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The Emerging Presence of Mexican Law in California Courts

JORGE A. VARGAS*

Last October, thanks to the invitation of Dean Aleinikoff of Georgetown University Law Center, I attended the dedication of the "Eric E. Hotung International Law Building" in Washington, D.C. On that important occasion, Sandra Day O'Connor, then Associate Justice of the Supreme Court of the United States, was the keynote speaker. In her address, she discussed the importance of international law not only for our Supreme Court “but for all courts, both here and abroad”—this she said—because of “Globalization.”

After alluding to the very few cases decided by the U.S. Supreme Court involving international law, Justice Day O'Connor pointed out

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2. In the 2004-2005 Term, these cases included: 1) Roper v. Simmons, 125 S.Ct. 1183, 161 L. Ed. 2d 1 (2005) (involving the U.N. Convention and the Rights of the Child and the International Covenant on Civil and Political Rights, decided March 1, 2005);
that "Globalization" is much more than a large array of international agreements, treaties and organizations. According to her, "Globalization" represents:

a greater awareness of, and access to peoples and places far different from our own. The fates of nations are more closely intertwined than ever before, and we are more acutely aware of the connections. As we learned in this country on September 11, 2001, these connections can sometimes be devastating rather than constructive. But as we also are learning in the post-September 11 world, the power of international cooperation and international understanding is much greater than the obstacles we face.3

That was not the first time Justice O'Connor underlined the significance of international law to American courts. In the speech she pronounced when she was presented with the "World Justice Award," Justice O'Connor alluded to the inescapable importance that foreign law exercises upon American courts when she said:

American courts need to pay more attention to international legal decisions to help create a more favorable impression abroad. . . . The impressions we create in this world are important. Although it is true that the U.S. judicial system generally gives a favorable impression worldwide, when it comes to the impression created by the treatment of foreign and international law by a United States court, the jury is still out.4

The relative timidity or reticence apparent in the brilliant minds of our U.S. Supreme Court Justices when confronted with cases involving international law is not limited to our highest court or to the geographical area of the District of Columbia. With about 4,000 international treaties and conventions (3,813 to be exact) to which our


3. See O'Connor, supra note 1 at 1.

country is a bilateral, regional or international party,\(^5\) embracing a dazzling array of commercial, cultural, economic, military, political, scientific and technical subjects, it is not surprising that American judges are not anxious to decide cases governed by this multitude of international legal instruments. Moreover, to be frank, this old and chronic aversion experienced by judges to decide cases involving arcane notions of international and foreign law is a truly “global” phenomenon. In other words, this international law aversion has been known to be present in the hearts and minds of all judges—“both here and abroad” in the words of Justice O’Connor—regardless of age, culture, language or legal system.

Fortunately for our U.S. Supreme Court Justices, and for American judges at large—including our own California judges—most of these international instruments already include a number of avenues, mechanisms or institutions allowing for the peaceful settlement of disputes without having to rely on decisions to be rendered by our domestic courts. This explains the insignificant number of international law cases that are brought before American courts.

Direct consultations and negotiations, good offices, mediation and conciliation and, in particular, special international tribunals and arbitration bodies not only ameliorate but considerably reduce the prospects (and the associated anxiety) that some of these international law cases are known to generate when they suddenly end up on the desk of an American judge.

When one considers that the United States of America is the country with the largest number of bilateral and commercial agreements in the world (a total of 3,726),\(^6\) it is only reasonable to expect that American courts—including the U.S. Supreme Court and the California courts—are more likely to decide a considerable and increasing number of cases governed \textit{not} by international law but by foreign law every year. Indeed, the number of foreign law cases decided by American courts has increased dramatically over the last decade, and these cases are by far larger and more varied than cases involving international law.

In a quick search for cases involving foreign law that have been decided by California courts over the last two years, the results were not


\(^6\) \textit{Id.}
I would like to pose two ideas before this learned audience: first, that becoming familiar with foreign law is a practical, intriguing and beneficial exercise for California judges and for American judges at large. And second, that Mexican law represents an emerging and a very large component of foreign law within our State and at the domestic level.

Three simple words give the foundation to the idea that Mexican law is turning into the most prominent foreign law area in our State and in our country. These words are: 1) Geography; 2) People; and 3) Wealth.

I. GEOGRAPHY

For Mexico, its geographical contiguity to our country is, no doubt, its most precious and strategic asset. The old adage attributed to Porfirio Diaz, Mexico’s dictator of early last century, “Oh, Mexico, so close to the United States and so far away from God,” has now lost its original meaning. There may be close to 40 million Mexicans, most of them here in California, who can attest to this fact... including myself, by the way.

The 1952 miles of international boundary that run between our two countries—formed by natural and artificial segments—do not divide our two nations. Rather, they unite a major global power with a developing democracy rich in history, culture and natural resources.

II. PEOPLE

The Mexican people are Mexico’s best resource... and we are getting thousands of them every day. With 104.7 million people, Mexico continues to strengthen its position as a mid-size power in Latin America and the Caribbean. Last year, as you know, the U.S. Census Bureau reported that the Hispanic population became the largest ethnic minority in our country. Interestingly, about 67% of this group is formed by Mexicans and Mexican-Americans, and most of us live here in

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7. For a list of cases, see the Appendix at the end of this paper.
From a U.S. perspective, I do not have to remind you that about 15 million American tourists visit Mexico every year, and that the beauty of the colonial architecture of San Miguel Allende, Cuernavaca, Morelia, and other beautiful places in Mexico, shelter one million Americans who live there on a permanent or semi-permanent basis, including some 25,000 who refer to the Baja California peninsula as their "home."

The constant flow of people across both countries allows them to engage in a variety of activities: business and trade, tourism and excursions, shopping, attending movies and theaters, and enrolling in schools starting with kindergarten up to Ph. D. programs. The San Diego Chamber of Commerce reported that Tijuana residents shopping in San Diego spend some $6 billion dollars every year! Over the last two decades, binational marriages between American and Mexican people have become increasingly common, as well as adoptions and divorces, with the resulting exponential growth—of course—of international civil litigation between both countries.

III. WEALTH

Speaking in terms of wealth, Mexico is our most important trade partner, having displaced Japan first and Canada more recently. To give you an idea of the volume of wealth that moves across both countries, the United States sells more goods and services to Mexico than it does to Germany, the United Kingdom, Italy and France combined, or to the People's Republic of China, Singapore and Hong Kong combined, or to the rest of Latin America. Some of you may be surprised to know that California exports more to Mexico than it does to Japan. Furthermore,

10. In 2002, there were 37.4 million Latinos in the civilian non-institutional population of the United States, representing 13.3 percent of the total. Among the Hispanic population, two-thirds (66.9 percent) were of Mexican origin, followed by Central and South American (14.3 percent), Puerto Rican (8.6 percent), Cuban (3.7 percent), and the remaining 6.5 percent from other Hispanic origins. The regional distribution of the Hispanic population ranged from 44.2 percent in the West to 7.7 percent in the Midwest. Latinos of Mexican origin are more likely to live in the West (54.6 percent) and the South (34.3 percent), particularly in metropolitan areas. See Roberto R. Ramirez & G. Patricia de la Cruz, U.S. Dept. of Comm., Bureau of the Census, The Hispanic Population in the United States: March 2002 (June 2003), available at http://www.census.gov/prod/2003pubs/p20-545.pdf.

11. See Vargas, supra note 8, at 1340-42.
the volume of trade between Mexico and Texas as a result of NAFTA amounts to $750 million dollars a day!

These impressive figures become more meaningful when we place them within the context of American investment in Mexico. Since World War II, our country has been the largest foreign investor in Mexico, with investments totaling $85 billion dollars and representing 70% of Mexico’s total direct foreign investment (DFI). Other investors include the UK (6%), Germany (4%), France, Spain and Switzerland combined (3.5%), and The Netherlands and Japan combined (2%).

After the People’s Republic of China, Mexico today, is one of the top destinations of DFI on a global scale. Before NAFTA, U.S.-Mexico trade amounted to $86 billion dollars annually. Today, this trade exceeds $225 billion dollars every year. In 2002, the U.S. Department of Commerce reported that Mexico had a $35 billion dollars surplus over the United States.

Undoubtedly, geography, people and wealth will continue to play a decisive role in the introduction of Mexican law to the United States. Virtually every day, American courts—including our own California courts—decide a greater number of cases governed by Mexican law in a variety of fields, ranging from sales of agricultural produce, civil aviation, contracts, corporate law, customs, environmental law, family law, intellectual property, personal injury cases, technology transfer, etc., not to mention certain international criminal law areas involving drugs, extradition, trans-border kidnapings, organized crime, money laundering, and tax evasion.

In the same fashion that Mexican law is turning into a prominent presence in the American judicial landscape, our country reciprocates in the most vigorous manner—and this is only natural—by exercising a profound and pervasive influence upon Mexico, an influence that is already constructing Mexico’s present and is gradually shaping its future.

Maybe in a future conference there will be more time to address the topic of the “Americanization” of Mexican law—“Americanization” that may be traced back to Mexico’s very first federal constitutions of 1824 and 1857.

From a personal perspective, there is no doubt that in the near future Mexican law is likely to require considerably more time from our California courts. The time to be prepared to constructively respond to this challenge may be here already. One should envision a number of

12. Id.
13. For a list of cases governed by Mexican law recently decided by California courts, see Appendix One to this address.
strategies or programs to be better prepared to effectively confront this challenge. Some of these strategies may include:

- to create a *Training Team and Core Curriculum* for California Judges to introduce them to and educate them about Mexican law;
- to create *Mexican Law Libraries* in strategic points in California (and other states with a large population of Mexican and Mexican-Americans);
- to prepare *Mexican Law Manuals* in priority areas of Mexican Law;
- to organize summer courses on *Mexican Legal Spanish* and *Mexican Legal Documents*;
- to organize periodic *Legal Conferences* for California judges to meet with their Mexican counterparts and discuss Mexican law questions or problems;
- to organize *Mexican Law Conferences for California Judges* (and conferences on American law for Mexican Judges);
- to produce a series on *"Mexican Law Papers,"* discussing practical legal issues of interest to California Judges; and
- to support *Mexican Law courses* in the curriculum of California law schools.

In closing, I would like to express my sincere and personal thanks to the California Judicial Council for having invited me to participate in this conference. It has been an honor to be in front of such a distinguished and knowledgeable audience.