married when cohabitation with their spouses or their children is rendered impossible or when spouses lose affection for one another. The court reasoned that divorce is a mechanism devised by the state to dissolve the marital union and to avoid instances of mistreatment or violence that can result from cohabitation between consorts who no longer wish to live together. Therefore, divorce is not a tool to promote conjugal rupture, but a mechanism to protect the freedom of spouses to express their wish to leave the marriage and to do so only by giving formal recognition of the de facto dissolution of the marital union. Similarly, in 2010, the court unequivocally declared in isolated, non-binding case law that Mexico City's divorce reforms did not in any way 'imply discrimination against any of the consorts' because under no circumstances does it allow 'treatment of

Francisco Banda Jiménez, Registro No. 162599, Localización: Novena Época Instancia: Tribunales Colegiados de Circuito Fuente: Semanario Judicial de la Federación y su Gaceta, XXXIII, Marzo de 2011, Página: 2323, Tesis: I.8o.C.300 Tesis Aislada, Materia(s): Constitucional.

¹²⁵ 'Divorcio. Para determinar la legislación aplicable para decretarlo debe atenderse a la fecha en que se actualiza el hecho que lo genera, y no a la de celebración del matrimonio, Amparo directo en revisión 1013/2010. René Alejandro Chavarría García. 4 de agosto de 2010. Cinco votos. Ponente: Juan N. Silva Meza. Secretario: Rodrigo de la Peza López Figueroa, Registro No. 162866, Localización: Novena Época, Instancia: Primera Sala, Fuente: Semanario Judicial de la Federación y su Gaceta, XXXIII, Febrero de 2011, Página: 614, Tesis: 1a. XXXII/2011, Tesis Aislada Materia(s): Civil.

¹²⁶ 'Divorcio sin causa. El artículo tercero transitorio del decreto por el cual se reforma y deroga el Código Civil para el Distrito Federal y se reforma, deroga y adiciona el Código de Procedimientos Civiles para el Distrito Federal, publicado en la Gaceta Oficial de la entidad el 3 de octubre de 2008, no viola el principio de irretroactividad de la ley', Localización: Novena Época, Instancia: Primera Sala Fuente: Semanario Judicial de la Federación y su Gaceta, XXXIII, Mayo de 2011, Página: 232, Tesis: 1a. LXXVII/2011, Tesis Aislada, Materia(s): Constitucional.

¹²⁷ The article recognises the rights of families to a 'dignified and decent household', children's integral rights and empowers the state to enforce these rights against ascendants, tutors and guardians. In this particular case, the court used the language of freedom of expression to protect divorce-seeking spouses.

inferiority that translates into discrimination (on the basis of age, race, religion, politics, social position, civil status, etcetera) that provides unfair advantage to either of the consorts'.¹²⁸

By giving privilege to freedom in marriage choice, the court has indirectly constitutionalised a right to divorce. While constitutionalising private law rights has become an expedient solution to resolving the inequities of substantive and procedural private law in Mexico, it does not resolve the competing constitutional interests that arise. Thus, by privileging divorce and failing to acknowledge or consider how this individual right to divorce competes against basic constitutional gender equality and children's rights, the court has too easily surrendered analysing divorce when there are competing interests at play. With this change in criteria the court has affirmed the principle that a 'person has no due process interest in remaining married'¹²⁹ but the court has neglected to deeply examine the corollary of this principle, whether marriage and the parenting and property partnership that it can give rise to creates 'any legally recognized interest' in divorce that merits constitutional due process protection.¹³⁰

VII CONCLUSIONS

The examination of Mexico City's recent family law reforms through a federalism lens highlights the connections between women, family and shifts in private law governance in Mexico. The most recent broadening of cohabitant rights within the Mexican civil codes has been the result of a combination of the complex democratisation process that has taken place in the Federal District and the inclusion of concubinage as a family form. The reforms are connected to the surge of private law power introduced by Mexico's new private law autonomy and the gendered legal remedies instituted for unmarried women and mothers during Mexico's early codification period.

This same pattern of events is evident in Mexico City's law recognising cohabitation unions, which was drafted to protect inheritance rights, common property rights and the support obligations of registered same-sex and different-sex cohabitation partners. The CP law was one step towards the ultimate goal of legitimising same-sex unions; however, reforms eliminating the gendered language of concubinage and marriage within the civil codes rendered CP laws virtually irrelevant in the family law landscape. Mexico City

¹²⁸ 'Divorcio exprés. Su regulación no es discriminatoria para las partes. Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito', Registro No 165562, Localización: Novena Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, XXXI, Enero de 2010, Página: 2108, Tesis: I.4o.C.206 C.

¹²⁹ See Sheila Jordan Cunningham 'Jurisdiction in the Ex Parte Divorce: Do Absent Spouses Have a Protected Due Process Interest in Their Marital Status' (1982–1983) 13 Mem St U L Rev 205 at 243 and fn 226 at 243. This means that the court has ignored from the outset the fact that there could exist a 'protected interest' that can only be resolved by 'remaining married to an unwilling spouse'.

¹³⁰ Ibid at 244.

reforms allowing the celebration of same-sex marriage in 2009 also opened up the possibility of concubinage between same-sex partners.¹³¹ However, these reforms are strongly connected to several years of struggle in the recognition of LGBT rights in Mexico, which started in Mexico City and could not have come about without the independence of the Federal District. The reforms have opened the window to health insurance, home financing, pension and daycare rights through the figure of social security rights as well as immigration rights for foreign same-sex marriage spouses.

Federalism has also been shown to be a recurring theme in divorce reform. While federalism issues were present in early nineteenth century divorce reform, the political and ideological context surrounding Mexico City's divorce laws is quite different from that which prevailed during the 1930s and 1940s, as is the treatment of these issues by the Supreme Court. The balance has largely shifted in favour of individual rights, allowing individuals to make decisions concerning their private lives, especially decisions relating to marriage and family life, free from unwarranted interference by the state. It privileges the competing interests between the rights to marital freedom, as well as economic and custody rights and obligations. In addition, the shift in balance has given judicial authorities a key role in the distribution of assets, allocation of support and custody. These differences indicate a change by the state to the relative weight accorded to individual rights compared to the interests of the state.

¹³¹ CCDF 2000, art 291 bis, above n 10.