MEXICAN LIVING LAW: AN INSIDER'S VIEW

Resumen

El Maestro Raúl Cervantes Ahumada de México, fué entrevistado por Boris Kozolchyk, profesor de derecho internacional de la Universidad de Arizona, durante un visita de intercambio de profesores y administradores de UNAM. Durante la entrevista, el Profesor Cervantes Ahumada habló sobre sus experiencias en el desarrollo de la teoría legal y la practica en México, hubicando estos hechos en un contenido histórico y demostrando el "derecho vivo" de México. Habló de su uso de rompimiento de promesas fiduciario como un método de recobrar propiedad transferida bajo la compulción de la confiscación. Habló de su papel en el cambio de la práctica de proporcionar copias de las ecutatorias de la suprema corte al modo legal que existe hoy. Cervantes Ahumada describe su primera y única aparencia en la televisión durante cual el explicó su oposicíon a la propuesta legislación contra el contrabando por razón de la practica común del contrabando. Finalmente, demuestra sus singulares poderes de la presidencia mexicana através de fugas de reos.

This interview with Professor Raul Cervantes Ahumada took place in November of 1987 during the second annual visit of UNAM Law School professors to the University of Arizona College of Law. The interview was conducted by Boris Kozolchyk, professor of international law at the University of Arizona.

BK: Professor Raul Cervantes Ahumada is one of the most revered law teachers in Latin America. For more than 50 years his name has been associated with commercial law topics such as negotiable instruments and maritime law. In addition to voluminous scholarly writings, he has authored model uniform negotiable instrument laws for Central and South American countries. He is an integral part of a group of Mexican commercial law professors who, in the late 1940s, began the task of creating a truly Mexican commercial law doctrine. Others in the group were the late Roberto Mantilla Molina, who combined meticulous exegesis employing every tool of grammar and etymology with a keen sense of what was going on in practice, and Jorge Barrera Graf, who was the most rigorous of conceptualists, his writings steeped in legal doctrine, and who subjected statutory provisions to a most searching conceptual screening.

Raul Cervantes Ahumada is the master maverick. At times he is linguistic, at times conceptual, on occasion metaphysical (as befits a fine poet), and on the whole he is persuasive. His persuasiveness has

earned him not only many legal victories in courts and legislatures throughout Mexico, but also the position of advisor to Mexican presidents and cabinet ministers. As will be apparent in this interview, his persuasiveness stems from a keen sense of reality. He knows the Mexican geographic and human landscape as few others do. He understands the feeling behind the gesture and the principle or standard of fairness behind the invoked rule. Thus, he knows how to roll with the punches. Where a lesser academic or litigant would give up the battle when faced with a highly literal and hypertechnical interpretation of existing statutory and decisional law, he accepts such an interpretation but turns it around on the interpreter.

His wisdom is inevitably accompanied by his wit. One need only listen to one of his stories to perceive the deep irony that underscores the tale. Each tale brings out a different wrinkle in Mexico's fascinating human landscape. If one understands Raul Cervantes Ahumada, one understands much of what moves and shapes "legal" Mexico. His life and deeds are an exhaustive compendium of Mexican living law and, in that spirit, I would like to introduce my friend and teacher of many years, Raul Cervantes Ahumada, to the readers of the *Arizona Journal of International and Comparative Law.*

I propose that you first describe some aspects of at least two of the many significant cases in which you have been involved. I would like to suggest that you tell us about cases which, in your opinion, have contributed to the growth of Mexico's substantive or procedural commercial law. Thereafter, you could narrate some incidents which illustrate attitudes toward law and lawmaking in Mexico, particularly by the executive branch. Is this acceptable?

RCA: Yes.

BK: Perhaps we can start out with the case which established a method for enforcing fiduciary promises. I gather this case came about very early in your career as a litigant and pitted you against some of the most famous litigants in Mexico. It involved valuable property conveyed by a debtor facing insolvency to his father, in an attempt to prevent the creditors' possible attachment or foreclosure.

RCA: This is a good beginning. Yet, the reader will not understand Mexico's fiduciary legal institutions unless he is aware of certain basic facts about Mexico's revolutions. From a legal standpoint, the most significant revolutions Mexico has undergone are the War of Independence, the 1857 Juarez-inspired Laws of Reform (*Leyes de la Reforma*), and the 1910 revolution leading to the Constitution of 1917. As a result of this last revolution, Mexico acquired an entity known as the PRI (the Revolutionary Institutional Party), which is nothing

more than the branch of the government in charge of electing government officials. The last revolution, like the preceding revolutions, was authentic in the sense that it sprang from the people. Unlike so many other revolutions in Latin America, Mexico's revolutions, and particularly the 1910 revolution, were not mere coups or military takeovers. In a country of approximately 14 million people, this revolution wound up costing as many as a million and one-half lives. The enormity of the cost of this revolution, among other factors, gives the 1910 revolution a continuing legitimacy and protects the PRI's hold on power.

I was digressing to dramatize the circumstances under which property was conveyed during the revolution by those who feared losing life and limb at the hands of the various revolutionary groups. The fear was real, and the probable consequences of capture or punishment were such that many did not hesitate to convey large estates to fiduciaries. This was going on during the revolution and was continued after the enactment of the first agrarian laws distributing the *latifundios* (large landed estates) among landless peasants.

I hasten to add that Mexico did not invent the device of fiduciary transfer under fear of confiscation. The world has a long history of such conveyances and, as you pointed out in some of your own lectures in Mexico, the development of the Anglo-American trust is organically connected with feudal conveyances to the Church in England, to the point that the English found it necessary to enact their Mortmain statutes. Juarez' 1857 laws of the *Reforma*, incidentally, echoed the English Mortmain statutes.

In Mexico, however, fiduciary transfers took a different turn than in English law. The success of the 1910 revolution meant that the professional army that had ruled Mexico for generations was destroyed. In its place emerged a myriad of small armies headed by *caciques* (chieftains) who were frequently at war with each other. Political power ebbed and flowed with the success or failure of a particular army. If you had cast your lot with one *cacique* and he was defeated or had to flee the territory, this often meant that you had to do the same. If you had valuable property often you would leave it with your children's *compadres* (godparents). It was not unusual that, after an initial period of true fiduciary handling by the *compadre*, he would "warm up" to the property and stop sending you the rent or mortgage payments. Then, if you were lucky enough to return after the defeat of the reigning *cacique*, you often had to sue your *compadre* to recover the property.

The ordinary cause of action in this recovery lawsuit was the "action on simulation," alleging that the conveyance to the faithless *compadre*, or to his heirs, was a nullity because the true intent was not to convey but to save the property from a revolutionary takeover. Most courts, however, rejected the simulation argument stating that the intent was not simulated, and held that there was an intent to convey ownership to the grantee. The intent may have been inspired by whatever founded or unfounded apprehension the grantor had but, nonetheless, there was a true and valid intent to convey.

BK: It seems, then, that the courts' attitude was to ignore the duress that influenced the grantor's conveyance or to refuse to take judicial notice of it. It appears to me that the courts were, in effect, establishing a highly stoic standard of duress while ignoring the effect that the revolutionary wars were having on the grantor's intent to convey.

RCA: Precisely. I do not believe, however, that duress was alleged by the lawyers who sued on the simulation cause of action. What they alleged was the invalidity of the conveyance as a result of an invalid or simulated intent to convey. And the important datum is that these recovery lawsuits were unsuccessful.

This was the state of the law on fiduciary transfers when the widow of a deceased grantor came to see me. Her late husband had conveyed to his father a valuable building which he wished to save from the reach of his creditors and revolutionary chieftains. The assumption was that the father, who was in his 70s, would will the property to his son, who obviously was expected to live longer than the elderly father. Fate had it, however, that the son died some time after he had conveyed the property and the father, perhaps fearing that the young and very attractive widow would soon remarry to a greedy stranger, or perhaps because he had "warmed up" to the property, refused to reconvey or to include the property in his will.

BK: What about the possibility of using some "constructive" or even "resulting" trust rationale. If I remember correctly, this case was decided after the enactment of Mexico's 1934 Law of Negotiable Instruments, which contains a whole chapter devoted to trusts. There were also some Supreme Court decisions that I read in Professor Batiza's work (R. Batiza, El Fideicomiso, Teoria y Práctica, Mexico, 1980) which discussed the nature of the trustee's property under Mexican law.

RCA: I am glad you called attention to the trust because, unlike the common law trust, the Mexican *fideicomiso* does not accept the division of ownership into legal and equitable titles. There is only one owner, and he is the legal owner. It would have been a perfectly

quixotic venture on my part to try to convince a court of the presence of an institution that was not recognized or understood. On the other hand, Mexican courts did accept and understand the meaning of a *pacto fiduciario* or fiduciary transaction and the fact that this type of transaction is governed by a high standard of good faith. Accordingly, my argument consisted of asserting that, while it was true that the defendant father had acquired legal ownership over the conveyed property, it was also true that he had acquired it subject to an obligation to act as a fiduciary and in good faith. This meant that he was supposed to forward to the son, or the son's surviving widow, those rent proceeds in excess of the sums he was entitled to retain in order to pay for property-related debts and his own living expenses. In addition, he was under a fiduciary, good faith duty to reconvey the property in his will. This duty, I must emphasize, did not arise from a division of ownership into legal and equitable titles, but from the fiduciary's contractual or quasi-contractual obligation in the fiduciary transaction. I recall quoting Professor Ferrara's study on fiduciary transactions (C. Ferrara, Il Negozio Fiduciario, Cedam, Padova, 1934) to the effect that the fiduciary transaction comprises two transactions: the apparent but unreal, and the hidden but real transactions. Unlike my losing colleagues in the preceding attempts to recover, I was not attacking the validity of the contract or conveyance between son and father. On the contrary, I was affirming its validity and enforceability.

Moreover, because I believed the transaction to be valid and enforceable, I was going to introduce evidence as to the parties' true intent. My evidence consisted of, *inter alia*, more than 200 letters between father and son in which the father reported punctiliously on the property's income and expenses and repeatedly praised the son's generosity in allowing the father to use some of the income to defray living expenses. I recall one particular letter in which the father asked the son to please relieve him of the duty to include the property in his will and allow him to reconvey it back immediately because he feared disputes among his heirs concerning the property if it appeared in the will as his own. The same letter suggested conveying the property to a corporation and handing over all the shares to the son to assure reversion of the property to its true owner.

The court admitted these letters into evidence and ruled for the existence of a fiduciary transaction which imposed the duties I have described. Nevertheless, the court came back with an unexpected procedural twist, saying that I had proved that someone, but not necessarily my client, was entitled to the reversion. Upon the court's inquiry with the land registry, it appeared that neither the plaintiff nor

the deceased grantor appeared as having conveyed to the defendant, but that a certain corporation had made the conveyance. I should add that it was common in Mexico at that time, for fiscal and other reasons, to record the ownership of valuable real property in the name of a family-held corporation. Thus, said the court, while the defendant is under a duty to return the property to the corporation at the expiration of the fiduciary relationship, the corporation had not been made a party to the lawsuit and thus the petition to insure a reconveyance to the plaintiff, or indeed to the corporation or to its successor, if any, had to be denied.

Naturally I appealed this decision all the way to the Supreme Court of Mexico on the purely procedural ground of the incongruence or inconsistency between what was proved before the Court and the Court's decision. My argument was that the Court had no power to introduce a new, unalleged, and unproven element into the litigation, nor to rule my action proven on the merits and then deny my prayer for relief on the basis of the unalleged and unproven new element. The appeal to the Supreme Court then was on the basis of a violation of procedural due process. The Supreme Court agreed with me and a breach of a fiduciary promise became the method to recover both a beneficial interest in the property as well as, eventually, its legal title.

BK: Since we are now talking about an appeal to the Supreme Court of Mexico, I would like you to talk about a related subject. It is my understanding that you are responsible for a significant change in the rules that govern litigants' access to drafts of Supreme Court opinions. Prior to your explanation, however, I would like to clarify for our readers that contrary to prevailing notions of procedural propriety in the United States, in Mexico it is quite common for counsel to meet with judges and court clerks while the case is being litigated to discuss facts and law before and after the various hearings. And to the utter shock of Anglo-American lawyers these meetings are often ex parte; in fact, it is rare that these informal meetings include counsel for both sides. This easy access to the judge's or clerk's ear, which is not in violation of any canon of law or ethics in Mexico, should help place in proper perspective what you are about to describe.

RCA: Yes, that is true. I should also clarify that the rules we are talking about are customary or, as you call them, "living law" rules. The rule that I helped bring about, while also customary, became a bit more official once it was announced as a rule of procedure applicable to appeals before the Third Civil Branch of the Supreme Court.

The procedure in question involved the availability of draft opinions by the designated justice (*Ministro Relator*) to appellant and appellee prior to actual open hearing by the Supreme Court.

I should also clarify that, unlike the hearing before the Supreme Court of the United States, the open hearing before the Supreme Court of Mexico is an occasion for the justices to argue and for the attorneys and their clients to listen but not to argue. Counsel simply submits an appellate brief and, from then on, does not officially have the opportunity to discuss his point of view with the justices, regardless of whether they have properly understood the briefs or whether they had doubts about the scope or nature of the allegations. Moreover, in theory and from the standpoint of official law, there was no opportunity for counsel to react to a draft which sought to evaluate the validity of counsel's argument. Unofficially, however, well-connected counsel would meet with a justice, find out the general direction of the draft opinion, and then submit a supplemental brief to each of the justices. Alternatively, counsel could pay a small amount of money, a *gratificación*, to one of the court stenographers to obtain the draft opinion.

In one case I appealed to the Supreme Court, I found out from the *Secretario de Estudio y Cuenta*, the clerk in charge of processing the text of the draft opinion, that writing the draft opinion had been entrusted to Lic. Jose Castro Estrada, a very able and honorable justice. Upon reading his draft opinion, I found he had taken a dim view of many of my grounds for appeal. I asked for a meeting with this Justice so that I could find out what I could argue in a supplemental brief to persuade him. He denied my request in a terse note that referred to the impropriety of a litigant's access to a draft opinion. To the consternation of the Justice's secretary, I disregarded the rejection and entered the Justice's office armed with a copy of his draft opinion. I was quite irate at his refusal to admit reality and told him that anyone willing to pay no more than 50 pesos was able to obtain copies of the draft or drafts. I indicated that I was sure the other side had done so and that the only reason they had not sought to see him was because he had agreed with their arguments.

The Justice's initial reaction was to ask me for the name of the person who sold me the copy of the draft opinion. I responded that I could not give it to him because any punishment against one seller would only result in higher costs for attorneys trying to purchase such drafts in the future. To his credit, this fine justice contained his anger and asked me what could be done to remedy the situation. I told him that the reality of access to the drafts had to be admitted for what

it was, a customary law response to the need for a public airing of the views in dispute before a final decision by the Supreme Court resulted from an argument in which counsel had not been allowed to participate. I asked why we should not do openly what was being done surreptitiously by everyone. If the litigants had no opportunity to respond to the justices' opinions of their respective briefs other than by submitting unofficial supplemental briefs based upon what appeared in surreptitiously obtained draft opinions, why not eliminate the whole surreptitiousness? Why not legitimize the custom and allow both parties to gain official access to the draft opinion? He asked me to leave his office and shortly thereafter he authored a change in the rules of practice which has now been in effect for approximately 30 years. Today, once the hearing date is set, both parties are entitled to copies of the draft opinion and, based upon what they read in this opinion, they can file supplemental briefs.

BK: Now that you have given your views on realism in judicial rule-making, perhaps it is time to hear your views also on realism in legislation. I remember the famous incident involving your one and only television appearance. Could you tell us what happened?

RCA: As you know, I have been a law professor to four consecutive Mexican presidents. One such former student, upon becoming president about twenty years ago, accepted another former student's suggestion that I be allowed to have a television program in which I could explain current developments in Mexico's legal system in very simple terms.

During the late 1960s, the Mexican Congress was considering enactment of a new anti-smuggling statute, adding to the considerable number that had been enacted previously in one fashion or another. I felt this was significant enough to merit some comments. I opened up my discussion of the proposed act by expressing my opposition. I justified my opposition on common sense and historical grounds. The common sense argument was best expressed in Don Quixote's advice to Sancho Panza when the latter was about to become the governor and supreme lawgiver for the imaginary island of Barataria. Don Quixote advised Sancho not to enact any laws that were not likely to be obeyed. This may sound so simple as not to deserve elaboration, yet it is an example of the supreme wisdom of common sense. Spanish and Mexican legal compilations are pregnant with ineffective, never-obeyed legislative enactments often reflecting nothing more than what I think you once described as the legislator's "lyrical declarations of intent," intended to make the legislator feel good and accomplished by the "mere act of solemn statement."

The reason why I was and am certain about the unenforceability of the anti-smuggling statute in Mexico is rooted in Mexico's history. Almost since time immemorial, Mexican citizens and inhabitants have honestly felt that they have a natural right to smuggle. This has been true for Mexicans in every station of life and is apparent in our own day and age. In fact, I related to my television viewers a recent incident that fully illustrated the point. Shortly before having been given the opportunity of having my own program, I had been watching a television program on which the President of Mexico was congratulating a Mexican prize fighter who had just won a world championship in Japan. Much as Soviet leaders talk to their cosmonauts or as the American President congratulates his astronauts after a successful mission, our President had called Tokyo to congratulate our sports hero. At the same time, however, he was catching glances of himself on a nearby television set, a Sony color portable set which could not be imported into the country legally. It happened to have been one of the first models listed in the so-called forbidden list. So, I said, there you have it; the President himself smuggled. And, had I been asked how I knew about the illegality of the import, I would have had to confess that I came across this list when smuggling my own portable color T.V. set into the country.

BK: I gather that, after your Sherlock Holmes-like deduction, your program did not become a permanent fixture in Mexican television.

RCA: You gather correctly.

BK: You once told me about the incident with Manuel Avila Camacho and David Alfaro Sisqueiros which reflected the enormous power the Mexican president has. How does this incident reflect the division of powers and the political system in Mexico?

RCA: Throughout the world, there are two types of constitutions. One is a type of banner to which we aspire. The other is a protective written constitution. What you are asking me, then, refers to the evidence of these constitutions. Formally, Mexico has a constitution which establishes division of powers between the branches of government. Nonetheless, power has become concentrated in the military as it has in other countries as well. Similarly, the Mexican president exercises more power than he formally possesses.

Political scientists often refer to the Mexican presidency as an all-powerful office. They are basically correct, but very few among them suspect the true magnitude of presidential power. The Mexican president has, in addition to all his worldly powers, Houdini-like powers. He can conceive and execute the most incredible and far-reaching of escapes. Consider, for example, the attention the world

press gave to a recent escape by a prisoner who managed to fly away from the prison yard in a helicopter that landed in the middle of the prison yard. There was a true shortage of adjectives with which to describe what went on. I can assure you that this was a non-event compared to what happened to David Alfaro Siqueiros, one of Mexico's foremost muralists and also a militant communist.

Several years ago, Siqueiros had served in the revolutionary army of General Dieguez. The army's paymaster was a plump young man, affectionately referred to by officers and soldiers alike as *el gordito* (the little fat man). One dreary evening following a lost battle, the plump young man was separated from the rest of the army and desperately searched for his colleagues in arms. A group of his colleagues had found refuge in an abandoned hut. Apprehensively, the paymaster knocked at the door. The soldier who opened the door unceremoniously asked him to leave and find his own refuge. Siqueiros, however, was much more humane and said "*entra hermano, compartiré contigo mi petate*" ("come in, brother, I will share my mat with you"), saving this *gordito* from sleeping on the floor or seeking another shelter hundreds of meters away.

Some years later, Leon Trotsky, the founder of the Red Army and of his own brand of Marxism, was given refuge in Mexico by President Lazaro Cardenas. Siqueiros was asked by the Soviet Communist Party to arrange for Trotsky's assassination. Accordingly, he organized an assault on Trotsky's place of abode, which ironically had been provided by none other than Diego Rivera, another of the great figures of Mexico's muralism. In this first attempt against Trotsky's life, in which Siquieros participated, one of Trotsky's bodyguards was killed. Siquieros was captured and sentenced to a long prison term.

Once in jail, Siqueiros feared the worst from the recently elected president. If a leftist such as Cardenas had placed him in jail, the newly elected president, known to be devoutly Catholic and not an enemy of capitalism, was likely to have him executed at the first opportunity. One night his worst fears seemed to have been confirmed. The prison warden showed up at Siqueiros' cell and asked him to follow him and a special escort. Fearing execution, Siqueiros started to yell desperately that he was about to be executed, in accordance with the classical procedure known in Mexico as the "law of escape." He had to be tied and gagged. He was then taken to a very impressive mansion, which turned out to the President's Official Residence. Suddenly a door was opened and President Avila Camacho appeared, dressed in his most elegant polo attire (Avila Camacho was known by then as an avid polo player). The President embraced Siqueiros and said,

"David, brother, ever since I was elected I could not stand the idea of my being in this magnificent mansion, and you rotting away in jail, especially after you shared your *petate* with me one night — I could have been killed were it not for your generosity." In disbelief, Siqueiros kept on muttering, "*este es el gordito del petate*" ("this is the plump fellow of the *petate*"). Shortly thereafter, then-Secretary of the Interier Miguel Aleman (later one of Mexico's most effective presidents) showed up with a passport and a thick envelope of dollars. Siqueiros was taken to a military airport and was told to get ready to fly to Chile, where he would be met and taken care of by none other than the Mexican Ambassador. Thus, through a presidential slight of hand, a prisoner disappeared from Mexico and appeared as a diplomat in Santiago de Chile, where he was to live in considerable comfort for a long time.