

Cohabitation Without Marriage in Mexico

It is extremely difficult and rather over-ambitious to undertake an analysis of the legal relationships arising from extramarital cohabitation in Latin America, due to the pervasive difficulty in our region of obtaining current comparative legislative and doctrinal material. We must therefore limit ourselves to a brief exposition of the statute law of Mexico, Venezuela, Brazil, Cuba and Costa Rica, with Mexico as the principal point of reference.

In 1870 Mexico established its own civil law by promulgating a Civil Code for the Federal District and Lower California (published by decree on 8 December 1870 and in force since 1 March 1871). The Constitution of 1857, in force at that time, assigned matters of a civil nature to local jurisdiction; hence each of the states adopted its own Civil Code. This pattern persists to this day so that there are altogether 32 different Civil Codes in Mexican territory. At the outset, for inherent political reasons, the Civil Code of the Federal District became the prevailing model. The states, with a few exceptions, limited themselves to reproducing the civil legislation of the Federal District—a situation that has now however been substantially modified.

All the same, family law in Mexico has several distinctive traits that are now shared by all Mexican civil legislation:

(i) *Secularism*: One of President Juarez's greatest merits during the 19th century was not only to promote the drafting of a Civil Code (1870) but to endow it with continuity. As a politician he was able to give significant leadership in consolidating the Reform Laws and realizing postulates of liberalism such as a radical separation between Church and State. Hence in 1870 the Registrar's Office was set up and its acts secularized.

(ii) *Equality*. Equality between men and women under the law is declared by Art. 2 of the Civil Code in the Federal District.

The preceding traits are shared by the civil legislation in all of Mexico. What follows is based primarily on the Civil Code of the Federal District, except for a few interesting side glances.

Neither the Civil Code of 1870 nor that which followed, the Civil Code of 1884, contain any reference whatsoever to concubinage in

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spite of its constituting a major social problem in Mexico. Civil legislation took an important turn at the beginning of the Mexican Revolution of 1910 when the Chief of the Constitutionalist army, exercising plenary power, repealed part of the Civil Code of 1884 and promulgated a Law of Family Relationships.

This legislation abolished several requirements for marriage (such as banns) in order to facilitate its celebration and also established equality for the woman during marriage. In order to assure effective economic independence for her (under the previous regime, community of property, the husband had been the legal administrator, etc.) it was recognized that the only possible economic regime between marital couples was separation of property, each partner keeping and administering his own property. This law also eliminated all differences between children, be they legitimate, illegitimate, incestuous, etc.

These important reforms of marriage law were later embodied in the current Civil Code published in 1928 and in force since 1932. We can now turn to its provisions regarding concubinage.

Concubinage

In our legal literature concubinage is considered a factual relationship to which certain legal consequences are attributed when it is stable and prolonged. The cohabitation of man and woman—if both are single—is a lawful relation productive of legal effects. Its characteristic elements are as follows:

1. A factual element consisting in the partners in concubinage attaining a state which gives them the name and reputation of being married.
2. A condition of temporality which may be understood as implying continuity, regularity or duration in sexual relations or in the frequency, permanence or habit of same.
3. A condition of publicity.
4. A condition of fidelity.
5. A condition of singularity, i.e., a union of one single male and one single female in concubinage.
6. An element of capacity. This element consists of demanding from the partners in concubinage the same capacity required for marriage.

In sum, the model of concubinage is derived from the marriage model.

A special provision in our statute law is Art. 70 of the Civil Code of Tamaulipas. It specifically equates marriage to concubinage, denominating it marriage by behavior: "for all legal purposes, matrimony will be considered the continuous union, cohabitation and

sexual relation of a single man with a single woman." It also defines the capacity of the parties concerned, i.e., they must have reached a set age, have no blood ties or affinity with relatives of direct descent, collateral kinship between brothers, the existence of a previous marriage, etc. The Code also provided facilities for registering such a relationship. In supporting these provisions, the Code invoked the statute laws of Bolivia and Guatemala. Art. 131 of the Bolivian Constitution of 24 November 1945 recognized as a marriage any union in concubinage, with only two years of life in common, verified by proof or by the birth of a child, provided the parties had legal capacity to marry.

Guatemala in its statute of 26 November 1947, Art. 1, recognized the legal union in fact of a man and woman, with a capacity to marry and for the purpose of living together, to beget, feed and educate their children and help each other, kept in public manner and consecutive for over three years, provided that this union had made a home and both partners conducted themselves as such before their families or social relations. By Art. 2 verified unions publicly kept by the people of the Indian race, celebrated in accordance with their customs, traditions or rites, were deemed to be unions in fact and entitled to the rights established by the present law, even though they had not yet lasted three years, provided they were registered and recorded in the Registrar's Office.

So also the Cuban Family Code, Art. 18, clearly refers to the relationship of *de facto* unions. It admits the existence of a marriage union between a man and a woman with legal capacity to contract marriage, which fulfills all requisites of singularity and stability and brings about the desired effects proper to a marriage formally legalized when the union is recognized by a competent court. Moreover, Art. 43 of the Cuban Constitution calls on the courts to determine when for reasons of equity the union between two people with legal capacity to marry shall, by reason of its stability and singularity, be equated with civil matrimony.

At the other end of the spectrum stands the Brazilian Constitution of 17 October 1969 which declares that the family is constituted by matrimony and will be protected by public authority (art. 175). Originally it also proclaimed matrimony to be indissoluble, civil and its celebration free. But dissolution of marriage was finally admitted by the Ninth Amendment to the Constitution on 28 June 1977.

Effects of Concubinage

The effects of concubinage may be considered at two levels: personal and economic.

- a. *Personal relations* may be those the partners in concubinage

have with their children. Mexican statute law establishes a presumption of fatherhood with respect to children born 180 days after the concubinage began and within 300 days following its termination (Civ. Code Art. 383).

If the presumptive child may be credited with the status of son, he may initiate an investigation of paternity and in consequence may establish the relationship. Mexican statute law only admits an investigation of paternity in specific cases, one being the aforementioned. Investigation of maternity, on the other hand, is open and may be proved by any of the usual methods of proof; it is prohibited only when the object is to bastardize the child of a married woman.

Once the relationship is established, the child belonging to partners in concubinage has a right to carry the father's and mother's surname, to receive an allowance set by law and to acquire the hereditary portion in the succession of the concubine (Civ. Code Art. 389 and 1607 ff.).

Under the Family Code of Cuba, registration of the birth of the child in the Registrar's Office by *one* of the parents can carry legal effects regarding the mother and the father only in case of a formalized or lawfully recognized marriage (Art. 661). For children born of unmarried parents the registration must be made by both, either jointly or separately (Art. 67). This code contains no system for investigation of paternity. It only admits a presumption of fatherhood when the marital relationship with the mother, during the period when conception could have taken place, was notorious (Art. 75 II).

The Civil Code of Brazil (4 September 1942) contains only isolated provisions with reference to the offspring of partners in concubinage. Art. 364 permits an investigation of maternity except when the object is to attribute an illegitimate child to a married woman or to an incestuous relation. Illegitimate offspring may also claim recognition of the relationship if at the time of conception the mother lived in concubinage with the presumptive father, if conception coincides with the abduction of the mother by the presumptive father or with the length of time they had been having sexual relations or, finally, if there is a document specifically recognizing paternity.

b. *Economic Relations.* Mexican legislation has made special effort to recognize the *de facto* relationship between man and woman specifically in this respect. This was a declared purpose as set out in the "motives" of the Civil Code because of the great prevalence of concubinage among the popular classes and the need to protect the female concubine.

Accordingly, the testator must leave his concubine an allowance if he has lived with her as her husband during the five years immediately preceding his death, or begotten children with her, provided

they remained unmarried during concubinage and the surviving party is unable to work and lacks sufficient means. This right subsists as long as she does not marry and behaves properly. But if the testator lived with several concubines, none has any right to an allowance.

Under the same conditions the female concubine may also inherit from her partner (Civ. Code Art. 1636). The purpose is clear: a prolonged and stable cohabitation.

Social welfare legislation also looks in the first place to the marriage relationship, but secondarily to *de facto* dependency. Thus worker's compensation death benefits, in the absence of a widow, accrue to the persons who partially or totally depended on the deceased worker, among them a concubine with whom the worker shared his life in common. Again, the Social Security Law in the absence of a legitimate wife entitles the concubine to survivor's pension, if she lived with the deceased worker during the five years immediately preceding his death and if both had remained unmarried during concubinage (Art. 38). Similarly if he died from accident or non-employment illness (Art. 54) or had been in receipt of a pension of disability, old age or dismissal (Art. 78).

The Family Code of Cuba does not deal with the economic repercussions of concubinage or in formal marriage, but the Civil Code of Venezuela (1942) creates a presumption of community property for all unwed couples where the woman demonstrates that she has lived permanently in such a state and has contributed with her work to the formation or increase of the man's assets, even though these appear to be documented in his name only.

Brazil's approach used to be based on the concept of *de facto* society, originally linked to foreign immigrants, especially Italians, who were married under a regime of separation of property and were building a common patrimony in Brazil. The courts conferred part of the common patrimony on the woman, even when it was documented in the husband's name, on the principle that he should not without cause enrich himself at his wife's expense. In order to facilitate this trend, the Brazilian legislator in the Introduction to the Civil Code, Art. 7, authorized that a foreigner who became a naturalized Brazilian could choose the regime of universal community property. On this premise the dominant jurisprudence of the Brazilian courts confers on the female concubine a right as partner in fact of her companion in view of the existence of concubinage between them or of repeated sexual relations. However, true concubinage does not presume a society in fact. In its opinion no. 380 the Supreme Federal Court held common effort to be sufficient, i.e., the existence of concubinage alone does not presuppose a society in fact. On the other hand, the special legislation on transport and

work accidents (Law no. 2681 of 1912 and law no. 7036 of 10 November 1944) provides that a female concubine who is economically dependent on her companion has the same rights as those of the other economic dependents.

CONCLUSION

On the occasion of International Woman's Year, the Mexican legislator in 1974 reformed Art. 4 of the Constitution, proclaiming the equality of man and woman under the law and reaffirming his obligation to protect the formation and development of the family. He also affirmed the right of each person to decide freely, responsibly and informedly on the number and spacing of his/her children. Consequently this right extends to both a union in fact as well as matrimony.

Matrimony continues to be the legislative model for solving problems related to the family. All the same, a tendency can be discerned to give the family concept legal effects, whatever its source. Thus the 25th Legislative Congress of the Mexican Union set up a Commission of Reform for the Civil Code. In its draft bill, Art. 328 provided that the family when founded on a relationship of concubinage may only have legal effects when the relationship between the man and woman consists of successive acts implying a complete community of life. The partners in concubinage were charged with the responsibility of contributing to the maintenance of the family on a 50-50 basis, it being understood that care of the home be considered economically productive work and therefore the contribution of whomever performs it. Although this draft bill has no political possibility of becoming enacted, it is indicative of the attitude taken by Mexican doctrine. The conservative elements in Mexico, with their great political weight in our society, furnish the reason why reforms are so slow and restricted in coming. But the policy of the Mexican State on family planning and incorporating women into employment are two constant factors which, if they persist, may substantially modify family relations and thereby the matrimonial model perceived by the legislator.