

ANIA LOUIS

WOMEN AND THE LAW
CARMEN DE BURGOS,
AN EARLY FEMINIST

TAMESIS

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First published 2005
by Tamesis, Woodbridge

ISBN 1 85566 121 7

Tamesis is an imprint of Boydell & Brewer Ltd
PO Box 9, Woodbridge, Suffolk IP12 3DF, UK
and of Boydell & Brewer Inc.
668 Mt Hope Avenue, Rochester, NY 14620, USA
website: www.boydellandbrewer.com

A CIP catalogue record for this book is available
from the British Library

Library of Congress Cataloging-in-Publication Data
applied for

This publication is printed on acid-free paper
from camera-ready copy provided by Anja Louis

Printed in Great Britain by
Athenaeum Press Ltd, Gateshead, Tyne & Wear

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ACKNOWLEDGEMENTS

The intellectual and personal debt owed to others is enormous in a project that takes over one's life for such a long time and I feel privileged to have had the support of so many people. Everybody listed below contributed — often unbeknownst to themselves — to varying degrees and at different stages; their help and encouragement enriched both the study and its author in ways that are often difficult to articulate and sometimes impossible to repay.

Undoubtedly, the biggest debt is owed to Jo Labanyi, *directora sin par*. If this study has any intellectual rigour, it is mainly due to Jo's stubborn belief in my abilities, her refusal to let me settle for mediocrity and her patience during periods of my slowness of thought. For that my eternal gratitude.

I am also particularly indebted to Alison Sinclair, whose genuine interest in both my professional and private self has been a vital source of support. Sincere thanks to Nicola Lacey (LSE) for making me feel that this is an interesting project. Piya Halder (School of Law, Birkbeck College) for advising me not to ask 'what is law' and much less 'what is justice'. The whole School of Law at Birkbeck for their kindness and encouragement to 'that woman from the Spanish department'. Cristina Enríquez de Salamanca for basic lessons on Spanish law and gender discourse at the beginning of my research. Montserrat Lunati for her encouragement throughout. Bill McNeil (Griffith University, Australia) for his serious interest in young Turks at many a Critical Legal Studies conference. Many thanks also to the staff at the Ibero-Amerikanisches Institut PK, Berlin, and at the Biblioteca del Congreso de los Diputados, Madrid.

My bookselling contacts in Spain were all very supportive, my thanks to all of them, and especially to Elizabeth Feigenbaum, Jaime Lucia, Juan Mateos and the Fàbregues family (Angels, Joan and Sebastián) who were always 'at my service'. Infinite thanks to the Grant & Cutler community for providing a home when I first came to London and for encouraging me to leave home when I had grown out of it.

Lala Isla, *amiga sin par*, who I will never be able to thank enough for her friendship and her help in all things Hispanic. Paloma Castañeda for assistance whenever Burgos resisted easy categorisation. My friends in Madrid for unstinting support, genuine interest and, most importantly, countless lessons on Spanish culture: Ariadna Allés (also for editorial help), Simón Bernal, Susana Bertuzzi, Terry Berme, Fernando González, Jesús Lara, Angeles Marín (also for help at nervous-breakdown stage), Samuel Muñoz, Ana Rubio, María José Saiz

and Fernando Tafalla. Warmest thanks to all my friends at Suffolk University in Madrid, particularly Leslie Croxford for his unwavering belief in my abilities and Elizabeth Baile for providing “you-can-do-it” kind of solidarity. I am also grateful to everybody at New York University in Madrid, especially Anjouli Janzon, *¡qué sin par* and soulmate, for her lively curiosity about my work and her sensitivity and understanding in times of difficulty. My lovely students at both institutions for so much fun and so many lessons they taught their teacher.

Astrid Abelen, Anja Brauers and Kate Burton, my three musketeers, for fighting with me against vicious enemies and windmills. Patiently listening to my ‘feminist nonsense’, they brought the ‘real-life’ perspective into my analyses. Kate Burton, fountain of knowledge, also for innumerable editorial Busche for practical help and making me laugh so much. Nicola Nonhoff for always ‘jumping’ — in true family fashion — whenever I asked her to. Deborah Nonhoff, *abogada sin par*, without whom the task of getting to grips with legal thinking would have been even more daunting. The many discussions we had about law and literature have enormously enriched my views on the complexity of law; not to mention her moral support against the trials of life. My sister Britta for her love, her patience, her friendship in times of acute crisis and for the many discussions enlightening me about grass-root feminist mobilisation. My father for being the first feminist in my life, for his genuine interest in this project and for providing the proverbial ‘shoulder’. My brother Jan for his love, his patience, for believing in me and for sharing his pertinent observations about the academic world with me. Dagmar Diehl for putting things into perspective a couple of times — in her inimitable fashion — and for all her practical help. My brother Stefan for being there whenever needed. My mother for her unflinching support despite the fact that she would have preferred a grandchild rather than a book and for her outrageous sense of humour at times when I was not amused. The one and only Efraín Sánchez Caba for believing in me more than I ever will, for getting me through this one yet again and for declaring one Saturday morning that law cannot possibly be *that* unjust.

When a subject is highly controversial — and any question about sex is that — one cannot hope to tell the truth. One can only show how one came to hold whatever opinion one does hold. One can only give one’s audience the chance of drawing their own conclusions as they observe the limitations, the prejudices, the idiosyncrasies of the speaker. Fiction here is likely to contain more truth than fact. [...] Lies will flow from my lips, but there may perhaps be some truth mixed up with them; it is for you to seek out this truth and to decide whether any part of it is worth keeping. If not, you will of course throw the whole of it into the waste-paper basket and forget all about it.

(Woolf 1992: 4-5)

*To my parents
for letting me do everything my way;*

*To my family and my friends
who have always been there for me,
even when I didn't want them to be.*

*To my students
for teaching me so many things.*

Introduction

Law is like love:
Romantic in concept,
but the actual practice
gives you a yeast infection
(*Ally McBeal*, 1997: Pilot episode).

Carmen de Burgos Seguí, if known at all by posterity, is mainly remembered as an author of popular novellas and, to a lesser extent, as a feminist. This study in the interdisciplinary field of law and literature aims to contribute to a reading of Burgos as a champion of first wave feminism and argues that her feminist fiction can only usefully be analysed in conjunction with her feminist essays, in particular *La mujer moderna y sus derechos* (1927a). As I shall demonstrate, the events narrated in the novellas discussed encapsulate many of the ideas presented in Burgos's theoretical works. I suggest that Burgos's narratives of legal critique were used as a means of political propaganda, in which she introduced the question of women's rights into the public domain. To this end, this introduction first contextualises Burgos's feminism and then gives an overview of her life and work. This is further contextualised by an overview of the publishing developments of which Burgos took advantage, as well as a concise discussion of melodrama as a genre. Finally this introduction also supplies an account of Spanish law relevant to this study, a discussion of the functions of law and legal subjectivity.

FIRST WAVE FEMINISM

The intellectual origins of feminism can be traced back to the Enlightenment when, for the first time in history, divine omnipotence was rejected and replaced by the power of reason. By 1789 there was a considerable amount of literature demanding equal education, equal rights to work and equal political rights for women, 'justifying these claims on the grounds that all human beings were equally endowed with reason' (Evans 1977: 15). In 1792 Olympe de Gouges' *Déclaration des droits de la femme et de la citoyenne* and Mary Wollstonecraft's *A Vindication of the Rights of Woman* were published, both basing their demand for rights on the fact that women are equally intelligent beings and thus, they argued, male dominance is arbitrary (Evans 1977: 16). The nineteenth century saw the rise of organised feminist movements in the United States and most

European countries. However, as Evans rightly points out:

Intellectual history cannot by itself explain the growth of feminism in the nineteenth century; people do not, whatever the rationalists of the Enlightenment thought, commit themselves to political action and suffer the scorn, contempt, ridicule and hatred which the feminists were forced to endure, merely out of intellectual conviction (Evans 1977: 23).

Evans, amongst others, argues that with industrialisation and urbanisation the feminist movements grew stronger, since unmarried middle-class women began to demand admission to the professions, which would guarantee them a salary corresponding to the social status of their family (Evans 1977: 23-24).¹ Furthermore, throughout Europe women became increasingly aware of the fact that they were denied basic civil rights. In most countries they did not have legal personality, i.e. they were minors before the law.² Hence it is not surprising that first wave feminism was preoccupied with legal rights, most notably the vote, although, as Evans notes, their point of departure was more immediate:

The aims of feminist movements were initially primarily economic in character. The early feminists demanded access for unmarried women to the professions and the right of married women to control their own property. They backed these demands by fighting for improvements in girls' secondary education and the admission of women to universities, in order to secure the qualifications necessary for engagement in professional activities and to attain the level of education necessary to manage their own domestic and financial affairs. As these demands were conceded, [...] middle-class women began to move into professions, above all into teaching (Evans 1977: 232).

While the aim was to become independent, the means to do this was almost entirely dependent on legal reform. Evans also suggests that the moderate and radical feminists were often so divided regarding how to achieve equality that the only focus they could all agree on, amongst the many rights they demanded, was the vote.³ Once that was achieved, the momentum of first wave feminism was lost: 'By the 1930s classical feminism in Europe, America and Australasia had come to the end of its historical trajectory' (Evans 1977: 232). Evans also notes how surprisingly similar the aims and convictions of feminists were in the different countries and explains that all feminist movements observed their fellow organisations in other parts of the world. What is more, in many countries

¹ See also Fagonga (1985: 16), Folguera Crespo (1997: 457-461) and Franco Rubio (1982: 243-245), who argue similarly with regard to feminism in Spain.

² 'Legal personality is the sum total of a person's legal rights and duties' (Curzon 1994: 285).

³ For more details on how Spanish feminists could not agree even on the topic of the vote, see Fagonga (1985).

international feminist organisations were founded partly to give their own movement an 'air of internationalism' (Evans 1977: 247), and, more importantly, to give themselves confidence 'in the inevitability of ultimate victory' (Evans 1977: 252). In the case of Spain, social change in general and feminism in particular were less effective than in other European countries. Geraldine Scanlon argues that the delayed arrival of Spanish feminism stems from the lack of influence of the Enlightenment period and the backlash of Catholic dogma against the egalitarian ideals of the French Revolution (Scanlon 1986: 6). She also maintains that:

las fuertes tensiones políticas y sociales en España perjudicaron el desarrollo del feminismo en el siglo XX. En otros lugares, las feministas de diferentes opiniones políticas consiguieron unir sus fuerzas para la causa de la emancipación, pero semejante colaboración fue imposible en España. [...] El movimiento se debatió, por tanto, entre la indiferencia de la izquierda y las ambiciones de la derecha, y, en consecuencia, consiguió muy poco (Scanlon 1986: 11).

Folguera Crespo distinguishes between different kinds of feminism, most importantly, Catholic, moderate and radical feminism. While the former saw the key function of women as their reproductive role, the last two fought, in varying degrees, for equal rights (Folguera Crespo 1997: 487). Mary Nash argues that, while a small number of women led the feminist struggle, the vast majority supported the status quo (Nash 1994: 155-156). Scanlon includes Burgos, alongside Margarita Nelken and Clara Campoamor, in the category of women who publicly fought for social and legal reform:

Además de la actividad colectiva de las organizaciones femeninas, hombres y mujeres exigían individualmente una reforma, destacándose en especial la actividad de Margarita Nelken, Clara Campoamor y Carmen de Burgos. Carmen de Burgos abogó por la causa de la reforma legal no sólo en sus artículos periodísticos, sino también en su labor literaria; su relato *El artículo 438* es un apasionado alegato propagandístico (Scanlon 1986: 139).

Folguera Crespo also makes special mention of Carmen de Burgos and the *Cruzada de Mujeres Españolas*:

El feminismo de Carmen de Burgos se encuentra en una posición intermedia entre un feminismo burgués y un feminismo obrero. La reivindicación del derecho al voto, la igualdad en el trabajo y la exigencia del principio de igual salario para igual trabajo, serán algunos de los presupuestos incluidos en su ideario (Folguera Crespo 1997: 489).

Contextualising Burgos's work a few points can be established: firstly, regardless of the success or size of Spain's feminist movements, Burgos can be considered one of the most distinguished proponents of Spanish feminism in the

lead-up to the Second Republic. As I hope to demonstrate throughout the study, at the beginning of her career Burgos was a moderate feminist, becoming increasingly radical by the 1920s. Secondly, in line with international first wave feminism, she strongly believed in the urgency of legal reform, manifested most notably in her life-long campaigns for divorce and the vote. Finally, as President *Mujeres Ibéricas e Hispanoamericanas*, Burgos understood the importance of both national and international organised feminism.

BURGOS'S LIFE AND WORK

Carmen de Burgos's life was as melodramatic as her fiction. Yet, unlike her heroines who are invariably victimised women, Burgos herself was a feminist, always determining the course of her own life. The beginning of her life, however, was rather conventional. Born in 1867 into a bourgeois family in en mi inolvidable Rodalquilar, se formó libremente mi espíritu y se desarrolló mi cuerpo. Nadie me habló de Dios ni las leyes, y yo me hice mis leyes y me pasé sin Dios' (Burgos 1909a: 42). Despite her bourgeois education Burgos, from an early age onwards, ignored two bastions of patriarchal society: religion and the law. In 1882 she fell in love with Arturo Álvarez Bustos, a local journalist and poet. Despite family opposition and the fact that he was fifteen years older than her, she married him around 1883, this being the only socially acceptable form of escape from paternal guardianship. As for many of her heroines, married life was a rude awakening for Burgos. Her husband turned out to be an alcoholic who showed little, if any, respect for his wife. Due to his alcoholism, she was obliged to become the bread-winner and virtually take over his work as a typesetter on his father's newspaper. Ironically, this experience gave her both financial independence from her husband — which would later become her first stepping stone towards leaving him — and her first experience of journalism. She stayed unhappily married for seventeen years, which is, without doubt, the source of her harsh criticism of marriage in all her work and legislation. During these years the couple had four children, of whom only the last survived. It was the death of her son Arturo in 1894, aged 8 months, that was the turning point in the relationship, leading her to end this unbearable situation. Since she had to do this without any family support, her only option was to educate herself. In 1894 she enrolled on a teacher training course and, after years of studying, she finally graduated as a teacher in 1900. An early example of a single mother, she soon decided to move to Madrid with her daughter in order to start a new life of self-determination.

Once in Madrid she initially supported herself and her daughter through teaching. After a few preliminary attempts with articles in *El Globo* and *La*

Correspondencia de España in 1902, in 1903 she became the first *redactora* of the newly-founded progressive newspaper *Diario Universal* and started writing daily columns in it (*Lectura para la mujer*) covering everything from fashion, health and needlework through political events to outright feminist articles. In short, the column — almost always prominently situated on the front page of the paper — informed women about everything which could possibly interest them. Writing under the pseudonym *Colombine*⁴ she quickly made a name for herself and became established as a journalist. In 1903 she caused a big stir with a survey of the divorce question, closely followed by another survey on female suffrage (1906). In 1906 she moved from *Diario Universal* to the liberal newspaper *Heraldo de Madrid*. The newspaper announced her joining as follows:

La notable escritora Carmen de Burgos, que ha popularizado el pseudónimo de *Colombine*, entra a formar parte de la Redacción del HERALDO, en cuyas columnas tratará de asuntos interesantes para la mujer. La sección *Femeninas* es una de las permanentes, creadas en el HERALDO al aumentar éste su lectura, poniéndose a la altura de los grandes diarios de Europa. [...] Por lo mismo estimamos de importancia el concurso constante de *Colombine*, y le anunciamos seguros de que él complacerá al gran público que apoya al HERALDO (*Heraldo de Madrid* 13 February 1906: 1).

She was also the first Spanish female war correspondent during the Spanish-Moroccan War (1909-1925), as well as during the First World War, which broke out while she was travelling in Europe. Burgos was often funded by government grants to extend her studies abroad and thus travelled through most of Europe, Argentina, Mexico and Cuba.

In 1906 her estranged husband died, improving her civil status from separated wife to respected widow. In 1908 she started a relationship with Ramón Gómez de la Serna which was to last twenty years until its melodramatic conclusion when she discovered that he had had a brief affair with her daughter. When they met *Colombine* was already a famous figure while the much younger Gómez de la Serna was almost unknown. They were both very active members of the literary establishment, each publishing and editing literary journals while Burgos also organised *tertulias* in her house. For many years they worked together at her home, enriching each other's work and becoming 'one of the most modern, productive relationships in Spanish literary history' (Davies 1998: 120). In 1921 Carmen de Burgos founded the *Cruzada de Mujeres Españolas* to

⁴ See Castañeda (1994: 35), where she explains that the editor of *Diario Universal*, Augusto Suárez de Figueroa gave her the job of *redactora* as well as her pen-name: 'Figueroa también decide que cambie su nombre. Nace Colombine, seudónimo que la identificará durante toda su carrera, si bien ella en nada se parece a la frágil y voluble marioneta de la Commedia dell'Arte. Carmen es fuerte, recia, emprendedora.'

demand women's suffrage and two years later she became President of the *Liga Internacional de Mujeres Ibéricas e Hispanoamericanas*. Burgos herself explains that:

En 1921, la "Cruzada de Mujeres Españolas" y la "Liga Internacional de Mujeres Ibéricas e Hispanoamericanas", convencidas de la justicia de la causa femenina y de que nada existe en la Constitución española que se oponga al voto, acudió a las Cortes a presentar su demanda y su programa de vindicación de todos los derechos civiles y políticos. Grupos de mujeres de todas las clases sociales repartieron el manifiesto por la calle y lo presentaban en el Congreso y el Senado, realizando así el primer acto público de las sufragistas españolas (Burgos 1927a: 283).

Concha Fagoaga rightly points out that, strictly speaking, it was not the first public act but the first time the suffragists went to the streets and distributed leaflets, the first time photographs of them were published in the press, and the first time that 'el Heraldo llega a calificar el acto como "el amanecer de un serio movimiento feminista" que había sorprendido a los propios diputados' (Fagoaga 1985: 153). Given Burgos's involvement in both feminist groups, it seems safe to assume that from 1921 onwards she became increasingly involved in politics, primarily through the issue of the vote. In 1930 she joined the *Partido Republicano Radical Socialista* (one of the victorious parties in the elections of the following year), only to break party discipline and support Clara Davies, by the end of her life, her worldview 'was anticlerical, antimarchist, was, similar to her whole life, tinged with melodrama. While giving a public speech she collapsed with heart failure. According to newspaper reports her last words were: "Muero feliz, porque muero dentro del pleno triunfo republicano! ¡Viva la Republica! [...] Señores: griten ustedes conmigo ¡viva la Republica!"' (*Heraldo de Madrid* 9 October 1932: 1). The *Unión Republicana Femenina* praised Burgos in an obituary and demanded public recognition of her life's work:

Una ilustre precursora de las actuales realizaciones feministas en España, ya como periodista, como escritora y como organizadora infatigable de nobles empresas femeninas, laboró toda su vida y hasta el instante de su muerte, por los derechos y por los ideales que la República ha venido a consagrar. En consideración a estos singulares méritos y a la alta categoría de escritora de la insigne mujer que acaba de rendir su último aliento en un viva a la República, la Unión Republicana Femenina, acogiendo un deseo de su presidenta, Clara Campaamor, acordó por unanimidad solicitar del Ayuntamiento de Madrid que de una calle de esta capital al nombre preciado de Carmen de Burgos (*El Liberal* 13 October 1932: 12).

To date there is no street in Madrid named after her.

Much of Carmen de Burgos's work is autobiographical.⁵ Her sheltered Andalusian childhood, her unhappy marriage, her travels, her experiences as a war correspondent, and her feminist and Republican convictions are all fictionalised in her novellas and novels. Her total output consists of some 160 titles. This includes some 120 novels and novellas, as well as travel accounts, translations, literary criticism, books about fashion, beauty, needlework, and other manuals. Additionally, she published a vast number of newspaper articles throughout her life. At the beginning of her career she was a writer with little overt interest in feminist issues. Her first four novellas, published in *El Cuento Semanal*, were quite traditional short stories in a *costumbrista* style without feminist overtones. It is also interesting to note that her work is very varied. A woman who as early as 1903 took the divorce question into the public domain and who in 1906 introduced the debate on female suffrage to her readers, would also publish what today would be classified as self-help manuals such as *Moderno tratado de labores* (1904b), *La mujer en el hogar* (1909d), *El arte de seducir* (1916a), *¿Quiere usted conocer los secretos del tocador?* (1917e) or *El tesoro de la belleza* (1927b). One would understand the need to do so at the beginning of her career, but as the dates of publication show she published, for example, *El tesoro de la belleza* (1927b) the very same year as *La mujer moderna y sus derechos* (1927a), at a time when she was one of the most well-known writers of contemporary Spain and, according to Davies, earned 'a sizeable salary' (Davies 1998: 121). Davies also states that, due to the increased production of literature, 'authors — including women — became professionals able to make a decent living from their writing' (Davies 1998: 118). However, in the case of Burgos there was a price for this: as shown above, she had to publish works that perpetuated a female stereotype. Almost all of Burgos's fiction has female protagonists, yet apart from a few notable exceptions the heroines are, by and large, the powerless victims of a hostile male world. As we will see in the discussion of melodrama later, Burgos's representation of women characterises them as victims, which is, paradoxically, totally opposed to the vision of women presented in her feminist essays.

Burgos's life and work have to be considered against the backdrop of a fast-changing Spain. The first three decades of the twentieth century saw the transition from a monarchical system to the proclamation of the Second Republic. Due to an increasing literacy rate, the potential readership grew considerably and there was unprecedented demand for reading material, which completely redefined the relationship between writer and the reading public. Burgos took advantage for feminist purposes of one of the biggest publishing events of her time, namely the conversion of fiction into an article of mass

⁵ For an extensive overview of the entirety of Burgos's work, see Núñez Rey (1992).

consumption on an unprecedented scale through the publication of cheap popular novellas in pamphlet form, which set out to satisfy the demands of, and to educate, a growing reading public. The publishing world underwent a drastic modification and became ever more dependent on market forces. Research into this phenomenon has mainly centred on *El Cuento Semanal* (1907-1912), publication seen as the first weekly literary magazine on the Spanish market.⁶ Its with varying success, the most important of which were: *Los Contemporáneos*, *El Libro Popular*, *La Novela Corta*, *La Novela Semanal*, *La Novela de Hoy* and *La Novela Mundial*. The contributors to these series included renowned writers (Pérez Galdós, Pardo Bazán, Picón, Baroja, Valle-Inclán, Unamuno and Benavente) as well as those whose emerging reputation and popularity were inextricably linked to the magazine (Pérez de Ayala, Miró, Martínez Sierra, Noel, Espina, Insua, Mata, García Sanchiz and Hoyos y Vinent). Burgos was one of the first contributors to *El Cuento Semanal*; her first four novellas, *El tesoro del castillo* (1907), *Senderos de vida* (1908c), *En la guerra* (1909b) and *El honor de la familia* (1911a), were published in the above series and hence shared its enormous success. Granjel suggests that the print-runs for *El Cuento Semanal* and *Los Contemporáneos* were between 50,000 and 60,000, whereas *La Novela Corta* and *La Novela Semanal* had print-runs of between 100,000 and 200,000 (Granjel 1968a: 478, 1968b: 15). The illustrations that accompany the text assume a less educated readership, since one can almost follow the plot by looking exclusively at the pictures. The purported aim of the publishers, not only to satisfy demand but also to educate an increasing reading public, is most obviously expressed in the editorial statement 'Nuestro Propósito' in the second issue of *La Novela Corta*. José de Urquía, the editor, explains that:

Esta es la verdadera manera de hacer patria, de elevar el nivel cultural del país, de dignificar al obrero. Al obrero español, que si bien está organizado para su completa redención, le faltaba este pan espiritual. La cultura, bajo una forma no pedagógica, severa, doctrinal para la que no está preparado, sino bajo una apariencia amena o frívola, algo así como esas maravillosas comedias de Jacinto Benavente, que lo dicen todo sin decir nada. [...] Hace tiempo, los editores, a través de sus publicaciones de carácter popular — semanarios y revistas — vienen persiguiendo un noble ideal estérilmente. Poner en contacto al vulgo con los grandes escritores (Urquía 1916: 1).

Sáinz de Robles quotes Pérez Galdós (without date or bibliographical details), who allegedly summarised the whole phenomenon with the following words:

Poco, muy poco leían los españoles de mi tiempo. Una edición de dos mil ejemplares tardaba en venderse... ¡que sé yo el tiempo! Y el precio de los mejo-

INTRODUCTION

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res libros era irrisorio: una, dos pesetas, tres... Ahora, vosotros, en plena juventud [...] conseguís tiradas de cinco, de seis mil ejemplares, y las agotáis en menos de un año. Habéis logrado "el milagro" de que el pueblo se apasione por las novelas con calidad literaria. De rechazo nos habéis beneficiado a los novelistas de mi tiempo, que ya también vendemos bastante mas... ¡Yo os estoy muy agradecido, muy agradecido! (Sáinz de Robles 1966: 111)

It is important here to recognise that Pérez Galdós considers the novellas quality literature. According to him, the promotion of popular fiction feeds back into increased consumption of high-class literature. As far as he is concerned, mass culture and elite culture are not separate phenomena but interrelate with each other. Hence it was so important that high-class writers wrote for these publications.

LAW AND LITERATURE

Both law and literature construct narratives that are, at best, artificial and, at times, arbitrary. Some narratives have more discursive power than others, some narratives impose and legislate meaning. It is the aim of the law and literature project to show that these two disciplines both deal with texts that are ultimately open for negotiation. Broadly speaking, the field can be divided into 'law in literature' and 'law as literature', the former examining the cultural representation of law and the latter exploring the dissimilarities of legal and literary language and its functions in the various situations of human interaction. Law as literature seeks to apply the techniques of literary criticism to legal texts. Such analysis raises questions of objectivity in interpretation, a question that has long preoccupied literary scholars. By confronting two disciplines that have traditionally been constituted as distinct discourses, looking for textual and thematic affinities and contrasts, we can enquire into how legal and literary discourses construct subjectivity, before going to explore how literature subverts or reinforces the narratives that help to legitimate the legal order. As I will argue throughout this study, law at the time of Burgos was used as a patriarchal instrument of social control. This manifested itself amongst other things, in the male opposition to legal changes regarding divorce or female suffrage. In my discussion on legal subjectivity, I will also argue that reading and hence interpretation in law, unlike in literature, requires giving normative meaning to legal texts with practical consequences for people's lives. In their excellent article 'Convergences: law, literature and feminism', Carolyn Helbrun and Judith Resnik suggest that feminism is where the social and the political converge, and hence the field of law and literature lends itself to the debate on women's position in society. Women's narrative, which has long been recognised in literature, can make its way, by means of this debate, into law.⁷

⁶ For an extensive analysis of *El Cuento Semanal*, see Magnien (1986).

⁷ See also Smart (1989: 1), who argues that in literary studies the inclusion of women's

The point of departure, Heilbrun and Resnik argue, ought to be women's actual experience, since the highlighting of experience is, in part, an act of recognition. A key issue is what they term proximity, i.e. 'the closeness of the intellectual discussion to the experiences of daily life' (Heilbrun/Resnik 1996: 95). Feminist literary theory has long known of the need for a new language representing women's experience, and feminist legal theory, facing the same problem, finally found legal terms for long-standing women's problems like sexual harassment or Battered-Woman Syndrome. The historical example of Burgos's work demonstrates that the highlighting of women's precarious legal or social situation is nothing particularly new. Much of her journalistic, essayistic, fictional and politically activist work shows Burgos's endeavour to construct proximity and interaction between the intellectual debates of her time and women's lived experiences. As will become clearer in my discussions throughout this study the crucial question for a law and literature project is whether, and if so how, law and literature, respectively, can be instrumental in social change.

Does law change society or, conversely, does social change alter law? These questions have been a major source of controversy throughout the history of law. Some argue that law is determined by the morality of the population and legislation can only achieve change by staying relatively close to social norms. Others, however, perceive law as a tool of programmed social change. As Steven Vago rightly points out, both contentions are likely to be correct; the more interesting question is under what precise circumstances does law entail social change (Vago 1997: 287). Historically, law has always been used as a tool during the 1930s, laws were implemented to reform agrarian labour, employment relations or the position of women in society (Graham 1995: 101). Similarly, in the former Eastern bloc, law was the main tool in transforming society from a bourgeois to a socialist one. According to Vago, law entails two interrelated processes: the institutionalisation and the internalisation of patterns of behaviour. While the former process establishes norms and provides the necessary sanctions to enforce them, the latter incorporates the implicit values of law in society's attitudes. Law directly influences behaviour through institutionalisation and only if this process is successful does it facilitate the changes in law's implicit values (Vago 1997: 294). Vago suggests that morality, i.e. people may come to believe that abortion is not evil, that contraception is desirable, or that divorce is not immoral. These shifts in social attitudes can be caused by a variety of factors such as changing social and economic conditions, politics and technology. In such cases, law is reactive and

narrative has been easier than in social sciences and law.

follows social change. Nevertheless — Vago explains — many legal theorists consider law to be a highly effective instrument of social reform, preferable to other implements of change. The advantage of law as an agent of social change is its binding character, not just because it imposes sanctions, but also to a large extent because people consider it 'the right thing to do' (Vago 1997: 291-298). However, Vago also rightly notes:

A good illustration of the systematic ineffectiveness of unsupported law is provided by the utter failure of legislation designed to enforce private morality. [...] Laws prohibiting adultery, for example, have existed for centuries, but adultery remains a favourite indoor sport in the United States and elsewhere. Similarly, laws dealing with homosexuality and prostitution have generally been ineffective. The well-known failure of the prohibition of alcohol through constitutional amendment and legislation to produce a truly "dry" society, or to keep most people from drinking, is another example of the limitation of the law to bring about social change in public "morals" (Vago 1997: 304).

As discussed in more detail in Chapter 1, the relationship between law and morality is another controversial issue in legal theory. Burgos's work illustrates how one of the crucial issues in legal discourse of the time was the prevalent morality that prohibited such 'revolutionary' behaviour as divorce and remarriage. Finally, Vago also explains that there is a variety of factors which resist change, for example, vested interests of a social class or group, ideological reasons, psychological factors such as habit, ignorance or selective perception, and cultural factors such as ethnocentrism or sexism (Vago 1997: 306-312). In conclusion, it can be argued that law can influence social change directly or indirectly in that it redefines the normative order and extends formal rights.

Law as a means of social control relies on two basic processes: the internalisation of group norms due to socialisation and control through external sanctions. Formal controls are incorporated into social institutions and characterised by the explicit establishment of procedures regulated by laws (Vago 1997: 190-191). Most interesting for this study is Vago's discussion of why certain norms but not others are chosen for inclusion in the criminal code. Vago explains that crimes are either *mala in se*, acts that are inherently wrong, like rape or murder, or *mala prohibita*, i.e. behaviour that is made criminal by law and where there is no social consensus as to whether these acts are evil in themselves. Vago suggests that certain social forces are instrumental in the creation of laws, e.g. moral indignation, a high value attached to order, and political reasons (Vago 1997: 195). As my later discussion of the laws relating to *adulterio* will show, adultery at the time of Burgos is a prime example of how morally wrong behaviour is not only constructed as a *mala prohibita*, but is also highly gendered.

LEGAL SUBJECTIVITY

Like justice and law (discussed in Chapter 1),⁸ legal subjectivity is a concept that is notoriously difficult to define. For current legal theory, the definition of legal subjectivity fundamentally involves the ability to bear rights and responsibilities, basic equality before the law, respect and self-determination. As we will see in Chapter 1, both Rawls' and Dworkin's theories of justice construct a legal subject in these terms. In cultural studies, subjectivity is an equally contested concept. According to Ashcroft *et al.* (1998), the concept of subjectivity problematises the relationship between the individual and language and focuses on the notion that the human subject is produced through discourse. This has been elaborated in the work of Foucault who argues that the subject is the result of social processes and that subjectivity is produced by a system of knowledge that controls the subject's identity (Foucault 1980). A sharp criticism of Enlightenment philosophy, this theory contradicts the belief in individual autonomy most famously summarised in the Cartesian declaration: 'Cogito, ergo sum' (Ashcroft *et al.* 1998: 219-220). Discourse, then, is seen as a decisive factor in the production of subjectivity, and individual identity is understood as an effect rather than a cause of the production of discourse. Ashcroft *et al.* question the validity of this theory pointing to its inherent problem for any kind of social change: 'for if the subject is produced by ideology, discourse or language, is it trapped in this subjectivity beyond the power of choice, recognition or resistance?' (Ashcroft *et al.* 1998: 225) While Ashcroft *et al.* are right in challenging Foucault's conceptualisation, I think it is fair to suggest that the individual's perception of their own identity is at least influenced, if not dominated, by cultural discourses and that this, in turn, can conceivably weaken their ability to challenge the conditions of their subjection.

In legal studies, the legal subject, in its simplest form, has an abstract identity. Legal subjectivity is the legal definition that is given to a subject: either externally, i.e. all citizens are subject to the law (all citizens have the duty to obey the law as well as having a set of rights), or internally, i.e. the subject infringes a law. According to the English Vagrancy Act of 1824, for example, anybody found begging more than twice in a public place was deemed to be an 'incorrigible rogue' (*Halsbury's Statutes of England and Wales* 1997: 61-66). This example of an internal definition shows that the need to define a subject arises only when somebody disturbs public order and, more importantly, that the

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definition given is arbitrary: the law could also have constructed a person as an incorrigible rogue after 'more than three times' or 'more than five times'. Equally, the definition of minors and adults is arbitrary. According to current English law, a child under the age of ten is *doli incapax*, i.e. incapable of a crime (Curzon 1994: 126). This is based on the irrebuttable presumption that a child under ten is incapable of forming a *mens rea*.⁹ Whereas the argument is reasonable (children under a certain age are not capable of predicting the consequences of their actions), legal subjectivity is fixed somewhat arbitrarily by partly basing the definition of this legal subject on the age. As these two examples have shown, there often is a certain arbitrariness in the construction of legal subjectivity, while at the same time it rests on reasonable assumptions. What interests me for the argument of this study, however, is the fact that Spanish law at the time of Carmen de Burgos not only fixed female identity in legal definitions arbitrarily, but also based them on unreasonable assumptions.¹⁰

In Spanish law at the beginning of the twentieth century female subjectivity was defined, in the Constitution and legal codes, in a variety of ways through a multitude of different definitions. Spanish legal discourse made a distinction between *discriminación por razón de matrimonio* and *discriminación por razón de sexo*. The latter mainly involved *mayoría de edad*, *tutela*, *testigos*, and most importantly, *el voto*. Since the lack of marital rights and female suffrage are discussed extensively in my first and second chapters, respectively, here I will give only a brief overview of the legal subjectivity of women in relation to the other above-mentioned matters. In her chapter on single women's rights, Burgos calls for equality before the law: 'Se necesita en las leyes igualdad completa, no privilegios de un sexo' (Burgos 1927a: 208). Calling for legal reform, she informs her readers that: 'Se dice que tienen capacidad jurídica las solteras, viudas y legalmente divorciadas porque pueden comprar, vender, administrar sus bienes, hacer contratos, [...], pero realmente, su capacidad jurídica está limitada, no es cierto que tienen plenitud de derechos' (Burgos 1927a: 192). While it is true that single women had more rights than married women, legal subjectivity in their case was still often defined by gender. Single women could look after their own financial and commercial affairs and become the director of a bank or any other commercial entity. Scanlon explains that an unmarried woman could:

enajenar y gravar sus bienes, arrendar y comprar los ajenos, ser depositaria o depositante, prestamista o prestataria, constituirse en fiadora de otro. [...] A pesar de la igualdad en estas esferas, había todavía una amplia gama de acti-

⁸ 'Justice' is defined as: 'The basic value underlying a system of law, or the objective which that system seeks to attain' as well as 'the correct application of a law, as opposed to arbitrariness' (Curzon 1994: 213). 'Law' however is the 'written and unwritten body of rules largely derived from custom and formal enactment which are recognised as binding among persons who constitute a community or state, so that they will be imposed upon and enforced among those persons by appropriate sanctions' (Curzon 1994: 219).

⁹ Literally 'guilty mind', more accurately, 'criminal intention, or an intention to do the act which is made penal by statute or by the common law' (Curzon 1994: 245).

¹⁰ For an interesting introduction to fixing female identity in today's Anglo-American legal systems, see Bridgeman and Mills (1995).

vidades donde la capacidad legal de la mujer soltera estaba mucho más restringida que la del hombre. Por lo general, se le negaba a ella los puestos de autoridad o responsabilidad en los que estuviesen implicadas otras personas. Podía dirigir una banca, un comercio, una industria, pero no podía pertenecer a una Cámara de Comercio, aunque fuese elegida por los asociados. Podía ser declarada en concurso o quiebra, pero no tenía, a pesar de esto, capacidad para ser síndico en esos juicios, aunque en ellos tuviese comprometida su fortuna (Scanlon 1986: 123).

They were under the guardianship of their father until the age of 25, despite legally coming of age at 23 (*Código Civil* 1889: art. 320-321). The issue of guardianship is another interesting example of gendered legal subjectivity, not so much because of the fact that under article 237 of the *Código Civil* (1889) women were not allowed to be legal guardians but, more importantly, on account of other subjects excluded from such responsibility: female legal subjectivity is equated with that of criminals, delinquents and bankrupt people. In other words women, for reasons of gender, are by definition given parity of treatment with men who have committed an offence. However, to confuse matters even further, when there was a practical requirement to allow for women to be guardians, then wives, mothers or grandmothers were given the legal capacity to do so (*Código Civil* 1889: art. 211-227). An equally unstable category of female legal subjectivity is that of women's capacity to be witnesses. As Burgos notes:

Otra función de orden civil privado es servir de testigo en documentos públicos y también se le niega a la mujer. No se la admite como testigo de matrimonio, contrato, testamento y muerte. Si se necesita un testigo para uno de estos actos puede servir un hombre cualquiera que se preste, [...] pero no puede servir la señora abogada, doctora o profesora, ni la comerciante o propietaria de reconocida solvencia y honorabilidad. Se acepta al que va oliendo a vino, derrochado, asalariado tal vez pero su testimonio tiene valor... por ser hombre. [...] Pero lo más raro es que a pesar de ese concepto de la mujer se la admite como testigo en lo criminal, donde el testimonio puede decidir del honor y de la vida de los acusados. Se le concede lo más negándole lo menos. Además su incapacidad desaparece en casos de epidemia, que se las admite de testigos de testamentos, sin pedir más requisitos (Burgos 1927a: 191).¹¹

Again there appear to be various legal subjects for the same juridical function of being a witness. The codification of law was supposed to create a body of laws arranged in an orderly, comprehensive and logical way. However, the unity that was aimed at in the various codes remained theoretical. The legal discourse concerning women shows quite clearly that there were glaring discrepancies

¹¹ Burgos refers to articles 681, 701 and 1245 of the *Código Civil* (1889).

between the legal subjectivity of women in the Constitution, Civil Code and Penal Code. As the above two examples clearly show, even within the *Código Civil* (1889) there is no one coherent female legal subject to be found. I would therefore go even further and argue that the codification of law at the time of Burgos is a testimony to arbitrary patriarchal power. If power fixes identity by defining subjects, then these legal codes are not so much a demonstration of a body of laws arranged in an orderly and logical way as reminiscent of arbitrary absolutism.

THE SPANISH LEGAL SYSTEM

Spanish law is part of the Romano-Germanic legal system that predominates in Europe. It is a codified system whereby basic laws are set out in codes, i.e. a body of laws arranged in an orderly, comprehensive and logical way. By contrast, English common law, or 'case law', is based on the doctrine of precedent cases. The divisions of the common law, its substance, the methods of the legal profession and its vocabulary are very different from the Romano-Germanic systems. While I am aware of the danger of legal anachronism and of falsification of Spanish legal reality when using theoretical concepts derived from Anglo-American theoretical writing, I would nonetheless argue that in the realm of the law and literature debate, and to quote Richard Posner:

the law is a remarkably unchanging facet of human social existence. Specific doctrines and procedures may change, but the broad features of the law do not. The legal systems of Elizabethan England and even Periclean Athens are thoroughly accessible to modern understanding, and differences between the Austro-Hungarian procedures reflected in *The Trial* and modern Continental or American procedures, though important to lawyers, would strike most laymen as small (Posner 1996: 63-64).

The Age of Enlightenment constituted the theoretical basis for a dramatic change in the history of law. The School of Natural Law,¹² represented by Grotius and Hobbes amongst others, proclaimed that if reason could explain the functioning of nature and its laws, it should also be able to explain the laws governing human nature and hence proclaim the principles according to which men should be governed. These principles, together with the theories of individual natural rights¹³ of Locke, Montesquieu and Rousseau, provided the

¹² Natural law denotes 'a system of right and justice common to all men prescribed by the supreme controlling force in the universe and distinct from positive law, laid down by any particular state or other human organisation' (Walker 1980: 868).

¹³ 'Claims asserted as being rights inherent in an individual by virtue of natural law or the nature of man rather than by the positive law of his State. The individual natural rights normally asserted are life, liberty, property and happiness' (Walker 1980: 871).

ideological background that quickly spread across Europe. Absolutism with its arbitrary system of justice received harsh criticism from these philosophers as contrary to reason and to the natural order of things.¹⁴ Three principles emerged as a result: the principle of legality (both nature and mankind are subject to laws);¹⁵ the principle of rationality (laws governing humanity are deduced from natural laws by use of reason); and the principle of nationality (positive law must be adapted to the circumstances of each nation). These philosophical ideas entailed two major achievements in legal history: the creation of a state of law governed by a supreme rule — the Constitution — and the codification of law. As we will see in what follows the principle that human behaviour obeys natural laws was used in the early twentieth-century legal debates about divorce and female suffrage as a reasoning strategy to argue that 'natural law' dictates that women should not be granted basic natural rights. It is these rights that Burgos's heroines claim for themselves in their pursuit of happiness.

The notion that the law was an organised system of rules derived from nature was articulated by the creation of codes. Merino-Blanco explains that:

The existence of a single source whereby the rights recognised by the Constitution — especially private ownership and individual freedom — could be established in an universal way provided the bourgeoisie with legal certainty. A code could also be presented as the instrument with which to achieve a break with the past and consolidate the new order recognised in the constitutional text (Merino-Blanco 1996: 20).

The legal codes in force during Burgos's time were the Constitution of 1876 (the one longest in force until the proclamation of the Second Republic), the *Código Civil* of 1889, the *Código Penal* of 1870, and the *Código de Comercio* of 1885. The first Spanish *Código Civil* came into force on 1 May 1889, nearly a century after the first French Civil Code (1804), by which it was highly influenced. It is a product of nineteenth-century liberalism, which is reflected in the protection of individual freedom and private ownership. The *Código Penal* of 1870 was derogated during the dictatorship of Primo de Rivera and replaced by the *Código Penal* of 1928, and then re-established and modified in 1932 under the Second Republic (Merino-Blanco 1996: 22). Despite the agenda of universal human rights, or at least legal recognition of the same, liberal discourse falls short of including women. Cristina Entriquez de Salamanca

observes that:

El mundo liberal imagina al individuo como un ser libre, lo redefine como propietario de su propio cuerpo y bienes, y en virtud de tal definición lo constituye en sujeto de la vida pública. Y es en la sociedad liberal, pero no en las anteriores, donde el discurso legal se convierte en obligado referente para un movimiento feminista que afirma la opresión de la mujer mirando las limitaciones establecidas por el derecho para que la mujer actúe como el varón (Entriquez de Salamanca 1998: 222).

As demonstrated below, Burgos's heroines are not owners of their property, let alone their bodies. The above quotation explains why Burgos analyses the legal discourse of the time in order to highlight and publicise the gendered injustices of the law.

MELODRAMA

Melodrama theory is wide-ranging and to outline the whole spectrum is beyond the scope of this study. Nevertheless, to ignore it altogether would do injustice to Burgos's work and, more importantly, disregard some obvious similarities between melodrama as a genre of manichean worldviews and law as a system of binary oppositions. My aim is to demonstrate that mass culture, in general, can have a positive function in the renegotiation of identities and how Burgos's work, in particular, reworks melodramatic conventions in order to foreground and question accepted identity formations. We may note that the history of melodrama gives some indication of the subversive potential of the genre and thus its appropriation for feminist purposes does not seem entirely unreasonable. However, melodrama is also renowned for being a genre that disempowers women by portraying them as virtuous victims. As I hope to demonstrate in Chapter 4, the conservatism of melodrama's representation of women is undermined in Burgos's popular fiction. What is more, by using not only the genre of melodrama but also the mass distribution series discussed above, Carmen de Burgos ensured that she would reach readers who had had little, if any, contact with feminist issues, thus obliging a wide readership to reflect on these ideas. One of the distinguishing factors between high and low culture is their respective modes of consumption, i.e. disinterested aesthetic detachment as opposed to participatory, emotional involvement. According to Elsaesser, the usefulness of melodrama lies in the 'audience's participation, for there is a desire to make up for the emotional deficiency, to impart the different awareness, which in other genres is systematically frustrated to produce suspense: the primitive desire to warn the heroine of the perils looming visibly over her in the shape of the villain's shadow' (Elsaesser 1987: 66). In melodrama of political protest the conflict of good and evil as opposites not subject to compromise is politically crucial and becomes a useful means of easy recognition: the reader

¹⁴ For a good brief introduction to natural law, see Walker (1980: 867–871).

¹⁵ See Merino-Blanco (1996: 15, n. 42), where she explains that the principle of legality was first recognised by the French Constitution of 1791: 'There is no authority superior to the law.'

¹⁶ Positive law is defined as: 'The legal rules adopted and actually endorsed in formal fashion by the state' (Curzon 1994: 220).

can take a side and accept its credo. Ethical conditions are made manifest and operative through bipolarisation. The celebration of right and condemnation of wrong, the binary constructions of virtue/villainy, justice/law and woman/man in its either/or exclusivity are intrinsic to the moral manicheisms of melodrama as well as to law. Burgos not only subverts melodrama, but also intelligently uses a genre based on manichean worldviews in order to criticise a legal system of melodramatic proportions, using the very construction of reality that is criticised. Looking at the generic features of melodrama, we will find that all forms share a few fundamental characteristics: the indulgence of strong emotionalism; a manichean worldview and the desire to express all. These characteristics have by and large encouraged critics to treat melodrama as vulgar and degraded near-tragedy. Yet the genre's *raison d'être* is the possibility of saying everything, of expressing emotions that are almost overwhelming. Women in Burgos's melodrama are not silenced, they speak out with melodramatic clarity, although society would want them to assume the stereotypical role of silent martyr. As I will argue throughout this study, manichean terms is particularly suited to Burgos's purpose of disseminating information about legal issues and a powerful reminder that some ethical issues are beyond moral relativism.

OVERVIEW OF CHAPTERS

Chapter 1, 'Justice versus Law', examines the intersection between society and morality and argues that justice is absent from Spanish law at the beginning of the twentieth century. Injustice can best be demonstrated when examining married women's lack of rights. Focussing on inequality before the law, this chapter concentrates on Burgos's critique of the indissolubility of marriage in her theoretical writings and her fiction. Using John Rawls' *A Theory of Justice* (1999b) and Ronald Dworkin's *Taking Rights Seriously* (1978) as a theoretical framework, this chapter first examines Spanish legal and public discourse regarding the divorce debate, and then discusses Burgos's work in the context of both legal theory and historical practice. It also explores the lack of rationalism in the legal argumentation of the divorce debate. For my analysis I have chosen four non-fictional works (*El divorcio en España* (1904a), *La mujer en España* (1906), *La misión social de la mujer* (1911b) and *La mujer moderna y sus deberes* (1927a)), in order to illustrate how prevalent the issues of divorce and adultery are throughout Burgos's work. I will also analyse two fictional works: the novel *La malcasada* (1923d) and the novella *El artículo 438* (1921a) and show how Burgos's melodrama fed into a public debate and was used as a vehicle of feminist propaganda. Chapter 2 is theoretically informed by the 'equality versus difference' debate in recent feminist legal theory. I hope to demonstrate how the politics of equality and the discourses of difference at the

time of Burgos were diametrically opposed to today's concepts. Focussing on her book-length essay *La mujer moderna y sus deberes* (1927a), I shall ask where, how and why the prevailing equality feminism resisted its own politics and slid into difference feminism. My legal discussion is supplemented by recourse to Thomas Laqueur's *Making Sex* (1992) which argues, amongst other things, that medical discourse in the nineteenth century 'created' biological difference in order to legitimate legal difference between the sexes. This chapter therefore explores the creation of biological difference in dominant Spanish legal discourse and examines the relevance of these biological 'facts' in the debate on female suffrage. As in Chapter 1 regarding divorce, I will explore the emotionalism and non-rational reasoning strategies of these debates. The third chapter deals with theories of moral reasoning, taking as a point of departure the common philosophical contention that women have an inferior sense of justice. Having given a brief historical overview, the chapter will then centre on Carol Gilligan's *In a Different Voice* (1993), one of the most influential studies on gendered moral reasoning in recent years. While the first chapter raises questions about justice from a legal point of view, this chapter looks at justice from a moral viewpoint, examining the intersection between the individual and morality, and asks how the individual arrives at a sense of justice. The discussion of gendered moral reasoning lends itself to application to the female sense of justice as portrayed in *El abogado* (1986a), *El hombre negro* (1916b), *El artículo 438* (1921a) and *La malcasada* (1923d). The last two, also discussed in Chapter 1, are analysed here again in order to look at the same stories first from a public and then from a private angle. In Chapter 1 the implicit question is whether women should have the public legal right to equality, self-respect and freedom of the person, while in Chapter 3 I analyse them in relation to the question of how a woman privately reasons about her moral rights. Two issues are recurrent throughout this study: female selfishness and the question of equality versus difference. Chapter 1 shows how those opposed to divorce argued that divorce was a selfish female pursuit, while Chapter 2 discusses how prevailing notions of female selfishness in demanding suffrage co-exist with a belief in female altruism, seen as a form of moral superiority. My third chapter deals with selfishness and moral reasoning: how do Burgos's heroines negotiate between the desires of the self and the demands of others? The second recurrent issue of equality versus difference is raised differently in each chapter. Whereas Chapter 1 deals exclusively with the politics of equality in terms of the modernisation of *divorcio* and *adulterio* legislation, Chapter 2 introduces difference into the debate and explores the relation between the two concepts. Chapter 3 concentrates on difference and demonstrates how prevalent the issue of a different sense of justice was in the work of Carmen de Burgos. The concluding chapter deals with the correlation between melodrama and law. Using melodrama theory, in particular Peter Brooks' *The Melodramatic Imagination* (1985), as my theoretical framework, I will use the fiction of

Carmen de Burgos as a paradigmatic case to draw conclusions about the relation between law and melodrama. It is my aim to show how two disciplines with quite disparate aims share important matter of common concern, and how transgressing the boundaries that separate them enriches our understanding of both.