ABA Section of International Law
Your Gateway to International Practice

UNIVERSIDAD PANAMERICANA

MEXICO UPDATE

Message from the Co-Chairs

Mexico Committee Friends and Members,

2015 was an excellent year for our Committee. For the first time in American Bar Association history, a new international city chapter was formed, and it gives us great pride that the Mexico Committee was the starting point for the new chapter, joining San Diego and Tijuana attorneys. Our Committee actively participated in finalizing and organizing the Americas Forum regional event, forthcoming in Miami. We are enjoying increased collaboration with the *Barra Mexicana de Abogados*, continuing to deepen our long relationship. In 2015 we had greater attendance and representation of our Committee in our Section's Spring and Fall meetings, and in the Leadership Retreat; this evidences increased involvement of our Committee members in the affairs of the Section.

With respect to legal affairs in Mexico, 2015 continues to be a year of great reforms and changes in the legal rulings which regulate not only the activities of our clients, but also advance the professionalization of the practice of law. While bar membership is not yet mandatory, there have been great advances so that someday in the near future, this can become a reality. Additionally, there have also been structural reforms that not only advance the promotion of investment, but also combat corruption, which will allow, without doubt, the strengthening of the rule of law in Mexico, a topic which is fundamental for our Section and the ABA in general. As a consequence, 2016 is not only a year of great challenges for Mexico, but also of great opportunities that will allow for the implementation of the reforms and structural changes that occurred in 2015 with the goal of creating and strengthening the Mexican legal system, the economy and faith in the rule of law.

For our Committee, 2016 holds much promise. In the first quarter 2016, we will be participating in the Americas Forum (February 28-March 1, 2016), and our Section's celebration of the Tijuana-San Diego City Chapter at the ABA midyear meeting in San Diego (February 6, 2016). As is our custom, we will be making presentations and providing programming at the Spring (New York) and Fall (Tokyo, Japan) meetings, with the goal of continuing the legal education of all our members on the diverse and novel legal topics that arise each day.

Rene Alva and Ben Rosen, Co-Chairs

A Note from the Editors

This issue's table of contents further emphasizes the vitality our Mexico Committee, as the contributions here presented speak in diverse voices to an impressive range of the current developments of critical importance to lawyers and others concerned with Mexican law. These contributions reflect combined efforts of the *Facultad de Derecho, Universidad Panamericana*, Guadalajara Campus and the ABA Section of International Law's Mexico Committee, as well as of our friends at the *Barra Mexicana*. We continue to seek volunteers to submit articles and to participate in the editing and compilation of MEXICO UPDATE!

The Editors, Matthew Hansen, Yurixhi Gallardo Martínez, Patrick Del Duca

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About the Mexico Committee

Anchored by coordinators in cities in Mexico and the United States, the Mexico Committee seeks to grow its members' involvement in dialog on current and potential developments of Mexican, United States and other law relevant to their practice of law and to the establishment of sound policy. Current substantive focuses of the Committee's work include arbitration, antitrust law, criminal procedure reform, data privacy, environmental law, legal education, secured lending, and trade law. The Committee contributes to the annual *Year In Review* publication, is developing its newsletter in partnership with a leading Mexican law faculty, maintains its website, and actively organizes programs at the spring and fall meetings of the International Law Section.

The Mexico Committee's membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely their suggestions and ideas.

Upcoming Events – Save the Date

ABA Section of International Law
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Judge Margaret McKeown and
Magistrado Manuel González Oropeza

A Conversation between US and Mexican Jurists on
National and International Law and Rule of Law Reform

Organized by the Section of International Law and its Mexico Committee in celebration of the launch of the Section's San Diego/Tijuana City Chapter

Program & Reception at the ABA Midyear Meeting

Saturday, February 6, 2016
Manchester Grand Hyatt Hotel, Seaport Ballroom D (2nd Level, Seaport Tower)
1 Market Place
San Diego, CA 92101
4:30 P.M. – 5:30 P.M. PST
Cocktail Reception Immediately Following Program, Harbor Terrace

The Section of International Law and its Mexico Committee will host a conversation between two distinguished jurists seasoned in rule of law work and the role of international law in domestic courts. **Judge Margaret McKeown** of the **US Court of Appeals for the Ninth Circuit** serves as **Chair of the ABA Rule of Law Initiative Board**. **Magistrado Manuel González Oropeza** serves as a member of the Sala Superior of **Mexico's Federal Electoral Court**, as well as a member of the **Council of Europe's Venice Commission**, assisting countries that seek advice to bring their legal and institutional structures into line with international experience in the fields of democracy, human rights and the rule of law.

Advance registration required. Register

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ROLI Update: Access to Justice

Michael McCullough

The American Bar Association's Latin America Rule of Law Initiative ("ROLI") has been awarded a two-year, $1,000,000 grant for a new program from the State Department/Bureau of International Narcotics and Law Enforcement Affairs to be known as Project for Participation, Transparency, and Open Information (*Proyecto para Participación, Transparencia, e Información Abierta*, "PATRIA").

The Program will have as its goal to support effective collaboration between the Mexican justice sector and civil society to improve accountability and citizen engagement in certain "Priority States." In support of this goal, the Program will have two Strategic Objectives, each with its respective outputs, outcomes, and activities, as follows:

Through access to justice facilities via open houses and tours, the Program will move to reduce uncertainty and misconceptions about the legal system's structure and allow citizens to gain a sense of familiarity that will encourage participation in the legal system's mechanisms.

Objective 1. The justice sector fosters positive interactions with communities and educates citizens about their rights and responsibilities.

- Outcome 1(A). Public Access to Justice Sector Institutions is Promoted.
- Activity 1(A)(i). Conduct "Courthouse Experience Visits."
- Activity 1(A)(ii). Conduct "State Attorneys General Open Houses."
- Outcome 1(B). Police Conduct Outreach to Communities.
- Activity 1(B). Support Police Soccer Teams for Young People.

Objective 2. Engaged citizens advocate for transparency and accountability within the justice sector.

Outcome 2(A). Civil Society Understands How to Request Information from the Government.

- Activity 2(A). Train Civil Society to Make Requests under the "Freedom of Information" Law.
- Outcome 2(B). Civil Society Has the Tools to Track and Monitor Requests for Information from the Government.
- Activity 2(B)(i). Create a System for Tracking Requests Filed under the "Freedom of Information" Law.
- Activity 2(B)(ii). Train Civil Society on the Use of the System for Tracking Requests Filed under the "Freedom of Information" Law.

This represents ABA ROLI's second current INL program in Mexico (and its third award from INL Mexico). It

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In 2008 statistics demonstrate 85% of victims of crimes refused to denounce the perpetrators due to unpunished offenders and an interminable timeline for adjudication.

also represents a new thematic area, focused on freedom of information.

Throughout its 25 years, ABA ROLI has sought to strengthen legal institutions, support legal professionals, and move toward a more hospitable environment for the rule of law worldwide. The PATRIA program aims to engage with communities and justice sector operators to spark a continued dialogue toward transparency and greater accountability within the Mexican legal system.

PATRIA seeks to empower citizens to engage directly with issues of accountability and procedure with the justice sector by creating a more open and transparent legal sector.

The PATRIA program consists of two main pillars. The first pillar intends to foster positive interaction with communities to educate citizen stakeholders on their rights and responsibilities. Through access to justice facilities via open houses and tours, the Program will move to reduce uncertainty and misconceptions about the legal system's structure and allow citizens to gain a sense of familiarity that will encourage participation in the legal system's mechanisms. Additionally encompassed in the first pillar, the Program will conduct youth and community outreach through forming youth-police soccer teams to build network linkages and personal familiarity that will foster greater collaboration and trust.

The second pillar aims to build greater transparency and accountability within the justice sector. Through trainings on requesting public information from the government and monitor ongoing requests, PATRIA seeks to empower citizens to engage directly with issues of accountability and procedure with the justice sector by creating a more open and transparent legal sector. The move toward greater transparency fits squarely in the aims of ABA ROLI to engender stronger legal and social supports for transparency within the rule of law.

To combat chronically inefficient court proceedings and a potentially corruptible judicial process, the Mexican government shifted from a mixed/inquisitorial system to an accusatorial system such that the powers to investigate and adjudicate will be clearly divided. Progress within the legal system to adapt to the new code has been arduous due to the scale of Mexico's justice system and the scope of the paradigmatic shift in values inherent in the change to a new system. Progress within civil society has proceeded stiffly due to previous concerns of legal accountability and respectability and an uneven regional distribution of the code's implementation.

While progress can be slow, sometimes necessarily so, for robust change in judicial code and judicial procedures, the shift in systems presents profound opportunities for growth in civil engagement with the justice system, for fostering greater civic institutional trust, and for advocating greater procedural transparency and accountability of the justice sector. In 2008 statistics demonstrate 85% of victims of crimes refused to denounce the perpetrators due to unpunished offenders and an interminable timeline for adjudication. Through encouraged civil engagement, victims of crime better understand the judicial process, and particularly the changes constituted in the move to an accusatorial system, to best approach reporting and adjudicating violations of law. With greater knowledge of the system through civic engagement and a manifest increased capacity to pursue reported crimes, citizens will more commonly utilize the resources provided by the justice system and share in a renewed commitment toward the protection of citizens' rights and the rule of law. To better maintain a level of quality while presenting greater accountability and transparency, opportunities also remain to support a framework for certification procedures for private practitioners and continued training for judges, prosecutors, law professors, and other justice system actors to understand the new code and most competently maintain its implementation.

Progress within the legal system to adapt to the new code has been arduous due to the scale of Mexico's justice system and the scope of the paradigmatic shift in values inherent in the change to a new system.

Because the transformation is arduous and can be conflict riddled, especially for those indecently benefited by the ways of old, encouraging civil engagement and assisting with training remain vital ways to support ongoing efforts. The new PATRIA program then represents a concerted effort to support accountability and civil engagement in priority states in light of these areas of opportunity.

To learn more about the ABA Rule of Law Initiative, please visit www.abaroli.org.

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Comments on the *Hague Convention on Choice of Court Agreements* and Mexico as a Contracting State

Yves Hayaux du Tilly and Juan Pablo Sainz

On October 1, 2015, the Hague Convention on Choice of Court Agreements (the "Convention") came into force between Mexico and 27 countries of the European Union. The Convention's goal is to "promote international trade and investment through enhanced judicial co-operation."

In June 2005, at the 20th Session of the Hague Conference on Private International Law, forty three countries approved the terms and objectives of the Convention. This consensus was the result of more than a decade of negotiations to draft a multilateral treaty able to unify the rules on choice of jurisdiction and on recognition and enforcement of judgements in international cases.

The compatibility of the Convention with the Mexican Constitution, federal laws and the liberal policies that, at that time, had driven Mexico's economy for more than a decade, made the Mexican Senate move swiftly, approving the Convention on April 26, 2007. It was not until December 2014, however, that the Council of the European Union approved the Convention on behalf of the European Union and in June 2015, deposited the respective instrument of ratification, which triggered the Convention's entry into force as of October 1, 2015. The United States of America signed the Convention in 2009 and recently Singapore has also signed it; however, neither of them have ratified the Convention.

A competent court of a chosen Contracting State shall hear the case of the dispute and shall not decline to hear the case on the grounds of forum non conveniens (Article 5).

The Convention provides certainty in the enforcement of contractual provisions on choice of law jurisdiction, with a direct impact on the effectiveness of the recognition and enforcement of foreign judgments in civil and commercial matters.

The Convention relies on three principles:

- A competent court of a chosen Contracting State shall hear the case of the dispute and shall not decline to hear the case on the grounds of forum non conveniens (Article 5).
- Any court of a Contracting State not chosen as the exclusive court by the parties, must refrain from hearing or getting involved in any dispute derived from that contract (Article 6).
- The courts of the Contracting States shall recognize and enforce a judgment of a court of another Contracting State designated in an exclusive choice of court agreement (Article 8).

On October 1, 2015, the Hague Convention on Choice of Court Agreements (the "Convention") came into force between Mexico and 27 countries of the European Union.

In Mexico, pursuant to Article 133 of the Constitution and according to the latest non-binding decisions of the Supreme Court of Justice with regard to the normative hierarchy of international treaties, the Convention shall apply in all federal and local courts.

The United States of America signed the Convention in 2009 and recently Singapore has also signed it; however, neither of them have ratified the Convention.

As to the provisions of the Convention that refer to the prevalence of domestic legislation, the Federal Civil Procedure Code and the Commercial Code shall continue to be applicable. The Convention will not change the recognition and exequatur proceedings that Mexican courts have been applying for almost thirty

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years, nor will it change the formal requirements of letters rogatory and foreign documents.

Although the Convention has a minor impact vis-à-vis the current requirements for recognition of choice of forum and process for the recognition and enforcement of foreign judgements setting forth in Mexican laws and regulations, by being a Contracting State of the Convention, Mexico conveys its commitment to openness and confidence to foreign business and investors. The Convention brings legal certainty to international disputes involving Mexican parties, and ensures that international investors will have a suitable jurisdiction, such in which to resolve conflict or enforce judgments.

Now that the Convention is in effect, the remaining signatory countries are in the process of ratifying the Convention. The United States must first resolve internal legal and political obstacles in order to sign the Convention.

Mexico has signed three other international treaties related to the recognition and enforcement of foreign judgments:

- the Inter American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention) in 1979,
- the Inter American Convention on Jurisdiction in the International Sphere for the Validity of Foreign Judgements (La Paz Convention) in 1984 and
- the Bilateral Convention between Mexico and Spain on the Recognition and Enforcement of Judgements and Arbitral Awards in Civil and Commercial matters in 1989.

To date, the only treaty that conflicts with the Convention is the Bilateral Convention between Mexico and Spain, particularly with regard to the competency of a court to enforce a judgement. Pursuant to Article 30 (2. and 3.) of the Vienna Convention on the Law of Treaties (1969) and Article 26 (2.) of the Convention, *prima facie,* as to Mexico and Spain only, the Bilateral Convention between Mexico and Spain should prevail over the later signed treaties.

The Convention is meant to create a world-wide set of rules that unify the main principles of choice of law litigation, and more specifically the choice of jurisdiction, recognition and enforcement of judgments.

When acceding to the Convention, Mexico did not make any reservations (called "Declarations" in the Convention) to any provision. Conversely, the European Union made a Declaration to avoid the application of the Convention in cases where the subject matter relates to an insurance contract, arguing that the Convention will not protect certain policyholders, insured parties and beneficiaries that are already protected by EU regulations. However, the Declaration itself excludes reinsurance contracts and certain other insurance contracts where the insured is not deemed to require special protection.

The benefits of the Convention include its international impact on trade; the consolidation of best practices of international law; and deeper and wider judicial cooperation between national judiciaries, independent lawyers and legal institutions to use and promote the Convention.

An essential aspect of the Convention is its universal outreach. The Convention is meant to create a world-wide set of rules that unify the main principles of choice of law litigation, and more specifically the choice of jurisdiction, recognition and enforcement of judgments. Now that the Convention is in effect, the remaining signatory countries are in the process of ratifying the Convention. The United States must first resolve internal legal and political obstacles in order to sign the

Other countries such as Russia, China, Australia and Canada are actively considering becoming contracting states.

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Convention. In the case of Singapore, the most recent country to sign the Convention, it will most likely take advantage of the momentum and ratify the Convention supporting its reputation as a leading jurisdiction for international dispute resolution and promoting the growing prestige of its courts. Other countries such as Russia, China, Australia and Canada are actively considering becoming contracting states. The Hague Conference for Private International Law is making significant efforts to promote the Convention and have more countries to become Contracting States.

The Convention will also support international judicial cooperation, ensuring that judiciaries of the contracting states assume basic principles of collaboration which go further than the traditional exhort or letter rogatory. For example, Article 23 of the Convention provides that when interpreting the Convention, the courts shall consider the Convention's international character and goals in promoting uniformity in its application.

In Mexico, pursuant to Article 133 of the Constitution and according to the latest non-binding decisions of the Supreme Court of Justice with regard to the normative hierarchy of international treaties, the Convention shall apply in all federal and local courts.

Finally, European and Mexican lawyers, legal academics, lawyer's societies and bars have played a key role in developing the Convention, as well as fostering its application and promotion as an outstanding achievement in International Private Law.

Sources and Notes

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Denmark, being the only exception on the grounds of Protocol 22 on the Treaty on European Union and the Treaty on the Functioning of the European Union.

Convention on Choice of Court Agreements (2005), Hague Conference on Private International Law, prologue.

In the XIX session of the Hague Conference on Private International Law, in 1992, the United States led the negotiate an agreement on international recognition and enforcement of judgments. Two drafts were approved, in 1999 and in 2001, but in 2003, the approach of the discussions turned to the design of an instrument to recognize the exclusive choice of court agreements.

Pursuant to Article 31 (1) of the Convention.

Singapore signed the Hague Convention of 30 June 2005 on Choice of Court Agreements on 25 March 2015.

Suprema Corte de Justicia de la Nación, [TA]; 9a. Época; Pleno; S.J.F. y su Gaceta; Tomo X, Noviembre de 1999; Pág. 46. P. LXXVII/99.

In the Federal Civil Procedure Code provisions are located in Book Fourth and in Chapter 27 of the Commercial Code. Local regulation of states shall apply in civil disputes that are not subject to any international treaty on recognition and enforcement of judgments.

Decreto en el que se reforman, adicionan y derogan diversos artículos del Código Federal de Procedimientos Civiles, DIARIO OFICIAL DE LA FEDERACIÓN, Tuesday January 12, 1988.

Section 3 of Regulation (EC) 44/2001.

Survey by Prisma Consulting Latin America, http://prismamx.net/pdfs/juiciosorales.pdf.

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Constitutionality of Marijuana Use

Francisco García Bedoy Uribe

It is a historic day for constitutional justice in Mexico. – Justice Arturo Zaldívar Lelo de Larrea

Drug abuse impacts society on multiple levels. For instance, in 2002, the economic costs of drug abuse in the United States alone surpassed the nominal 2014 Gross Domestic Products of Croatia, Guatemala and Uruguay combined. Drug-related violence in Mexico in the past decade is estimated to have left more civilian deaths than the wars in Afghanistan and Iraq. In the United Kingdom, drug overdose related deaths exceed those from road accidents. Globally, cannabis/marijuana is the world's most used illicit substance, with an estimated 224 million users. Contrary to popular belief, it is at the root of the vast majority of drug-related offences.

Mexico's drug-related concerns arose in the 1980's with emergence of the first "cartels". Since then, the country has expended over 320 billion pesos to combat marijuana-related crime. Cannabis, the most trafficked and consumed illegal substance, is the primary onset drug for 89.8% of male patients at youth rehabilitation centers in Mexico.

Against this background, the decision by Mexico's Supreme Court of Justice to open its doors fully to confront the problem is no surprise. The Court's November 4, 2015 decision, by its First Chamber, arises in its review of *amparo* proceeding 237/2014. The Court held the absolute prohibition of cannabis consumption to be "unconstitutional".

The case arose from the request of four individuals to COFEPRIS (Mexico's Federal Commission for Protection Against Health Risks) for authorization to use marijuana "personally" and "regularly" for leisure and recreational proposes:

- Josefina Ricaño Nava, founder and current president of *México Unido Contra la Delincuencia* (Mexico United Against Delinquency);
- Armando Santacruz González, director of Pochteca Group, a chemical company listed on the Mexican Stock Exchange (BMV);
- Juan Francisco Torres Landa, Secretary General of *México Unido Contra la Delincuencia* and a prominent Mexican lawyer [*editor's note*: and a former co-chair of the Mexico Committee of the American Bar Association's Section of International Law]; and,
- José Pablo Girault Ruiz, a high profile leader of the venerable Rafael Dondé Foundation and treasurer of *México Unido Contra la Delincuencia*.

They sought approval to perform activities related to cannabis consumption, including planting, harvest, growing, preparation, possession and transport, but excluding "commercial transactions". The request was refused. Thereafter, they brought an *amparo indirecto* proceeding, which the courts consistently denied until their plea reached the First Chamber of Mexico's Supreme Court.

The Court, led by Justice Arturo Zaldívar, declared that adults have a fundamental right to decide the type of recreational or leisure activities they wish to perform. The Court ruled that such a right cannot be limited in contradiction of objectives protected by Mexico's Constitution, such as health and public order.

Following the Court's ruling, is cannabis now legal? Not exactly. In Mexico's legal system, the Court's *amparo* ruling directly benefits only the four petitioners. Nonetheless, the ruling implies fundamental change. Four further such rulings by the Supreme Court without interruption by a contrary ruling will establish precedent binding on all of Mexico's court. In the meantime, the ruling may inspire other courts to follow its reasoning.

Amparo 237/2014 reflects the challenges facing a rapidly changing Mexican society. As the 21st century advances, Mexico is increasingly embracing human rights and their articulation in international treaties. Consistent with this embrace, our lawyers must advocate for the common good and true human development, never forgetting or denying all the values intrinsic to the person. Only time will tell if the Court's decision is a decisive contribution for the betterment of the Mexican people or simply a favorable ruling obtained at the instance a few articulate professionals. It would be a pity if the case comes to be understood merely as a maneuver by *México Unido Contra la Delincuencia* motivated by its frustration at the Sisyphean aspects of its efforts to serve the downtrodden.

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Missing Students and the Tragedy of Ayotzinapa: Human Rights Mechanisms in Action

Karla Gudiño Yáñez

Ayotzinapa is a small village located in Guerrero, a vast Mexican State, where a rich culture coexists with high rates of poverty[1] and illiteracy,[2] and also with an increasing, protracted presence of organized crime.[3] True to its name (Guerrero means warrior in Spanish),[4] the State has also a history of strong social movements steeped in its rugged mountains. Ayotzinapa is home to *Raúl Isidro Burgos* Normal Rural School, one of the few of its kind remaining in Mexico, which educates young students –mostly from peasant families, as elementary school teachers who will work in rural communities.

On September 26, 2014, about one hundred Ayotzinapa students travelled 150 miles to Iguala City, aiming to gather funds for their school activities. In order to get there, the students commandeered a number of buses for their trip.

That night, for reasons still unknown, the local police of Iguala and of the neighboring municipality of Cocula opened fire on the students and arrested an unknown number. Six persons died, others were injured and forty-three students remain missing. Some of the students were last seen aboard local police cars. As of today, there are no clear answers on the students' whereabouts, what happened to them, and who is responsible for their disappearance.

Federal authorities took over the investigation, and last January 2015, Attorney General Jesús Murillo Karam publically announced what he called "a historic truth," based on testimonies, confessions and forensic reports. He stated that the students had been "deprived of their liberty, deprived of their lives, incinerated and their ashes thrown to the river."[5] The Government attributed this to organized crime and with this statement, deemed the investigations concluded, pending the capture of the remaining fugitives and to ultimately prosecute those indicted. Nonetheless, the victims' families, along with a larger part of Mexican society, have disputed this version, and recent developments have proven their concerns well founded.

As a Party to the Organization of American States (OAS) Charter and the Pact of San José, Mexico has subjected itself to the jurisdiction of the Inter-American Commission on Human Rights (IACHR). Based on the an agreement between Mexico and the families of the missing students to allow the IACHR to investigate the Ayotzinapa disappearances, the IACHR designated an Interdisciplinary Group of Independent Experts (IGIE) to conduct a technical analysis of the police actions undertaken by Mexico in relation to the Ayotzinapa case.

After six months of work, on September 6, 2015, the IGIE published its (non-binding) report, including some noteworthy conclusions contesting the government's official version of events.[6] The most relevant conclusions are as follows:

There is clear evidence of enforced disappearances which contradicts the prosecutor's characterization of the events as kidnappings and killings by criminal gangs.

1. There is clear evidence of enforced disappearances which contradicts the prosecutor's characterization of the events as kidnappings and killings by criminal gangs. The IGIE found it likely that there was State participation in the disappearances, which has grave implications for Mexico under international law, including specific human rights treaties that Mexico has ratified.[7]

2. The IGIE further found that Mexico has clear responsibility for the actions and omissions of State agents in all level of government who engaged in misconduct during the investigation, including delay in investigating the disappearances, the failure to protect the students, the active participation in the shooting of the student, the inadequate handling of evidence and the complete disregard of proof.

3. The IGIE questioned the government's explanations, given the excessive degree of violence perpetrated against the students, and the coordination required to

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perpetrate the crimes.

3. The impossibility of incineration of the remains, as was concluded in the official version, based on forensic evidence analyzed by the IGIE.

The IACHR depends on the cooperation of member states. Thus, it is compelling that the IGIE reached its conclusions as to State culpability in the disappearances based on the evidence provided it by the Mexican government. Indeed, the IGIE used the same sources as the Mexican authorities that originally investigated the case, but came to very difference conclusions.

In addition to their implications for State responsibility or how they affect public opinion, these findings directly impact prosecutions already ongoing in this case. If a detainee is wrongfully accused or if the accusation is based on questionable evidence, he or she should be released and ultimately absolved according to Mexican (and international) law.

The IGIE recommended that it be given additional authority to investigate the disappearances, and its mandate was extended until April 30, 2016. Over the next few month, the IGIE will interview military personnel, and the Mexican authorities have declared their willingness to cooperate with the IGIE in all aspects of its investigation. The day after the report was published, President Enrique Peña Nieto gathered with the students' families and announced the creation of a special agency dedicated to the search of missing persons.

The IGIE's involvement in the Ayotzinapa investigation is a watershed moment for human rights law, as international human rights treaties are having a real impact on the domestic investigation of human rights abuses. In developing countries, most human rights investigations are of a *macro* nature--limited to the rhetoric of condemning, regretting, recommending or urging, but very far from *micro* investigations into the day-to-day reality of abuse, and have been mostly ineffective when faced with State power.

Since 2009, Mexico has increasingly accepted the jurisdiction of the Inter-American Court of Human Rights' compulsory decisions; but the IGIE investigation into the Ayotzinapa disappearances is unprecedented under Mexico law. It is an example of how international human rights can have a real impact on domestic law. I cannot think of a previous domestic case in which soft law had been such a protagonist. The IGIE's non-binding investigation is already influencing the government's actions, decisions and attitudes; it has offered the victims' families a valid alternative in seeking answers for the disappearance. Above all, the IGIE is helping to find the truth, without which there cannot be justice.

The IGIE questioned the government's explanations, given the excessive degree of violence perpetrated against the students....

[1] According to the National Council for the Social Development Policy Evaluation (CONEVAL), in 2014, 65.2% of Guerrero's population lived in poverty. http://www.coneval.gob.mx/coordinacion/entidades/Guerrero/Paginas/pobreza-2014.aspx, consulted on November 2, 2015.

[2] Guerrero has the second highest rate of illiteracy in Mexico, according to the National Institute of Statistics, Geography and Informatics (INEGI). http://www.inegi.org.mx/est/contenidos/espanol/sistemas/perspectivas/perspectiva-gro.pdf, consulted November 2, 2015.

[3] Last year, federal authorities declared that Guerrero is the state with greatest presence of drug cartels. http://www.excelsior.com.mx/nacional/2014/09/16/981925, consulted November 2, 2015.

[4] The State is named after Vicente Guerrero (Guerrero translates literally as Warrior), a celebrated leader of Mexican independence who was also President.

[5] Final report on Ayotzinapa case, presented by the General Attorney on January 27, 2015, page 58. http://www.presidencia.gob.mx/reporte-final-sobre-el-caso-ayotzinapa/, consulted on November 3, 2015.

[6] The full report is available at www.oas.org/en/iachr/activities / giei.asp.

[7] Specifically, the Inter-American Convention on Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance.

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Gay Marriage

Susan Burns

Several states Mexican states have declared that bans on same-sex marriage were unconstitutional. Same-sex marriage has been permitted by courts in states such as Baja California and Chihuahua. It was permitted in Quintana Roo, after advocates pointed out that the civil code on marriage did not specify that couples had to be one man and one woman. Coahuila and Mexico City (D.F.) legalized gay marriage.

The Court reasoned: "As the purpose of matrimony is not procreation, there is no justified reason that the matrimonial union be heterosexual, nor that it be stated as between only a man and only a woman."

Mexico City's law was upheld by the Supreme Court (SCJN) in 2010 and the Court ruled that other states were required to recognize marriages performed in D.F. The Court has steadily agreed that marriage laws prohibiting gay marriage were discriminatory, relying on international decisions and anti-discrimination treaties to which Mexico is a signatory.

The first gay couple married in Baja California in the beginning of 2015 after a protracted legal battle and numerous failed attempts, ultimately requiring intervention of the Supreme Court. Then in April, a similar decision was reached in response to a petition submitted by a gay couple from Sinaloa, where state laws prevented them from marrying. In that case, the Supreme Court said:

"The contested provisions are clearly discriminatory because the relationships in which homosexual couples engage can fit perfectly into the actual fundamentals of marriage and living together and raising a family."

"For all of those relevant effects, homosexual couples can find themselves in an equivalent situation to heterosexual couples, in such a way that their exclusion from both institutions is totally unjustified."

In June, the Court expanded further on its rulings and decreed that any state law restricting marriage to heterosexuals is discriminatory. In other words all bans on same-sex marriage were unconstitutional, a major turning point because it effectively legalized gay marriage.

The Court reasoned: "As the purpose of matrimony is not procreation, there is no justified reason that the matrimonial union be heterosexual, nor that it be stated as between only a man and only a woman." Adding further that, "Such a statement turns out to be discriminatory in its mere expression."

Most recently, on November 25, 2015, Mexico's Supreme Court struck down a law banning gay marriage in the state of Jalisco in response to petitions by two gay couples challenging an article in Jalisco's civil code after their marriage applications were denied by the state's civil registry. Although injunctions had previously been granted on this same-sex marriage ban, the state congress and civil registry filed a petition of review to request a reversal. The Court ruled that the article in question discriminated against LGBTI people and, therefore, was unconstitutional.

Still, Chihuahua, Coahuila and Quintana Roo (and the Federal District) are the only states out of the 31 in Mexico to recognize gay marriage. And, same-sex marriage has not been specifically written into law. Accordingly, same-sex couples may still require a judge's approval before being wed if the states or municipalities continue to attempt to ban such unions, in spite of the Supreme Court's very clear decisions that same-sex marriages are constitutionally permitted in Mexico.

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Mexican Energy Reform: Temporary Import of Offshore Oil Rigs

Sergio Sánchez and Francisco J Cortina

The reforms to Mexico's energy sector are prompting international companies to become more involved in Mexico's oil and natural gas sector, creating a need to import industry-specific products such as oil rigs. This article addresses the complex regulatory structure that international companies face when importing off shore oil rigs to Mexico on a temporary basis.

Mexican law does not clearly distinguish between import of offshore oil rigs used on a temporary basis and the import of such equipment for installation in a more permanent fashion. However, Mexican customs regulations distinguish between fixed offshore platforms, and floating, semi-submersible and submersible drilling and exploration platforms. The ambiguity associated with lack of a clear statutory foundation for the regulatory distinction could serve as a disincentive to invest in Mexico, and ultimately a source of price increases in the absence of competitive investment.

Most new oil rigs will be imported into Mexico on a temporary basis. The purpose of these temporary imports will be to fulfill short term drilling agreements,

While not specifically defined in the statute, off-shore oilrigs are generally considered "special vessels and naval artifacts," which would allow them to be imported up to ten years.

and will require the importers to return the rigs to their country of origin in the same conditions in which they were originally imported. The heavy import taxes make permanent importation of the rigs prohibitively expensive.

Three statutes govern te temporary import of oil rigs: Mexico's Customs Law, the Regulations of Customs Law, and the Mexican General Rules on Foreign Trade. Mexico's Customs Law defines a temporary import as the entry of goods to stay for a limited time, with a specific purpose, and the good must be returned to its country of origin in the same condition as it was imported.

Mexico's Customs Law authorizes the temporary import, for up to ten years, of vessels engaged in the transport of passengers, cargo, commercial fishing, and special vessels. While not specifically defined in the statute, offshore oilrigs are generally considered "special vessels and naval artifacts," which would allow them to be imported up to ten years. However, other portions of Mexico's Customs Law conflict with this interpretation, as any item not part of the description of a special vessel or naval artifact may only be imported for up to six months.

Notwithstanding the forgoing, Mexico's General Rules on Foreign Trade allow for import of goods for the duration of the agreement under which the good was imported. However, the good must be returned to its country of origin upon the expiration of the contract.

This lack of clarity in the law could serve as a disincentive to invest in Mexico, and ultimately could result in price increases as fewer foreign investors would be able to invest in Mexico.

Likewise, the Customs Law also requires that temporarily imported goods be returned abroad based on the original import schedule. If the good is not returned abroad, it is considered to be "illegally" in the country. Companies that "illegally" keep temporary goods in Mexico face high tax liabilities, and risk seizure of the goods. While the Mexican General Rules on Foreign Trade include offshore oil rigs in the definition of drilling and exploration platforms, this set of regulations is subject to interpretation, as it applies different standards on goods that can be used for the same purpose.

Most troubling for companies considering to import temporary oil rigs is Rule 4.2.11 of the Mexican General Rules on Foreign Trade, which allows the temporary import of floating, semi-submersible or submersible oil rigs as special and naval artifacts as classified in Chapter 89 of the Mexican Tariff Schedule of the General

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Import and Export Tax Laws (the "Tariff Schedule").

Chapter 89 of the Tariff Schedule relates to "vessels and other floating structures." Chapter 89.05 lists "lighthouse boats, pump boats, dredgers, pontoon cranes and other ships where navigation is secondary to the main function of the vessel; floating or submersible floating docks, and drilling or exploitation platforms." Subheading 80.05.20 also includes floating or submersible platforms for drilling or exploitation.

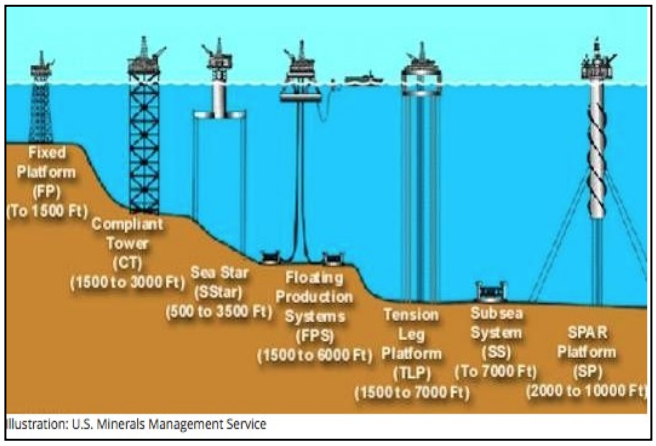
Additionally, temporary oil rigs already in use may be subject to fines and surcharges, including the payment of a value added tax based on the value of the oil rig….

Chapter 84 of the Tariff Schedule relates to "nuclear reactors, boilers, machinery, and mechanical appliances, parts of these machines or apparatus." Heading 84.67 relates to "electric or manual use hydraulic or built-in engine pneumatic tools." This section includes subheadings relating to divers and drills.

The distinction between offshore oilrigs could result in making some oilrigs subject to the six month or length of the contract import rule, while others would be allowed to stay for 10 years.

Analyzing chapters 84 and 89 together, it is clear that the Tariff Schedule distinguishes between fixed rigs in Chapter 84 and floating or submersible vessel-platforms for drilling or exploration. These differences impact the application of Rule 4.2.11 of the Mexican General Rules on Foreign Trade on the temporary import of oil rigs as fixed offshore oil rigs are not considered floating or submersible platforms as defined in Chapter 89. Mexican tax authorities have not yet issued a definitive ruling on whether fixed platform offshore oil rigs fall under the definition found in Chapter 89, notwithstanding that they are used for the same purpose as floating and submersible oil rights—offshore oil perforation and exploration. If the tax authorities find that the temporary oil rigs do not qualify as floating or submersible oil rigs under Rule 4.2.11, they will not qualify for ten year entry and stay in Mexico.

The illustration below shows the different types of offshore oil rigs and platforms.



The distinction between offshore oil rigs could result in making some oilrigs subject to the six month or length of the contract import rule, while others would be allowed to stay for 10 years. This will certainly generate uncertainty for foreign importers of oil rigs as there is no clear definition of oil rig under any of the related Mexican statutes. Additionally, temporary oil rigs already in use may be subject to fines and surcharges, including the payment of a value added tax based on the value of the oil rig, and oil rigs outside of the six month limit would be subject to seizure, causing massive disruptions to contracts and decreasing oil production in Mexico.

To eliminate market uncertainty related to the import of oil rigs, Rule 4.2.11 should be expanded to include all offshore oil rigs, eliminating the distinction between fixed platform rigs and floating and submersible rigs. Moreover, Chapters 84 and 89 of the Tariff Schedule should be harmonized between offshore and onshore oil rigs.

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US Legal Ethics and Disciplinary Sanctions: Mexican Perspectives

Romina Guarneros Galaz
Fernanda Ambrosio Agraz

In Mexico, the *Barra Mexicana de Abogados* ("BMA") is a leading association of Mexican lawyers. This association, although not affiliated with the American Bar Association ("ABA"), shares many of the ABA's goals and objectives. Specifically, it shares with the ABA an understanding of the importance of imposition of disciplinary sanctions on lawyers who do not meet their ethical requirements, and on the importance of the continuing need for legal education.

On November 4, 2015, the BMA, as part of its ongoing efforts to promote these two goals, invited Flory Ore and Borchien Lai, Vice-Consuls of the American Consulate in Guadalajara, Mexico, to give a lecture on legal ethics to the members of the bar in Guadalajara.

Structure of the conference

The conference, among other things, addressed four major aspects of legal ethics:

- the importance of the profession of the attorney,
- compulsory membership to state bars in the US,
- the Multistate Professional Responsibility Examination, and
- the types of sanctions imposed on the lawyers who breach the codes of conduct of the various bars.

Role of the Attorney

Ms. Ore and Mr. Lai first discussed the fundamental role lawyers play in society. Attorneys defend the innocent, prepare contracts, and serve as mediators in disputes, among other things. Nevertheless, the legal profession is often times besmirched when a few lawyers choose to violate their professional ethics. Given the important role of lawyers, it is therefore fundamental that attorneys follow their professional code of ethics in their dealings.

Lawyers have three basic types of obligations: those to the public in general, given their role as representatives of the public within the courts; those to their clients, since they defend their client's rights; and those to the profession, since an attorney's conduct impacts the reputation of all lawyers in general.

State bars

Ms. Ore and Mr. Lai next discussed the important role that the state bars play in regulating the legal profession in the United States. The speakers used the American Bar Association ("ABA") and the State Bar of California ("Calbar") as the two examples of bars that impact and regulate the legal profession. They pointed out that the ABA has the highest number of members in the US, and the Calbar is bar that the speakers were most familiar with.

Lawyers have three basic types of obligations:

- **those to the public in general, given their role as representatives of the public within the courts;**
- **those to their clients, since they defend their client's rights; and**
- **those to the profession, since an attorney's conduct impacts the reputation of all lawyers in general.**

One of the bars' principal duties is to ensure lawyer's compliance with ethical principles. In order to accomplish that, the bars have developed sets of rules regarding ethical matters, such as the ABA's Model Rules of Professional Conduct. The ethical rules are mandatory and their disregard has harsh consequences for attorneys.

Multistate Professional Responsibility Examination ("MPRE")

The MPRE is a multiple-choice examination required for admission to almost all bars within the United States. The speakers stated that the purpose of the MPRE is to measure the knowledge and understanding of standards related to the legal professional. During the lecture the speakers gave two examples of the types of questions asked in the MPRE and guests were asked to answer

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them. By doing this exercise, guests understood how sometimes deciding what to do in a particular situation is not always clear, which is why lawyers must always think about the consequences of their actions and act according to the rules of ethics.

Sanctions

It is unfortunate that bars have to use sanctions in order to have their members comply with ethical rules. However, these sanctions have proven necessary to prevent lawyers from acting unethically when facing difficult situations.

The nature of sanctions depends on the level of attorney misconduct. Some of the most common sanctions imposed include: disbarment, which terminates the individual's status as a lawyer; suspensions, meaning the removal of an attorney from the practice of law for a specific period of time; reprimand, which is a sanction that pronounces the conduct of the lawyer as improper; and probation, which allows an advocate to practice law under specified conditions.

Unlike the United States, in Mexico, membership in a bar organization is not mandatory. Nevertheless, several attempts to implement compulsory membership have been made.

Importance of Legal Ethics

Attorneys must balance their legitimate aspirations to earn a living with their obligations to the legal profession. Lawyers must combine. Therefore professional legal ethics are frequently established in codes of conduct and professional responsibility rules. Those codes and rules establish obligations for moral conduct that are used as a guide attorneys in their practice and to advance the objectives of the profession. A lawyer's responsibility is not just to himself or his client, but to the profession as well. Therefore, it is imperative that attorneys behave according to the ethical principles established by their respective bars.

Compulsory Membership

Unlike the United States, in Mexico, membership in a bar organization is not mandatory. Nevertheless, several attempts to implement compulsory membership have been made.

There have been two major federal bills:

- the General Act on Professional Practice Subject to Compulsory Membership and Certification (*Ley General del Ejercicio Profesional Sujeto a Colegiación y Certificación Obligatorias*) and
- the Initiative to Reform Articles 5, 28 and 73 of the Mexican Constitution regarding Compulsory Membership and Certification (*Decreto por el que se reforman los artículos 5°, 28 y 73 en materia de Colegiación y Certificación Obligatorias*).

Unfortunately, the discussion of these bills has been postponed due to the complexity of the implementation of such requirements in the Mexican legal system. Mandatory bar membership, however, will happen some day in Mexico, and its implementation of standard legal ethics will help elevate the profession, avoid abuse, and sanction misconduct. Mexico, like the United States, will have a compulsory bar system of which to be proud.

Mandatory bar membership, however, will happen some day in Mexico, and its implementation of standard legal ethics will help elevate the profession, avoid abuse, and sanction misconduct.

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Implications of *Tesis de Jurisprudencia* 33/2015: Right to Work

Gil Anav and Jorge García Peralta

On September 25, 2015, the full Mexican Supreme Court issued a *tesis de jurisprudencia*[1] by unanimous vote with significant implications for the constitutional right to work set forth in article 5 of Mexico's Constitution.

The five cases decided simultaneously in order to create this *jurisprudencia*, constituting binding new case law, were brought by elementary and high school teachers challenging the provisions of the *Ley General del Servicio Profesional Docente* (General Law on the Professional Teaching Service) that require them to undergo competency testing. If the teachers fail to pass the test after three chances, they are either to lose their jobs or be reassigned to other duties.

[T]he door appears to be open for the imposition of mandatory testing and bar association membership as a condition for being able to practice law.

The law at issue was adopted in September 2013 as part of President Peña Nieto's much heralded and highly controversial educational reforms. Large parts of Mexico's powerful teachers' unions vociferously opposed these reforms, objecting both to the threat to their members' jobs and to losing the control that the unions had long exercised over teacher hiring and promotion.

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The teachers filed *amparo* (writ) proceedings challenging the constitutionality of the testing provisions on the ground that such provisions violated their right to work declared in Article 5 of the federal Constitution, reasoning that once they had been hired as teachers, their right to continue working could not be conditioned on their obtaining a certain score on an exam.

In *Jurisprudencia* 33/2015, the Supreme Court disagreed with the teachers' position. The Court based its reasoning on a *jurisprudencia* created in 1999 to the effect that the constitutional right to work is not absolute, but rather can be limited when the work is illicit, when it affects the legitimate rights of third parties or when it affects the rights of society in general. Reasoning that society in general had a right to ensure that teachers were qualified to perform the important educational duties assigned to them and noting that that right was implicated in articles 3 and 4 of the Constitution, the Court concluded that society's general right to quality education was superior to the teachers' right to continue to work as teachers regardless of their performance on competency exams.

Society's general right to quality education was superior to the teachers' right to work as teachers irrespective of their performance on competency exams.

Besides validating a key element of the government's education reforms, this holding also suggests that the Court will not stand in the way of future moves to restrict individuals' right to perform a given job or practice a given profession if they do not meet quality standards. This ruling is far reaching. Most notably for lawyers, the door appears to be open for the imposition of mandatory testing and bar association membership as a condition for being able to practice law.

[1] A *tesis de jurisprudencia* is binding case law created when five uninterrupted decisions come out with the same holding regarding a given point of law.

the constitutional right to work is not absolute, but rather can be limited when the work is illicit, when it affects the legitimate rights of third parties or when it affects the rights of society in general

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Constitutionality of Laws on Education: General Law on the Professional Teaching Service

Yurixhi Gallardo Martínez

Education is fundamental to every country as it generates development, while its absence paralyzes development. In Mexico, recent statistics have forced analysts to look closely at the education challenges facing the country. OECD statistics suggest that notwithstanding improvements in some areas of education, such as the reduced numbers of students failing to meet thresholds of achievement in mathematics, which dropped from 66% in 2003 to 55% in 2012, deterioration in other areas has occurred. Moreover, analysts have found that:

"[s]tudents in Mexico tend to drop out of school prematurely. Only 62% of 16 year olds attend secondary school or higher levels of education; only 35% of 18 years olds attend school (19% attend high school, while 16% are registered in higher education); and only 30 % of youths are registered at education institutions (6% are registered at high schools, while 24% are registered at higher education institutions)."

Students in Mexico tend to drop out of school prematurely. Only 62% of 16 year olds attend secondary school or higher levels of education….

As part of his "Pact for Mexico", President Enrique Peña Nieto has targeted education reform since he assumed office December 1, 2012. The President and the leaders of the three main political parties signed the "Pact for Mexico" in Chapultepec Castle the day after the President assumed office, agreeing to strengthen the National System of Educational Evaluation. As a consequence, an initiative to amend article 3 of the Constitution was presented to Congress, and published in the Official Gazzette, on February 26, 2013. In what was titled the "Education Law", Articles 3 and 73 of the Constitution were amended and new sections added. Despite Congressional opposition, the Education Law passed. The new portions of the Education Law reformed the professional teacher's service, and created a new autonomous constitutional entity known as the National System of Educational Evaluation. On September 11, 2013, additional constitutional amendments reformed the existing General Law on Education (the "LGE"), and the General Law on the Professional Teaching Service ("LGSPD"). These reforms have brought new hope that Mexico's leaders have the political will to institute real changes and bring progress to Mexico's educational system.

As part of his "Pact for Mexico", President Enrique Peña Nieto has made education reform an important part of his agenda ….

Education reform is not without controversy, particularly when it involves teacher evaluations. Article 1 of the LGSPD states that:

"This Law regulates Section III from article 3 of the Mexican United States Constitution, regulates the Teaching Professional Service, and establishes criteria, terms and conditions for the acceptance, promotion, continuity, and recognition in the Service."

The Teachers' Labor Union opposed the new education reforms, bringing twenty-six *amparo* actions (writs) to the Federal District Court based in Puebla. The Teachers' Union challenged the constitutionality of the amendments published on September 11, 2013. The District Court ruled that the September 11, 2013 amendments were constitutional. However, the Teachers' Labor Union sought review by the Supreme Court (the "SCJN"). On May 7, 2014, the SCJN chose to create what is known as "Commission 69", led by Justice José F. Franco-González. Commission 69's mandate was to determine whether articles 52 and 53, as well as transitional articles 8 and 9, of the LGSPD are constitutional.

After a review of Commission 69's findings, the SCJN issued a ruling declaring educational evaluations to be constitutional. Based on the SCJN's ruling, Article 52 of the LGSPD requires evaluations of teachers' performance, and applies to all public elementary, secondary, and higher education teachers. This evaluation shall be conducted at least once every four years. Article 53 of the LGSPD provides that any

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teacher who obtains an unsatisfactory score in the first evaluation shall sign up for a "second-chance evaluation, within a twelve month period after the evaluation provided in Article 52 takes place, and such evaluation shall be performed before the next school year begins."

After a review of Commission 69's findings, the SCJN declared educational evaluations to be constitutional.

Article 8 of the LGSPD provides that teachers whose credentials are terminated by virtue of unsatisfactory scores obtained in the third-chance evaluations contemplated in Article 53, be reassigned to other departments. Whereas transitional Article 9 of the LGSPD, among other provisions, provides that teachers and personnel performing management and supervision functions, who obtain satisfactory scores in the evaluation, will be awarded a definitive credential, such credentials are to be terminated if they refuse to be subject to the corresponding evaluation processes or participate in regularization programs, or if they obtain unsatisfactory scores in third-chance evaluations.

With respect to the portion of the education reform which involves teacher dismissal, the SCJN ruled that the new laws are compatible with international treaties, as well as with the teacher's constitutionally recognized human rights. The SCJN also found that the new education laws do not violate any of the teacher's labor rights, since the goal of the evaluation process is not to deprive a teacher of a source of employment, but rather to assure a high quality education to all students. The SCJN observed:

The SCJN also found that the new education laws do not violate any of the teacher's labor rights, since the goal of evaluation process is not to deprive teachers of a source of employment, but rather to assure a high quality education to all students.

"[F]rom its content it cannot be observed that it forbids teachers from performing the job they choose, but it only establishes as a condition of permanence, that they secure a satisfactory score in the evaluations conducted by the National Institute for the Education Evaluation."

Introduction of Punitive Damages into Mexican Tort Law: Ruling 30/2013 of Mexico's Supreme Court

Marco Antonio Peña Barba

Ruling 30/2013 of Mexico's Supreme Court addresses the issue of punitive or exemplary damages as they have developed in the Mexican legal system, establishing parameters on when to apply punitive damages, and how to determine the appropriate amount of damages. In reaching its decision, the Court examined the consequences of awarding punitive damages, the concepts of individual versus collective liability, wrongfulness, causation, and the right to fair compensation, among other things.

[T]his ruling is a watershed moment in Mexican civil law as Mexico did not previously allow for the imposition of punitive damages.

The underlying facts in the case are tragic. While on holiday at a famous hotel in Mexico, a young man fell into an artificial lake on the property and was electrocuted. He ultimately died, and his family brought a wrongful death action against the hotel based on a theory of negligence, seeking compensation for their loss.

Punitive damages not only aim to compensate the victim, but also serve as a deterrent to harmful conduct, and prevent future illicit behavior.

After winding its way through the court system, the Supreme Court ultimately issued ruling 30/2013, which fundamentally changed the award of damages in Mexico by virtue of establishing the right to punitive damages under Mexican law. Moreover, the Court established when and under what circumstances punitive damages are appropriate, discussed the types of liability and the duty to repair damaged property, quantified the types of compensation available to plaintiffs (i.e. compensatory versus punitive damages), defined present versus future

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damages, found that punitive damages were separate from general liability, and ruled on what causal elements are necessary to establish a claim in tort for punitive damages. While the availability of punitive damages is well established in common law countries, this ruling is a watershed moment in Mexican civil law, as Mexican law did not previously allow for the imposition of punitive damages.

Ruling 30/2013 declares that certain rights are fundamental:

"In a legal system like ours - in which constitutional norms constitute the Supreme Law of the Union, fundamental rights occupy a central position and undisputed as content minimum of all legal relationships that occur in the system...the structure and content of each right will allow us to determine what rights are only enforceable against the State and other rights that may be alleged against multiple parties."

Ruling 30/2013 further establishes that under Mexican law, the right to fair compensation is a human right, based on article 1 of the Constitution and article 63.1 of the American Convention on Human Rights. The ruling finds that any violation of an obligation which results in a harm must be remedied. Punitive damages not only aim to compensate the victim, but also serve as a deterrent to harmful conduct, and prevents future illicit behavior. Indeed, the value of punitive damages as a deterrent is what motivated the Court to accept the doctrine of punitive damages as part of Mexican law.

In Ruling 30/2013, the Court determined that the amount of damages owed by the tort-feasor to the victim should be: (1) sufficient to make him or her whole, and (2) enough to penalize the defendant for his or her reprehensible conduct. The Court found that a victim has a right to punitive damages when considering fair compensation, and that the law disapproves of people who act illegally and rewards individuals who act in conformity with the law. Ruling 30/2013 further reinforced to victims of torts that the legal system is fair, and not biased in favor of big business.

[T]he amount of compensation that is awarded must compensate the victim his damages, but also punish improper behavior, stating that such compensation does not unfairly enrich the victim because it is justified under the right to fair compensation.

The ruling further explains that punitive damages reflect public disapproval. If punitive damages were limited, tort-feasors would be enriched *vis-à-vis* their victims as they would lack any meaningful incentive to avoid negligent conduct as the cost of compensatory damages is relatively minimal. Indeed, the lack of punitive damages creates a negative incentive and avoids prevention of future harm. The ruling also further fosters a culture of responsibility in which negligence or a lack of due care has a real cost in the form of actual and exemplary damages.

The ruling also further fosters a culture of responsibility in which negligence or a lack of due care has a real cost in the form of actual and exemplary damages.

In addition, the lack of punitive damages causes additional suffering to the victim, who often feels ignored, and that his or her hopes for justice, in the form of compensation, is being mocked at by the authorities. This has the effect of re-victimizing the victim, and violates his or her fundamental right to fair compensation.

Ruling 30/2013 further establishes that under Mexican law, the right to fair compensation is a human right, based on article 1 of the Constitution and article 63.1 of the American Convention on Human Rights.

The Supreme Court found that the right to punitive damages derives from Article 1916 of the Federal Civil Code, which declares the concept that reparation through cash compensation is a matter for the court to decide when taking into account the rights of the injured party, the degree of culpability of the parties, the economic situation of the defendant, and all

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other circumstances of the case. Indeed, the Court found that it not only consider what it can do to erase the damage suffered by the victim, but must also weigh the aggravating factors to the "quantum" of compensation, and allow the court to rate the degree of responsibility when evaluating who caused the damage.

The Court also based its decision to recognize punitive damages in tort on the legislative history that gave rise to the reforms of December 31, 1982 to the Federal Civil Code, which specifically states in part:

"because civil compensation not only restores the affected individual and punishes the guilty, but also strengthens the value of fundamental human respect to collective life."

The Court concluded that the amount of compensation that is awarded must compensate the victim his damages, but also punish improper behavior, stating that such compensation does not unfairly enrich the victim because it is justified under the right to fair compensation.

Ruling 30/2013 also establishes parameters on the degree of responsibility of injury, based on a concept of slight, medium or severe involvement. The court will then look at the quantitative aspect of punitive damages. The court will determine and identify the degree of responsibility of each tort-feasor, be it slight, medium or severe, when considering the corresponding amount of compensation. The greater the culpability, then the greater the compensation. Additionally, the number of people who were affected by the negligent acts, and whether the acts qualify as aggravated malice, bad faith, were intentional, or merely grossly negligent, are all factors for the court to determine. Likewise, the value that punitive damages will have on society in order to create a culture of greater responsibility will also be a factor. The court will also look at the responsible party's ability to pay as part of its evaluation to dissuade the person from committing similar acts in the future.

The Court further found article 1916 of the Civil Code unconstitutional because it instructs the court to consider the economic situation of the victim when determining of the amount of punitive damage. The court found that basing punitive damages on the financial capacity of the victim violates the right to equality as the victim's financial capacity should not be the basis of punitive damages, particularly in cases like this one which based on the loss of a child.

The court found that basing punitive damages on the financial capacity of the victim violates the right to equality….

It is important to note that Justice José Ramón Cossio criticized the introduction of punitive damages into the law, without establishing the elements to be taken into account by the court. Additionally, since no limit on punitive damages was established, the court has granted a tremendous amount of discretion to the lower courts without providing them necessary guidance. Additionally, the concurring opinion questioned whether punitive damages would apply any time the court found despicable conduct, or only when the degree of malice is high. This appears to question what opens the door to punitive damages because the ruling did not provide a real foundation for the imposition of punitive damages.

The court will also look at the responsible party's ability to pay as part of its evaluation to dissuade the person from committing similar acts in the future.

Justice Cossío has planted doubt on what justifies a large award for punitive damages, which will surely lead to further litigation and review by the highest court.

In Mexico, following ruling 30/2013, punitive damages are now part of Mexican law, and the court has the discretion to determine fair compensation. However, Justice Cossío has planted doubt on what justifies a large award for punitive damages, which will surely lead to further litigation and review by the highest court. What is clear, however, is that Mexico is committed to strengthening a culture that promotes the duty of care, and creates disincentives to negligent and malicious conduct.

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American Bar Association
Section of International Law

Mexico Committee©

The American Bar Association Section of International Law held its annual Fall Meeting in Montreal, Canada this year from October 20 to 24, 2015. At the Annual meeting, the General Committee of the International Law Section approved the formation of the San Diego/Tijuana City Chapter. Congratulations! The new chapter's first initiative will be an event at the ABA Mid-Year Meeting, held in San Diego February 6-9, 2016 at the Manchester Grand Hyatt!

The Mexico Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Mexico and Mexican law, who are fellow American Bar Association members.

The Mexico Committee welcomes any suggestions, ideas or contributions to enhance this periodic publication. The **current submittal deadline** for **contributions** to the **next issue** is **February 15, 2016**, but please do not wait until the deadline. Rather, be in touch now with any member of our Editorial Committee with your offer of help, be it as an editor or a contributor. We can offer topic suggestions and provide translation and editing as needed.

If you are interested in participating actively with the Committee and in joining its steering group, please contact any member of the Committee leadership.

Mexico Committee WEBSITE:

http://apps.americanbar.org/dch/committee.cfm?com=IC845000

From left to right: **Rodrigo Lazo**, **Fernanda Ambrosio Agraz**, **Borchian Lai** and **Flory Ore** (vice consuls of the USA in Mexico), and **Rubén Darío Gómez Arnaiz** and **Romina Guarneros** (members of the MEXICO UPDATE editorial team in the Facultad de Derecho, Guadalajara campus) at the event of the *Barra Mexicana de Abogados* reported on page 14 of this issue of MEXICO UPDATE in the contribution *US Legal Ethics and Disciplinary Sanctions: Mexican Perspectives*.