2006

Mexican Law

Michael W. Gordon
University of Florida Levin College of Law

MEXICAN LAW

By Stephen Zamorra, Jose Ramon Cossio, Leonel Pereznieto, Jose Roldan-Xopa, and David Lopez*
Oxford: Oxford University Press, Inc., 2005. 712 pp.

Reviewed by Michael Wallace Gordon**

During the past forty years, little attention has been given to what I have consistently believed was a demand for scholarly writings on the Mexican legal system in English. When the University of Houston began the first summer law program in Mexico (Cuernavaca) in the 1960s, followed by one by the University of Florida in Mexico City in 1971, nothing existed in English that was useful enough for an introductory course on the Mexican Legal System.[1] Professor James Herget of the University of Houston and Lic. Jorge Camil, a highly respected attorney in Mexico City, wrote *An Introduction to the Mexican Legal System* in 1978.[2] Less than 100 pages of text, it was helpful, but insufficient as a text for a course on Mexican law. There were few such courses in U.S. law schools outside of those offered in summer law programs in Mexico.[3] In fact, there was more information available for a course on doing business in Mexico than on the Mexican legal system. In 1972, an American attorney practicing in Mexico City, Alexander Hoagland, produced a guide on *Company Formation in Mexico* that proved useful for such a course.[4] One may appropriately argue, however, that a course on doing business in any

---

* Stephen Zamora is a Professor of Law and former Dean of the University of Houston Law Center. José Ramón Cosío is a Justice of the Mexican Supreme Court. Leonel Pereznieto is a Professor of Law at the National Autonomous University of Mexico. Jose Roldan-Xopa is a Professor of Law and Director of the Master's Programme in Administrative and Regulatory Law of the Instituto Tecnológico Auotónomo de México. David Lopez was a Professor of Law at St. Mary's University School of Law in San Antonio, Texas from 1993-2001.

** John H. & Mary Lou Dasburg Professor of Law, University of Florida, Levin College of Law.

1. The author of this review directed the University of Florida program, located in Mexico City, from 1971 through 1981. The University of Houston program was held in Cuernavaca, but later moved to Mexico City. Telephone Conference with Stephen Zamorra, former Dean, University of Houston School of Law (Sept. 14, 2005).

2. JAMES E. HERGET & JORGE CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM (1978).

3. The author of this review reviewed all the curricular offerings of law schools along the Mexican-United States border in preparing the proposal for the University of Florida summer program in 1971.

4. ALEXANDER C. HOAGLAND, COMPANY FORMATION IN MEXICO (1972).

nation presupposes some understanding about the nation's legal system.

The Herget-Camil book remained the sole overview of the Mexican legal system for two decades. In 1998, Professor Jorge A. Vargas of the University of San Diego began his series of volumes on *Mexican Law: A Treatise for Legal Practitioners and International Investors*, published by West.[5] That series has proven to be very successful, serving well its intended audience – foreigners (non-Mexicans) engaging in transactions with Mexico. However, it was not intended to be an introduction to the Mexican legal system with regard to its history, culture, institutions, actors, procedure, rules or sources of law.[6]

Now the gap is filled. Five prominent Mexican and U.S. legal scholars have produced *Mexican Law*.[7] No shelf of literature in English on Mexican law can be considered even remotely complete without the addition of this volume.

Reading about Mexican legal history is essential for a foreign lawyer beginning to develop some understanding of Mexican law. The U.S. law student less "bypasses" taking U.S. legal history than finds it no longer offered. But the U.S. student has knowledge of U.S. history in general and thus the introduction to contemporary U.S. legal society does not occur in an historical vacuum. In contrast, the U.S. lawyer most likely has not studied Mexican history, except to be fed some mythology of stereotypes.[8] *Mexican Law* provides a forty-two page overview of the history of Mexican law that should serve as recommended reading for anyone beginning to deal with Mexico and wishing to understand such contemporary institutions as the *ejido* or the oil giant Pemex, or the meaning of constitutionalism or federalism in Mexico. The authors further develop constitutional law in Chapters 7 and 8, the latter appropriately devoted largely to the most important constitutional concept in Mexico, the *amparo*.[9]

Federalism and centralism is the subject of Chapter 4. Mexi-

---

5. JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS (1998).

6. Vargas states in his Preface that "This book aspires to provide the most authoritative, current and practical information on Mexican law in the areas of business, investment and international trade for the benefit of legal practitioners and international investors." 1 VARGAS, *supra* note 5, at xxix.

7. STEPHEN ZAMORA ET AL., MEXICAN LAW (2004).

8. *See generally* Michael Wallace Gordon, *Mythical Stereotypes: Dealing with Mexico as a Lawyer*, 38 J. LEGAL EDUC. 279 (1988).

9. The Mexican *amparo* is one of the rare features of Mexican law that U.S. authors have long addressed, the most important work being Richard D. Baker's 1971

can federalism is vastly different than U.S. federalism, but in this reviewer's opinion the line between federal and state competency and authority is one of the most intellectually absorbing issues of both the Mexican and U.S. legal systems. The line between the two, federal and state, is like a river, the course of which changes its contours as the years pass. Ongoing debate in Mexico about the line between federal and state authority is important to questions of the applicable law in a U.S. court. For example, whether the federal civil code's open-ended moral damages provision applies rather than a state law that retains a fixed and nominal approach to moral damages, will make a great deal of difference in the amount of a damage award.[10] Chapter 4 does not address the relatively new federal civil code and its importance in the federalization process. This effective spin-off of an exclusively federal law from the old civil code that was applicable in the federal district and throughout the territory in federal matters is significant. The federal civil code may gain prominence both from any increase in scope its provisions gain from interpretations that matters once thought state are now federal, and if this code becomes the standard that states follow as they amend their civil codes. I suspect it will have more effect than the civil code for the federal district.

An example of the significant contrast between Mexican and U.S. law in the application of state versus federal tort law applies to such issues as the law applicable to injury resulting from an automobile accident. The location of the accident was important in some of the Ford and Bridgestone/Firestone litigation.[11] When an accident occurs on a federal highway in Mexico, federal law applies rather than state law.[12] But when the driver turns off onto a state road, the applicable law would shift to state law.[13] As U.S.

Judicial Review in Mexico: A Study of the Amparo Suit. Numerous developments to *amparo* have since occurred and are addressed in *Mexican Law*.

10. *See infra* notes 40-42 and accompanying text.

11. The author was a consultant on numerous Bridgestone/Firestone cases involving accidents in Mexico and Venezuela filed in Chicago, Houston, Nashville and Miami. One of the first inquiries made was whether the Mexican police accident report indicated the location of the accident to be on a federal or state road. *See, e.g.*, Huerta v. Bridgestone/Firestone, Inc., No. 02-07115-F, (Tex. Dist. Ct. Dallas County July 26, 2004).

12. The Mexican Código Civil Federal states in Article 1 that it governs all matters of a federal nature. "Federal nature" is not further defined, but is understood by most jurists to include torts occurring on federal land, which includes the federal highways. *See* JORGE A. VARGAS, MEXICAN CIVIL CODE ANNOTATED 3 (2005).

13. Each Mexican state civil code has as one of its first provisions (disposiciones preliminares) the scope of applicability. That scope covers all inhabitants of the state. These state laws do not specifically exempt matters of a federal nature, which may be

courts become more comfortable with applying Mexican law, knowing the state versus federal distinction is essential. There is not a great deal of attention paid to this in *Mexican Law*, and it is a fitting subject for future writings.[14]

Comparative law study often somewhat crudely distinguishes common from civil law systems by suggesting that cases have no role as a source of law in a civil law system. Instead, it is more appropriate to discuss the degree of influence that an accessible case may have. Mexico has a rich history in developing its theory of *jurisprudencia,* and this is the heart of Chapter 3 on Sources of Law. It is one of the best portions of the book, and divides sources of law into classifications followed by discussing their place in the Mexican hierarchy of law. Mexican decisions, like those of many other civil law nations, including France, are often not easy for a common law trained lawyer to analyze. While *Mexican Law* briefly discusses this, I wish it were less brief. Jurisprudence can only be effective when it is understandable and accessible, both attributes that need attention within the Mexican legal system.[15] It is not sufficient explanation, as the authors imply, to suggest that the role of written decisions is *different* than in a common law country.[16] Any decision that adds understanding to the meaning of statutory law should receive written clarity. As the authors add, many Mexican judges are becoming far more than judicial clerks, although the clerkship role continues to provide a hiding space for incompetence or excessive fear of diversion from legislative instruction.[17] Legislative clarity has never been an attribute legislators themselves have consistently achieved, in Mexico or elsewhere, including the United States. Judges need not fear diversion from failed instruction.

Many American comparative law scholars have believed that

---

implied in the Mexican Constitution. *See, e.g.*, CÓD. CIV. QUINTANA ROO art. 2 (Mex. 1980).

14. One of the authors, Leonel Pereznieto, is one of Mexico's leading private international law jurists, and author of the excellent DERECHO INTERNACIONAL PRIVADO (7th ed. 2000). Chapter 22 has helpful discussion of the new federal civil code.

15. Accessibility may extend to the willingness of judicial clerks to hand out written decisions. One Mexican friend and author two decades ago requested from the government offices of the Supreme Court a number of decisions involving the foreign investment laws. When asked why he wanted them, he told the clerk they were for analysis for a forthcoming book. The clerk refused to provide them, stating that was not a proper use of the decisions.

16. ZAMORA ET AL., *supra* note 7, at 76, 83-88, 96-101.

17. *Id.* at 83, 87-88, 96-101.

before one can meaningfully teach a specific subject of foreign law, such as contracts, family law, or criminal law, there must be some prior study of the legal system. That means some understanding of the history, culture, and distribution of the legal system; its legal institutions such as the court structure and the law making process; legal actors such as law students, practitioners, notaries, judges, and others; rules, sources of law, and perhaps some study of procedure. *Mexican Law* makes this all possible with regard to the Mexican legal system. Indeed, the first eleven chapters are devoted to this study,[18] while the final eleven chapters are devoted mainly to substantive law, such as contracts, property, labor, and intellectual property law.[19] The book is certainly the only English language, single volume text that is suitable for a course on Mexican law. It allows considerable depth about the legal system of Mexico and, once an understanding of that system is acquired, it offers a range of areas that can provide a foundation in substantive law.

This reviewer is a frequent consultant on civil litigation in the United States involving motions to dismiss on *forum non conveniens* grounds and motions to apply foreign law.[20] *Mexican Law* has several chapters that are very useful for anyone involved in cross-border litigation. Any attorney undertaking litigation involving Mexico should read Chapter 22 on Conflict of Laws as well as Chapter 10 on Civil Procedure, Chapter 17 on Contracts and Other Obligations, and Chapter 18 on Commercial Law. However, it would be much better to just go ahead and read the entire volume, remembering that only by delving into the rich legal literature of Mexico in Spanish can one gain a more thorough

18. Administrative law is the subject of Chapter 9, which is often difficult to classify. The French have placed it essentially outside the legal system, with its own court system and advocates. *See* Jean-Philippe Colson, *Remedy Discussion Forum*, 39 BRANDEIS L.J. 597, 605 (2001).

19. Two chapters might fit into the study of the legal system: Chapter 14 that covers The Civil and Commercial Codes (part of sources of law), and Chapter 22 on Conflict of Law (part of procedure). But the lines are not intended to be distinct.

20. The author of this review has consulted for BASF, Ciba-Geigy, Dupont, Scott Paper, Sandals Resorts, SuperClubs, and DelMonte, on various cases in Panama, Guatemala, Ecuador, Cuba, Colombia, Venezuela and Costa Rica; for the Department of Justice in the civil cases resulting from the Alvarez-Machian kidnapping in Mexico (recently before the Supreme Court); for Mallory Battery, Best Western and Sheraton for injuries in their Mexican facilities; for Telemundo in international defamation litigation involving Mexico; and for Firestone/Bridgestone on the tire litigation for injuries in Mexico and Venezuela. He has consulted on the same issues for other clients on Italian, French, Monacan, Spanish, Netherlandish and German law.

knowledge of this exceptionally interesting system of our southern neighbor.

Conflict of Laws, the final chapter, is certainly one of the most important in the book for foreign lawyers engaged in transactions crossing the Mexican border. Mexico has only recently begun to emerge from its past to participate in the first world, rather than seeking leadership within the third world. The principle of territoriality is receding like an ebbing tide, but it has further to diminish in some areas where nationalism continues to persist. Thus, while conflict of laws rules have been modified partly, the reform's impact has often been seen more on the books than in actual practice.

The authors make an effort to describe the Mexican laws allowing for the recognition of a forum selection clause in Mexico.[21] However, I wish another paragraph had been included describing this law in action – has a Mexican court ever applied such a clause to dismiss the case in Mexico and move it to the chosen foreign forum? While Mexican law allows the application of foreign law in very limited circumstances,[22] I have not yet heard of a reported decision where that has occurred, especially where there seems to be a choice of alternatives and the analysis requires determining the law most closely connected or the law that bears a significant relationship to the country. It should not be difficult to apply foreign law to a corporation chartered in a foreign nation, or to a will executed on foreign territory. It is more difficult when the issue is a contract with significant links to both Mexico and another country.

Mexican Law emphasizes the importance of the recent reforms by including a discussion of two articles of the 1988 Federal District Civil Code rules on choice of law and application of foreign law.[23] Unfortunately, as the authors explain, when reforms were enacted in 2000, a new article was added that returned Mexico to a strict territorial rule, at least in the Federal District.[24] One must hope that Mexican states do not follow this development. That is uncertain because states have traditionally looked to the federal district's law for guidance in proposing state reforms. But perhaps this populist impact on the federal district's law is partially offset by Mexico's participation in numerous trea-

21. ZAMORA ET AL., *supra* note 7,at 691.
22. *Id.* at 679.
23. *Id.* at 680.
24. *Id.* at 681.

ties with choice of law provisions, and the Mexican Supreme Court's recent decisions elevating treaty law above legislation.[25] But it remains to be seen whether public policy notions will be used to limit treaty application.

Mexican Law includes substantial discussion of jurisdiction in the Conflict of Laws chapter. This material is extremely useful to U.S. lawyers attempting to both understand Mexican jurisdiction and explain it to a U.S. judge when moving to dismiss a U.S. case on *forum non conveniens* because a Mexican court would be a more proper forum and the Mexican court would accept jurisdiction. Plaintiffs' attorneys often argue that a foreign (such as Mexican) forum is not available because the Mexican courts do not have jurisdiction, making creative but incorrect interpretations of the foreign statutes. Frequently, U.S. courts condition dismissal on the defendant's consent to jurisdiction, and often the plaintiffs will argue that the foreign law does not provide for jurisdiction by consent. The truth is that foreign laws often do provide for jurisdiction by consent, and clearly it does in Mexico. The authors of *Mexican Law* help to illustrate the meaning of the code provisions and the Organic Law of the Judicial Power[26] that govern the *competencia* of a court, a power essentially containing both subject matter and personal jurisdiction as known in the United States. Mexican law provides for very broad jurisdiction, and it is hard to imagine that its courts would lack jurisdiction over any personal injury arising from a tort occurring on Mexican territory, or a contract with significant links to Mexico.

Arbitration is discussed with the same positive approach as other areas of private international law where Mexico has placed on the books rules bringing Mexico into the world of international commerce.[27] But like so many areas, there is little discussion of how these rules are actually working. My suspicion is that arbitration is the far more preferred method of dispute resolution than leaving a matter to the Mexican courts. But it is one thing to recognize and provide institutions for arbitration, and quite another to actually have the courts enforce arbitral decrees.

One question that is fair to ask of another nation that purports to be a major participant in the world community is whether it has adopted the major conventions that might be identified as

25. *See id.* at 683.

26. Ley Organica del Poder Judicial de la Federacion, D.O., 26 de Mayo de 1995 (Mex.), rev. 14 de Feb. de 2006.

27. ZAMORA ET AL., *supra* note 7, at 336, 691-694.

important to international trade, commerce, and other cross border relations. It is a little hard to discern certain aspects of Mexico's international status from the structure of the book. International treaties are briefly noted but refer only to the United Nations Convention on Contracts for the International Sale of Goods and NAFTA.[28] However, Mexico is additionally a member of the GATT/WTO Agreements,[29] which this reviewer believes must be noted. Also apparently unmentioned are two Hague conventions, one on service of documents[30] and the other on taking evidence abroad.[31] Although these conventions are not discussed,[32] reference is made to Mexico's participation in the Inter-American Convention on Letters Rogatory.[33] We know that Mexico is a participant in the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards,[34] and the Inter-American Convention on General Rules of Private International Law.[35] From reading Chapter 22, it seems that Mexico is trying to depart from absolute territorialism to a meaningful commitment to participate in the global economy, including signing international rather than only Inter-American conventions,[36] and by recognizing judgments, rendering judgments in foreign currencies, accepting forum selection clauses, and applying foreign law.

Chapter 17, Contracts and Other Obligations, should be required reading not only for cross-border litigators, but for any judge who is assigned to sit on a case in the United States where questions of Mexican law may arise. Few common law trained judges are familiar with the civil code structure of a civil law tradition nation such as Mexico, and especially with that part of the

28. *Id.* at 682.

29. Mexico joined the GATT in 1986. 1 VARGAS, *supra* note 5, at 24.

30. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

31. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

32. Mexico has adopted the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. H. Patrick Glenn, *The Morris Lecture: Conflicting Laws in a Common Market? The Nafta Experiment*, 76 CHI.-KENT. L. REV. 1789, 1808 n.78 (2001).

33. ZAMORA ET AL., *supra* note 7, at 694.

34. *Id.* at 692.

35. LEONEL PEREZNIETO CASTRO & JORGE ALBERTO SILVA, DERECHO INTERNACIONAL PRIVADO: PARTE ESPECIAL 484 (2000).

36. A list of some thirty-seven private international law conventions and agreements participated in by Mexico is included in Leonel Pereznieto Castro and Jorge Alberto Silva's work, *Derecho Internacional Privado: Parte Especial*. *See id.* at 484-488.

civil code that addresses obligations. The title of Chapter 17 is really redundant because Book Four of the Mexican civil codes addresses Obligations, and obligations include both contractual and extra-contractual obligations. What is often confusing to common law lawyers is that contract and tort law both are part of obligations.[37] A person has obligations both to perform contracts agreed to and to repair injury caused to other persons by one's fault or negligence.[38] This chapter is important because it discusses the complexity of the Mexican civil codes that exist in each state, plus one for the Federal District and finally, and of increasing importance, the Federal Civil Code. That Federal Civil Code has an application quite different from the federal laws in the United States, as noted above with respect to the application of federal law to accidents on federal highways.

A final comment on remedies. *Mexican Law* considers some of the fundamental concepts of Mexican law that flow from such words as *dolo*, bad faith,[39] and *daños morales*, moral damages.[40] Knowledge of these concepts is essential in litigation in U.S. courts where Mexican law may be applicable. Lawyers in the United States are usually unfamiliar with the civil law concept of moral damages, which reads as though they are linked solely to claims of defamation. But moral damages are much broader and may eventually develop to encompass pain and suffering, which is absent as a measure of damages in Mexican law and the law of many legal systems.[41] Moral damages might even develop towards punitive damages. There have been many instances where attorneys in U.S. courts applying foreign law have argued that moral damages are equivalent to punitive damages.[42] With

37. The Mexican federal and state civil codes are similarly structured, not unlike most civil law tradition nations' civil codes, including the influential French code. The codes are divided into four parts or "books." Book Four is Obligations, which includes both contractual and extracontractual obligations. Extracontractual obligations are what the common law knows as torts.

38. Under Contractual Obligations, Article 1832 of the Código Civil Federal states that "each party obligates himself in the manner and to the terms which he chooses." Under Extracontractual Obligations, Article 1910 requires "whoever, by acting illicitly or against good customs and habits, causes damage to another shall be obligated to compensate him."

39. ZAMORA ET AL., *supra* note 7, at 508.

40. *Id.* at 528.

41. Since 1994, the Federal Civil Code (and its predecessor Civil Code for the Federal District) has allowed moral damages whether or not material injury has occurred. But moral damage awards tend to be conservative. *See id.*

42. When cases are brought in U.S. courts that choose to apply Mexican law, plaintiffs fear the application of Mexican damage law, which is limited essentially to

the expansion of damages in many nations, especially developing nations where large multinational corporations have invested and a broad range of injuries have occasioned, there is a temptation to allow existing damages, such as moral damages, to fill what is viewed as a gap in local damage law that results in a severe limitation of available damages.

I expect to see numerous citations to *Mexican Law* in the coming decade, and use of its clear exposition of important concepts of Mexican legal theory in many affidavits filed in U.S. courts. If U.S. courts are to properly apply Mexican law, and to correctly evaluate Mexican judgments for recognition and enforcement purposes, U.S. judges will need to be able to sift through disparate proffered expert opinions on Mexican law. While primary authority is obviously essential for support of such an opinion, often that authority is inadequately linked to the culture of the foreign legal system. *Mexican Law* should provide a useful linkage between primary statutory and judicial authority. It will not sit on the bookcase shelves gathering dust.

repair of the injury and lost wages. Mexican law does not provide for either pain and suffering or punitive damages. But moral damages may be a sleeping giant, since they allow for non-material damages. CÓD. CIV. FED. art. 1916 (Mex. 2000).