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MEXICAN LAW ON OBSCENITY

DAVID RANGEL MEDINA*

STATUTORY ENACTMENTS

Among individual guarantees, the political Constitution of the United States of Mexico recognizes the free expression of ideas and freedom of publication.¹ However, this freedom is not without restrictions; it has some limitations. Thus, Art. 6 establishes that the expression of ideas shall not be subject to any judicial or administrative inquiry except in the event that it attacks morality, infringes the rights of others, provokes a crime, or disturbs the public order. Art. 7 provides that freedom of expression or publication in connection with any subject is inviolable, adding that no law nor authority may establish preliminary censorship nor restrict freedom of publication. This freedom has limits, among others, respect for morality.

The basic principles which limit freedom of expression and freedom of publication established by the Constitution are detailed and clarified in the Law of Publications (1917),² regulatory of Art. 6 and 7 of Mexico's fundamental law. Some of the statutory provisions define the concept of "attacks against morality;" they also broaden the concept of publication to include the media disseminating ideas; and lastly, they establish, for the first time, the sanctions corresponding to the criminal acts in question.

According to Section II of Art. 2 of the Law of Publications, the following constitutes an attack against morality:

All manifestations in the form of speeches, shouts, songs, exhibitions or representations, or any other of the means enumerated in Section I (manuscripts, prints, drawings, lithographs, . . . mail, telegraph, telephone, radio, or message) which publicly assault or offend the modesty, decency or good manners or incite to prostitu-

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tion or the practice of licentious or indecent acts. Among these are acts, which according to the public criteria, are held to be contrary to modesty.

Section III of Art. 2 holds the following to be an attack against morality also:

The distribution, sale or exposure to the public, in any way whatsoever, of writings, pamphlets, prints, songs, engravings, books, images, advertisements, cards, papers, or figures, paintings, drawings or lithographs of an obscene nature, or which represent lascivious acts.

Art. 32 sets forth the punishments for attacks against morality, and Art. 19 provides that:

In the case of theatrical performances, movie exhibitions or recordings, not only will the author be responsible, but the owner of the theater, cinema or phonograph will also be held accountable.

Since 1948, Mexico has adhered to the International Convention for Suppressing the Circulation and Traffic in Obscene Publications, signed in Geneva in 1923.³ According to this convention, the contracting parties agree to take all possible measures to pursue and punish acts consisting of:

1. Manufacture or possession of obscene writings, drawings, engravings, paintings, prints, images, advertisements, emblems, photographs, cinematographic films or other obscene objects for the purpose of selling, distributing or exhibiting them publicly.

2. Importing, causing the importation of, transporting, or exporting such writings, drawings, engravings, paintings, prints, images, advertisements, emblems, photographs, cinematographic films or other obscene objects, or circulating them in any manner whatsoever.⁴

3. Selling the above materials, even privately, effecting any operation related thereto, distributing them, or exhibiting them publicly, or leasing them.⁵

4. Advertising or informing others of their existence by any means whatsoever, taking part in their circulation, advertising or informing others, either directly or indirectly, how and by whom they may be procured.⁶

In compliance with the obligations undertaken by Mexico in the above mentioned convention, a Regulation to the Organic Law of Public Education on Publications⁷ was issued in 1951. Article I, Sections I and II consider immoral, and contrary to education and culture:

Publishing, distributing, circulating, exhibiting in public or selling drawings, writings, engravings, paintings, prints, images, advertisements, emblems, photographs or other objects which stimulate evil passions or sensuality, as well as those which have any of the following effects: provoke laziness; offend modesty or good manners; provoke, directly or indirectly, contempt for the Mexican people, its aptitudes, customs, traditions, history, or democracy; use expressions which offend the correctness of the language.

Art. 536 of the 1929 Penal Code for the Federal District and Territories,⁸ which had a very short life, established penalties against:

The author, reproducer or editor of writings (in prose or in verse), phonograph records, radio broadcasts, pamphlets or other papers of an obscene nature; or of paintings, drawings, photographs, cinematographic pictures, sculptures or any other figure which represents lascivious or obscene acts, when they are exhibited, sold or distributed to the public.

Art. 537 also punished:

Owners of public events who exhibit or permit the exhibitions of lascivious or obscene scenes, and the person or persons who perform them, or who employ obscene language in public.

The second part of Art. 539 considered:

As immodest or obscene, all actions or words which in the concept of the public are contrary to modesty.

In the Title devoted to crimes against public morality and good customs, and in the Chapter referring specifically to assaults on public morality, Art. 200 of the current Penal Code of 1931 for the Federal District and Territories⁹ sanctions with a prison term of from six months to five years:

Whoever manufactures, reproduces or publishes books, writings, images or objects, and whoever exhibits, distributes or circulates them.

Whoever publishes, by any means whatsoever, performs or causes others to perform, obscene exhibitions.

Whoever invites another in a scandalous manner to a carnal relationship.

An examination of the penal legislation of the States of the Republic¹⁰ reveals that, in general terms, obscene publications receive treatment similar to that given them by the Penal Code of the Federal District and Territories.¹¹ Because they furnish a less imprecise concept for determining what should be considered obscene, the following specific provisions are noted:

1. The Code of Social Defense of the State of Hidalgo considers as obscene "those objects or immodest acts which have immediate relation to intimate sexual acts." (Art. 184).

2. The Penal Code of Sonora punishes "whoever in a public place or by any means whatsoever performs or causes others to perform obscene exhibitions." (Art. 165).

3. The Penal Code of the State of Jalisco (Art. 347 and 348) sanctions "whoever manufactures, reproduces or publishes books, writings, images and obscene objects, but excepts acts carried out for scientific or artistic purposes."

4. Art. 186 of the Code of Social Defense of Puebla sanctions "whoever in a public place, with or without witness, or in a private place, in the presence of three or more persons, performs or causes others to perform immodest exhibitions or acts by any means whatsoever."

5. The Penal Code of Tamaulipas (Art. 185) establishes and sanctions crimes against public morality, i.e., assaults upon morality and the incitement to prostitution.

With the development of techniques relating to oral and written communications, as well as communication by means of images, the restrictions on the guarantees established in Art. 6 and 7 of the Constitution have been the object of new regulations. In step with the technological progress in the field of the transmission of ideas, Mexico has issued additional norms to prevent the use of new instruments of communication to spread obscenity. The first of these is found in Art. 114 of the Regulations for Radio Stations,¹² either commercial, cultural, scientific, experimental or amateur, according to which:

It is prohibited to transmit news or messages the text of which is contrary to the security of the State, international harmony, peace and public order, the laws of the country, and which lead to the corruption of the language.

Art. 134 of the above regulations establishes as grounds for revoking the authorization or licenses of announcers or commentators, the "uttering of obscene words through the microphone."

The Federal Law of Radio and Television (1960)¹³ in Art. 63 prohibits:

All transmissions which cause the corruption of the language and are contrary to good customs, either by means of malicious expressions, impudent words or images, or phrases and scenes having a double meaning.

In the above context, the provisions of the Regulations of the Federal Radio and Television Law and the Law of the Cinematographic Industry (1973)¹⁴ relating to the contents of radio and television transmissions are of particular interest. Among its most important provisions, the following should be mentioned:

Art. 5. Recreational programs shall provide healthy entertainment stressing the national values, shall not be contrary to good manners, avoid the corruption of the language, vulgarity, impudent words and images, phrases and scenes having a double meaning, and shall serve to elevate the tastes of the audience.

Art. 36. The holders of concessions or permits, announcers, news analysts, commentators, advertising artists, advertising agencies, publicists and all other persons who participate in the preparation or production of programs and commercial advertising by radio and television are prohibited from making transmissions resulting in the corruption of the language and which are contrary to good manners, either by means of obscene words, portrayals, images, phrases or scenes having a double meaning, offensive sounds, insulting gestures or postures, as well as vulgar devices.

Art. 39. The following is considered contrary to good manners. I—The treatment of subjects in such a manner as to promote ideas or practices contrary to morality and the integrity of the home: or offend modesty or decency; or incite to prostitution or to the practice of licentious acts. II— The justification of illicit or promiscu-

ous sexual relations, and the non-scientific treatment of social problems, such as drug addiction or alcoholism.

Art. 47. All advertising which offends morality, modesty and good manners, by virtue of the characteristics of the product advertised, is prohibited.

MEXICAN JURISPRUDENCE: THE *PLAYBOY* CASE

The judicial decisions in Mexico on obscene or pornographic publications are not abundant. However, an analysis of one of the more recent and interesting decisions on this subject is worthy of note. This decision was handed down on July 23, 1971 by the Second Collegiate Court in Administrative Matters of the First Circuit in *amparo* proceeding 196/71 re *Hugh H. Hefner*.

Art. 19 of the Federal Copyright Law,¹⁵ currently in force in Mexico, establishes that the registration of an intellectual or artistic work may not be denied nor suspended on the grounds that it is contrary to morality, except by judicial decision. The same article provides that if the work violates the provisions of the Penal Code or those contained in the Convention for Suppressing the Circulation and Traffic in Obscene Publications, the Copyright Bureau shall inform the District Attorney's Office so that it may proceed in accordance with the law. Nevertheless, in practice, said registration is not granted unless a ruling to the effect that the contents of the publication in question are lawful is obtained previously from the Qualifying Commission of Publications and Illustrated Magazines of the Department of Public Education.

In the case of the magazine *Playboy*, the ruling of the Commission declared said magazine illegal on the basis of the Regulations of the Organic Law of Public Education on Publications for the following reasons, among others:

1. The illustrations, drawings, and photographs are of a pornographic nature because they show uncovered bosoms;
2. the jokes are for the most part vulgar and lack ingenuity;
3. the illustrations incite to pleasure, evil passions and sensuality;
4. nothing is gained from studying the illustrations, neither do they contribute to culture or to education;

5. the illustrations, drawings and photographs are deemed harmful to those who lack maturity, especially minors who should be protected from reading material or illustrations which warp their minds.

An *amparo*, instituted against the above ruling, was decided by the Third District Judge of the Federal District in Administrative Matters. This Court, in a decision dated 19 December 1969, granted the *amparo* on the following grounds:

1. The Qualifying Commission lacks adequate reasoning in concluding that from the fact that on some pages of the magazine there appear uncovered women, these portrayals necessarily incite to pleasure, evil passions and sensuality. Such a conclusion constitutes a subjective opinion.

2. Although the law grants to the Commission discretionary power to evaluate the facts this does not mean that it is relieved of the obligation to specify the semantic and scientific value of the terms established by the law itself.

3. The expert designated by the plaintiff and the expert appointed by the Court agreed that the term "evil passions" does not have a precise connotation; that "pleasure" results in esthetic satisfaction, e.g., listening to a symphony or observing a photograph; that it is an error to give the term sensuality the same connotation as the term sexuality; that it is common practice to see in the art galleries, parks and public squares of Mexico City female bosoms in paintings, photographs and sculptures; that in Mexico City female nudes are displayed live in night clubs as a form of art.

4. On the basis of the opinion presented by the experts, the drawings, illustrations and photographs, when evaluated objectively, are not pornographic and do not offend modesty or good manners.

A petition to review the decision of the District Judge was filed by the Qualifying Commission for Publications and Magazines. The Collegiate Court which reviewed the case in last instance considered the decision below and denied the *amparo*.¹⁶ The conclusion and rationale of the Court is set forth below.

An examination of the pages of *Playboy* reveals that said magazine violates the moral principles set forth in the Regulations.

1. Photographs and drawings portraying nudes are frequently of an artistic nature and cannot be classified as obscene.

2. It is impossible to point out with precision the exact line beyond which an image is no longer exclusively esthetic and should be considered immoral.

3. The concepts "immoral," "evil passions" and "sensuality" should be understood and applied within the meanings attributed them by the pertinent juridical norms.

4. Identical or analogous expressions and terms used in juridical norms should not necessarily be understood in a strictly scientific sense, but rather given the connotation which the legislator intended.

5. The terms in question have the meaning ascribed to them by common, reasonable people having sensible criteria and mature judgment, within the ethical ideals inspired by our positive legal system.

6. Evil passions are those impulses which lead to morally reprehensible acts or customs.

7. Adultery, incest, prostitution, pimping, homosexuality, and the direct or indirect incitement to such acts, as well as the open or concealed defense of the same constitute reprehensible acts.

8. Judges should classify as immoral or pornographic whatever the common people understand to be obscene or offensive to modesty, without recurring to expert opinions which are only proper when resolving technical questions.

CONCLUSIONS

FIRST.—The various Mexican legal provisions discussed above, as well as the opinions of the Mexican administrative and judicial authorities in connection with the *Playboy* case, show how imprecise, ambiguous and undefinable is the concept of obscenity.

SECOND.—The legislator, as well as judges and administrative officials, give us tautological definitions when they say that obscenity is that which is obscene in nature. They classify, without distinction, as obscene whatever is contrary to good manners or offensive to modesty. Conversely, they state that immodest is that which consists of performing or causing others to perform obscene acts. They classify as obscene those actions

pertaining to sensuality as well as acts relating to lasciviousness and eroticism. Finally, they equate obscenity with pornography when they use the two terms indiscriminately and make them equivalent to the terms "assaults on morality," "offensive to good manners," "exciting to evil passions," "incitement to prostitution" or "justification of illicit sexual relations."

THIRD. — If it is true that it is almost impossible to determine precisely what should be understood by obscenity so as to be able to classify publications as obscene or pornographic, it is no less true that this circumstance cannot justify allowing nor tolerating the unconditional circulation of all kinds of publications. It is reaffirmed, as recognized by universal doctrine and Mexican judges, that within the flexibility of the concept existing at a given moment and in a given social medium as to what is moral, what are good customs and what is the meaning of obscenity, it will nevertheless be feasible to indicate with precision the ethical principles that the juridical and social organization should use to evaluate the production, sale, offer for sale, and circulation of publications of the type considered in this article.

NOTES

¹*Constitución Política de los Estados Unidos de México* (1917).

²*Diario Oficial*, April 12, 1974.

³League of Nations Treaty Series, vol. 27, p. 213, no. 685. The decree whereby the Mexican Senate approved this Convention was published in the *Diario Oficial* on Feb. 13, 1947. The decree enacting the international agreement was published in the *Diario Oficial* on March 11, 1948.

⁴Art. I, §1.

⁵Art. I, §2.

⁶Art. I, §4.

⁷Regulations Covering Art. 4 and 6, Section VII of the Organic Law of Public Education, in relation to publications and illustrated magazines insofar as concerns culture and education. *Diario Oficial*, June 12, 1951.

⁸*Diario Oficial*, Oct. 5 and 7, 1929.

⁹*Diario Oficial*, Aug. 14, 1931. Errata published Aug. 31, 1931. Clarification published Sept. 12, 1931.

¹⁰The Penal Codes examined correspond to the States of Aguascalientes, Campeche, Coahuila, Guerrero, Hidalgo, Jalisco, Nuevo León, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatán and Zacatecas.

¹¹Title VII, Art. 185.

¹²*Diario Oficial*, May 20, 1942.

¹³*Diario Oficial*, Jan. 19, 1960.

¹⁴*Diario Oficial*, April 4, 1973.

¹⁵*Diario Oficial*, Dec. 21, 1963.

¹⁶Second Collegiate Court in Administrative Matters of the First Circuit, *amparo* proceeding 196/71 re *Hugh H. Hejner*.