This is my final column as co-chair since my two year term is expiring this month. I have been active in the Mexican committee for over six years as vice chair and co-chair and have enjoyed the many friendships I have made with lawyers in Mexico and the U.S. Although I will continue on as Immediate Past Chair, I will not be as active this year and plan to devote more time to my position as vice-chair of programming for the Customs Committee where I have also been active. I will be in Buenos Aires, co-chairing our committee sponsored program with our continuing committee Co-chair Ernesto Velarde. The program is a great one with speakers from Mexico, Brazil, Canada, Argentina and the U.S. and I hope as many of you as possible can attend our program on Thursday October 23 from 2-4pm. One disappointment I have had in the past is that the Mexico Committee has produced many good programs sponsored at past Fall and Spring meetings in New York and London. These programs were generally well attended, New York was standing room only, but unfortunately not very many of our own Mexico Committee members who were in New York and London and came to our committee breakfasts and other events showed up at our own Mexico Committee sponsored program! Que Lástima! I hope all of you that go to Buenos Aires this year will turn out and support our own Mexico committee sponsored program. The topic and speakers are below:

NAFTA, Mercosur and CAFTA: Should They Merge into One Hemispheric Free Trade Agreement

Argentina is part of the trade agreement known in the U.S. as Mercosur which includes Argentina, Brazil, Chile, Uruguay, Venezuela, Paraguay and Bolivia. It is an influential and important agreement affecting trade within Latin America. NAFTA is a trade agreement for North American countries including Canada, Brazil and Mexico. (Continues on page 3)

A Note from the Editors

This issue of the Mexico Update summarizes a variety of subjects, from a critical view of Mexico’s court system to a philosophical approach on H. L. A. Hart and natural law. We also included an article on human rights focusing on homosexual marriage and another one that addresses legal ethics and its importance in the legal world.
About the Mexico Law Committee

Anchored by coordinators in nine 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

Everything Is Fine Until It Isn’t: Ethical Problems in a Tax Practice

Format: Webinar
Date: August 12, 2014
Time: 1:00 –2:00 p.m.
Panelists: Fred F. Murray, Karen L. Hawkins, Walter J. Pagano, William J lovett

Ethical Pitfalls for New Lawyers

Format: Webinar
Date: August 20, 2014
Time: 1:00 –2:30 p.m.
Panelists: Aria Eee, James A. Kawachika, Josh H. Camson

Talking Dollars and Sense: Taking Control of Your Consumer Debt

Format: Webinar
Date: August 13, 2014
Time: 1:00 –1:45 p.m.
Panelists: Andrea Galvez, Kristin Brandli

Doctors vs. Lawyers: Why Can’t We All Just Get Along

Format: Webinar
Date: August 26, 2014
Time: 12:00 –1:30 p.m.
Panelists: Howard T. Wall III, Janice F. Mulligan, Martin Guerrero

Disclaimer

The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication that is made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are responsibility solely of each author/contributor and do not necessarily reflect the view of the ABA, its Section of International Law, the Mexico Law Committee or the Universidad Panamericana.
CAFTA-DR is a free trade agreement that includes most Central American countries and the Dominican Republic. Together they represent a large amount of the world's trade and commerce. Given the failure of the World Trade Organization to be able to produce successful multilateral trade agreements among all their member countries, an alliance between these three powerful regional trading regimes could be a significant event creating a strong Western hemispheric trading block with significant influence. The factors that might facilitate such an agreement and the obstacles nationalistic agendas might present to such an agreement will be discussed by prominent attorneys from the region.

**Primary Sponsoring Committee:**
Mexico Committee

**Co-Sponsoring Committees:**
Customs Law Committee

**Program Chair & Moderator:**
Les Glick, Porter Wright, Washington, DC

**Program Chair & Speaker:**
Ernesto Velarde, Velarde Danache, Mexico City, Mexico

**Speakers:**
Gilberto Ayres Moreira, Ayres Ribiero Abogados, São Paulo, Brazil
Laura Lavia, M&M Bomchil, Buenos Aires, Argentina
Dominique Babin, BCF, Montreal, QC, Canada

It’s a great topic because it fits in with the current discussions of moving to regional trade agreements and away from bi-lateral. Hope to see you there.

We also have a good program submitted for the Spring 2015 meeting in Washington on
FATCA: The US and Latin America, the new relationship”

FATCA (Foreign Account Tax Compliance Act) has impacted not only Mexicans but citizens/residents from Switzerland, The British Virgin Islands, Luxembourg and Belgium, etc. (amongst others with whom the US has signed FATCA Agreements) that have financial investments in the USA that earn more than US$10 per year and has caused untold millions of US dollars to leave the United States (for countries that do not have such or similar agreement with Mexico) and has also caused that the renunciation of US citizenship increase significantly.

THE PROGRAM WAS ORGANIZED BY COMMITTEE MEMBER

Aureliano Gonzalez-Baz, Esq.
Bryan, Gonzalez Vargas & Gonzalez Baz, S.C.
Mexico City, Mexico

And speakers include:

Yolanda C. Knoll, Esq. Ytterberg Deery Knoll LLP
Houston, TX -

Claude Medernach, Esq. Arendt & Medernach Luxembourg
Alberto Navarro, Esq. Navarro Catrex Abogados Buenos Aires, Argentina

And Ms. Claudia Caffuzz JPMorgan Chase Bank,
Managing Director New York City

Sin más, enviarles mis más cordiales saludos,

Les

European Court: Gay Marriage is not a Human Right

By Stefano Gennarini, J.D.

NEW YORK, July 25 (C-FAM) The highest human rights court in Europe shattered hopes that it would judicially impose same-sex marriage when it told a male to female transsexual and his wife that a civil union should be good enough for them.

European human rights law does not require countries to “grant access to marriage to same-sex couples,” according to a judgment of the European Court of Human Rights in a case that tests the remote boundaries of possibility in law and fact.

The parties to the litigation and supporters of same-sex marriage acknowledge the result was predictable. Nevertheless the judgment has a devastating effect on gay rights in Europe, dashing hopes that same-sex “marriage” can become a reality there. The facts of the case are distinctive.
Heli Hämäläinen of Finland had a sex change operation in 2009 to appear anatomically as a woman, despite having fathered a child with his wife of over 10 years in 2002. Before the operation, he tried to change his legal identity from male to female without success.

He sued before the European court when he was told that it would not be possible so long as he remained married, because Finland does not allow persons of the same sex to marry each other. Hämäläinen and his spouse insist that their religious beliefs prevent them from seeking a divorce and that civil unions do not give them the same benefits as marriage in Finnish law.

The European court was unequivocal. It not only said that European human rights law does not contemplate same-sex marriage, it said that civil unions are good enough for same-sex couples.

The court confirmed that the protection of the traditional institution of marriage is a valid state interest—implicitly endorsing the view that relations between persons of the same sex are not identical to marriage between a man and a woman, and may be treated differently in law.

The judgment says that European human rights law recognizes the “fundamental right of a man and woman to marry and to found a family” and “enshrines the traditional concept of marriage as being between a man and a woman.” It explains how no European consensus on same-sex marriages exists, as only 10 of the 47 countries bound by the treaty allow such designations.

The ruling is a particularly hard blow to gay rights in Finland, where a parliamentary committee rejected same-sex marriage before it could be brought to a vote last month for the second time since 2012.

Finland is the only Scandinavian country that does not allow same-sex marriage. Around the world gay activists have been told that same-sex marriage is not a human right.

The Italian Constitutional Court was faced with almost identical facts only last month. That court also said that civil unions would be adequate to protect the interests of the same-sex couple in that case.

The U.S. Supreme Court declined to say that marriage between persons of the same sex is a right under the U.S. Constitution or international law last year. In a case involving a law that prohibited the U.S. federal government from recognizing marriages between persons of the same sex, the Court ruled that individual states may decide whether or not to allow individuals of the same sex to marry each other.
The Mexican State, as any other modern state, is internally organized in three powers, same that support a healthy division of faculties and competences without excluding for that same reason the collaboration among them. Therefore it is not surprising that the material functions of the executive branch are executed by the legislative branch when ratifying the appointment of consuls and ambassadors, neither is that the executive branch performs functions of the judicial power by granting pardon to a citizen. These are functions attended by the collaboration of the different government branches without it being an invasion of powers; this because such functions are established in the Mexican Constitution and in secondary laws.

The Judicial Federal Power, whose highest court rests in the Supreme Court of Justice of the Nation, has within its faculties the interpretation of the law in the sentences of the “Amparo” trials that are brought up to their consideration in order to be resolved, creating a criterion of obligatory application for the judicial branch and that subsequently provokes legislative reforms.

This faculty that is perfectly defined by both our Supreme Law and by the “Law of Amparo”, has extended its scope in such a measure in which it seemed that the legislative branch, both federal and local, has been set aside, and the resolutions that the Court issues in countless topics have been left behind. These resolutions leave without effect the regulatory contents of these legislations, breaking paradigms and legal principles that due to jurisprudential interpretation remain withdrawn from the legal reality.

Topics such as homosexual marriage, homosexual adoptions, the labor principle touching upon the protecting norms of the salary and its unseizability, the creation of express rights in cases where the Constitution has omitted them, among others, in which jurisprudential interpretation openly contradicts and violates the contents of the laws, and although it is true that these interpretations expand and include in some cases interpretations of international instruments, these turn out to be invasive of the legislative local intentions. Let us remember that we elect our form of government in a sovereign way as a representative republic and that our initial representatives in the first instance are the local state representatives; they are the ones with the function to legislate on the common jurisdiction excluding all matters reserved to federal legislation according to the catalogue under article 73 of the Mexican Constitution. These local legislators are the ones that capture the idiosyncrasy of their represented people and reflect in their legislative production the democratically held representation.

Where then is the division of power and respect for both federal and legislative work as local legislatures?

The Supreme Court of Justice of the Nation has been empowered to make all the decisions of the legal disputes in Mexico, that after ending up in a trial, will finally be resolved by the criteria of eleven ministers at the most and, in this way, the future of democratic Mexico, of modern Mexico, will be in the hands of the new de facto legislator, the Federal Judicial Power and in particular, the criteria of the ministers of the Supreme Court of the Nation.

A revision of the model of sovereignty, the application of the division of powers in Mexico and the de facto empowerment that the Federal Judicial Power holds is urgently needed.
THE MINIMUM CONTENT OF NATURAL LAW IN H. L. A. HART

By Master Antonio Flores Saldaña

First of all, it should be noted that legal positivism, and even, law in general, will not be the same after the contemporary debate between Hart and Dworkin. The actual legal positivism, in open dissolution with the ancient rigid positivism, which denied any kind of connection or principle between law and morality, has found in Hart’s doctrine an element which provides vitality and oxygen to an argument-legal positivism/natural law - that had no plausible solution. A positivism that has been imprisoned in a normativist dogmatism, as the kelsenian doctrine states that preached perfection, completeness and coherence of the legal system, and had it’s dead on arrival.

Hart has come to revitalize the controversy and to give Law a paradigmatic shift, so that it can be put into perspective what many positivists now a days can no longer sustain. Hart accepts that “Hay muchos tipos de relaciones entre el Derecho, la moral, y nada hay que pueda estudiarse provechosamente, en forma, separada, como la relación entre uno y otra.” 1 Nevertheless, he clarifies that this relationship comes from a reflection of some pretty obvious generalizations concerning human nature and the world in which men live; These generalizations consist in certain rules of conduct that every social organization requires in order to be viable. These rules derive from an element that is common to law and conventional moral of all societies that have reached the point in which one and other are distinguished as different forms of social control 2 To Hart, those universally acknowledged conduct principles, have a foundation in elementary truths, referring to human beings, their natural circumstances, and its purposes; they can be considered as a “modest” minimum content of Natural Law, in contrast to the most pompous and controversial works that have often been proclaimed under that name. 3

On the other hand, Hart considers that these relationships between law and moral observe obvious truths; the connection with law and moral is originated in each case in which it is observed a reason for the survival of human kind in society. In other words, “Without such content, legal precepts and moral would not be able to carry out the minimum purpose of survival that men have when they decide to arrange themselves in society.” 4 The connections between law and moral refer to the content of certain legal and moral precepts that can be explained from the obvious fact that Hart describes as: human vulnerability, approximate equality, limited altruism, limited resources and limited understanding and strength of will.5 Hart considers the simple obvious truths that he analyses, as the nucleus that reveals the common sense in the doctrine of Natural Law, in order to explain the prominence of the understanding of law and moral, and to explain why the definition of the basic forms of one and other, in purely formal terms, without any reference to an specific content or to social needs, has proven to be inadequate. 6

2 Ibidem, 238
3 Ibidem, pp. 238-239
4 Ibidem, 239
5 ibidem, pp. 240-245.
6 Ibidem, p. 246.
In the polemic of the concept of law as a system of rules or precepts, one can infer the existence of a fundamental paradox: It was precisely a positivist, H. L. A. Hart, who anticipated the argumentative shift that today encourages the neoconstitutionalist theories, in order to adopt moral arguments justifying legal precepts in an unnecessary way. The open texture of law leads in an unavoidable way to the interpretation of the undetermined language of the concepts contained in its norms. The aperture of legal language has derived in the same way in which the very concept of law is essentially the additional exercise of interpretation of the general dispositions for the selection of a specific meaning in the concrete case.  

Hart, whether or not consciously, inaugurates the analytic philosophy of the legal language in the positivist tradition, as a practice opened to the world of normative interpretation. Law turns into a form of applying precepts in a rationally based way, something that classical legal positivism had not yet raised. In other words, the concept of law is at the same time precept and language, translatable in general dispositions with a determined direction in the specific case in which becomes necessary to ascribe a meaning, that in a given time could be relevant to the manifestations of justice immersed in such concepts, a matter that distances itself of the exegetic-legalist-normativist dogmatism of absolute neutrality of Hans Kelsen’s Pure Theory of Law.

Before this positivist school authority, Hart dragged his coreligionists who ended up on relenting to the incessant and overwhelming evidence that shows the insufficiency of the “system”; the only way of survival is reduced to the last strategy of making more flexible the radical separation between moral and law by means of a recognition rule that allows the establishment and incorporation of moral contents to law, without the entailment of law and moral being necessary. It is about inclusive positivism, soft positivism or mild positivism, which inspired in Hart’s ideas, in his Postscript of The Concept of Law, introduced moral arguments of justification of the precepts, consistent in adopting as an analysis of the legal phenomenon the justification context. While this analysis in given in a contingent form, the moral sustainment of precepts not only has to do with the strength or violence inside of the context of justification and discovery, which makes of such criteria sustain the actual debate among them positivists. Positivist law could no longer be the same before the statements of an authority as Hart.

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7 Ibidem, pp. 155 y ss.
9 BAUTISTA ETCHEVERRY, Juan, El debate sobre el positivismo jurídico incluyente, Un estado de la cuestión, UNAM, 2006; BAUTISTA ETCHEVERRY, Juan y SERNA, Pedro, El caballo de Troya del positivismo jurídico, Estudios críticos sobre el inclusive legal positivism, Comares, Granada, 2010.
ETHICALLY RESPONSIBLE LEGAL ADVICE

By Master Elvira Villalobos Chaparro

Law is one of the most ancient known professions, and at the same time one of the most needed in society. Lawyers stand for their clients and seek for the best solution for a given issue. Usually, Law students start their studies wishing to responsibly become lawyers, and to gain the right tools to achieve commonweal by means of justice.

Sadly, this illusion that future lawyers cherish slowly disappears in their professional practice. And the Ethics courses they approved fade as superficial clouds which don’t reach required water to wet the floor. Clouds scattered by the wind that don’t help the seeds grow and bear the expected fruit to satisfy human needs.

Maybe the efficient cause to this lack of ethics in the legal profession is that lawyers didn’t have teachers who did not only talk about the differences between Natural Law and Statutory Law, but rather the need to study their similarities and complementarities.

Independence of Statutory Law is suggested and its relation to morals is questioned. There is not a deep academic training regarding the need of searching for justice in social life. Justice which is the greatest social virtue and among solidarity and subsidiary form the means to create all conditions in favor of full and comprehensive development of each and every member of society.

The great influence of the German jurist Hans Kelsen about Mexican lawyers is constantly experienced within our judges and attorneys. Kelsen, to whom we recognize his merits in Statutory Law studies, but at the same time, has been criticized about the lack of awareness about Natural Law. To him, only law enacted by human authorities is worth and moral rules or Natural Law is irrelevant in social life regulations.

This influence in legal positivism in the study of law in Mexican universities has caused the contempt for ethic rules and the connection they should have with Statutory Law rules. It is considered that ethics or moral, whose rules by regulating human conduct within society become Natural Law rules have no relation with Statutory Law whatsoever.

Mr. Efraín González Luna Morfín (a recently deceased Natural Law scholar from Jalisco, Mexico) held that Natural and Statutory Law mutually complement. He held that Statutory Law, as it is a human creation, is vague and deficient, and also that Natural Law needs the existence of Statutory Law so it can be applied in social life, because of the obligatory demand of the State for its compliance.

Statutory Law rules must have their grounds in moral standards. Morals rules in whole people’s life, but when these moral standards rule the external phase of human conduct, when the internal phase exteriorizes and affects other people, then the ruling of that conduct is performed both by Natural and Statutory Law.

Law is necessary, but not enough for human life’s moral fulfillment. Law and morals complement each other. Legislation tries to achieve justice in reality. Justice; which is the defining feature of individuals and entities. An unfair Law is something absurd and contradictory. The basis of Law must be justice and this is the least of love to the fellow that must exist in society.
Generally, Law is considered as legislation, but we must emphasize that Law as a rule is only one of the three meanings of this concept. Law is of course a joint of rules that regulate people’s conduct in society. Nevertheless, this is neither the only nor the main meaning of Law. Law, being an analogical concept, can be asserted as several means of knowledge, which have something in common, but also have specific differences. Among these concepts of Law, the main analogy is the objective fairness, meaning the good or conduct which is owed to another. For everyone to have their own (as Romans said their ius) among society, it is necessary that both rules and authorities or subjective rights, as a result from that rules, shall exist and be complied to make commonweal possible. Commonweal is the joint of all kinds of goods and conditions that allow and favor the development of each and every member of society.

To consider that Law is only the joint of social rules of conduct is decreasing it to an important but incomplete meaning. Certainly Law is a necessary conduct ruling to regulate social coexistence. Nevertheless, this regulation must pursue the need for people to demand what they own. If a person is considered as a substantial compound of material body and spiritual soul, the whole development of its personality requires physical and intangible goods to allow and permit this development.

This is one of the topics that is not analyzed and questioned in Ethics and Legal Deontology classes. It is taken for granted that Law is only a system of rules and the importance of the purpose of such rules is lessened. The main meaning, which is perceived from humans since they are of sound mind, is precisely the Law as the objective fair, as the good that belongs to each one. That this is true –the adjustment of the mind with reality- is constantly perceived even in the easiest situations. Once, Peter was waiting for his dad to take him to the soccer game he had promised to take him. Peter’s parents were divorced and his dad picked him every Saturday. That day, Peter woke up particularly active and happy. He took a shower, finished his homework, and helped his mom to clean his room and to cleanse the garden. He ate early and at three thirty he was ready, waiting for his dad to pick him up at four o’clock as he promised. Four o’clock came around; four thirty, five o’clock, and his dad never showed up. He went, after work, with some friends to have some drinks. The boy crying said, as he wiped his eyes: “THERE IS NO RIGHT”… “THERE IS NO RIGHT”…

This right has its grounds on the person’s dignity. Dignity which every human being own, for being the kind of being he is. Regardless of the wealth he has, his intelligence, his social recognition, every person, by the fact of being a person, owns dignity.

All this topics that should be analyzed in Legal Ethics classes or in Attorneys’ Deontology as referred to jurists’ ethics, are either superficially addressed or not deeply questioned as considering that written law –by being a human creation- has to be separated from morals.
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 quarterly publication. The current submittal deadline for contributions to the next issue is September 30, 2014.

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

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