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Sex and the State in Latin America

One of the more contentious developments of modern politics is the claim of the state to regulate family life and gender relations. How and on what grounds should states organize the rights of parents over children, allocate property within marriage, offer the possibility of and grounds for divorce, and allow women the choice to terminate a pregnancy? In most countries around the world, laws on these issues historically conformed to religious and patriarchal models. State policy granted men almost complete power in the family and limited citizen discretion over decisions about marriage and reproduction. Between the 1960s and the 1990s, the rise of the feminist movement brought new ideas about women's roles, while changes in social practices and the consolidation of democratic politics put pressure on old laws. Lawyers, feminist activists, and liberal and socialist politicians organized to demand reform of laws on family equality and divorce; many also favored decriminalizing abortion. Some states introduced major liberalizing changes in what Glendon has called "the most fundamental shift since family law had begun to be secularized at the time of the Protestant Reformation" (1987: 63). Other countries continued to uphold restrictive laws, often stressing the importance of traditional gender norms to cultural integrity and national identity.

This book studies the experiences of Argentina, Brazil, and Chile during the last third of the twentieth century to understand how and why states make decisions about policy on gender issues. Through comparative analysis, it assesses how the transition from dictatorship to democracy, relations between Church and state, the mobilization of liberal and feminist reformers, and international norms shaped state policy on abortion, divorce, and gender equality in the family. The book reaches some surprising conclusions, and proposes a new, disaggregated approach to studying gender policy and the state. All three countries in this study modified laws to grant women greater rights in marriage. By contrast, only two out of three legalized divorce and none liberalized abortion. This suggests that differences among

gender issues are politically consequential. Rather than treating "women's rights" or "feminist policies" as a single issue area, we should disaggregate gender issues. The book also stresses how political institutions, including the expert policy-making commissions of military dictatorships and the party systems of democratic polities, shaped the ability of elite reformers to enact policy changes. We also see that, in spite of their vociferous opposition to divorce and abortion, under certain circumstances Roman Catholic bishops can be defeated. Armed with the disaggregated approach, this book explores the conditions in which the partisans of reform "hooked into" state institutions, including the institutions of the military authoritarian state, to bring about change in abortion, divorce, and gender equality in the family.

The last third of the twentieth century witnessed significant economic and political transformations in Latin America. Argentina, Brazil, and Chile experienced military coups in the mid-1960s to early 1970s, prolonged periods of military rule, and transitions to democracy in the 1980s. They passed through state-led economic growth in the 1960s and 1970s, economic crises in the early 1980s, and market-oriented reforms in response to their respective crises. In the 1990s, the three countries together shed their authoritarian and statist pasts and embraced democracy and freer markets. These changes affected the power of the Roman Catholic Church and the status of Catholic values, and altered the role of women in society and the place of the family in citizens' lives. Argentina, Brazil, and Chile thus provide interesting territory to explore how countries in transition and countries with hegemonic religious institutions negotiate complicated questions about abortion, divorce, and gender equality in the family. The conclusions reached here may have a broader meaning as well, for Latin American experiences mirror the dilemmas faced by many societies in the last decades of the twentieth century. The greater embrace of principles of individual rights and citizen equality produced a tension with models of family life and gender relations upheld by religious doctrine, patriarchal traditions, and conservative and nationalist movements. These conflicts over gender and the state are prominent in national politics, and their outcomes have profound implications for people's lives.

In the civil law countries of Latin America, laws on abortion, divorce, and family relations are embedded in civil and criminal codes. They are not short-term policies introduced and withdrawn by each incoming government but weighty tomes passed from one generation to the next. The historical institutions of the civil and criminal codes are decades, and often centuries, old. Most predate the imposition of military rule in the region and some date from the nineteenth century. Historically, these codes have provided a continuous framework for the administration of justice amidst coups, constitutional changes, and chaotic economic conditions. Like other institutions, the civil and criminal codes structure social action over time and serve as transmitters of common values, providing "moral or cognitive

templates for interpretation and action" (Hall and Taylor 1996: 939). The law "tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going" (Glendon 1987: 8). The civil and criminal laws of Latin America thus have a strong ethical component, making ideas an important part of debates about legal change.

This book shows that liberalizing reforms on gender and the family may come about in surprising ways. Between 1960 and 1990, conservative military governments in Latin America introduced liberalizing reforms to laws on gender and the family. In Argentina in the late 1960s, the military government of General Juan Carlos Onganía promulgated major changes to the civil and criminal codes to grant married women more property rights, permit couples to obtain judicial separations by mutual consent, and make it clear that abortion was permitted for women who had been raped.[1] In Brazil in the 1970s, the military government legalized divorce, altered the marital property regime to grant women more rights, and liberalized laws on family planning. Brazil's military rulers introduced a national women's health program, designed, in part, by feminists, in 1983. In Chile, on the eve of its departure from power in 1989, the Pinochet government introduced changes to the civil code, granting married women full civil capacity and erasing the requirement that wives owe their husbands unconditional obedience.

By contrast, though we might expect democratic governments committed to citizen equality and human rights to respect women's equal rights, the freedom to divorce, and the choice to terminate a pregnancy, this did not occur. Latin American democracies uniformly failed to change old laws on abortion. Argentina and Brazil introduced changes to family law, including, in Argentina, the legalization of divorce. But in Chile, even twelve years after the democratic transition, laws remain restrictive. Chile presents a puzzling combination of economic modernization and social conservatism. It has enjoyed the region's most rapid rates of economic growth and is considered a model of successful economic reform, rational state institutions, and pioneering social programs. But Chile is the only country in the world (besides Malta) where divorce is not legal and is among the small group of countries where abortion is banned under all circumstances, even to save the mother's life.

Until now, virtually no scholarly work on Latin American politics has explored these puzzles. Various studies have documented the rise of

[1] As Chapter 6 explains, the Argentine Criminal Code of 1922 was ambiguous on the point of whether abortion was permitted in the event of the rape of *all* women or only the rape of mentally handicapped or mentally ill women. Differing interpretations of the code gave way to a vigorous debate among criminologists. Reformists working under the Onganía regime attempted to give closure to this debate by redrafting the law.

second-wave feminist activism in the region, the multiplication of feminist and feminine groups, and the relationship between these groups, political parties, and the state (Alvarez 1990; Baldez 2002; Charlton, Everett, and Staudt 1989; Craske 1999; Friedman 2000; Gonzales and Kampwirth 2001; Jaquette 1994; Jaquette and Wolchik 1998; Luciak 2002; Matear 1996; Navarro and Bourque 1998; Pitanguy 1996; Rodriguez 1998; Waylen 1994, 2000). More historical analyses have studied the achievement of suffrage and documented early legal reforms expanding women's rights (Dore and Molyneux 2000; Lavrín 1995; McGee Deutsch 1991; Miller 1991). These studies have proposed useful conceptual frameworks for analyzing the genesis of women's activism, and the effects of the democratic transition on women's political participation and women's groups in civil society. There are fewer works that engage in comparative historical analysis of the state and its approach to gender issues.[2] To be sure, there are several studies of gender-related public policies in Latin America, though most focus on a single country (Alatorre 1999; Baldez 2001; Friedman 2000; Haas 1999; Schlueter 2000; Stevenson 1999) or have a descriptive character (Htun 2001a). A few works explore the influence of international norms and treaties on local policy on domestic and sexual violence, women's political participation, and the formation of state agencies on women in different countries (Htun 1998; Htun and Jones 2002; Keck and Sikkink 1998). Yet no one has adopted a comparative, macrohistorical approach to explain variation in gender policy[3] changes across Latin American countries making transitions from dictatorship to democracy.

In this book, I introduce an approach that stresses the distinctiveness of different gender issues. Issues differ in how they are processed politically, the groups that weigh in on policy debates, and the ideas at stake in change. Some policy issues provoke rhetorically charged public debate informed by clashing world views, principled beliefs, and religious and ethical traditions. Other policy issues occupy small groups that spend days arguing over details of syntax and sequence. The prospect of change on some issues threatens the status of Catholic values, prompting bishops to defend the Church's position

[2] One study with an approach similar to this book is Mounira Charrad's *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (Berkeley: University of California Press, 2001). Charrad proposes that the relationship between states and tribes was the decisive variable influencing different approaches to family law in the three Maghribi countries.

[3] From this point on, this book uses the terms "gender policies" and "gender rights" to refer to laws and policies on divorce, abortion, and gender equality in the family. In general, however, "gender policies" and "gender rights" may refer to a broader range of policy issues than those considered in this book. "Gender rights" are not the same as "women's rights," for they also involve men. Though gender is frequently used as a synonym for women (Scott 1988), it is better understood to refer to the social organization and cultural interpretation of sexual differences. Gender policies and rights are thus the legal regulations, obligations, and privileges that refer to or reinforce sex relations and sex differences.

in the public sphere. The Church is disinterested in other issues and neglects to flex its muscles in policy debates. These differences among issues stem in large part from how policies are framed (Yishai 1993: 208). "Absolutist" policies tend to be seen in symbolic terms, provoke gut responses and value clashes, and "more likely deal with policy ends than means" (Carmines and Stimson 1980: 80). Religious institutions are likely to weigh in on changes to an absolutist agenda. "Technical" policies, by contrast, demand expert knowledge and provoke little public controversy. Change on technical issues is less likely to put religion on the defensive. In short, "gender rights" is not one issue but many. Opportunities for reform on one issue may not lead to reform on others. To explain policy change, we must disaggregate gender issues.

The book emphasizes the role of "issue networks" – elite coalitions of lawyers, feminist activists, doctors, legislators, and state officials – in bringing about policy change. These issue networks, inspired by ideas of modernity, equality, and liberty; changes in other countries; and international treaties constituted the impetus behind reform. The growth of the second-wave feminist movement, in particular, helped put gender equality and reproductive rights on the policy agenda in many countries. Feminist movements in all three countries raised public awareness about questions of gender, lobbied state officials, and worked with or within the state to help formulate state policy. Yet many members of issue networks were not feminist activists but middle-class male lawyers. These lawyers, who played decisive roles in early abortion reform, the legalization of divorce, and changes promoting equality in the family, have been the unsung heroes of much of gender law liberalization in Latin America. Their activism on gender rights serves as important evidence that gender, far from being a "woman question," involves and affects all of society.

The possibilities for policy change depended on whether and how these elite issue networks were able to hook into state institutions. Institutional features of military and democratic regimes and the relationship between Church and state shaped this "fit" between issue networks and the state (the notion of "fit" comes from Skocpol 1992: 54–7). Military governments created technical commissions charged with modernizing the civil law, opening a privileged window of influence for lawyers to bring cosmopolitan legal theories to bear on domestic policy. The closed nature of these governments insulated technical decisions from societal input, thus expediting change. As a result, military rulers in Argentina, Brazil, and Chile presided over important reforms advancing gender equality in the family. Under democratic rule, the success of issue networks was more varied, for it depended on the weight of the authoritarian legacy, the political party system, and the strength of executive and partisan commitment to women's rights. Not all democratic governments were able to complete an agenda of gender equality, reneging on promises made during the transition and contributing to the trend

toward illiberal democracy in the region (Diamond 1999; O'Donnell 1994; Zakaria 1997).

The other major factor shaping issue network success was the relationship between Church and state. For partisans of legal divorce to succeed, the bishops had to be overpowered and defeated. The eruption of Church-state conflict over human rights, economic policy, and authoritarian rule performed this function, opening a window of opportunity for liberal issue networks to promulgate divorce.

Abortion is a special case in this book, because it provoked considerably more moral conflict than other issues. Even when citizens in Latin America came to accept divorce, they remained deeply ambivalent about abortion. Though the practice is widespread, abortion laws are rarely enforced. Since middle-class women generally have access to safe abortions in private clinics, many see little reason to press for the liberalization of abortion laws. It is primarily poor women who suffer the consequences of clandestine abortions. At the same time, the political clout of abortion opponents grew, particularly after John Paul II became Pope of the Roman Catholic Church and antiabortion movements organized at the global level. Whereas abortion was once considered a technical issue of interest to criminologists and health practitioners, by the 1970s the abortion debate became polarized around a clash of absolutist values, frustrating political compromise over abortion legislation.

By studying three issue areas in three countries across two time periods (pre- and postdemocratization),[4] the book has a total of eighteen observations with which to test hypotheses and draw conclusions about the causes of policy change (see Table 1.1).[5] Table 1.1 shows that, in spite of their superficial similarities, the timing and content of gender policy in Argentina, Brazil, and Chile differed significantly. This variation is striking across countries and across issues. Brazil started to change its laws first, and these changes continued throughout the period of military rule. Argentina introduced major civil law reforms during military rule, though most of its changes came after the 1983 democratic transition. Chile, by contrast, which waited until 1989 to grant married women full civil status (also under military rule), has still not legalized divorce, and abortion remains illegal under all circumstances. In fact, no Latin American country has liberalized its laws on abortion since the 1940s.[6]

[4] For the most part, the book studies the period between the early 1960s and the end of 1999.

[5] Including several issue areas and distinct time periods in the analysis is one way to multiply observations and minimize the small-number problem in qualitative research (King, Keohane, and Verba 1994).

[6] One exception must be mentioned here. In 2000, the legislature of Mexico City approved changes to the city's criminal code to expand the conditions of legal abortion. Based on a bill introduced by then mayor Rosario Robles, the reforms granted women permission to abort if the pregnancy threatened their health (not just their life), or in the event of fetal abnormalities.

TABLE 1.1. *Dates of Major Gender-Related Legal Reforms in Three Countries*

		Time period	
Country	**Issue**	**Predemocratization**	**Postdemocratization**
Argentina	Family equality	1968 law granted married women full civil capacity and equal property rights	1985 law granted mothers equal parental rights
	Divorce	No change	1987 law legalized divorce
	Abortion	No change	No change
Brazil	Family equality	1962 married women's statute granted married women full civil capacity[a] 1977 law granted married women equal property rights	1988 Constitution upheld principle of sex equality in the family, including parental rights
	Divorce	1977 constitutional amendment permitted legal divorce	
	Abortion	No change	No change
Chile	Family equality	1989 law granted married women full civil capacity	1998 law granted mothers equal parental rights
	Divorce	No change	No change
	Abortion	1989 law withdrew permission for therapeutic abortion	No change

[a] Brazil's 1962 reform came at the end of a democratic period (1946–64), but still preceded the major wave of democratic transitions of the 1980s.

How can we make sense of this variation? This book discerns four patterns in the timing and content of gender policy. Using a common set of variables, each pattern is described in one of the four empirical chapters of the book. Chapter 3 addresses the question of why military governments alleged to be patriarchal and conservative initiated civil law reforms to expand women's rights in Argentina, Brazil, and Chile. It shows that military governments seeking to modernize state and society turned to experts to advise them on legal reform. By creating small, official commissions where experts could deliberate about the law, modernizing military leaders opened a window of opportunity for liberalizing policy changes. Influenced by international trends and the ideas circulating in cosmopolitan legal circles, these experts proposed reforms that in some cases brought about major modifications to women's civil status and property rights.

Chapter 4 focuses on divorce. Opposition from Roman Catholic bishops can pose an enormous obstacle to divorce, particularly when no other civil society institutions can act as countervailing influences to Church power. As a result, restrictive laws may endure in spite of social changes, international pressures, and widespread acceptance of new ideas about gender and the

family. Argentina, Brazil, and Chile were among the last Latin American countries to legalize divorce.[7] Yet the patterns of change differ significantly in the three countries. In Brazil, a military government approved a divorce law in 1977. Argentina legalized divorce following the return to democracy in 1983. In Chile, divorce remained illegal in 2002, twelve years after the transition. The chapter shows that conflict between Church and state creates an opportunity for change, while Church-state cooperation precludes it. In Argentina and Brazil, governments clashed with the bishops over education, human rights, and economic policy. Triggered by the political repression and human rights abuses of military dictatorships, these moments of Church-state conflict enabled liberal and feminist partisans of divorce to defeat the Church. In Chile, Church-state collaboration posed an obstacle to divorce. Chile's progressive Church helped usher in the transition to democracy and was seen to play a crucial role in the consolidation of democratic rule and the protection of human rights. Having built ties to democratic parties and politicians during the struggle against military rule, the Church took advantage of its clout by vetoing the legalization of divorce under democratic governance. In this way, the same Church that helped bring about the fact of democratization later curtailed the extension of democratic rights and liberties.

Chapter 5 analyzes the varied success of democratic governments in completing the family equality reforms begun under military rule. After the political transition, feminist activists joined with male lawyers and officials in state women's agencies to see that married women and mothers had equal rights with men. They were inspired by changes to family law in European countries and a growing body of international agreements such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Though an emerging national and international consensus favored reform, the configuration of national political institutions shaped patterns of policy. In Argentina, strong parties in Congress and a commitment from actors in the Executive helped the cause of reform. In Brazil, the formulation of a new constitution in 1988 provided an opportunity to advance gender equality, but it took thirteen more years to change the civil code because of the weakness of the party system and the state women's agency. In Chile, policy making was more affected by an authoritarian legacy than in the other two countries, as agreements made at the time of transition preserved the power and prerogatives of the military and its allies. There, "authoritarian enclaves" in the political system and coalitional dynamics among governing parties delayed and thwarted family equality reform.

[7] Other countries where the legalization of divorce was delayed include Colombia, where divorce was legalized for non-Catholics in 1976 and for Catholics in 1991, and Paraguay, where divorce was legalized in 1991.

Chapter 6 considers the question of abortion. In spite of the growing influence of feminist reproductive rights movements, Latin American countries have failed to loosen abortion restrictions. Much of the resistance to change comes from the Roman Catholic Church and antiabortion movements, who have redoubled their efforts to fight abortion at home and at United Nations conferences. Yet most politicians show little enthusiasm to confront conservative forces; consequently, big coalitions backing reform, so important in the case of divorce, have not yet materialized. Though illegal abortion is prevalent and disastrous for women's health, punitive abortion laws are almost never enforced and there is little public support for major changes. Beyond the general failure to decriminalize, however, there are differences in abortion politics in the three countries. Argentina and Brazil permit abortions in the event of rape or when the pregnant woman's life is at risk; Chile forbids abortion under all circumstances. Brazilian feminists have organized a legal abortion movement to see that rape victims have access to free abortions (though abortion is *legal* in the case of rape, it may not be *available*), and the Ministry of Health responded by requiring all public hospitals to perform those abortions permitted by law. By contrast, due to the antiabortion posture of most of the political elite, Argentine and Chilean feminists have been unable to provoke serious debates about legal abortion and have focused instead on reproductive health and family planning legislation.

These chapters make propositions about the causes of change on individual issues; these propositions are summarized in the conclusion. Chapter 2 continues the theoretical background begun in this chapter by sketching the evolution of ideas about gender and the family in Roman Catholicism, liberalism, feminism, and socialism. After offering some brief background on Latin American legal systems, the remainder of this introductory chapter introduces the main causal variables used in the rest of the book: issue differences, the role of elite issue networks, and the factors determining the "fit" between these networks and the state, such as military technical commissions, democratic political institutions, and Church-state relations. Reform on each gender issue was a shared process, but national specificities sometimes generated dissimilar outcomes.

Latin American Legal Systems

Two aspects of Latin American civil law systems will be unfamiliar to readers who know the common law tradition of the Anglo-American world. The first is the mechanism of legal change. The power of the judicial branch to issue binding interpretations of existing laws is more circumscribed in Latin American civil law systems than in common law countries (although Latin American high court judges have historically been invested with the power of judicial review). In civil law systems, most judges have the authority to

decide only individual cases; their decisions are not binding on later cases or on the lower courts.[8] Reformers seeking legal change must direct their energies to the national legislature and not the courts.[9] In the common law system, by contrast, judges are far more empowered to make law by issuing interpretations that are binding on subsequent judicial decisions. These precedents are as much a source of law as the original laws crafted by the legislature (Glendon, Gordon, and Osakwe 1982). As a result, reformers in the Anglo-American system exert pressure not only on the legislature responsible for enacting statutory changes but also on the various federal and state courts.

The second distinguishing feature of Latin American laws is their hortatory nature. Gender rights conflict everywhere may assume dimensions of a cultural struggle among competing world views. The thick normative content of Latin American civil and criminal codes increases the symbolic stakes in legal reform. That the law should have a role in enforcing the moral order is an idea more deeply rooted in continental European and civil law than in the Anglo-American common law. Civil law has preserved an older Platonic tradition that invests laws with a rhetorical and pedagogical function. As Plato wrote in the *Laws*, the objective of the law is not merely to control social behavior but, through powers of persuasion, to "lead the citizens toward virtue, to make them noble and wise" (Glendon 1987: 6). As Glendon puts it, "the civil law systems retain vestiges of the classical view of law as educational. The great codifications, especially those modeled on the French, kept alive a certain rhetorical tradition of statutory drafting and a certain story-telling aspect of law that is notably absent from the Anglo-American legislative tradition." Lawmakers in Europe "took from Montesquieu and his followers an awareness of how culture shapes law, and from Rousseau and his followers a belief that law can help to shape society and the individuals who compose it" (1987: 130–1). In the Anglo-American common law system, by contrast, legal positivist notions of the law as a set of rules that impose duties and confer powers are dominant (Hart 1994). Common law consists of a slow accretion of judicial decisions, while civil laws reflect the strenuous efforts of legal scholars to apply reason to the meticulous ordering of human affairs. The content of the law establishes not merely the hedges constraining individual freedom but the moral rules by which people live and the symbols that shape their social identities.

[8] According to Glendon, Gordon, and Osakwe (1982), however, several civil law systems have mitigated this rule in practice, and judges have at times exercised vast discretion in developing the law.

[9] Although Argentina and Brazil are federal systems, civil and criminal law is established at the national level. Mexico is the only Latin American federal system where each state has its own civil and criminal code.