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Mexico

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Mexico

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MARCO ANTONIO PEÑA BARBA, AND JUAN PABLO SAINZ

In 2015, Mexico continued to make great strides toward furthering an independent judiciary and a legislative branch in touch with the needs of a growing democracy. This year, the legislative reforms continued with implementation of Occupational Health and Safety regulations and other less comprehensive initiatives. Mexico also continued to demonstrate an authentic commitment to human rights and became a contracting State to the Hague Convention on Choice of Court Agreements.

However, the real star of the reform show this year was Mexico's Supreme Court, taking center stage with a number of landmark decisions and definitively establishing itself as the true third branch of government it was intended to be under the Constitution.

I. Mexico's Supreme Court of Justice (SCJN)

The court's decisions in 2014 included limited legalization of marijuana for personal use, legalizing gay marriage, establishing the constitutionality of teacher evaluations, deciding the "Mayan Palace" case, which affirmed the availability of punitive damages.

A. CONSTITUTIONALITY OF MARIJUANA CONSUMPTION

Drug abuse poses major public complications due to its impact on society at multiple levels. In Mexico, it is estimated that drug-related violence in the past decade has resulted

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

626 THE YEAR IN REVIEW

in more civilian deaths than both wars in Afghanistan and Iraq.¹ Globally, marijuana is the world's most used illicit substance, with about 224 million users.²

Mexico has significant drug-related concerns that date as far back as the 1980's with the creation of the first "cartels." Since then, the country has spent more than 320 billion Mexican pesos combating the cartels.³ Cannabis is Mexico's most trafficked and consumed illegal substance.⁴ And the "war on drugs" has been a continuous source of tension in the relationship between Mexico and the United States.

It is against this backdrop that Mexico's First Chamber of the Supreme Court of Justice (SCJN) ruled in an Amparo trial⁵ that an absolute prohibition on self-consumption of marijuana was unconstitutional. A majority of *Ministros* voted 4-1 to find for the four plaintiffs⁶—members of the NGO *Sociedad Mexicana de Autoconsumo Responsable y Tolerante* (SMART)—who now can use marijuana for recreational purposes, and also plant, cultivate, harvest, prepare, possess and transport marijuana, although for self-consumption only. The ruling expressly excludes any act of commerce or profit.⁷

According to the Court, the plaintiffs requested authorization from COFEPRIS (Mexico's Federal Commission for Protection Against Health Risks) to use marijuana "personally" and "regularly" for leisure and recreational purposes, which COFEPRIS denied. The plaintiffs then began an *amparo indirecto*, which was denied at all levels until

1. See INSTITUTO NACIONAL DE ESTADÍSTICA, GEOGRAFÍA Y INFORMÁTICA (INEGI), <http://www.inegi.org.mx/> (last visited Apr. 17, 2016); see also U.N., REPORT ON THE PROTECTION OF CIVILIANS IN THE ARMED CONFLICT IN IRAQ: 1 MAY – 31 OCTOBER 2015 (2016), available at http://www.uniraq.org/images/humanrights/UNAMI-OHCHR_%20POC%20Report_FINAL_01%20May-31%20October%202015_FINAL_11Jan2016.pdf; Watson Institute of Int'l & Public Affairs at Brown Univ., COSTS OF WAR – AFGHAN CIVILIANS, <http://watson.brown.edu/costsofwar/costs/human/civilians/afghan> (last visited Apr. 17, 2016).

2. U.N. DEP'T ON DRUGS & CRIME, WORD DRUG REPORT 2012, U.N. Sales No. E.12.XI.1 (2012), available at https://www.unodc.org/documents/data-and-analysis/WDR2012/WDR_2012_web_small.pdf.

3. Nancy Flores, *320 Mil Millones Para Seguridad Nacional*, CONTRALINEA.COM.MX (Apr. 22, 2012, 12:00 AM), <http://www.contralinea.com.mx/archivo-revista/index.php/2012/04/22/320-mil-millones-para-seguridad-nacional/>.

4. INSTITUTO NACIONAL DE PSIQUIATRÍA RAMÓN DE LA FUENTE MUÑIZ, ENCUESTRA NACIONAL DE ADICCIONES 2011 – DROGAS ILÍCITAS (2012), available at http://www.conadic.salud.gob.mx/pdfs/ENA_2011_DROGAS_ILICITAS_.pdf.

5. *Amparo* trials are an avenue for challenging unconstitutional government actions or inactions. *Amparo* rulings have a limited effect, generally only benefiting the parties involved in the dispute, as was the case here. According to *Fórmula Otero*, the Amparo principle of relativity named after founder Mariano Ortero, the *Amparo* court order does not have effects *erga omnes*.

6. *Quiénes Son Las Cuatro Personas Que Podrán Consumir Marihuana Legalmente?*, EL FINANCIERO (Apr. 11, 2015), <http://www.elfinanciero.com.mx/nacional/quienes-son-las-cuatro-personas-que-podran-consumir-marihuana-con-fines-recreativos.html> (The four plaintiffs were: Josefina Ricaño de Nava, founder and current president of *México Unido Contra la Delincuencia* (Mexico United Against Crime); Juan Francisco Torres Landa, Secretary General of *México Unido Contra la Delincuencia* and past-chair of the Mexico Committee; Pablo Girault Ruiz, an ITAM graduate, vocal owner of the foundation *Rafael Dondé* and treasurer of *México Unido Contra la Delincuencia*, and Armando Santacruz Gonzalez, director of Pochteca Group, a chemical industry firm currently listed on the Mexican Stock Exchange (BMV)).

7. Jesús Aranda, *Mex. Sup. Ct. Grants Four Individuals Right to Grow Marijuana for Personal Consumption*, MEX. VOICES (Nov. 5, 2015), <http://mexicovoices.blogspot.mx/2015/11/mexico-supreme-court-grants-four.html>.

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

MEXICO 627

it ultimately reached the First Chamber of the Mexican Supreme Court of Justice, which issued its verdict in favor of the plaintiffs.⁸

Although the SCJN ruling only benefits the four plaintiffs in the case, it lays the path for future challenges. The majority of the First Chamber of the Highest Court held that an absolute prohibition on self-consumption of marijuana violates the right to free development of the personality. And, further, that the right of adults to decide the type of recreational or leisure activities they want to perform which are protected by the Mexican Constitution cannot be limited to enforce objectives, such as health and public order.⁹

It is likely that the reasoning of the Court will be followed by lower courts in similar cases. Additionally, because only four more judgments on the same subject under the same criteria are required for the ruling to become law, that result is likely just a matter of time.¹⁰ This decision is a major milestone in a rapidly changing Mexican society. Only time will tell if the Court's decision was a decisive contribution for the betterment of the Mexican people and a good step toward accomplishing the goals of the plaintiffs, all members of *México Unido Contra la Delincuencia*.

B. SAME-SEX MARRIAGE

Several 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.) have also legalized same-sex marriage.

The Supreme Court (SCJN) upheld Mexico City's law in 2010 and ruled that other states were required to recognize marriages performed in D.F. The Court has steadily agreed that marriage laws prohibiting gay marriage are 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.¹¹ Then in April, the Court reached a similar decision in response to a petition submitted by a gay couple from Sinaloa, where state laws prevented them from marrying.¹² In that case, the Supreme Court stated:

8. It is important to note that the writ of *amparo* in the Mexican legal system is an action of assistance found in certain jurisdictions to protect constitutional rights. A very similar figure is that of the writ of security in Brazil or the German constitutional complaint procedure.

9. Reed Brundage, *Mex. Drug War: Sup. Ct. Grants Protection for Sowing and Consumption of Marijuana*, MEX. VOICES (Nov. 4, 2015), <http://mexicovoices.blogspot.com/2015/11/mexico-drug-war-supreme-court-grants.html>.

10. This would turn the case into jurisprudence.

11. Michael K. Lavers, *Ct. Rules Against Baja on Same-Sex Marriage Ban*, BANDERASNEWS.COM (July 3, 2014), <http://www.banderasnews.com/1407/nr-courtrulesagainstbajaonsamesexmarriage.htm>.

12. Pleno de la Suprema Corte de Justicia [SCJN], *Inconstitucional Normas de Sinaloa Que Excluye a las Parejas del Mismo Sexo: Primera Sala 04-15-2015 (Mex.)*, formato HTML, <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=3072> (last visited Apr. 17, 2016); *Mexico's Sup. Ct. Says Banning Same-Sex Marriage is Unconstitutional*, PUERTO VALLARTA DAILY NEWS (June 5, 2015), <http://www.vallartadaily.com/living/lgbt/mexicos-supreme-court-says-banning-same-sex-marriages-is-unconstitutional/> (last visited Apr. 17, 2016).

SPRING 2016

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SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

628 THE YEAR IN REVIEW

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.¹³

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 are 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. . . . Such a statement turns out to be discriminatory in its mere expression."¹⁴

Most recently, on November 25, 2015, Mexico's Supreme Court struck down a law that banned gay marriage in the state of Jalisco in response to petitions by two gay couples which challenged an article in Jalisco's civil code after their marriage applications were denied by the state's civil registry.¹⁵ 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.

C. RIGHT TO WORK AND CONSTITUTIONALITY OF TEACHER EVALUATIONS

Access to a quality education is considered the great equalizer among classes. In contrast, failure of a nation to effectively invest in the education of its youth can paralyze development. Only 62% of Mexico's sixteen-year-olds attend high school, and only 35% of eighteen-year-olds attend school at all.

13. Pleno de la Suprema Corte de Justicia [SCJN], *Inconstitucional Normas de Sinaloa Que Excluye a las Parejas del Mismo Sexo: Primera Sala 04-15-2015* (Mex.), formato HTML, <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=3072> (last visited Apr. 17, 2016); Tim Wilson, *Sup. Ct.: 'Sinaloa Marriage Ban Unconstitutional'*, BANDERANEWS.COM (Apr. 21, 2015), <http://www.banderanews.com/1504/nr-mexican-supreme-court-gay-marriage.htm> (last visited Apr. 17, 2016).

14. Pleno de la Suprema Corte de Justicia [SCJN], *Inconstitucional Normas de Sinaloa Que Excluye a las Parejas del Mismo Sexo: Primera Sala 04-15-2015* (Mex.), formato HTML, <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=3072> (last visited Apr. 17, 2016); Janet Arelis, *Mexican Sup. Ct. Rules in Favor of Same-Sex Couples*, GLAAD (June 19, 2015), <http://www.glaad.org/blog/mexican-supreme-court-rules-favor-same-sex-couples> (last visited Apr. 17, 2016).

15. Ricardo Acero, *Sup. Ct. Overturns Jalisco's Gay Marriage Ban*, BANDERANEWS.COM (Dec. 2, 2015), <http://www.banderanews.com/1512/nr-court-overturns-jalisco-gay-marriage-ban.htm> (last visited Apr. 17, 2016).

VOL. 50

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SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

MEXICO 629

Long plagued by underinvestment and a powerful and corrupt national teachers' union, Mexico identified education reform as vital to the country's future growth and productivity. The Peña Nieto Administration's *Pacto por Mexico* sought to accomplish just that through the amendment of Article 3 of the Constitution¹⁶ and its associated legal framework.

The amendments to the education system centered around two key pillars: (1) the professionalization of educators, and (2) the creation of the National System of Educational Evaluation as an autonomous constitutional entity. The formation of this new system was a signal of hope, which led analysts to believe that the country's leaders had finally made joint decisions that would lead to real change in the legal system, and that would make real progress in the education field.

In addition to the constitutional amendments, the General Law on Education ("LGE")¹⁷ was amended, and both the Law on Educators as a Professional Service ("LGSPD")¹⁸ and the Law on the National System of Educational Evaluation ("LINED") (collectively "Education Laws") were enacted.¹⁹

These Education Laws were highly controversial and were vehemently opposed by some large parts of Mexico's powerful teachers' unions.²⁰ They objected both to the threat to their members' jobs and to losing the control that the unions had long exercised over teacher hiring and promotion.

The concept of teacher evaluations and possible dismissal for repeatedly failing them faced several political battles waged by the national teachers' union, including twenty-six *amparos* (federal suits to enjoin allegedly unconstitutional state action) challenging the constitutionality of the testing provisions on the ground that these provisions violated teachers' right to work enshrined in Article 5 of the federal Constitution.²¹ The unions argued that once their members had been hired as teachers, their right to continue working as such could not be conditioned on their obtaining a certain score on an exam.

16. Constitución Política de los Estados Unidos Mexicanos [C.P.], Diario Oficial de la Federación [DOF], 02-26-2013 (Mex.) (Official Mexican Gazette, February 26, 2013; Article 3, sections III, VII, and VIII, was amended; as well as article 73, section XXV; and a third paragraph, a section d), a second paragraph from section II, and a section IX were added to Article 3 of the Constitution.).

17. Ley General de Educación (General Education Law) [LGE], Diario Oficial de la Federación [DOF] 09-11-2013 (Mex.).

18. Ley General de Servicio Profesional Docente (General Law on the Professional Teaching Service) [LGSPD], Diario Oficial de la Federación [DOF], 09-11-2013 (Mex.).

19. *Id.*

20. There are two major unions —the Sindicato Nacional de Trabajadores de la Educación (SNTE) and the Coordinadora Nacional de Trabajadores de la Educación (CNTE), which sometimes are confused because of the similarity in their acronyms. The SNTE was conformed in 1943 by merging all existing teachers' unions in Mexico and has historically played on the government side and been a factor in major political decisions. The SNTE has been supportive of the reforms since the incarceration of its former leader Elba Esther Gordillo in February 2013. The opposition to the reforms has been centered in various state chapters of the CNTE, with the strongest opposition occurring in the southern states of Oaxaca, Guerrero and Chiapas, as well as in Michoacán.

21. *Mex. Update*, AM. BAR ASSOC., Jan. 2016, at 16, available at https://www.google.com/url?sa=t&ct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwi6po73yJbMAhUM6CYKHWgJCUgQFggfMAE&url=http%3A%2F%2Fapps.americanbar.org%2Fdch%2Fthedl.cfm%3Ffilename%3D%2FC845000%2Fsitesofinterest_files%2FVolume48.pdf&usq=AFQjCNGO40oJkeiBpexTk6ygr5BV835A&sig2=iIIxtlfqX02_sbYAXNW3Q&cad=rja.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

630 THE YEAR IN REVIEW

The federal district court hearing the *amparos* ruled that the Education Laws were constitutional. A number of teachers decided to file an appeal before the Supreme Court (“SCJN”). On May 7, 2014, the SCJN decided to create Commission 69, led by Justice José F. Franco-González, in order to determine if articles 52 and 53, as well as transitory articles 8 and 9, of the LGSPD were constitutional.

Finally, on September 25, 2015, the full Mexican Supreme Court issued a *tesis de jurisprudencia*²² by unanimous vote with important implications for the constitutional right to work contained in Article 5 of the Mexican Constitution. The five cases decided simultaneously in order to create this *jurisprudencia* were brought by elementary and high school teachers challenging the requirements to undergo competency testing and to either lose their jobs or be reassigned to other duties if they failed to pass the test after three tries.

In Jurisprudencia 33/2015, the Supreme Court roundly 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 can rather 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 was superior to the teachers’ right to continue to work as teachers, regardless of their performance on competency exams.

Essentially, the finding was that the requirement of teacher evaluations did not violate labor rights because the intent was not to take away the teachers’ source of employment but rather to assure a high quality education. According to the Court, the laws in question “do not forbid teachers from performing the job they choose, they only establish as a condition of permanence, that they secure a satisfactory score in the evaluations conducted by the National Institute for the Education Evaluation.”²³ Further, in relation to the causes of dismissal, the SCJN ruled that they are compatible with international treaties, as well as with basic human rights as recognized in the Constitution. Finally, the effects of the reforms were not deemed retroactive.

In addition to validating a key element of the government’s education reforms, this holding also suggests that the Court may not stand in the way of future moves to restrict individuals’ rights to perform a given job or practice a certain profession if they do not meet certain quality standards. Most notably for lawyers, the door appears to be open for the imposition of mandatory testing and bar association membership as a condition to practicing law.

D. EVOLUTION OF MEXICAN TORT LAW

The Supreme Court also addressed the issue of extra-contractual civil liability on a global perspective in its ruling 30/2013, commonly referred to as the “Mayan Palace”

22. 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.

23. Obtained from the minutes of the public ordinary meeting of the SCJN, which was celebrated on June 29, 2015.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

MEXICO 631

case.²⁴ The Court addressed moral damage and defined parameters for increasing the degree of responsibility, the right to fair compensation, causation, and the quantification of damages on a case-by-case basis. And, in a first-of-its-kind decision, the Mexican Supreme Court increased damages thirty-fold for “moral injury,” the equivalent of punitive damages in U.S. jurisprudence.²⁵

The case involved a young man, Angel Sinue García Medina, who died in October 2010, as a result of being electrocuted in an artificial lake at a famous Mexican hotel, owned by the Admivac Group. Angel and his girlfriend were kayaking in the lake. Their kayak overturned; they were electrocuted because of a short circuit in one of the water fountains. Both Angel and his girlfriend died. Angel’s parents sued.

The original trial court awarded damages in the amount of \$8MM MXN. His parents appealed on the basis that the court disregarded what Angel would have earned during his lifetime. Lost earnings are a common component of damage awards in personal injury and wrongful death cases in the U.S. At the intermediate appellate level, the court cut the award to \$1MM MXN on the basis that “no one should be enriched or impoverished.” Angel’s parents appealed to the Supreme Court (SCJN).

The five-judge panel found gross negligence on the part of the hotel, noting that the electricity was not shut off until 20 minutes after the accident. And, while there was a physician on duty, he did not have adequate equipment to resuscitate the victims, doing little more than calling an ambulance. Further, evidence was presented that Mayan Palace management tried to alter the facts of the case, having eliminated the word “electrocution” from internal reports, and that they accused Angel’s parents of trying to profit from his death.

The Court characterized the hotel’s treatment as “humiliating” and increased the award to \$30MM MXN, the equivalent of \$1,762,356 USD,²⁶ including damages for “moral injury.” The unanimous panel wrote:

In this case evidence was presented demonstrating the serious impact of the defendant’s conduct upon the sensibilities of the decedent’s parents, who were forced to deal with the loss of their only child, as well as the defendant’s extreme negligence and significant economic resources.”

Judge Arturo Zaldívar Lelo de Larrea noted the judgment was designed not only to compensate Ángel’s family, but also to punish the Admivac Group for failing to adequately protect its clients and discharge its general “social responsibilities.”

24. Pleno de la Suprema Corte de Justicia [SCJN], Tercero Perjudicado: Admivac, Sociedad Anonima de Capital Variable 02-26-2014 (Mex.), available at http://www.osunalegal.com/yahoo_site_admin/assets/docs/30-2013_AD_PS_VP.178170228.pdf.

25. *Id.*; *Game Changer in Tort-Like Liability in Mexico? MXP\$30 Million Judgment vs. Hotel for Wrongful Death*, JURISMEX BLOG (Feb. 27, 2014), <https://jurismex.wordpress.com/2014/02/27/game-changer-in-tort-like-liability-in-mexico-mxp30-million-judgment-vs-hotel-for-wrongful-death/> (last visited Apr. 17, 2016); Alejandro Osuna, *Mexican Supreme Court Recognizes Punitive Damages and orders Mayan Palace to Pay \$2.4 million dollars in a Wrongful Death Case*, OSUNA GONZALEZ Y ASOCIADOS, <http://www.osunalegal.com/articles/punitivedamagesmexico> (last visited Apr. 17, 2016).

26. The current rate of exchange is \$1 USD to \$17.02 MXN.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

632 THE YEAR IN REVIEW

In Mexico large damage awards to civil plaintiffs are unusual and commonly consist only of the actual economic losses the claimant is able to prove. Unlike in the U.S., damages for emotional injuries are not typically awarded.

This case leaves us with the following jurisprudential takeaways:

1. Right to Fair Compensation. The court opined that fair compensation is a fundamental human right, stating: “In a legal system like ours – in which constitutional norms constitute the Supreme Law of the Union, fundamental rights occupy a central position and are undisputed as a minimum component of all legal relationships.” Accordingly, a violation of a duty of care that results in harm involves a duty to properly fix it. The Court continued that the purpose of damages is not only compensation but also to have a deterrent effect on harmful behavior, setting the stage for punitive damages.
2. Punitive Damages. The right to fair compensation includes the right to punitive damages. The amount of compensation for damage suffered by the victim must be sufficient to compensate the damage as well as fault those responsible for improper behavior. This result does not enrich unfairly the victim but rather is part of the right to fair compensation.

Failure to sanction abdication of responsibility and neglect of legal rights of care implies a tacit approval of the illicit behavior. In some cases, this would mean that those responsible are unjustly enriched at the expense of the victim. In addition, insufficient compensation causes victims to feel their hopes of justice are being ignored or mocked by authorities, thereby re-victimizing the victim and violating their right to fair compensation.

The Court also considered that the punitive character derives from the interpretation of article 1916 of the Federal Civil Code, which enshrines the repair through compensation in cash, which will be determined by the judge, taking into account the rights of the injured, the degree of responsibility, the economic situation of the person in charge, and the victim and the other circumstances of the case. The judge should not only consider the damage suffered, but must also weigh those aggravating factors for the corresponding “*quantum*” of compensation and consider the degree of responsibility of who caused the damage.

In addition, the Court’s ruling based the existence of punitive damages in the legislative history that gave rise to the reform of the Federal Civil Code posted on December 31, 1982, specifically because compensation for the civil wrong not only restores the affected individual and punishes the guilty, but also strengthens and respects the value of human dignity that is fundamental to collective life.

3. Quantification of Damages. In assessing damages, courts should take into consideration the existence of damage and the severity of the damage. It is important to generate a culture of responsibility, so quantification of damages should include the degree of negligence, the number of people involved, whether malice and bad faith were involved, and whether acts were intentional or grossly negligent.

Also, the capacity of the person in charge to pay is a factor to be considered in awarding damages, while the economic situation of the victim is not part of the

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

MEXICO 633

consideration.²⁷ Again, the deterrent effect of the damage award is of paramount importance.

While the *Mayan Palace* case presents a significant jurisprudential development in Mexican tort jurisprudence, and it sets forth a number of factors to consider in awarding damages, as well as introducing punitive damages, it merely provides a springboard for future awards, rather than providing a definitive guide. This is particularly true because of the concurring opinion issued by Minister José Ramón Cossío, criticizing the introduction of punitive damages without establishment of specific elements to be considered. Further, it is not clear if punitive damages are required when there is a finding of “moral injury” or only when there is a finding of a high degree of liability.

What is clear is the case established the availability of punitive damages under Mexican law and the fundamental right to fair compensation.

II. Human Rights

A. AYOTZINAPA: A NON-BINDING INTERNATIONAL HUMAN RIGHTS MECHANISM IN ACTION

Ayotzinapa is a small village located in Guerrero, a vast Mexican State where a rich culture coexists with a high rate of poverty and illiteracy, and also with an increasing, protracted presence of organized crime. True to its name, the State has also a history of strong social movements nested in its steep orography. Ayotzinapa is home to the “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 26 September 2014, about a hundred Ayotzinapa students travelled 150 miles to Iguala city, aiming to gather funds for their school activities. With this purpose, they performed a usual practice regularly tolerated by transporters, passengers, and authorities alike, consisting of temporarily capturing buses.

That night in the city, for reasons still unclear, the local police of Iguala and of the neighboring municipality of Cocula opened fire on the students. Six persons died, others were injured, and 43 students have been missing ever since. Some of them were last seen with local police patrols. The students’ whereabouts remain unknown, as do facts about what happened to them afterwards and who was responsible for their disappearance.

Federal authorities took over the investigation, and last January the Attorney General, Jesús Murillo Karam, publically announced what he called “the historic truth,” based on testimony, confessions, and forensic reports: the students had been “deprived of their liberty, deprived of their lives, incinerated, and thrown to the river.” The Government attributed the deaths to organized crime and with this statement deemed the investigations concluded, pending capture of the remaining fugitives and sentencing of those indicted. Nonetheless, the victims’ families and a considerable sector of civil society have strongly disputed this version, and recent developments have proven they are not being unreasonable.

27. Article 1916 of the Civil Code was determined to be unconstitutional because it included the victim’s economic situation as part of the criterion to consider in damage awards.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

634 THE YEAR IN REVIEW

As a State Party of the Organization of American States (OAS) Charter and the San José Pact, Mexico has accepted the competence of the Inter-American Commission on Human Rights (IACHR). Derived from an agreement signed between Mexico, the victims, and the IACHR, the IACHR designated an Interdisciplinary Group of Independent Experts (IGIE) to conduct a technical analysis of the 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.²⁸ The most relevant are the following:

1. The clear categorization of the crimes as enforced disappearances, contrary to the prosecutor's characterization of kidnappings and killings, presupposes State participation, which has distinctive implications and even may assign international responsibility under specific human rights treaties Mexico has ratified.
2. The decisive responsibility, whether by action or grave omission, of State agents of the three levels of government, who engaged in conduct such as the delay in adequate intervention, the failure to protect the students, the active participation in the shootings, the inadequate handling of evidence, and the complete disregard of some critical proof.
3. The questioning of the perpetrators' motive, given the excessive degree of violence and the coordination required to perpetrate it.
4. The impossibility of incineration as concluded in the official version, based on forensic evidence analyzed by the IGIE.

One must keep in mind that the IACHR necessarily works in collaboration with States. Thus, the IGIE reached its conclusions from sources provided by the same authorities investigating the case, which makes the discrepancies between the domestic and international versions even more inexplicable.

These findings are not only significant regarding State responsibility or public opinion, but conforming with the presumption of innocence, they could also affect the criminal procedures already being conducted: if a suspect is wrongfully accused or if the accusation is based on questionable evidence, he should be released and ultimately absolved according to Mexican (and international) law.

The IGIE recommended reconsideration of the hypothesis and investigation lines. Its mandate was extended until April 30, 2016, and will include interviews of military personnel. Mexican authorities declared their willingness to cooperate. The day after the report was published, Enrique Peña Nieto gathered with the students' families and ordered the creation of a special agency for the search of disappeared persons.

Ayotzinapa is an example of the effectiveness of non-binding international human rights mechanisms in the domestic sphere when activated in the right circumstances. The IGIE's non-binding work has offered the victims' families a valid alternative for fighting opacity and impunity and, above all, it is helping to find the truth, without which there cannot be justice.

28. Grupo Interdisciplinario de Expertos Independientes (GIEI), *Informe Ayotzinapa: Investigación y primeras conclusiones de las desapariciones y homicidios de los normalistas de Ayotzinapa*, Sept. 6, 2015, available at http://media.wix.com/ugd/3a9f6f_007ea0656fc84f4b99465229305e44df.pdf.

III. Legislative Reform

A. WORKER SAFETY - OCCUPATIONAL HEALTH AND SAFETY

It is the responsibility of the Ministry of Labor and Social Welfare (“STPS”) to draft regulations governing labor, health, and safety relations and to enforce compliance with the same. Accordingly, and pursuant to the Mexican Constitution, the Federal Labor Law (“LFT”), and the National Development Plan 2013-2018, the STPS published new regulations.

Mexico’s new federal Regulation of Occupational Health and Safety (“OHS”) became effective on February 14, 2015.²⁹ These regulations impose stricter rules on workplace hazard prevention and on ensuring the life and safety of workers in Mexican facilities. New concepts introduced under these regulations include:

- Assessment of occupational health and safety, including identifying unsafe or hazardous conditions, physical, chemical or biological agents, dangerous ergonomic or psychosocial risk factors, and applicable legal requirements;
- A favorable work environment, meaning a sense of belonging to the organization, adequate training to perform the job, identification of job responsibilities, proactive team communication, distribution of workplace responsibilities with regular labor shifts, and performance reviews;
- Psychosocial risk factors include anything that may cause anxiety or sleep disorders as well as serious stress and adaptations disorders derived from the work;
- The physical workplace, meaning the buildings, installations and areas of production, distribution, transportation and warehousing, as well as any area in which services are performed;
- Workers with disabilities, meaning those who have permanent or temporary physical, mental, intellectual, or sensory deficiencies;
- Labor violence, meaning harassment, sexual harassment, or treatment of a worker such that may damage the worker’s integrity or health.

The workplace regulations require implementation of an OHS assessment program, preparation and dissemination of programs, manuals and procedures for worker safety, establishment of a Health and Safety Commission and provision of Preventive OHS services in the workplace, posting of visible risk warnings, regular assessment of workplace contaminants and ordering of medical exams of exposed workers, provision of protective gear, and informing workers of their risks as well as providing risk and emergency training, just to name a few.

These regulations also mandate certain employee obligations, including

- observance of preventive measures,
- submitting to required medical exams, and
- participation in training

In addition, regulations establish rules governing building and worker area safety regulations, as well as additional protections for pregnant or nursing women, minors,

29. . Sergio Bustamante, *Mex.: Mexico’s New Fed. Reg. of Occupational Health & Safety*, MONDAQ (July 13, 2015), <http://www.mondaq.com/mexico/x/408476/employee+rights+labour+relations/Mexicos+New+Federal+Regulation+Of+Occupational+Health+And+Safety> (last visited Apr. 17, 2016).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

636 THE YEAR IN REVIEW

workers with disabilities, and field workers. The regulations also address health promotion and addiction prevention.

The regulations are complex, and each workplace is different. Applications of the new regulations and compliance measures need to be determined on a case-by-case basis. Non-compliance can result in steep sanctions. Provisions for fining employers who fail to comply range from 50 to 5,000 days of general minimum daily wage in force in the Federal District, or up to approximately 25,000 USD at current exchange rates.

IV. International Treaties

A. THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS AND MEXICO AS A CONTRACTING STATE

On October 1st, 2015, the Hague Convention on Choice of Court Agreements (Convention) came into force between Mexico and 27 countries of the European Union.³⁰ The aim of the Convention is to “promote international trade and investment through enhanced judicial co-operation.”³¹

In June 2005, in 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 judgments in international cases.³²

The compatibility of the Convention with the Mexican Constitution and federal laws and the liberal policies that, at that time, had been driving Mexico’s economy for more than a decade, made the Mexican Senate move swiftly, approving the Convention on 26 April 2007. It was not until December 2014 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 1 October 2015.³³ Other countries have signed, but not ratified.³⁴

The Convention provides certainty in the enforcement of contractual provisions on choice of jurisdiction, with direct impact on the effectiveness of the recognition and enforcement of foreign judgments in civil and commercial matters. The core of the Convention relies on three principles:

30. Denmark is the only exception on the grounds of Protocol 22 of the Treaty on European Union and the Treaty on the Functioning of the European Union.

31. Hague Convention on Choice of Court Agreements, June 30, 2005, *available at* <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>.

32. In the XIX session of the Hague Conference on Private International Law, in 1992, the United States led the negotiations for 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. Hague Convention on Choice of Court Agreements, June 30, 2005, *available at* <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>.

33. Pursuant to Article 31 (1) of the Convention. *See* Hague Convention on Choice of Court Agreements, June 30, 2005, *available at* <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>.

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

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

MEXICO 637

1. A competent court of a chosen contracting state *shall bear the case* of the dispute and *shall not decline to bear the case* on the grounds that the dispute should be decided in a different jurisdiction (Article 5).
2. 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).
3. 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).

In Mexico, pursuant to Article 133 of the Constitution and according with the latest non-binding decisions of the Supreme Court of Justice (SCJN) with regard to the normative hierarchy of international treaties, the Convention applies in federal and local courts in the 31 independent states of the Federation and in the Federal District.³⁵

As to the provisions of the Convention that refer to the authority of domestic legislation, the Federal Civil Procedure Code and the Commercial Code continue being applicable.³⁶ The Convention will not change the recognition and exequatur proceedings that Mexican courts have been applying for almost thirty years or the formal requirements of letters rogatory and foreign documents.³⁷

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 set forth in Mexican laws and regulations, by being a contracting state of the Convention, Mexico sends a message consistent with its commitment to openness and confidence to foreign traders and investors. The Convention brings legal certainty to Mexican parties trading with foreign countries and may become a suitable instrument to facilitate resolution of conflicts and enforcement of judgments with commercial partners, such as the United States and Canada.

Mexico has signed three other international treaties on recognition and enforcement of foreign judgements: The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention) in 1979, the Inter-American Convention on Jurisdiction in the International Sphere for the Validity of Foreign Judgments (La Paz Convention) in 1984 and the Bilateral Convention between Mexico and Spain on the Recognition and Enforcement of Judgments 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 competence 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

35. Tratados Internacionales. Se Ubican Jerarquicamente por Encima de las Leyes Federales y en un Segundo Plano Respecto de la Constitucion Federal, Suprema Corte de Justicia de la Nación [SCJN], Semanario Judicial de la Federacion y su Gaceta, Novena Epoca, tomo X, Noviembre de 1999, Tesis P. LXXVII/99, Pagina 46 (Mex).

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

37. Código Federal de Procedimientos Civiles [CFPC], Diario Oficial de la Federación [DOF] 01-12-1988 (Mex.).

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

638 THE YEAR IN REVIEW

Convention, *prima facie*, the Bilateral Convention between Mexico and Spain should prevail.

When acceding to the Convention, Mexico did not make 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 is an insurance contract, arguing that the Convention will not protect certain policyholders, insured parties, and beneficiaries that are protected by the EU regulations, but the Declaration itself excludes reinsurance contracts and certain insurance contracts in which the insured is not deemed to require special protection; therefore, reinsurance and certain insurance contracts are subject to the Convention.³⁸

Some of the benefits and effects of the Convention include its international outreach, the creation and consolidation of best practices of international law, deeper and wider judicial cooperation, and the important role, not only of the judiciaries, but of 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 establish global rules that unify the main principles for the choice of jurisdiction and recognition and enforcement of judgments. An additional benefit is that it will create and consolidate best practices of international private law.

The inclusion of clauses on choice of exclusive jurisdiction according to the Convention may well become the best practice in international contracts, bringing clarity and certainty to international commerce. Moreover, the Convention will develop and set universal principles of due process of law and procedural fairness, which reinforce the fundamental right of effective and efficient access to justice. For example, one could use the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) in the case of arbitration in international commercial contracts.

The Convention will also support international judicial cooperation, meaning that judiciaries of the contracting states assume basic principles of collaboration that go further than the traditional letters rogatory. For example, Article 23 of the Convention provides that the interpretation of the Convention shall consider its international character and need to promote uniformity in its application.

Because Mexico is a signatory, Mexican lawyers, judges, legal academics and bar associations will play an important role in discovering how to maximize the potential benefit of the Convention, as well as fostering the correct application and promotion of this outstanding achievement in international private law.

38. See 2001 O.J. (L. 012) 16/01/2001 Section 3 of Regulation (EC) 44/2001, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML>.