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Bruce Zagaris

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# THE AMPARO PROCESS IN MEXICO

BRUCE ZAGARIS\*

The writ of amparo is perhaps the most important procedural mechanism in the Mexican legal system.<sup>1</sup> Amparo is an extraordinary recourse in the Mexican justice system, with no equivalent in the common law tradition. The word amparo literally means protection, favor, or aid.<sup>2</sup> This paper provides an overview of an institution that is complex through its origins,<sup>3</sup> judicial evolution, practical operation, and procedural development.

## I. THE AMPARO PROCESS

Amparo relief can either be direct or indirect.<sup>4</sup> Direct amparo relief is started in either the Supreme Court, or the appellate circuit courts.<sup>5</sup> Indirect amparo relief is initiated in a district court, but the decision may be appealed to a higher court.<sup>6</sup> Indirect amparo is generally brought to compel or prevent actions of non-judicial government agents, such as prosecutors, police, or public administrators, though an indirect amparo may be brought against a judge to challenge an unconstitutional or unlawful act committed apart from the trial, such as the issuance of an arrest warrant.<sup>7</sup>

### A. Amparo Against Laws

An act of authority detrimental to the constitutionally guaranteed rights of a private person, or the patrimonial rights of a public person, may be attacked in amparo on one or both of two grounds: the unconstitutionality of the act itself, or the unconstitutionality of the law upon which it is based. Sec. I, Art. 103 of the Mexican Constitution provides that the federal courts shall decide all controversies arising "(f)rom laws or acts of the authorities that violate individual guarantees." The Supreme Court has evolved an additional jurisdiction rule, holding that in certain cases the unconstitutionality of a law may be attacked in the absence of any administrative act of enforcement or judicial act of application. This form of suit is referred to as *amparo contra leyes* [amparo against laws].<sup>8</sup>

The Law of Amparo enables an individual through filing an indirect amparo to ask for the suspension of any act that threatens deprivation of life, personal liberty,

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1. Partner, Cameron & Hornbostel, L.L.P., Washington, D.C.

1. See B. Claggett, *The Mexican Suit of Amparo*, 33 GEO. L.J. 418 (1945); Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570 (1960); K. Karst, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* 614-46 (1966).

2. Kenneth L. Karst & Keith S. Rosenn, *LAW AND DEVELOPMENT IN LATIN AMERICA* 128 (1975).

3. Although the origins of the amparo in Mexico are beyond the scope of this paper, interested persons should see Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. WESTERN INT'L L.J. 306-16 (1979).

4. See Lic. Arturo Serrano Robles, *El Juicio de Amparo en General y las Particularidades del Amparo Administrativo* [*The Amparo Action in General and the Particularities of the Administrative Amparo*], *MANUAL DEL JUICIO DEL AMPARO*, at 75-86.

5. *Id.*

6. *Id.*

7. *Id.* at 133.

8. Richard D. Baker, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* 164 (1971).

deportations, or banishment,<sup>9</sup> and extradition,<sup>10</sup> as well as any official actions prohibited by Article 22 of the federal constitution.<sup>11</sup> The rights include punishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or extreme penalties.<sup>12</sup>

The Supreme Court established the doctrinal basis for this jurisdiction although the formal statutory authority for its exercise was not granted until the enactment of the new Amparo Law of 1935. The explicit constitutional authorization occurred only with the amendments of 1950. Section VII, Article 107 provides: "When amparo is sought...against laws..." Because of the accepted technical meaning of the term "amparo against laws," its application appears sufficiently explicit. Jurisprudence and commentaries of publicists indicate and significantly limit the precise circumstances under which the jurisdiction may operate.<sup>13</sup>

Articles 103 and 107 do not provide any procedural distinctions between the admissibility or trial of amparo suits contesting the enforcement or application of allegedly unconstitutional laws and that of suits questioning their constitutionality in the absence of the enforcement or application of laws. Hence, the general rules on admissibility presumably contained in the articles are equally applicable in either case. Hence, a plaintiff must demonstrate in amparo against laws that the law in question constitutes an authoritative act in the constitutional sense of that term and that its mere existence violates an individual guarantee or guarantees. Further, the law in question must be materially prejudicial to the interests of an identifiable private person or to the patrimonial interests of a similarly identifiable public person.<sup>14</sup>

The provisions of the Amparo Law cited by the Court in the *Orellana* case show limited circumstances in which the law can be used to initiate an attack against the laws.<sup>15</sup> Section I, Art. 22 provides that amparo against laws may be initiated at any time within a period of thirty days following the promulgation of the law. Sec. VI, Art. 73 provides that the suit is inadmissible when the law, by merely being enacted, does not cause injury to the complainant. Sec. I, Art. 114 provides that original jurisdiction in amparo against laws is exercised by the federal district courts.<sup>16</sup> A personal injury is also a prerequisite of jurisdiction. As such, the law must actually be in force on the date of the alleged injury. If any of the procedures required for this purpose are absent, the suit is inadmissible and any attempt at enforcement may be

9. An alleged member of the Chinese Mafia unsuccessfully brought an amparo against orders of arrest, detention and expulsion of Mexico. See *THE LAW OF THE AMERICAS* (Henry P. de Vries and José Rodríguez-Novás, ed.) 63 (1965), discussing and abstracting Case of Chong Bing J. Domingo, Supr. Ct. of Mexico, Jan. 12, 1925, 16 Sem. Jud. Fed. 59.

10. For a discussion of the use of *amparo* in extradition, see Bruce Zagaris and Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers—150 Years and Beyond the Rio Grande's Winding Course*, 12 *AMER. J. OF INT'L L. & POLICY* 101, 126-27 (1996).

11. Fix Zamudio, *supra* notes at 317.

12. For a discussion of the use of amparo in criminal matters in Mexico, see Lic. Guillermo Velasco Félix, *Juicio de Amparo Directo en Materia Penal [Direct Amparo Actions in Criminal Law]*, *MANUAL DEL JUICIO DE AMPARO*, at 483-510.

13. Baker, *supra* note 8 at 165.

14. *Id.*, at 165, citing the case of *Villera de Orellana Maria de los Angeles y coags, Suprema Corte de Justicia*, 123 S.J. 783 (1955).

15. *Id.* at 167.

16. *Id.*, at 166.

challenged in a suit against the act of application, based on violation of Articles 14 and 16 of the Constitution.<sup>17</sup>

Another requirement is that the challenged regulation be a law in the constitutional sense of the term. For instance, the Supreme Court has held that the statutes of law attaches only to the statutory enactments of constituted legislative bodies and, presumably, to legitimate exercises by the executive of extraordinary legislative faculties. Therefore, administrative regulations, while they may be indistinguishable from formal legislation in substance and effect, are not laws in the technical sense. As a result, the injured party may attack them only after specific enforcement of the regulation against him.<sup>18</sup>

The Supreme Court and the Amparo Law have established that amparo cannot be considered admissible in every case in which the charge of unconstitutionality might be brought against a statute, but only in those circumstances in which the law causes an injury to the complainant without the necessity of any intermediate or subsequent acts of authority. That is, when the law in question is *auto-aplicativo* [self-executing].<sup>19</sup>

As the *Orellana* and related cases show, the Mexican Supreme Court has tried to discriminate between self-executing and non-self-executing laws. It has required a number of conditions that must exist in the former while being entirely or partially absent in the latter. These are: (1) the provisions of the statute must identify clearly and unmistakably, by establishing explicit classes, those persons to whom it is applicable; and, (2) the person so identified must be subjected, *ipso jure*, to an obligation. The compulsory character of the obligation is completely independent of any prior, intermediate, or subsequent acts of authority except those involved in passing and promulgating the law itself; (3) compliance with this obligation would require performing an act not previously required or abstaining from an act formerly permissible; and, (4) such compliance would result in a prejudicial modification of rights vested in the person of the obligor.<sup>20</sup>

The admissibility of amparo against laws has been conclusively established both by statute and Mexican jurisprudence. However, the question remains whether this recourse is available only to those persons who are in the situation governed by a self-executing law at the time it is promulgated or whether it is equally available to all who come to occupy such a situation during the life of the law. While logic and equity would seem to require the latter of these alternatives, practice and the provisions of Article 22, Section I of the Amparo Law have required the former.<sup>21</sup>

One of the most fundamental procedural rules limiting the use of amparo and illustrating its status as an extraordinary remedy is the inadmissibility of the suit as long as the complainant has access to other administrative or judicial remedies, whereby the act allegedly violative of guarantees may be modified, revoked, or annulled. Clearly, this rule cannot be applied to amparo against laws. If so, the

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17. *Id.*, at 167, citing *Asociación Nacional de Funcionarios Judiciales, Ricardo Lopez y coags.*, 110 BJ 718 (Oct. 1956).

18. *Id.*, at 167, citing *Suprema Corte, Fraccionadora Nacional, S.A., Informe, 1957 (Informe de la segunda sala)*, pp. 13-14, *idem, Vazquez Negri Rafae*, 119 S.J. 3278 (1953), *Asociacion, Luz Lopez de Arrendondo*, 130 BJ 325 (June 1958), *idem, Compania Gustavo Luvy Sucs., S.A., and Editorial Sol, S.A.*, 132 BJ 404 (July 1958).

19. *Id.*, at 167, citing *Suprema Corte, Garza Flores Hnos., Sucs.*, 28 S.J. 1208 (1930).

20. *Id.*, at 168.

21. *Id.*, at 171.

complainant would be compelled to avail himself of the procedural remedies afforded by the very statute whose constitutionality he proposes to attack, an act constituting consent and resulting in the admissibility of the amparo suit. The Court has ruled that the complainant need not exhaust the ordinary remedies.

### B. Amparo as Appeal (Cassation)

A discussion of the *cassation* function of amparo is important to understand the practical significance and use of the suit. The individual guarantees contained in Article 14 of the Mexican Constitution require the Mexican federal courts, especially the Supreme Court and the collegial circuit tribunals, to accept a universal appeals jurisdiction through the mechanisms of amparo. Technically, it applies to every judicial and quasi-judicial decision of any court or administrative tribunal in Mexico. Cases of this kind comprise more than half of the amparo suits annually filed with the Supreme Court and provide the great bulk of the cases heard by the collegial circuit tribunals. *Cassation* means the power to review and annul judicial or quasi-judicial decisions on the basis of error in selecting, applying, or interpreting secondary legislation. That is, all laws except articles of the Constitution itself. Because the issues under review in the cases are strictly legal ones, considerations of fact, merit, and equity, as well as issues on the substantive constitutionality of the laws applied, are excluded.<sup>22</sup>

The constitutional foundation for the *cassation* function of amparo is established in Article 14 of the Mexican Constitution. These are: (1) the prohibition of *ex post facto* laws and of the retroactive application of laws otherwise valid; (2) the guarantee of procedural due process; (3) the prohibition, in criminal trials, of offenses and penalties created by analogy; (4) the prohibition, in criminal trials, of offenses and penalties created by judicial construction; and, (5) the prohibition, in civil suits, of judgments not based on the letter of the law, on its judicial interpretation, or in the absence of a relevant statute, on general principles of jurisprudence.<sup>23</sup>

The trial of all types of amparo suits, with the exception of the criminal, is controlled by the rule of *stricti juris*. As used in amparo, the rule of *stricti juris* requires the courts to confine their attention to and make their decisions exclusively on those *conceptos de violacion* [conclusions of law] wherein the plaintiff, in their formal written complaint, tries to show that the contested act has violated their constitutional rights. If the rule applies, the courts are strictly precluded from adding anything to or correcting any defect in the complaint.<sup>24</sup>

The *stricti juris* rule is derived by implication from paragraphs 2, 3, and 4, Sec. II, of Article 107 of the Constitution. In particular, Article 79, paragraph 2, of the Amparo Law provides for *stricti juris* in civil amparo because it provides that: "the amparo suit for inexact application of the law against acts of judicial authorities of the civil order is of strict law and, consequently, the judgment decreed in it...must be directed to the terms of the complaint without correcting it or adding anything to it." These requirements apply not only to correcting substantive defects, but even to

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22. *Id.*, at 175-76.

23. *Id.*, at 176.

24. *Id.* at 185.

correcting errors in citing the constitutional guarantees violated. Even when a complainant must demonstrate beyond doubt that his rights under Article 14 have been violated, his suit would be dismissed if he mistakenly claimed a violation of Article 16 instead.

Paragraph 1 of Article 79 allows the correction of this type of error in all other types of amparo suits. Article 178 of the Amparo Law permits the courts to instruct the complainant to furnish any omitted formal elements whose inclusion in the complaint is required by Article 166. If he does not do so within a period not to exceed five days, the suit must be dismissed. However, the courts do not advise the complainant about the nature of the arguments he should make, but indicate only the missing item.

If the amparo suit will succeed, the complaint, besides meeting all technical requirements, must show conclusions of law that are not only accurate and valid in themselves, but also adequate to refute the legal basis on which the contested judgment or procedural ruling is based. In an amparo against a judgment of this type, the complainant must prove not only that one or various conclusions of law on which the judgment is based are illegal, they must demonstrate that all the foundations on which it rests violate the law. If one of them is legitimate, it will be sufficient to confirm the judgment. The conclusions of law remaining in support of the judgment need not be legally valid. If the plaintiff does not attack and refute them in his written complaint, the courts cannot examine their possible unconstitutionality.<sup>25</sup> The limitations that apply in civil amparo apply equally to all varieties of administrative amparos except for the ones concerned with protecting communal agrarian rights.<sup>26</sup>

If the rule of *stricti juris* governs the trial in first instance, it also applies on appeal. Hence, the Supreme Court or appropriate collegial circuit tribunal must confine its attention, in conformity with the principles discussed above, to the injuries the complainant alleges to have been inflicted in the judgment of the district court. Conversely, if correction of defective complaints is allowed on first instance, it is also allowed on appeal.

The application of *stricti juris* can result in serious injustices, because technical oversights on the part of the complainant, or his attorney, may require the courts to ignore probable, or even flagrant, illegalities when they are improperly contested or omitted from the complaint. The application of *stricti juris* in such a manner may be incompatible not only with the emphasis on the individual litigant and the tutelary purpose for which the amparo action was devised, but also with the ends customarily pursued in *cassation*. In contrast to amparo, *cassation* is not fundamentally concerned with the interests of individual litigants. Instead, it is intended to serve the law itself by providing the means whereby uniformity of interpretation and application can be maintained. Hence, proceedings in *cassation* have a rigorous formalism. The defendant and the court must exclude from the lawsuit equitable principles evident on the extralegal merits of the case, new factual allegations, or any matter not present on the face of the record or in the relevant law. The restriction to evaluating the sufficiency and validity of the conclusions of the law in the pleadings and to those conclusions alone compel the courts to make multiple and inconsistent

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25. *Id.* at 187, citing *Orozco Juan Jose*, 44 S.J. 3408 (1935).

26. *Id.* at 187.

interpretations.<sup>27</sup> The rigid limits on *cassation* and the dismissal of such suits means that the legal issues behind them and the personal interests represented by them do not receive final judicial resolution.<sup>28</sup>

### C. Administrative Amparo

Since Mexican law does not provide a uniform system to challenge administrative actions and decisions, an injured party can find relief before an administrative tribunal. In any event, the amparo is always available as a final remedy.<sup>29</sup> It may be used to test administrative actions of both state and federal officials. Hence, an American and/or foreign business person who is aggrieved by an administrative decision, may have recourse to an administrative amparo. Similarly, such a person may find that an adversary who is aggrieved by an administrative action that accrues to the benefit of the foreigner may have recourse to the administrative amparo.<sup>30</sup>

### D. Analysis

Since its incorporation into Article 102 of the Constitution of 1857, amparo has evolved into a highly complex and peculiarly Mexican institution with three distinct functions: (1) the defense of the civil liberties enumerated in the first twenty-nine articles of the Constitution; (2) the determination of the constitutionality of federal and state legislation; and, (3) *cassation*.

From the procedural perspective, the first of the views is fundamental since no amparo suit is admissible unless the complainant, a real or artificial private person or a governmental agency acting as the subject of private law, alleges that individual rights have been violated by some act of a public authority.<sup>31</sup>

The range of constitutional issues subject to judicial determination depends upon the manner in which these rights are interpreted. Sections II and III of Article 103 of the Constitution also direct that the federal courts will decide controversies arising from laws or acts of the federal government which violate States' rights and *vice versa*. Suits alleging the violation of sections II and III may only be initiated by private persons who can demonstrate that the act complained of has also resulted in the violation of an individual guarantee.

In a purely legal sense, the adequacy of amparo as an instrument of general constitutional defense has been determined by the interpretation of the due process clause in Article 14 and the "competent authority" and "legal basis and justification" provisions of Article 16 of the Constitution. The Supreme Court has construed these guarantees as protecting individual complainants from the injurious consequences of unconstitutional laws and arbitrary or legally unfounded actions of administrative and

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27. *Id.* at 189.

28. *Id.* at 194.

29. For administrative amparo, see Robles, *El Juicio de Amparo en General y las Particularidades del Amparo Administrativo* [The Amparo Action in General and the Particularities of the Administrative Amparo], 3-184.

30. Fix Zamudio, *supra* note 3 at 325-27.

31. Baker, *supra* note 8 at 267.

judicial authorities.<sup>32</sup> Obviously, recourse to the amparo suit can be useful to a foreigner aggrieved by an arbitrary decision. However, a decision favorable to a foreigner can be delayed or even overturned by a successful amparo action as well.

Clearly, Americans whose rights are violated and suffer personal injuries in Mexico in either criminal or civil cases can resort to the amparo to seek to rectify the situation. Conversely, Mexicans who are targeted by Americans can seek recourse to the amparo process to remedy alleged violations of their constitutional rights.

A legally distinct limitation on the effective performance of the constitutional defense function comes from the nature of the amparo judgment. When the U.S. Supreme Court determines a law is unconstitutional, as a result of custom and the operation of the rule of *stare decisis*, the practical effect is the abrogation of the offending statute. However, in Mexico, the enactment and repeal of laws is an exclusively legislative function. Hence, Section II of article 107 of the Constitution directs that "the judgment [in amparo] shall always be such that it affects only private individuals, being limited to affording them redress and protection in the special case to which the complaint refers, without making any general declaration about the law or act on which the complaint is based." Hence, the amparo judgment cannot have the effect of abrogating a law. Obtaining the benefits deriving from a declaration of unconstitutionality requires each and every person adversely affected by the law to seek the protection of a separate amparo judgment individually.<sup>33</sup>

The scope of consistency of the amparo judgment is limited by applying the rule of *stricti juris* in civil and administrative amparo suits, and in those labor amparos in which the complainant is the employer. Where applicable, the rule requires the court to confine themselves strictly to the *conceptos de violacion* [legal arguments] presented by the complainant and has the effect of nullifying the usual procedural rule that "the judge knows the law." The effects of *stricti juris* are somewhat modified by constitutional provisions authorizing defective complaints in any type of amparo suit to be corrected when the act complained of is based on a law declared unconstitutional in *jurisprudencia*. However, this does not benefit litigants in cases in which *jurisprudencia* has not yet been established or in which the content of relevant *jurisprudencia* is concerned with subjects other than declarations of statutory unconstitutionality.

The Mexican Supreme Court's willingness to decide constitutional questions of broad policy significance is restricted by the civil law tradition within which it operates. The strict distinction between the legislative and judicial functions due to the civil law tradition in Mexico derives from a conception of the judicial role that would exclude decisions of a primarily legislative character.<sup>34</sup>

The failure of the Mexican Supreme Court to contribute significantly to resolving fundamental constitutional issues is due partly to the political environment under which the judges are selected and operate.<sup>35</sup> Until now, the Mexican Supreme Court comes from the PRI. Judicial decisions conspicuously incompatible with the policy positions of the PRI and its allied major interest groups would not have an independent power base and could not maintain themselves. The Amparo and

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32. *Id.* at 268.

33. *Id.* at 270.

34. *Id.* at 271.

35. *Id.*, at 270.

Judicial laws amendments promulgated in 1958 illustrate this. While the Court's jurisdiction was left unimpaired by transferring appeals that contested the constitutionality of a law from the chambers to the full Court, the law reversed the Administrative Chamber's growing tendency to subject fiscal legislation to strict constitutional scrutiny.<sup>36</sup> In addition, an attorney is not likely to be elevated to the bench if s/he is not a member in good standing of the PRI or considered by it as reliable. If a maverick should be appointed, the president's domination of the Congress would assure easy removal by impeachment or a timely decision to resign.<sup>37</sup>

In view of the legal and political contexts, the amparo suit, as an instrument for the defense of the constitution, is inferior to the system of judicial review in the U.S., both in its constitutional scope and the practical effect of its judgments. Under current and foreseeable future conditions, political rather than judicial agencies will continue to control the interpretation of the Constitution wherever significant issues of policy are implicated. Hence, the amparo suit will continue to be most valuable and effective as a defense of individual liberty and in the performance of the *cassation* function.<sup>38</sup>

As the political liberalization process continues in Mexico, the amparo action may well become a more powerful mechanism to challenge arbitrary conduct, especially by government officials and the business elite. Hence, foreign businesses and their counsel should monitor the interaction of the evolution of the amparo action in the context of political liberalization in Mexico.

#### IV. CONCLUSION

Globalization, NAFTA, and the growth of bilateral and multilateral agreements and mechanisms provide businesses that are trading with and investing in Mexico new potential for resolving disputes. It also provides the same opportunities for their potential and/or actual adversaries. Hence, businesses must be aware of the doubled-edged sword nature of the fluid situation. There is a need for professionals knowledgeable in civil, criminal, and administrative matters to be able to review problems and emerging disputes simultaneously, with an eye to developing a solution.

Increasingly, businesses are forming national, bilateral, and multilateral trade associations. These groups enable businesses to educate and influence governments and international governmental organizations in their perception of a dispute. Sometimes politics and diplomacy may play important roles in resolving disputes. Still another potential force is the media. The impact of the media and of globalization gives a multiplier effect that may compel action by national, state, and local governments to resolve disputes or face adverse consequences.

Clearly, an increasing number of mechanisms are available to resolve disputes. In the short term, there will exist much overlap and interaction between legal, diplomatic, and administrative levels and mechanisms. Just as important, increased interaction will occur between criminal and civil matters. In this connection, the

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36. *Id.*, at 272.

37. *Id.*, at 272.

38. *Id.*, at 272.

amparo can be important to prevent injustice in criminal cases and even to obtain injunctive relief.

