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NOTES, INFORMATIONS ET DOCUMENTS

Women in Mexican Labor Law*

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Introduction

Women's issues, regardless of the composition of the interest groups involved, always turn out to be candent subjects for discussion. There seems to be no possibility for reaching a universal consensus given the passionate polemics these topics unleash.

While every person involved would concede, at the outset, that the goal of the debate is to produce a standard of fairness, when it comes to defining what this fairness would consist of, one appreciates the abysmal differences of thought prevailing among the groups involved which make it difficult to agree on even this basic conceptual position.

If this is so, in general, when it comes to labor and the apparent privileges women demand, the arguments become fierce.

Should women be equal to men in labor provisions because in fact they are equal?

* Paper presented at the XXIX Conference of the Interamerican Bar Associaton, San José, Costa Rica, 1991.

Should women be protected by law given the different but essential functions only women can perform?

Would women's legal protection constitute a privilege based on sex or would it constitute an equalizing factor given the undisputable difference in the biological function they perform?

Is discrimination justified due to the fact that child care is, at any rate sex-linked in the sense that only women can bear and suckle babies rendering their work performance, per force, discontinued or unreliable for certain periods of time?

Arguments go back and forth.

On the issue of equality, misogynous arguments against women's equality are based on a supposed intrinsic inferiority of women. Supporters of this view base their position on experiments conducted by some "enlightened" scholars which establish, with apparent scientific rigor, the supremacy of male intelligence on the fact that the brains of men and women vary considerably in volume and weight. Women's brains are, they say, smaller than men's even proportionally smaller to their difference in body size. Therefore, they argue, women are, by their very nature, less intellectually endowed than men. To back this misogynous theory, its supporters point out the poor contribution of women, throughout the centuries, to intellectual, scientific and artistic accomplishments.[1]

Feminists counter-argue that it is neither the volume nor the weight of the brain but the quality of the nervous matter which determines the intelligence of a person and as far as intellectual achievement is concerned the social ambience has always been adverse to women's scholarly and artistic development.[2]

However, while the first group would argue for the inequality of women, it would accept some compensation for motherhood; on the contrary, the second group, that of women supporters, expresses such fervent arguments for egalitarian feminism that, at times, it makes abstraction of women's reproductive function.

Yet, there is an eclectic position supported by biologists and geneticists, who have found human beings to be ambisexual, in the sense that both men and women possess male and female sex hormones, albeit in different distribution; the sex organs of either sex containing in rudimentary form those of the other and consisting, so to speak, of the same ingredients, mixed in different proportions. This group of scientists agrees on the fact that even though the effect of sex hormones on human behavior is not yet fully understood, it is known, nonetheless, that sex hormones enter the brain and affect its activity and that, vice versa, the brain exerts a powerful influence over the organs secreting hormones. There is evidence from clinical observation of human beings and from experimental studies of infrahuman mammals that an increase in the amount of male or female sex hormones on members of either sex is followed by behavioral changes. The administration of androgen (a male hormone), for instance, appears to produce more aggression and greater motivation to initiate sexual relations; increased levels of estrogen (a female hormone), appear to lead, among other things, to more passive

1. N. DE BUEN, *Derecho del trabajo*, Editorial Porrua, S.A., 1990, pp. 165-167. Anti-feminist arguments supported by Huschke Bischoff, Moebius, Rudinger Forej, Lombroso and Spencer.

2. *Id.*, pp. 166-67. Feminist arguments supported by Topinard Manouvrier and Castan Tobenas.

behavior and emotional disturbances. Apparently it is the proportion of the distribution of these hormones which prepare and allow women to become mothers and later on to naturally fall on the nurturing and mothering role.

Supporters of this view would have no problem accepting an intrinsic difference between the sexes, which would, in no case, translate into inferiority. In this sense, legislation protective of women would only constitute an acknowledgement of this difference. Such statutes would neither be discriminatory nor unequal because, irrespective of changes in the social role of women throughout the ages and the countless variations on this theme in diverse cultures, woman's status still largely depends on the biological fact that she is — potentially, if not in reality at any given time — the bearer of children, whose care, at least in infancy, is usually her responsibility.

Furthermore, the one constant factor determining the division of labor in all pre-industrial and even current societies is the fact that women, because of an almost incessant preoccupation with childbearing and rearing throughout the greater part of their lives, are less mobile than men and are, therefore, allotted tasks nearer their homes.

But, the fourth group would argue, if the abovementioned arguments are true that the law should discriminate against women. If it is true that their biological condition makes them different, it is also true that this mere condition where men and women both do work of the same description, some disabilities attaching to women as employees, in particular the likelihood that they will not stay in the job as long as men, make them worth less to the employer. As for their fellow men employees, maternity leave and the eventual reinstatement of women to their former position creates privileges for women and discriminates against men.

In view of these acute discrepancies what is the law to do? How can the law solve these extremely difficult and sensitive questions?

Let us briefly review what Mexican constitutional provisions and their regulatory laws reflect.

I. CONSTITUTIONAL ACHIEVEMENTS

The Mexican Constitution of 1917 was the first one in the world to elevate to constitutional rank the rights and aspirations of the working class. At the time, it enacted the most advanced formulation affecting the general conditions of labor. This document gave constitutional status to important general principles of social policy, some of which concerned women.

In its article 123, the Mexican Constitution of 1917 established the basic and guiding principles ruling all labor contracts and the fundamental rights of the working class. These principles were threefold in nature : tutelary, imperative and unrenounceable.

The bulk of the tutelary norms concern the individual worker and are direct rules governing services rendered. They are relative to the duration of the work day, night work, obligatory rest, minimum wages, workers' share in company profits, payment of wages in national currency, extra work time and job stability.

Within this group of norms applicable to both sexes, we find those which, beyond the general principles governing the whole of the working class, specifically concern women and minors. These norms prevented them from working in unhealthy and dangerous environments and to do night shifts; they

absolutely forbade work for children under 12 and they established a reduced work day for minors under 16 and for pregnant women.

By Constitutional mandate, these labor norms are imperative because they act over the will of the parties entering into labor covenants which, by this very fact, lose their strict contractual nature.

Finally, these Constitutional provisions are unrenounceable because not even the beneficiaries of the rights granted by such norms may waive them.

II. Constitutional article 123

In its original text, Constitutional Article 123 reflected mixed tendencies. While paragraphs I, IV, VII, IX and X, reflect egalitarian grants, paragraph V is clearly protective of women and paragraphs II and XI are a combination of both tendencies as follows :

Paragraph I. The maximum work time per day was to be eight hours.

Paragraph II. Maximum night work time was to be seven hours. Women were prohibited from being employed in unhealthy and dangerous tasks as well as working after ten at night in industrial plants or commercial stores.

Paragraph IV. For each six days of work a wage earner was to rest for at least one day.

Paragraph V. Women, three months prior to childbirth will not be engaged to perform any work demanding considerable physical effort. After childbirth they will obligatorily have a month's rest during which time they will get full pay and retain their job and all inherent rights acquired by the work contract. During the following nursing period they will have two extraordinary rest periods at work, of half an hour each, to breast feed their babies.

Paragraph VII. To equal work must correspond equal salary regardless of sex or nationality.

Paragraph IX. Workers will have the right to participate in the profits of the company...

Paragraph X. Salaries must be paid precisely in national currency.

Paragraph XI. Extra work will have a 100 % premium. Under no circumstance overtime may exceed three hours a day or three consecutive days. Minors under 16 and women of any age are excluded from this kind of work.

Constitutional Article 123 is a historical document representative of its times. The fact that it raised, for the first time in the world, to Constitutional status, the demands of labor may be explained as the natural outcome of the revolutionary struggle of 1910 — the first such social confrontation of this century which brought to the forefront the tension between capital, labor and political power to an unbearable degree.

But the postulates of Constitutional Article 123 are also the crystallization of a century old debate. They are essentially the offspring of successive industrial revolutions from the 18th century onward. They became necessary when customary restraints and the intimacy of employment relationships in small communities ceased to provide adequate protection against the abuses incidental to new forms of mining and manufacturing on a rapidly increasing scale at precisely

the time when the 18th century Enlightenment, the French Revolution and the political forces that they set in motion were creating the elements of modern social conscience. These postulates developed rather slowly, chiefly in the more industrialized countries of Western Europe, during the 19th century and have attained their present importance, relative maturity and worldwide acceptance only during the present century.

The era during which the most decisive and, it would appear, irreversible changes in the status of women were initiated was the 19th century and the circumstances which got them slowly and falteringly under way were the technical, economic, and social upheavals generally known as the Industrial Revolution. Its impact on the lives of women was profound and manifold.

Many thousands of men, women and even children left their homes to work in factories and mines, living in industrial slums or crowded tenements in big cities. Many women of the new industrial proletariat worked in appalling conditions of near-starvation and unlimited working hours under a system of exploitation that became notorious as "sweated labor" while they gave birth to one child after another.

This is why Constitutional Article 123 reflects mixed tendencies. On the one hand it recognized the rights of the working class in general and, on the other, it protected, specifically, the weaker members of said class, women and minors from the extreme abuses they had been subject to.

In general, the conditions of the laboring poor eventually aroused public concern expressed in social investigations, philanthropic work, and, finally, legislation mitigating bit by bit the worst evils of the factory system through state intervention. In the case of Mexico, the outrage produced by outstanding labor conditions found its utmost expression in the abovementioned Revolution of 1910 which brought about the most radical reform in labor provisions around the world.

III. REGULATORY LABOR STATUTES, *FEDERAL LABOR LAW*

It took 14 years for the regulatory statutes of Constitutional Article 123 to be concluded. They were published in the *Official Gazette*, the 28th of August 1931 under the name of *Federal Labor Law*, which in essence is a Labor Code.

This Law in its special chapter dedicated to women (Art. 106 to 110) enforced all the abovementioned Constitutional dispositions but also, specifically forbade women from working in places where alcoholic beverages of immediate consumption were sold, and reiterated the prohibition for women to undertake dangerous and unhealthy jobs "unless in such instances in which, in the concept of the proper competent authorities all measures and equipment for their protection had been installed". It established that women should not be given jobs which demanded considerable physical effort. It finally determined the obligation for employers to provide day care centers whenever the female working force was of more than fifty.

This was the period when besides the female proletariat there was another category of women, who slowly but in ever-increasing numbers entered the labor market — namely, clerical workers. These were of mixed social origin but came mostly from the classes that hitherto had provided the governesses and the "distressed needlewomen." They did not oust men from their jobs but entered a new type of employment, created by such technical inventions as the telephone, the telegraph, and the typewriter.

This transition period characterized by different classes of women, joining the work force, shows their interests increasingly stretching out beyond the home. Hence the urgent need for day care centers. This legal disposition, however, never prospered for employers found it most impractical and got around it by not having more than 49 registered women workers at any given time.

IV. The 1962 reform

In 1962, by a Constitutional amendment and consequent reform of the Labor Code, published in the *Official Gazette* the 21st of November, some additions were enacted to the 1931 dispositions. Women were not to be engaged in serving extra time in their jobs under the penalty of having to pay them 200 % over their regular wages for such time.[3] These additions also furthered maternity leave establishing a six week mandatory rest period before and after delivery with an option to extend it if it were necessary with full pay and they reiterated working mothers the right to two extraordinary rest periods of half an hour each to breast feed their babies plus the right to return to their previous jobs up to a year after delivery and to take into account pre and post natal rests in computing their years of service.[4] Regarding day care centers, it mandated the Mexican Social Security Institute to render this service.[5] Lastly, employers were imposed the obligation of maintaining sufficient amount of chairs at the disposal of working mothers.[6]

These reforms show an increasing tendency to protect women, mainly, but not solely, as the bearers of children.

The 1962 amendment represents the climax of a long and painful process. It seemed that, at last, Mexican women were juridically protected; that they could enjoy a dignified status in the work place due to the legal recognition of the burdens of their reproductive function. More importantly, some claimed, a difficult balance had been reached between the law, social reality and the mores of the country. The proponents of the amendment considered women's legal standard to be so high that Mexican egalitarian and protective legislation on women could compete advantageously with that of developed and industrialized countries around the world.

Yet not everyone was happy. There were those who believed the restrictions on women's ability to do extra work were discriminatory because when equally situated, the employer would prefer a man to whom he would have to pay 100 % premium over a woman who would make 200 % over her regular wages for the same time and work. Others argued that pre and post natal rest periods were excessive.

These viewpoints reflect not only the difficult task before legislators but also the impossibility of pleasing everybody, not even the recipients of the innovations which would supposedly protect them.

For as employment opportunities for women have become more varied and responsible, there has been a shift of emphasis from protective legislation — which has now come to be regarded as discriminatory since it tends to limit such opportunities — to legal guaranties of equal pay and equal employment, coupled

3. *Federal Labor Law* as amended in 1962. Article 110 A.
4. *Id.*, Article 110 B.
5. *Id.*, Article 110 C.
6. *Id.*, Article 110 D.

with adequate maternity protection and the provision of facilities to enable women with family responsibilities to continue to be employed.

V. THE 1974 REFORM

On the eve of the International Year For Women to be celebrated in Mexico in 1975, the incumbent president, Luis Echeverria, sent an initiative to Congress whereby four Constitutional Articles would be amended, eleven articles of the *Federal Labor Law* reformed and two revoked in the name of what he called "the juridical equality of women". This initiative was part of a greater package with included, among others, important reforms to the *Civil Code*, the *Code of Civil Procedure* and the *Code of Commerce*.

Even though the occasion lent itself to promote juridical change with the view of introducing the most avant guard legislation on women's equality, it appears that the real issue behind it was to put women to work and incorporate them, massively, into the country's productive forces.

In point of fact, this was to be done, always in the name of equality, by depriving women of all protective legislation enforced at the time. This, it was hoped, would create an absolute need for women to leave home and go out to work.

The language of the exposition of motives of the abovementioned initiative explained it as follows : Mexico's low economically active force was composed of, in 1970, 13 million people, 81 % men and 19 % women. That is, only one fifth of the economically active people of Mexico were women. More importantly, out of married women only 15 % worked. In view of this statistical data, the proposed reforms, by elevating to Constitutional status the equality of the sexes, were to serve as incentives to spur women's will to leave home and join the country's productive forces.

This notion could have been based on international labor statistics which reveal that the most highly developed countries do not always show the highest proportion of women among their civilian labor forces; but they have the lowest number of so-called unpaid family workers. In advanced industrial societies, more and more women go out to work, the emphasis is on going out rather than on work. Following this line of thought, the economic stimulus plus the suppression of protective laws in Mexico, would operate to induce women to join the labor force.

The congressional approved reforms brought about changes in labor law which reflect on the Fifth Title of the *Federal Labor Law* concerning the work of women.

In its related articles the 1974 Reform begins by declaring that women will enjoy the same rights and have the same obligations as men[7] and that the reformed modalities have, as their fundamental purpose, the protection of mothers or mothers to be rather than women in general.[8]

In this guise, the prohibition for women to work in unhealthy or dangerous environments or after 10 at night is limited to the periods of pregnancy and nursing.[9]

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7. *Federal Labor Law* as amended in 1974, Article 164.
8. *Id.*, Article 165.
9. *Id.*, Articles 166, 167.

This is why two articles had to be revoked; the one protecting women in general from working in dangerous and unhealthy places or after ten o'clock at night and the other one preventing women from serving overtime.[10]

Maternity leave remains the same but an addition to its previous dispositions specifies that in the case of an extension leave, that is, after 12 weeks altogether, working mothers will be entitled to 50 % of their salary for sixty more days.[11]

Probably the most important change from the past is related to Social Security entitlement which had already been raised to a Constitutional guarantee. The 1974 Labor Law Reform mandated the Mexican Institute of Social Security to provide day care centers for working mothers.[12]

Finally, and as a forgotten remnant from the past, the reform reiterates the need for employers to provide sufficient number of chairs for working mothers.[13]

VI. Related reforms to the civil code

The only current legal protection extended to women is now limited to pregnant working women and working mothers. What about those women who do not work for a salary? Reforms to the *Civil Code* made sure that they too have to provide for themselves.

Said Code establishes the obligation for both spouses to contribute to the economic responsibilities of the household including food and education for children. Only he or she who is handicapped and has no assets is relieved of this obligation.[14]

Concerning divorce, there is no provision for women to receive alimony in fault divorce cases. Its award depends on women being acquitted of guilt. In mutual consent divorce, it is clearly stated that unless otherwise agreed to by the parties, spouses were not entitled to alimony or any other kind of support.[15]

Lastly, widows are not entitled to alimony or support of any kind unless they can produce the double proof of being handicapped and not in the possession of any assets. Even when this double proof is produced widows are entitled to alimony only if they do not remarry and lead honest lives.[16]

Given the absolute freedom to will, legally established in the *Civil Code* of 1884 and incorporated into the outstanding one, spouses, widows and daughters are entitled to no part of the *de cujus* patrimony by law. To top it all there is no such thing as marital property in Mexico. The parties, at the time of marriage, must decide under which marital regime is the marriage going to be subject to. If they opt for the regime of community property, then, in case of divorce or death, the community assets are equally divided but, if they choose a regime of separate property there is no way a spouse, a divorcee or a widow may gain access to any patrimonial assets of the other spouse.

10. *Id.*, Articles 168, 169.
11. *Id.*, Article 170, fraction V.
12. *Id.*, Article 171.
13. *Id.*, Article 172.
14. *Civil Code* as amended in 1974, Article 164.
15. *Id.*, Article 288, second paragraph.
16. *Id.*, Article 1368, fraction III.

From this very succinct description of the civil condition Mexican women hold, it is clear that they found themselves in a state of patrimonial defenselessness after the 1974 reforms. Unpaid at home, spouses were made to realize that their first priority was to work for a salary. In case of need, the law offered no protection. President Echeverria could now count on women to help him develop the country.

Not even the United Nations went that far for in its Declaration on the Elimination of Discrimination Against Women; we find the following statements: "those measures which, for reason of the inherent physical nature of women are adopted will not be considered discriminating [...] for the objective sought is the elimination of prejudices and the abolition of customary practices based on the idea of women's inferiority".[17]

But Mexico, in 1974, amended its Constitution and seven regulatory Codes to unmistakably establish women workers juridical equality.

The remaining haunting question could be framed as follows: Is equality fair? Or even, how equal is equality?

VII. A DIFFERENT PROPOSITION

Modern societies increasingly depend on the work of women. Contemporary industries, highly mechanized, provide a large variety of skilled, semiskilled and unskilled work that no longer requires physical force but depends on manual dexterity and speed-abilities in which many women excel.

Despite the dependence of the economy on women's work and in spite of outstanding egalitarian philosophy, women are almost universally either paid at a lower rate than men or employed in the lower grades, or both. It is much more difficult for women than for men to reach high-level positions, and it is a moot point whether this disparity of achievement between the sexes is primarily due to the entrenched male prejudice (as is often asserted), to the discontinuity of most women's careers, or to the reluctance of many women to assume positions of responsibility because their families come first in their order of priorities.

The ideal of marriage generally accepted in contemporary Western societies and among the westernized strata of developing countries is that of a partnership — that is, a sharing of interests and responsibilities between husband and wife on as nearly equal a basis as possible. As with so many other ideals, practice often falls short of precept, especialy if, as in this instance, social class and family traditions sometimes combine with personal temperaments to put up an emotional resistance against the implementation of principles to which one is intellectually committed.

But maybe it is not only social class and family traditions which prevent women from implementing rational decisions concerning their jobs. Maybe the juridical equality granted to women is not so equal after all because the only equality neatly defined is that of women who reach out to perform as men. Men are the standard of performance and, therefore, of achievement.

In the Western World today the emphasis is on economic success. Work leading to wealth. To this pursuit everything else is sacrificed. So intense

17. United Nations Declaration on the Elimination of Discrimination Against Women, Article 10, third paragraph, and Article 3.

is this implanted drive that it would almost appear as if the exacerbated materialism of our times has been, all along, planned for by politicians and legislators alike who seek to consolidate empires of power over alienated societies whose only gods would be work and profit.

For there is a catch to this egalitarian labor legislation. Women have been forced to blindly plunge into a diversity of economic activities to safeguard their material needs to the detriment of other non profitable but valuable ones. Furthermore, not only do they have to work for themselves but also for their offsprings. The bare reality is that families can no longer exist on one salary. So what was considered an opening for women, a new option, is nothing more than an imperative necessity — a salaried, inescapable one and closely regulated.

In Mexican Constitutional and regulatory dispositions, as in other countries' similar dispositions, there is a significant loophole. Nowhere is there any mention of equalling women's work at home to work outside the home. Nowhere is there a recognition of the intrinsic worth of this traditionally feminine role. Nowhere is there even an awareness of the damage society is experiencing for its absence.

Maybe if unpaid work at home were vindicated and equalled to that outside the home, today's technological advanced world would stand a chance for happiness — a very legitimate but currently forgotten human goal.

Maybe there is something to be said for hormones. Maybe what we are witnessing today is a society directed by and for androgen motivated individuals while estrogen motivated individuals submit to the formers' standards and procedures to be accepted. This, however, is done at tremendous expense. Firstly, there is a psychologically castrated, if economically productive, sector of society. Secondly, the suppression of the free expression of estrogen motivated individuals creates a void; the natural intended balance is altered and the consequences disastrous. Agressiveness is everywhere, crime is rampant, interests polarized.

Maybe the time has come to emphasize the difference between men and women and bring it to the forefront given the unfortunate results of attempting to homogenize the sexes.

Maybe if human beings were offered, as an equal option, a vindicated work at home against work out of home, some important tensions would be put to ease. At last, all members of society would be granted the ultimate dream : freedom of choice based on a standard of fairness.

This is a provocative proposition of difficult digestion for friends and foes. Its first supporters will risk social or political ostracism. Discussions will passionately challenge the validity of this proposition's claims. It would probably take a long time to observe any progress in its direction. But then, again, who said women's issues were not candent subjects for discussion?