

# THE MEXICAN LEGAL SYSTEM

## INTRODUCTION

Mexico has a “civil law” legal system, whereas the United States has a “common law” legal system. In a civil law system, the application of the law is based on a codification of the laws and legal principles. These codes reflect very general divisions in law that have developed over the years. Most of Mexico’s civil law comes from the French Civil Code, known as the Napoleonic code.

Case law, which is the basis of the common law system, is not used in a civil law system. Although case law is relevant in Mexico, it is not used in the same way as it is in the United States. The differences between the two systems are diminishing, especially since the United States is using a similar system in the form of uniform codes.

The Mexican constitution divides federal power into three branches: legislative, executive, and judicial. The executive branch is more powerful than the other two branches, and has some legislative powers, such as issuing regulations.

Mexico is a republic and has a federal system. The country comprises 31 states, each of which independently regulates its citizens by State Constitution, Civil Codes, Code of Civil Procedures, Penal Code, and Penal Procedures Code. Although some States have made changes to these laws, for the most part they closely follow their federal counterparts that apply to the Federal District.

## CIVIL LAW

In the Mexican legal system, civil law regulates the civil relations between individuals, their marital status, the organization of the family, legal capacity, the status of personal and real property, and civil contracts. It is important to understand the difference between civil law and other branches of the law, such as business law, labor law, etc. Civil law can be divided into five categories: persons, goods and property, successions and inheritance, obligations, and contracts.

The Civil Code (*Código Civil*) in Mexico is the backbone of the entire legal system. Most other branches of the law have some link with the civil code in one way or another. A foreigner in Mexico is subject to the provisions of the Civil Code. It is in the best interests of a foreigner wishing to purchase property in Mexico to be aware of the rules that apply to him so it is wise to have a basic knowledge of the general principles contained in the Civil Code.

## BASIC LEGAL PRINCIPLES

Men and women are equal in the eyes of the law. This provision is recognized both in the civil code as well as in the Mexican Constitution.

No law or any other governmental order may be applied retroactively if it is damaging or an impairment to someone. In other words, a law cannot be passed and then applied to situations or facts that took place before the law was passed if by doing so someone is negatively affected. If the law is intended to cure or remedy an otherwise unjust situation, without harming anyone, it can be retroactive.

The force of the law does not depend on the will of those to whom it is to be applied. This basic principle may be reduced to a statement: a person is subject to the provisions of the law. Only certain individual rights may be renounced and only when such renunciation is precisely in relation to a specific right, and it does not directly affect the public policy or harm others.

Some provisions of the law are seen as alternatives rather than obligations and are only to the benefit of an individual or group of individuals. These legal provisions are known to be of private interest. On the other hand, when a provision of the law is intended to be to the benefit of everyone or to society as a whole, such provisions are considered to be in the public policy.

A foreigner in Mexico is generally free to do whatever he likes as long as he does not violate the law or public interests. Any acts to the contrary are considered illegal, or, in the case of public interests, null and void. The importance of this provision should not be overlooked. Many laws in Mexico state that they are in the public interest, and thus none of their provisions may be renounced.

Ignorance of the law is not an excuse for disobeying it. Disuse or custom is no excuse either: if the law is still on the books, it is still enforceable. Most of the other branches of the law have some link with the civil code. For this reason it is good to have a basic knowledge of the general principles contained in the Civil Code.

The scope of application of Mexican Law is limited to anyone within Mexican territory as well as any events that occur within Mexican territory. The only exceptions to this rule are cases that are subject to foreign law by treaties with Mexico, or cases that expressly stipulate that foreign law would apply.

The Civil Code establishes the following rules for the determination of the applicable law:

- All legal acts validly originating in any Mexican state or in any foreign country in accordance with their law shall be recognized in Mexico.
- The laws applicable to their domicile determine the status and legal capacity of individuals.
- The establishment, regulation, and extinction of real property rights, as well as leasing contracts and temporary use agreements related to real property are regulated by the law applicable in the place in which they are located, even when the person who holds title to the property is a foreigner.
- The formalities required for legal acts are regulated by the applicable law of the place where they were executed, with the exception of those acts that fall under federal law. Generally, the Civil Code from each state mostly regulates civil matters; while federal law regulates business matters.
- With the exception of the above, the consequences of legal acts and contracts are regulated by the law of the place where they are executed, unless the parties validly designate the application of another law.

Article 17 of the Civil Code states that when someone acquires excessive profit by taking advantage of the ignorance, inexperience, or distressed state of another person, the disadvantaged person has the right to demand that the contract in question be declared null and void. Or, he can demand that there be an equitable reduction to his obligation, plus the payment of damages. In this provision the law is intended to protect people from being swindled. For it to be applicable, two basic conditions must be met:

1. That which was exchanged in a transaction was totally disproportionate and permitted excessive profit. What constitutes “disproportionate” and “excessive profit” is determined by a judge.

2. That one party took advantage of the other due to his relatively weak position. There must be a direct connection between the excessive profit obtained and the exploitation of the other party. If it cannot be shown that the person intentionally exploited the other person to obtain excessive profit, this provision does not apply.

The damaged party has a term of one year from the time of exploitation to take legal action before his right lapses.

## PERSONS

### LEGAL CAPACITY AND INDIVIDUAL ATTRIBUTES

This part of the law deals primarily with one's legal capacity and attributes. Basically, it states that all persons have rights and responsibilities and, therefore, have the capacity to act as independent adult individuals within the confines of a society and its laws. Often "legal capacity" is used synonymously with "legal personality" because one's capacity to act as an independent adult within the confines of a society and its laws is directly affected by his individual legal attributes.

Such legal attributes can be divided into categories:

- **Marital status** (*el estado civil*): This is whether a person is single, married, or divorced.
- **Legal capacity**: To have full legal capacity a person must be at least 18 years old, he must have complete control of his mental faculties, he must not be a deaf-mute who neither reads nor writes, he must not be addicted to drugs or alcohol.
- **Name**: In Mexico this includes first or given name or names, as well as father's surname and mother's surname, in that order. For example, the author's name would be Dennis John Peyton Callan.
- **Domicile**: The law recognizes three classes of domiciles: actual, legal, and conventional. A person's **actual domicile** is where he lives on a permanent basis. In the absence of this domicile, the principal business domicile is used, or if neither apply; a person's domicile is wherever he is found. A **legal domicile** is where the law determines a person's residency for the purposes of exercising his rights or for complying with his obligations, regardless if he can actually be found there or not. This is mostly applied to cases of minors, military personal, and convicts. Legal entities, such as corporations, associations, and the like, have their domiciles where their principal or administrative offices are located. A **conventional domicile** is where a person wishes to receive notification for legal matters, or for contractual purposes. Often this will be a lawyer's domicile.
- **Patrimony**: This is the total mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. Simply put, it refers to all rights and obligations that may be given monetary value.
- **Nationality**: This is determined by citizenship, and Mexicans may have dual citizenship.

### INDIVIDUALS AND LEGAL ENTITIES

Under Mexican Law there are two types of persons: Individuals (*personas físicas*) and legal entities (*personas morales*), such as corporations, associations, and institutions formed by individuals.

Individuals enjoy the rights and protection of the provisions of the Civil Code from the moment of conception. This legal capacity (*capacidad de goce*) takes effect even before birth and is lost only upon death.

In Mexico, legal age--the age at which a person may by law assume the rights and responsibilities of an adult--is eighteen. An adult enjoys unlimited legal capacity to buy and sell property and engage in any activity that is not prohibited by law. Minors, on the other hand, have limited legal capacity inasmuch as they are incapable of exercising their rights and fulfilling their obligations alone and therefore require a legal representative to exercise their rights and assume their obligations.

In the case of legal entities, since they are created by law, they must depend on legal representatives for the implementation of all of their rights and obligations. Therefore, the only attributes they have are name, domicile and nationality.

Legal entities are regulated by type of entity. Legal entities have many different forms: partnerships, clubs, unions, corporations, or governmental agencies.

### REPRESENTATION OF CHILDREN

Children are normally represented by their parents. Under the provisions of the Civil Code, there is "*patria potestad*," or **paternal power**. Paternal power is the sum total of rights and obligations which parents initially have with regard to their minor children.

Article 414 of the Civil Code provides for paternal power over children resulting from a marriage to be exercised in a certain order:

1. The father and mother;
2. The father's mother and father;
3. The mother's mother and father.

If a child is born out of wedlock, and if both parents live together, then they both exercise paternal power. If the parents are not living together, then the parent who has custody of the child exercises paternal power.

Only the people who adopt them can exercise paternal power over adopted children. It cannot be extended to include the parents of the adoptive parents (the child's adopted grandparents) from either side of the marriage. In order for any of the grandparents to exercise paternal power, both of the child's biological parents must be unable to do so.

The persons who exercise paternal power over a child have the responsibility to care for and educate the child as any good parent would do.

Paternal power is terminated under certain conditions:

- The death of the person who exercised the right provided that there is no other person who shared that right;
- The emancipation of the minor resulting from marriage (emancipation is the process by which a minor is liberated from either paternal power or a guardianship due to marriage);
- The child reaches adulthood.

The person who exercises paternal power loses this right in certain circumstances:

- When they have been expressly sentenced to such loss, or have been convicted of two or more felonies;
- In the event of divorce paternal power is lost by the parent who is found culpable;
- When the well being of the child is at risk due to mistreatment, abandonment, etc.

## GUARDIANSHIP

**Guardianship**, “*tutela*,” is intended to protect minors who for one reason or another are not subject to paternal power, and to protect adults who do not have legal capacity to act on their own behalf. A guardian acts on behalf of a person who otherwise would have legal capacity to do so on his own. In addition to the guardian, the law also requires that a conservator (*curador*) be assigned to oversee the guardian and to administrate, directly or indirectly, the property of the minor or incapacitated person.

Essentially, the guardian has the same obligations as those provided for under paternal power, i.e., they are responsible for the well being and education of the minor or the incapacitated person under his guardianship.

Persons who fit specific criteria are subject to guardianship:

- Minors not subject to paternal power;
- Adults who do not have control of their mental faculties due to insanity, idiocy, or imbecility;
- Illiterate deaf-mutes;
- Alcoholics and drug addicts.

The law provides for three types of guardianships: testamentary, legitimate, and court-appointed.

### TESTAMENTARY GUARDIANSHIP

Testamentary guardianship is established by designating a person as guardian by means of a will left by the person who exercised paternal power over one or more of his descendants. Testamentary guardianship takes precedence over all other normal designations of paternal power. For example, if a widow established testamentary guardianship with regard to her ten-year-old surviving son, such designation is legal even though the law stipulates that the child's father's parents exercise paternal power.

### LEGITIMATE GUARDIANSHIP

Legitimate guardianship is established in the absence of someone to exercise paternal power and the absence of a testamentary guardianship. Siblings or other close relatives of the minor or incapacitated person carry out this type of guardianship.

In the case of incapacitated adults, a husband or wife has guardianship over his or her spouse, and adult children have guardianship over their widowed parents.

### COURT APPOINTED GUARDIANSHIP

Court appointed guardianship is established in the absence of someone to exercise legitimate guardianship or in the absence of a testamentary guardianship. A court appointed guardianship is also necessary in the event that the guardian becomes incapacitated and no other substitute is available.

All guardianships are extinguished under certain conditions:

- By the death of the minor or incapacitated person subject to the guardianship.
- By the disappearance of the state of incapacity affecting the person in question.
- When a minor reaches adulthood.
- If the person subject to the guardianship becomes subject to paternal power due to adoption, or reuniting the child with someone who can legally exercise paternal power.

## FAMILY PATRIMONY

The family patrimony law is intended to assure that food and housing for all family members are protected. To do this the law provides for certain assets to be legally protected from any encumbrance or lien. Family patrimony can consist of two kinds of assets:

- A house to live in.
- Farm land that provides sustenance for the family, in certain cases.

Families differ as to the amount and value they put into a home, therefore the law limits the amount that is considered as family patrimony to the equivalent of 10 times the yearly minimum wage corresponding to the area of residence.

In order for family patrimony to be established, specific requirements must be met:

1. The person must be an adult or be emancipated;
2. The person must live in the place which is to be included in the family patrimony;
3. The person must prove that a family relationship exists that would benefit from the establishment of a family patrimony, and prove the family relationship by submitting certified copies of the appropriate certificates from the Civil Registry.
4. The person must prove that he has clear title to the property to be included in the family patrimony.
5. The person must prove that the value of the property does not exceed 10 years of minimum wage at the time and place in which the property is located.

The title to the property that is included in the family patrimony does not transfer over to the family that benefits from the family patrimony. There is simply a filing made at the public registry (*registro público de la propiedad*) which indicates that the property in question has been designated as such. From the date of the filing, the property becomes inalienable and cannot be encumbered. Once the family patrimony is terminated, the title once again reverts back to normal title in benefit of the owner.

Family patrimony is terminated for 3 reasons:

1. All family members no longer have the right to support
2. The family does not reside in the house for more than one year without just cause.
3. When agricultural property is not cultivated for two consecutive years without just cause.

## FAMILY RELATIONSHIPS

The law recognizes three types of family relationships.

1. Consanguinity relations: related by blood.
2. Affinity relations: related by marriage, includes in-laws.
3. Civil relations: related by adoption, applies only to the persons involved in the adoption--does not extend to other family members of the person adopted or to other family members of the person adopting.

## MARRIAGE

Under Mexican Law, marriage is a contract between a consenting single man and a consenting single woman to mutually assist each other. Because of the nature of the relationship the contract is considered to be civil.

The law allows marriage between minors, the man being at least sixteen years old and the woman at least fourteen years old. Minors must have the consent of their parents if they are still living. If the parents are not living, the grandparents on their father's side, or in their absence, the grandparents on their mother's side, give consent.

Foreigners may also be married in Mexico, either to another foreigner or to a Mexican national. Foreigners must obtain a permit from the Ministry of the Interior (*Gobernación*). The marriage contract is valid only if it is executed before a judge or an official of the Civil Registry and subsequently inscribed in the marriage section of the Civil Registry. To initiate this process, a written application is filed in the Civil Registry.

The law establishes specific impediments for the execution of the marriage contract:

- One or both of the parties are not old enough to get married.
- Lack of consent to be married by one of the parties. This usually only applies to minors who by definition need the consent of a guardian or an adult who has paternal power over the minor in question.
- The existence of a blood relationship between the parties.
- Adultery: anyone convicted of adultery may not enter into marriage.
- Attempting to take the life of a person in order to marry that person's spouse.
- The uses of physical or moral force to induce someone to consent to marriage.
- Alcoholism or drug addition by either of the parties.
- Certain illness.
- Either party is already married.
- The existence of a guardianship is an impediment to the guardian to marry the person subject to the guardianship.

## PROPERTY OWNERSHIP IN MARRIAGE

The law provides for two ways of handling property either party to a marriage contract own at the time they are married: joint ownership of property, which is known as "*sociedad conyugal*;" or separation of property, which is known as "*separación de bienes*".

***Sociedad Conyugal***: All property the husband and wife own separately prior to the marriage is jointly owned after the marriage. Any property acquired after the marriage is also jointly owned. Once the marriage contract is signed the husband and the wife become co-owners, and therefore all legal documents that transfer or encumber any of the property of the couple must be executed by both to be valid.

***Separación de Bienes***: Each person retains ownership of all the property owned before the marriage as well as any property they may acquire individually during the marriage, including wages, salary, etc. It is possible to have partial separation of property, in which case any property that is not expressly designated as forming part of one of the parties property, is considered jointly owned property.

## DIVORCE

There are two types of divorce provided for under Mexican Law:

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1. Necessary divorce
2. Voluntary divorce

#### **NECESSARY DIVORCE**

This type of divorce is based on circumstances that are considered to be dangerous to the married couple themselves or to members of their family. The law's intent is to eliminate such danger by separating the husband and wife.

There are established grounds for a necessary divorce:

- Adultery, provided that it is proved beyond a doubt.
- One spouse incites the other to acts of violence or to commit a crime.
- Immoral acts committed by either spouse that may risk corrupting their children.
- Any incurable hereditary or contagious disease, or incurable impotency, which occurs after entering into marriage.
- Any incurable mental illness.
- One spouse abandons the home for more than six months without just cause.
- The formal declaration of abandonment or the presumption of death.
- Extreme cruelty, threats or grave injustices caused by one spouse to the other.
- Lack of participation by one spouse to comply with his or her marital obligations as provided for in the Civil Code, such as sharing in the household expenses, educating the children, etc.
- One spouse is sentenced to prison for a term of more than two years for having committed an infamous crime.
- Continual disagreement between the spouses caused by immoderate and habitual drug use, or for drunkenness that threatens to cause the ruin of the family.

The spouse who is affected by any of the above causes must file for divorce within six months following the event or circumstance that typifies such cause for divorce.

#### **VOLUNTARY DIVORCE**

This type of divorce is filed for by mutual consent of any adult married couple.