Past and Possible Future of the Collective Amparo Process (Amparo Colectivo)

Lucio Cabrera Acevedo

Follow this and additional works at: https://digitalrepository.unm.edu/usmexlj

Part of the International Law Commons, International Trade Law Commons, and the Jurisprudence Commons

Recommended Citation

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in United States - Mexico Law Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.
I. INTRODUCTION

The term amparo colectivo [collective amparo] suggests a procedure for judicial review of class action suits under Mexican law. This proposed judicial review procedure would have two main purposes. The first purpose would achieve a practical end by avoiding numerous claims with the same purpose, similar to consumers’ rights cases. The second purpose would produce a legal end by protecting the “new” human rights laws and regulations developed in the 1960’s. These rights include a healthy environment—landscape and urban images—the equality of women, ethnic equality, and other rights comparable to civil rights laws in the United States. Currently, the amparo process does not protect these “new” human rights.

Unlike the amparo process, other foreign jurisdictions allow claims asserting violations of rights by giving parties standing. The concept of “le recours collectif” [class action suits] as defined by the Civil Code of Procedure of Quebec1, is as follows:

d) "Class action" means the procedure that enables one member to sue without a mandate on behalf of all the members.

c) "Member" means a natural person whom is part of a group on behalf of which a natural person brings or intends to bring a class action.

Therefore, in class action suits a “member” could be given standing for an entire group. The definition in Quebec’s Civil Code of Procedure seems to include Non-Government Organizations (NGO’s) as a “member” of a group. This appears to give NGO’s standing as a plaintiff without a mandate.

This kind of procedural remedy does not exist in Mexico. Therefore, this article suggests that the amparo process in Mexico adopt the concept of class action suits. This procedure could provide a preventive remedy against environmental damages and violations of human rights. The adoption of class action suits through the collective amparo system could be similar to injunctive class actions, as defined in the U.S. Federal Rules of Civil Procedure.2 However, the collection of damages would not be determined by this new amparo proceeding.

---

1. CODE OF CIVIL PROCEDURE [hereinafter CODE OF CIV. P.], Book IX, Title I, Art. 999-1002. (Can.)
2. FED. R. CIV. P. 23(b).
II. NAFTA CHALLENGES THE NATURE OF MEXICAN INJUNCTION AND JUDICIAL REVIEW

The adoption and implementation of the North American Free Trade Agreement (NAFTA)\(^3\) challenges Mexico’s injunction and judicial review procedures. These challenges are most obvious when environmental issues must be addressed. Presently, one of the most important legal fields is the enforcement of environmental law. In North America and Canada, federal, state, and provincial rules and statutes govern environmental law. These rules and statutes enforce decisions made by both administrative agencies and judicial courts.\(^4\) In Mexico, environmental law is governed by rules and statutes established solely by administrative agencies. Mexican courts cannot protect the environment because individuals and NGO’s lack standing in the judicial review process. Therefore, judicial decisions are simply not possible.

In any case, judicial intervention may not be a complete solution to protecting the environment because limitations always exist. However, judicial decisions could complement the decisions made by administrative agencies. Achieving this cooperative relationship would require awarding standing to individuals and NGO’s. By awarding standing, Mexican courts would be in accordance with NAFTA. The Rio Declaration, approved by Canada, the United States, and Mexico, expressed in its first principle that “human beings are the center of everything related to sustainable development. They have the right to a healthy and productive life in harmony with nature.”\(^5\) This principle is also incorporated into the text of NAFTA.\(^6\) For these reasons, it seems necessary that Mexico should permit individuals and NGO’S access to procedural remedies by adopting a collective amparo process. Mexico’s enforcement of environmental law would improve.

A. Comparative law

The collective amparo would be procedurally similar to processes commonly practiced in the United States, Canada, Western Europe, and Brazil. Although each country has its own particular proceedings, generally, in class action suits one claimant has standing to represent several other claimants without a mandate.

For example, in Sweden the “jammsställeombudsmanen” [ombudsman] protects the equality of women in their jobs. In the State of Bremen, Federal Republic of Germany, the courts have allowed NGO’s to protect the environment since 1979. Portugal and Italy permit NGO’s to initiate proceedings before the courts to protect

4. The Supreme Court of California held that “It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purpose of the trust.” Nat’l Audubon Society v. The Superior Court of Alpine County, 658 P.2d 709, 731 (Cal.1983).
their artistic and cultural heritage. Spain allows one member of a group to represent all of its members in the protection of their rights before the Constitutional Court.

The United States provides for both injunctive and damage class actions in Rule 23 (b) of the Federal Rules of Civil Procedure. This process permits legal actions protecting several rights such as ethnic equality in education, the environment and biodiversity. Similarly, Canada implemented this process when the province of Quebec adopted class actions in chapter IX of its Code of Civil Procedure. Moreover, in 1985 Brazil passed a law, illustrated in the Code of the Consumer of 1991, allowing collective proceedings protecting the environment and consumers. These governments use their codes for both injunctive relief and for the determination of damages.

As far as class action suits are concerned, there are primarily three types of countries, according to Mauro Cappelletti (Italian) and Bryant Garth (American) who studied the subject of collective actions in the Congress of Civil Procedure of Würzburg, Germany, (September 11-16, 1993). First, there are countries without procedures for collective actions. Second, there are countries with only injunctive relief. Finally, there are countries adopting the U.S. model, which allow both injunctive and damage class actions. Mexico’s system is in the first category, therefore, there are no collective actions in Mexico. Mexico’s adoption of collective amparo would introduce injunctive class action suits to Mexican judicial courts.

III. TWO MAIN FACTORS SUPPORTING THE CREATION OF COLLECTIVE AMPARO

The adoption and implementation of collective amparo in the Mexican judicial system is supported by two main factors—the international factor and the democratic factor. The international factor would permit Mexico to comply with its duties stated in the principles of the Rio Declaration and NAFTA. For example, according to the NAFTA supplemental agreement on environmental protection, “each Party shall ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations.” Furthermore, the agreement provides that:

Private access to remedies shall include rights, in accordance with the Party’s law, such as . . .

---

8. *Tribunal Constitucional de España* [Constitutional Tribunal of Spain] 1994. A case where a few people were allowed to represent the Spanish Jewish community.
11. Brazil has legislation protecting the environment through its judicial process in a 1985 law.
(c) to request the competent authorities to take appropriate action to enforce that Party’s environmental laws and regulations in order to protect the environment or to avoid environmental harm; or
(d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conducts by another person under that Party’s jurisdiction contrary to that Party’s environmental laws and regulations from torturous conduct. 16

Additionally, “each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.” 17

The NAFTA agreement on environmental protection requires that victims of environmental hazards should have access to independent courts, such as the Federal Courts of Mexico, the Circuit Court or the Mexican Supreme Court. These courts already utilize the amparo process as a method to challenge administrative actions. The collective amparo process could be implemented and enforced through these courts. Furthermore, collective amparo would be an aspect of the amparo against administrative action.

The collective amparo process would implement the Rio Declaration, which states that “the best way to deal with environmental problems is with the participation of all the citizens . . . . At the national level persons shall have proper access to the same information about the environment as the authorities have.” 18 It is the position of this article that Mexico is obligated to give standing to individuals and NGO’s to enforce environmental laws through judicial proceedings. The collective amparo would implement this process in conjunction with Mexican legal traditions. Moreover, it would be necessary to create another process for the collection of damages as illustrated by the United States in the Federal Rules of Civil Procedure.

The democratic factor’s necessity became apparent in May of 1994 when Professor Gilbert R. Winham of New Scotland, Canada, noted during NAFTA discussions at the Colegio de Mexico, that Canadians and Americans realized administrative law in Mexico was extremely hermetic and secret. 19 Therefore, it seemed that judicial review was not available, nor did an international arbitrage panel system seem to be possible. Since the enforcement of environmental laws and regulations has been a discretionary power of the executive in Mexico, individuals have not been allowed to participate in or gather information on this enforcement. To remedy this situation, the collective amparo could be used to open the accessibility of the administrative law system of Mexico. Mexico’s administrative law system would then be similar to democratic countries, which generally emphasize an open and public administration.

Through the collective amparo Mexico would necessarily open its administrative system. Mexican citizens should participate in the enforcement of environmental laws and regulations. Also the collective amparo would further protect human and

16. Id. at arts. 6-1, 6-3.
17. Id. at art. 7-4.
18. Rio Declaration, supra note 6, at princ. 10.
social rights that have not received attention until very recently. This process would encourage a more democratic government in Mexico.

IV. THE LIMITATIONS OF MEXICAN INJUNCTION AND JUDICIAL REVIEW IN AMPARO PROCEEDINGS

The young Mexican, Mariano Otero, who read Tocqueville’s famous book "Democracy in America", created the amparo process at the federal level in Mexico in 1847. Otero advised that amparo proceedings should protect individuals by limiting court decisions to a case by case basis without overall general effects.

In 1857, the Mexican Constitution stated in article 101 that standing in amparo is given to an individual claiming infringement of their human rights. Therefore, standing was only given to individuals directly affected by injuries of law, not by injuries of fact. At that time corporations, as artificial persons, would not have standing because they would not be entitled to human rights.

Eventually, corporations were considered to have standing to proceed in amparo if a corporation's by-laws stated that a manager with power of attorney could properly represent the corporation. The corporation also needed to demonstrate that they had suffered an injury of law, such as a breach of contract or loss of property.

Ten years after the fall of the Maximilian Empire, when Benito Juárez (1867-72) and Sebastián Lerdo (1872-1876) were respectively presidents of Mexico, the amparo process extended standing to disorganized groups of Indians. One or two individuals without power of attorney were granted standing to represent the whole of the Indian group. For example, the Supreme Court of Mexico granted amparo to several disorganized Indian groups such as the Tenochtitla, Puebla; Coxcatlán, Puebla and many others. Also during that time, the Supreme Court interpreted the amparo process as granting standing to individuals without power of attorney. In that case, the court granted amparo protection in order to stop the destruction of a plaza located in Ciudad Guzmán, Jalisco.

In another case, a vendor represented many other small vendors doing business in one plaza whereby enjoining the prohibition of their activities on the street. However, the Supreme Court of Mexico ended this trend when Ignacio L. Vallarta was Chief Justice (1877-1882). Chief Justice Vallarta insisted that individuals and corporations seeking standing for amparo protection should be restricted to cases of injuries in law, not injuries in fact. No person would be permitted to represent other persons without proper power of attorney.

The Constitution of 1917 did not change the way courts applied amparo privileges. The restricted procedure initiated by Vallarta continues to govern procedures today. This procedure has no exceptions for the protection of social rights of rural communities because individuals are not properly organized with specific by-laws nor represented by persons with specific powers. Although opinions of the Supreme

20. Mariano Otero was a young lawyer from Jalisco, Mexico that drafted the constitutional Reform Act of 1847.

21. CONSTITUCION POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Mexican Constitution], art. 101, ch. 1, art. 1, § 1.


Court of Mexico continue to mirror decisions made in the nineteenth century, the Circuit Courts of Mexico have made a few exceptions in recent years.

V. PRESENT SITUATION AND TRENDS TOWARD THE COLLECTIVE AMPARO

Generally, Mexican courts do not allow single individuals or NGOs to act on behalf of other people without a mandate. This idea is expressed in a 1972 amparo decision by the Mexican Supreme Court. The Supreme Court held that the "Federal Judiciary Power is not entitled to oblige an administrative authority to follow the urbanistic and sanitary rules, nor to deal with aesthetic and practical necessities, when it is establishing a cemetery." 25

This decision must be followed by Circuit Courts and Federal Judges in Mexico. However, there have been some inconsistent decisions by Circuit Courts. The decisions are often based on the practical circumstances and necessities of the people involved. Two decisions are of particular relevance. The first decision of the First Circuit Court of Administrative Matters of Mexico City states that "members of a neighborhood are interested in urban regulations of the parks and the esthetic aspects of them . . . and the government does not have the right to destroy parks and green areas." 26 Another important decision involved an individual claimant, Homero Aridjis, and an NGO, El Grupo de los Cien Internacional A.C. The plaintiffs claimed that the Secretary of the Environment, Natural Resources and Fishing of Mexico issued a decree simplifying the environmental protection standards applicable to small and medium industries resulting in severe damage to the environment. For the first time, the claimants based their standing on NAFTA's supplemental agreement on the environment. 27 This Circuit Court decision approved the application of the NAFTA agreement and granted amparo protection in favor of the plaintiffs. 28

These decisions are of great importance and entirely different from previous decisions made by the Supreme Court of Mexico because they mention the enforcement of a NAFTA parallel agreement. The existence of NAFTA helped make these decisions possible. Therefore, these are important steps supporting the creation of the collective amparo process. Some amendments to amparo law should be made in order to regulate with more precision certain points of procedure, as the Code of Civil Procedure of Quebec does. 29

VI. CONCLUSIONS

This article introduces a procedure that would complement the current amparo process utilized by the Mexican judicial system. The implementation of the collective amparo process would help guarantee the human rights that each individual is entitled to by allowing class action suits. These class action suits give both

28. Id.
29. CODE OF CIV. P. supra note 1.
individuals and NGOs the opportunity to file a claim for amparo protection against human rights violations. Currently, regular amparo is not granted when human rights violations are claimed. Mexico's adoption of the collective amparo process would not only give individuals and NGOs amparo protection, it would also comply with NAFTA's procedural requirements for human rights violations. The procedure for filing class action suits is simple. Individuals would submit a claim for amparo protection independently. A representative for an injured group would be elected as a sole claimant. However, decisions rendered by the courts would apply to the group as a whole. Since it is difficult to get amparo protection, class actions would help secure amparo protection for a group's claim by strengthening the claim's legal foundation. Essentially, the enforcement of the collective amparo would ensure a democratic approach to Mexican jurisprudence.