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Mexico: Child custody rights; the right of a parent to know the location of his or her children when the spouse relocates within Mexico; child abduction and legal recourse to protection (*amparo*) in the context of custody situations (2004 - 2006)

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While Mexican legal sources report that family law is governed by individual state civil codes, apart from some minor changes, the framework of each state's legislation is largely based on the Federal Civil Code (Vargas Jan. 2004; Zamora et al. 2004, 459; Vargas 2003, 20).

Child custody

With respect to child custody, federal legislation distinguishes between parental authority and custody (Zamora et al 2004, 473). Parental authority (*patria potestad*) refers to the "whole group of powers--which also entail duties--conferred upon those who exercise them (parents, grandparents, adoptive parents, as the case may be) for the protection of non-emancipated minors with regard to their person or property" (ibid.; see also Aspuru Eguiluz 2006, 28). Accordingly, a judge "normally awards *patria potestad* to both parents upon divorce, and only in extreme cases, usually based on lifestyle, is one parent deprived of parental authority." (Zamora et al 2004, 473; see also Mexico n.d.a.).

The second feature, commonly known as custody (*guarda y custodia*), refers to the "personal care of a minor child or incompetent adult, and it is understood that the ex-spouse who takes on this obligation is entitled to child support from the other ex-spouse" (Zamora et al 2004, 473). Typically, judges tend to grant the mother custody of the child, especially in the case of younger children (ibid.; 2006, Aspuru Eguiluz 2006, 27). According to an official from the System for Integral Family Development (Sistema para el Desarrollo Integral de la Familia, DIF), a government department, children under seven years of age are usually placed in the custody of the mother, unless there is a serious risk to the child in this situation (Mexico 29 May 2006). In a 2006 report prepared for the Federal District Human Rights Commission (Comision de Derechos Humanos del Distrito Federal, CDHDF), 94 per cent of custody decisions were granted to women (Aspuru Eguiluz 2006, 27). However, with respect to custody issues, "in making the final determination, the judge may listen to proposals and suggestions made for the benefit of the children by the grandparents, uncles, aunts, older brothers, and older sisters." (Vargas 2003, 86). For example, if the parents, for whatever reason, were unable to take care of the child, the grandparents may be granted custody (Mexico n.d.a.).

To initiate custody proceedings, the applicant must submit the following documentation: the original marriage certificate (if the couple is married), the original birth certificate of the child or children in question, the address of the parent requesting custody, and the names and addresses of two witnesses who are able to provide facts about the parent requesting custody (ibid.).

In April 2006, the Mexico City-based newspaper *El Universal* reported on a legal initiative to amend the Federal District's civil and criminal codes in order to provide better protection for children during divorce proceedings and address concerns raised by women's rights organizations regarding child custody and domestic violence (26 Apr. 2006). The proposed reforms were sent to the Federal District Legislative Assembly (Asamblea Legislativa del Distrito Federal, ALDF) by the mayor (*jefe de Gobierno*), Alejandro Encinas (*El Universal* 26 Apr. 2006). In particular, the amendments seek to extend maternal custody of child from age seven to twelve, except in cases where the child's development is endangered (ibid.). In addition, the amendments establish measures, including arrest and detainment for up to 36 hours, or the intervention of the Public Ministry, to prevent a spouse from denying the other parent access to the child (ibid.). Essentially, the amendments signify that both parents must agree to harmonious shared custody of the children (ibid.). The reforms also call for the creation of a new assistant for minors (*asistente de menores*) working under the DIF's Federal District office who will reportedly provide psycho-emotional protection for children during divorce proceedings, particularly when a child must appear before a judge individually (ibid.). Information on the progress of these amendments could not be found among the sources consulted by the Research Directorate.

Right of separated parents to know the location of their child

Regarding the right of a parent to know the location of his or her children, an official at the Family Law Assistance (Asistencia Juridica Familiar) section of the central DIF office in Mexico City provided the following information in a 29 May 2006 telephone interview (Mexico 29 May 2006). In a custody situation, both parents are obliged to communicate address changes to one another (*ibid.*). However, exceptions to this rule exist; for example, in circumstances such as domestic violence, in which case the Court will order that a change of address be communicated only to the Court (*ibid.*). In cases where there is a history of domestic violence, the children can be brought to a safe place so that, for example, the father can visit them without forcing the mother to disclose her address (*ibid.*).

According to Jorge Vargas, University of San Diego law professor and expert in Mexican law, the federal district law states that "the judge shall protect and respect the right of the children to visit their parents (*derecho de convivencia con los padres*), except when there is risk to the child" (Vargas 2003, 86). Moreover, only a family court judge (*juez de lo familiar*) can rule on issues related to custody and access rights (*ibid.*; US n.d.; Mexico n.d.a; Mexico n.d.b), and in this context, the judge must make a decision based on the best interest of the child (Vargas 2003, 86; see also Mexico n.d.b). When the divorce is finalized, "both parents may have parental authority (*patria potestad*), but only one may have custody; or one of the parents may lose parental authority as well as custody and the other may only have visitation rights" (Zamora et al. 2004, 473). Regarding visitation rights, if the parents are unable to agree to an arrangement, a family court judge will decide on the matter (Aspuru Eguiluz 2006, 27). Once the child reaches 13 years of age, the judge may ask for the child's input before making a decision (*ibid.*).

As mentioned in various sources, the DIF is a national government organization that provides, among other things, free legal and social assistance to those in need (Mexico n.d.c; NCMEC 2002, 3). Under its legal assistance mandate, the DIF works in cooperation with Attorneys General for the Defence of Minors and the Family (Procuraduria de la Defensa del Menor y la Familia) in order to address issues related to family law (Mexico n.d.c.).

Child abduction

In 2005, international and Mexican news sources reported that an estimated 70 per cent of missing children in Mexico were "taken by their father or mother during separation, divorce or custody battles" (IPS 28 July 2005; see also *El Sol de Mexico* 28 Jan. 2005). Reports about the effectiveness of authorities to locate a missing child vary (US 2005; NCMEC 2002, 5-6). According to a 2005 United States government report on international child abduction cases in Mexico, the Department of State's Bureau of Consular Affairs noted that while administrative and judicial efficiency has improved, authorities remained slow to locate missing children. In a country report on Mexico, however, the National Center for Missing & Exploited Children (NCMEC) suggested that a June 2001 agreement authorizing the Federal Preventive Police (Policia Federal Preventiva, PFP) to access various electronic databases, including social security, hospital and school records, would allow the PFP to "locate a child within a week" (2002, 6). Information on the implementation and effectiveness of this agreement could not be found among the sources consulted by the Research Directorate.

In addition, the NCMEC report noted that authorities provide a number of services to individuals wishing to report missing children (2002, 6). For example, in Mexico City, LOCATEL, the Federal District's telephone assistance program (Mexico n.d.d.) and the Assistance Centre for Missing and Abducted Persons of the Federal District's Attorney General's office (Centro de Atencion a Personas Extraviadas y Ausentes de la Procuraduria del Distrito Federal, CAPEA) (Mexico n.d.e.) provide help to those trying to locate a missing child (NCMEC 2002, 6).

Amparo

Regarding legal recourse to protection (*recurso de amparo*) for child custody disputes, the NCMEC report explained:

In Mexico, there is a procedure called the *Amparo* which literally translated, means protection or help. An *Amparo* is a procedure that may be taken to review the constitutionality of an action of an executive agency, a court or a judgment itself (2002, 5).

In its document on international child abduction, the US Department of State noted that, in Mexico,

[a]n *amparo* is a claim that a constitutional right has been violated by a government agency or a government process. When there is an *amparo* filed in a case, all action ceases until the *amparo* has been ruled on - often many months later. An *amparo* can be filed at any time during the case, so the case can be stayed even before a judge can rule. Decisions on *amparos* can be appealed, further delaying action by the judge (n.d.).

There are three possible outcomes to an *amparo* case: the *amparo* is denied (the court judges that no violation of constitutional rights has taken place); the *amparo* is granted (the court decides "that a violation of constitutional rights has occurred"); or, the *amparo* is dismissed based on "technical or procedural grounds (lack of standing)" (Zamora et al 2004, 272).

According to Zamora et al, an *amparo* is limited by a number of factors, including its "procedural complexities" which make its use prohibitively expensive and inaccessible for many, and because it is an inherently

slow procedure (2004, 273-274). Zamora et al conclude that, the *amparo* acts as a final avenue of appeal for parties that have not secured the judgement they were seeking (2004, 274). In this sense, Zamora et al claim that *amparo* is often "used as a delaying tactic in civil disputes that have little to do with constitutional guarantees" (2004, 274). The US Department of State's Bureau of Consular Affairs also noted that the *amparo* has caused significant delays in several international abduction cases (n.d.), and was of "serious concern" regarding Mexico's compliance with the Hague Convention on the Civil Aspects of International Child Abduction (2005).

This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection. Please find below the list of additional sources consulted in researching this Information Request.

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Additional Sources Consulted

Oral sources: The Asociacion Mexicana de Padres de Familia Separados (AMPFS), the Comision de Derechos Humanos del Distrito Federal (CDHDF), the Embassy of Mexico in Canada, and the Red por los Derechos de la Infancia en Mexico could not provide information within time constraints.

Internet sites, including: Amnesty International (AI), Asociacion Mexicana de Padres de Familia Separados (AMPFS), Comision de Derechos Humanos del Distrito Federal (CDHDF), Sistema para el Desarrollo Integral de la Familia (DIF), Embassy of Mexico in Canada, Factiva, Human Rights Watch (HRW), *La Jornada*, Mexico Legal, Parents Advocating for Return Through Education by Networking Together (PARENT International), United States Department of State, World News Connection (WNC).

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