„Krytyka Prawa", tom 12, nr 2/2020, s. 190–208, ISSN 2080-1084, e-ISSN 2450-7938, © 2020 Author.

MAURO ARTURO RIVERA LEÓN[1]

An Introduction to "Amparo" Theory: a Complex Mexican Constitutional Control Mechanism

Submitted: 21.04.2020. Accepted: 7.05.2020

Abstract

This article provides an outline as to the functioning of "Amparo," a Mexican mechanism of constitutional control. From the time of its introduction to Mexican constitutionalism in 1847, it has established itself as a robust constitutional control mechanism and has profoundly influenced Latin American constitutionalism and other countries in establishing similar mechanisms. This paper provides a summary of its evolution, functioning, and main procedural aspects.

Keywords: Amparo, constitutional control, human rights

[1] Dr. Mauro Arturo Rivera León – Universidad Iberoamericana, Mexico; Senior Law Clerk at the Mexican Supreme Court; e-mail: arturo.riverale@gmail.com; ORCID: 0000-0003-4964-7086. This article has not been financed from any sources.

„Krytyka Prawa", tom 12, nr 2/2020, s. 190–208, ISSN 2080-1084, e-ISSN 2450-7938, © 2020 Author.

MAURO ARTURO RIVERA LEÓN

Wprowadzenie do teorii „amparo": złożonego meksykańskiego mechanizmu kontroli konstytucyjnej

Złożony do redakcji: 21.04.2020. Zaakceptowany do druku: 7.05.2020

Streszczenie

W artykule opisano działanie mechanizmu „amparo", czyli meksykańskiej skargi o ochronę praw, będącej formą instrumentu kontroli konstytucyjnej. Rozwiązanie to wprowadzono do meksykańskiego prawa konstytucyjnego w 1847 r. Z czasem stało się ono niezwykle istotnym mechanizmem kontroli konstytucyjnej, wywierając ogromny wpływ na latynoamerykańskie prawo konstytucyjne, a także na systemy konstytucyjne innych państw, które wykształciły podobne mechanizmy. Artykuł stanowi swego rodzaju podsumowanie ewolucji historycznej, funkcjonowania i najważniejszych aspektów proceduralnych instytucji amparo konstytucyjnego.

Słowa kluczowe: „amparo", kontrola konstytucyjna, prawa człowieka

 DOI: 10.7206/kp.2080-1084.389

Introduction

The Spanish word "Amparo" means, literally, "protection." Amparo is a constitutional control mechanism that protects human rights. Amparo trials have had a significant influence on the world. The Mexican concept of Amparo has not only influenced the Universal Declaration of Human Rights,[2] but also many Latin-American, European,[3] and African countries[4] into adopting similar mechanisms directly inspired by it. Amparo is the most influential legal institution created by Mexican constitutionalism. The complexity of the institution is notable. University courses usually devote two semesters to the study of Amparo. A post-graduate Master's degree of 2 years is often devoted solely to the functioning of Amparo, and Mexican legal terminology created the concept "amparista," that is, a lawyer whose area of expertise is solely Amparo.

Amparo was initially envisaged in the 1841 Yucatan Constitution and introduced to Mexican constitutionalism formally in 1847. From its introduction, it has evolved into becoming the primary Mexican constitutional control mechanism. This article intends to provide an outline regarding the functioning of Amparo in order to

---

2 In 2015, UNESCO accepted documents pertaining to the birth of Amparo as the "Memory of the World." The documents are "Judicial files concerning the birth of a right: the effective remedy as a contribution of the Mexican writ of Amparo to the Universal Declaration of Human Rights (UDHR) of 1948." See https://bit.ly/2JS9H0I. The Universal Declaration of Human Rights of 1948 clearly adopted the Mexican terminology of Amparo in article 8. Alfredsson studies such an influence in: G. Alfredsson, A. Eide, *The Universal Declaration of Human Rights: A common standard of Achievement*, The Hague 1999, pp. 196–198. The same conclusion may be found in: G. Carozza, *From Conquest to Constitutions: Retrieving the Latin American Tradition of the Idea of Human Rights*, "Human Rights Quarterly" 2003, 25, pp. 287–288. Finally, a résumé on the way that the Mexican delegation provided direct input into redacting the article: D. Weissbrodt, M. Hallendorff, *Travaux Preparatoires of the Fair Trial Provisions – Article 8 to 11 – of the Universal Declaration of Human Rights*, "Human Rights Quarterly" 1999, 21, pp. 1092.

3 Spain, in Europe, adopted the Mexican "Amparo" under the same name as of the 1931 Constitution. The adoption of the mechanism was fostered by the Mexican Prof. Rodolfo Reyes, who explained in Spain the functioning of the Institution. The Mexican influence is presented by H. Fix-Zamudio, *El Derecho de Amparo en México y en España. Su influencia recíproca*, Revista de Estudios Políticos, Madrid 1979, pp. 245–248.

4 Odimba analyses the influence of the Mexican Amparo in African Constitutions. See J. Odimba, *La influencia del amparo mexicano en las constituciones de los países africanos*, [in:] H. Fix-Zamudio, E. Ferrer, *México y la Constitución de 1917: Influencia extranjera y trascendencia internacional*, Ciudad de México 2017, pp. 503 ff.

enable different legal system scholars to approach this complex mechanism, which has not yet been extensively analyzed in non-Spanish speaking legal literature.

Section 2) studies the evolution of constitutional control in Mexico before and after the adoption of Amparo and the main amendments of the institution. Section 3) addresses the functions that Amparo may perform and provides an analysis of its procedural aspects. It delves into the concept of Jurisprudencia (systematized binding precedents) and the general declaration of unconstitutionality as a mechanism that may produce an *erga omnes* annulment of a law. I conclude in section 4) that while Amparo is a remedy that has been treated with excessive nationalism in the Mexican doctrine it may yet benefit from a comparative analysis in the constitutional doctrine.

The rise of the "Amparo" hegemony

Evolution of constitutional control in Mexican constitutionalism

Mexico gained Independence in 1821 from the Spanish realm. Hitherto, the only Constitution that had been in vigor in the "New Spain" was the Gaditan Spanish Constitution of 1812. Even though, as I have argued before,[5] the Cádiz Constitution of 1812 foresaw constitutional control mechanisms of a political nature,[6] it was not strictly a Mexican Constitution, but rather a Spanish Constitution, in vigor also in its territories.

The first genuinely Mexican Constitution was the "Constitutional Decree for the Liberty of the Mexican America," also known as the Apatzingan Constitution (1814). This Constitution exacted a limited force. It created four elements of constitutional[7] control of a rather political nature.

---

5 M. Rivera León, *¿Justicia Constitucional en Apatzingán y Cádiz?*, [in:] E. Ferrer Mac-Gregor et al. (eds.), *Derecho Procesal Constitucional en Perspectiva Histórica: Tomo II*, Ciudad de México 2018, p. 227.

6 Mainly two mechanisms. In the first place, it established a "permanent deputation," which had the duty to note any constitutional breaches and inform Congress of them upon their first gathering. In the second place, it created the right to plea before the King or Congress to demand enforcement of the Constitution. See L. Sánchez Agesta, *Historia del Constitucionalismo español (1808–1936)*, Madrid 1978, pp. 77, 78.

7 These have been extensively developed in M. Rivera León, *De Apatzingán a Kelsen: tras las sombras de la justicia constitucional en México*, [in:] C. Andrews et al. (eds.), *Miradas a la Historia Constitucional de México*, Ciudad de México 2015, pp. 26–31. The only Mexican autor who has performed a similar analysis is H. Fix-Zamudio, *La defensa de la Constitución en el Decreto Constitucional para la Libertad de la América Mexicana*, [in:] J. Castañón et al. (eds.), *Estudios sobre el Decreto Constitucional de Apatzingán*, Ciudad de México 1957, pp. 585–616.

 DOI: 10.7206/kp.2080-1084.389

In the first place, it foresaw criminal procedure as a dissuasive element against unconstitutional action. For example, article 145 stated that the Ministers of the "Supreme Government" would be responsible for the decrees or orders they signed that conflicted with the Constitution. In the second place, following the influence of the Cádiz Constitution, it granted every citizen the faculty to demand the respect of constitutional rights before any public authority (article 37 of the Constitution). In third place, it granted Congress (article 107) the right to resolve doubts regarding the constitutional competences of the powers (a natural solution considering that the Apatzingán Constitution created a rigid division of powers and favored legislative primacy[8]). Finally, the Constitutional Decree created in its article 237 an *actio popularis* that granted every citizen the right to claim constitutional breaches.

After the Constitutional Decree, the next Mexican Constitution was the 1824 Constitution. The 1824 model adopted federalism and bicameralism, following the American example, although still with a strong Gaditan influence.[9] Constitutional control continued to be political and not jurisdictional. For example, article 38 of the 1824 Constitution introduced impeachment, stating the possibility of accusing public officers of actions contrary to the constitution.[10] In the same view of legislative primacy, the Constitution stated that only Congress could resolve ambiguities arising from the meaning of the Constitution.[11] The 1824 Constitution had a rather brief life. Its configuration of the Executive Power (President and Vicepresident) created an intricate balance. The Vicepresidency was constitutionally granted to the candidate who obtained the second place in the presidential elections conducted by State Legislatures. This meant that the natural substitute for the President was, in fact, a political adversary.[12] The unbearable political situation created by the distribution of powers highly contributed to the fall of the 1824 Constitution.

The "Seven Constitutional Laws" (1836 Constitution), which followed the 1824 Constitution, was a fascinating text from the perspective of constitutional control. It broke the classic division of powers proposed by Montesquieu by introducing

---

8 A clear influence of Spanish and French Constitutionalism. M. Balaguer, *La división de poderes en la Constitución de Cádiz de 1812*, "Revista de Derecho Político" 2012, 83, p. 26.

9 For example, Chust and Frasquet argue that even though the American model influenced greatly the 1824 Constitution it was not a mere replica. M. Chust, I. Frasquet, *Orígenes federales del republicanismo en México, 1810–1824*, "Mexican Studies" 2008, 24(2), p. 364.

10 M. González Oropeza, *El juicio político en sus orígenes*, "Revista del Instituto de la Judicatura Federal" 2000, 7, p. 232.

11 H. Rivera, *El control constitucional olvidado: Apuntes para una nueva teoría de la anulación*, [in:] D. Cienfuegos (ed.), *Estudios de Derecho Procesal Constitucional Local*, Ciudad de México 2008, p. 313.

12 Issues arising from this election mechanism have been highlighted by numerous authors, *inter alia*, D. Pantoja, *El diseño constitucional del Ejecutivo en México y sus problemas*, "Foro Internacional" 1998, 38, p. 255.

the so-called "Supreme Conservative Power"[13] (Supremo Poder Conservador). The ideas of Constant[14] and Sieyès[15] heavily influenced Sánchez de Tagle, one of the great ideologists of the 1836 Constitution. Thus, Sánchez de Tagle conceived a body which, not being part of the trinity of powers, had the competence (Article 12 of the "Second Law") to declare void the acts of the Executive, the laws of the legislative and the rulings of the judiciary. In such a way, the 1836 constitution granted legal standing to the Executive Power, the High Court, and a Parliamentary Minority to question the constitutionality of laws, a provision similar to the abstract action of unconstitutionality, which Kelsen would envisage many years later.

The Supreme Conservative Power in 1840, in a controversial decision, declared the 'Law of Thieves' to be unconstitutional (legislation that allowed summary judgment and execution of Highwayman). The declaration motivated a clash between the Supreme Conservative Power and the Executive, which ultimately led to the demise of the guardian of the 1836 Constitution and with it, the Constitution itself.[16]

From Crescencio and Otero to modern Amparo

1847 proved to be a decisive year regarding constitutional control. Mexico adopted the so-called "Acta Constitutiva y de Reforma" which reinstated the 1824 federal Constitution but introduced amendments in its text. One of the main amendments proposed by Mariano Otero was the adoption of "Amparo" by the federal Constitution, a procedure concerning the protection of constitutional rights. Otero, however, did not create the mechanism but was inspired by Manuel Crescencio Rejon's conception, present in the 1841 Constitution of Yucatan.[17]

Crescencio had initially conceived a mechanism to appeal unconstitutional acts by the executive and laws by the legislative if they were contrary to the grammatical

---

13 For the most comprehensive analysis of this controversial body see D. Pantoja, *El Supremo Poder Conservador*, Ciudad de Mexico 2005.

14 Particularly the "Pouvoir Moderateur." Constant would develop this idea in several texts. One of the most comprehensive is B. Constant, *Cous de politique Constitutionnelle*, Paris 1839, pp. 185 ff.

15 That is, the *Jury Constitutionnaire* envisioned by Sieyès. E. Sieyès, *Escritos Políticos de Sieyès*, Ciudad de México 1993, pp. 257–269.

16 R. Pérez, *El Supremo Poder Conservador y su sentencia de muerte: La ley sobre ladrones del 13 de marzo de 1840*, [in:] E. Ferrer, A. Zaldívar, *La Ciencia del Derecho Procesal Constitucional: Tomo II*, Ciudad de México 2008, pp. 467–475.

17 An independent movement in the Mexican State of Yucatan created its own proposal for a Constitution in 1841. Crescencio Rejón was one of its main ideologists. See J. Capetillo, *La Constitución yucateca de 1841 y la reforma constitucional en las Entidades Federativas*, [in:] F. de Andrea, *Derecho Constitucional Estatal: Estudios históricos, legislativos y teórico-prácticos de los estados de la República mexicana*, Ciudad de México 2001, p. 474.

 DOI: 10.7206/kp.2080-1084.389

interpretation of the Constitution. It also stated a division of competences between the ordinary judges and the Supreme Court of Yucatan, depending on the authority which issued the appealed act. Otero's concept was much more straightforward than Crescencio Rejon's. Article 25 of the Acta de Reformas merely stated that the Courts would grant Amparo to citizens in regard to attacks on constitutional or legal rights by public authorities.[18] However, Otero introduced[19] in the said article the specification that the ruling would limit itself to a particular case and thus a prohibition to make a general declaration against the appealed act/ruling. This provision is known as "Otero's formula." Otero's formula was a way to ease compliance to the rulings of the judiciary by the executive. In the first place, the *inter partes* effects expressly foreseen by the formula implied that regardless of the hypothetical granting of an Amparo against a law, such an Amparo would not extend to other individuals who had not filed a lawsuit themselves. In the second place, Otero tried to ensure that the federal judiciary would not interfere in the functions of the legislative or the executive power by constraining it to determining the constitutionality of the act/law on a case-by-case basis. This would be adequate in Otero's rigid division of powers. A judge could only determine with *inter partes* effects if the law was unconstitutional in "the particular case filed by the applicant" and not in general terms.

The right to Amparo was introduced to the Constitution from 1847 as an amendment to the 1824 Constitution. Nonetheless, Congress did not issue the first Amparo Law until 1861 (14 years later). In this "interregnum," the Mexican Judiciary embraced the principle of direct application of the Constitution. Some cases of Amparo were dismissed on formal grounds before 1869 due to a lack of legislation. However, Federal Substitute Judge Pedro Samano decided, in 1869, that if a right was constitutionalized, the lack of secondary legislation was not a valid ground to deny the defense of such a right. Samano employed generic civil procedure to grant the famous "Amparo Verástegui," that is, the first Amparo ruling.

Upon the kind invitation of Prof. Dr. Hab. Anna Łabno, I had the opportunity to teach a seminar at the University of Katowice on Mexico's legal system (2019), which included a discussion of the 1869 first Amparo ruling. As it may be of interest

---

[18] Literally: "Federal Courts will grant Amparo to any citizen of the Republic in the exercise and preservation of the rights granted by this Constitution and Constitutional Laws against any attacks by the Legislative and Executive Powers of the Federation or the States. The Courts will limit themselves to grant protection in a particular case regarding the process and will abstain from making any general declaration regarding the law or act which originated the process."

[19] Ferrer has noted that arguably a similar intent was already present in Manuel Crescencio Rejon's 1841 design. E. Ferrer, *Panorámica del Derecho Procesal Constitucional y Convencional*, Ciudad de México 2017, p. 390.

to non-Spanish speaking scholars, I offer the translation I provided for the said seminary.

> "San Luis Potosí, August 13 of 1849.
> This Court has analyzed the files and evidence submitted during the procedure. This Court points out the fact that article 25 of the Constitution obliges the judiciary to grant Amparo [Protection] to any citizen against violent attacks from the powers of the National Government or the State Government. In such a way, the circumstance that the legislator has not defined the procedure and terms in which the protection is to be granted cannot be an obstacle to fulfilling such a sacred duty. The proper way to process a case file is not unknown to this Court. Not resolving the present case would contravene the object and purpose of the constituent power. Law is binding upon publication unless it expressly states the opposite, as Mr. Verástegui's lawyer rightfully claims. This Court cannot ignore a constitutional article irrespective of the arguments of the Governor of the State of San Luis in his Statement of Defense regarding the absence of a procedure concerning the Writ of Amparo. This reason is not significant enough to ignore the law regarding the protection of individual rights. Having established this, this Court notes that it is proven in the procedure that the Governor issued an exiled order against Mr. Manuel Verástegui, which originated the present case. Therefore, the Governor violated the Constitution, which forbids such orders, and committed an attack on an individual right, in contravention of the fact that every authority must respect these rights. Such respect and obedience are required because of their constitutional hierarchy and their need in a properly ordered society.
>
> On the authority of the reasons mentioned above, this Court grants Mr. Manuel Verástegui the protection requested, which has grounds in article 25 of the Constitution. Therefore, this Court declares that he cannot be exiled from the State of San Luis without a fair trial, overseen and resolved by a competent judicial authority, according to the rights that the Constitution grants to him as a Mexican Citizen.
>
> This Court orders to notify the present resolution to the Plaintiff and to provide him an official copy, if so requested. In addition, the Court orders that the Government of the State be notified in terms of the proper compliance of the ruling. May it be reminded to the Government that this Court has the legal means to force compliance with its rulings, however it hopes that such measures will not be necessary.

 DOI: 10.7206/kp.2080-1084.389

> This ruling was resolved by Mr. Pedro Zámano, Temporary Substitute District Judge on the grounds of the absence of the District Judge."

Judge Samano's ruling started a doctrine that has lasted more than 150 years, that is, the idea that Amparo provisions, as positive rights, are directly applicable.[20] Even more critically, Sámano proved Amparo to be "operative" and a real mechanism to protect constitutional rights.

The 1824 Constitution was replaced by the 1857 Constitution, which consolidated Amparo as a constitutional feature of the Mexican legal system. The 1857 Constitution devoted two articles to regulating Amparo. Article 101 stipulated the original three withstanding hypotheses pertaining to the admissibility of Amparo. Amparo is admissible when a citizen claims that: 1) a law or act violated constitutional rights; 2) a law or act of the federation violates the competences of a state and 3) a law or act of a State violates the competences of the Federation.[21] In turn, Article 102 contained Otero's well-known formula and clarified the principle of the "aggrieved party," that is, that only an individual injured in one's legal rights had legal standing to the procedure.

The first Amparo law was the 1861 "Organinc Law/Articles 101 and 102 of the Constitution." The law was brief (33 articles) but introduced some of the most fundamental concepts of modern Amparo, such as the possibility of appealing Amparo rulings in the second instance to the Supreme Court and the Amparo parties: the applicant, the "responsible authority" (albeit only being granted the right of audience),

---

[20] This issue would repeat 142 years later. Mexico amended Amparo substantially in its Constitution in 2011. However, Congress did not issue a new Amparo Law until 2013. Therefore, for almost two years (666 days, in fact), Amparo's fundamental elements had been amended, but the Law did not reflect such changes. The Supreme Court employed the same doctrine envisaged by Judge Sámano and stated that concepts introduced by the Constitutional amendment should be directly applied. For the reasoning regarding the direct application of "legitimate interest," see AR 323/2014. For the direct application of adhesive/precautionary Amparo procedure see case law 1a. CCXIII/2012 (10a).

[21] Hypotheses 2) and 3) are known in the doctrine as the "Amparo Soberanía," that is, "Sovereignty Amparo." Sovereignty Amparo implies that a citizen may claim that a law/act is unconstitutional as it was issued by an incompetent authority. For an introduction to the concept see: R. Andrade, *El Amparo soberanía*, "Revista Direito UFMS" 2018, 4(1), pp. 7–35. Recently, the President of the Supreme Court (Justice Zaldívar) proposed a Constitutional Amendment to the Federal Judiciary. Among the many changes proposed, it is worth noting that it proposes to suppress these two hypotheses (that are reproduced in similar terms by Article 103 of the current 1917 Constitution). The argument is simple. Given the fact that articles 14 and 16 of the Mexican Constitution are interpreted as granting a right to "legality," the hypothesis of the "Amparo soberanía" is not required. A citizen may always argue that the condition of the first hypothesis (violation of human rights) is met because the act violates constitutional rights as the authority which issued it lacks competence. The argument is compelling and accurate. "Amparo soberanía" seems to be genuinely unnecessary in current times.

and Public Prosecutor/Ministerio Público. Given the lack of clarity regarding the possibility of appealing judicial resolutions through Amparo (a possibility indeed expressly denied by the original model of Crescencio), litigants pressed federal courts claiming the admissibility of such appeals.

The reaction of the Legislative power was swift. Returning to the spirit of Crescencio Rejon's model, a new law was enacted in 1869 (the Constitutional Organic Law regarding the Amparo Trial). The law (article 8) expressly forbade appealing any judicial resolutions through Amparo. In the legislative debate, Congress claimed that 1) analyzing judicial resolutions in Amparo would invade the sovereignty of individual States to apply their laws; 2) the 1857 Constitution did not expressly grant that possibility and 3) Judicial resolutions could already be appealed through ordinary mechanisms at the judiciary. However, the Supreme Court found such a prohibition unconstitutional. In the noted "Amparo Vega," the Supreme Court, in a controversial interpretation of the Constitution, ruled in favor of the admissibility of Amparo even against judicial resolutions, notwithstanding the express legal prohibition.[22] Despite the conflict with the Legislative branch, the interpretation of the Supreme Court would prevail.

As a consequence of the abovementioned dispute, the Legislative Power issued a new Amparo Law in 1882, which recognised the possibility of appealing judicial resolutions and introduced further elements that resemble very much the "modern Amparo." For example, it specified a list of cases in which Amparo was inadmissible (articles 10 and 35), the technical requirements of the plea (article 7), and the concept of "suplencia de la queja."[23]

Amparo flourished under the 1882 regulations until the Mexican revolution of 1910. The Mexican Revolution was a complex social and political movement which culminated in the 1917 Constitution, mostly known for the constitutionalization of social rights. The new Constitution did not only preserve the Amparo regulations (now in articles 103 and 107) but deepened the extent of its configuration. After the brief Amparo Law of 1919, the Congress issued the Amparo Law of 1939, which would be in force for 77 years. Under the 1939 Law, Amparo achieved its current

---

22 A brief analysis in J. Bustillos, *El amparo judicial: a 140 años de la Primera Sentencia (1869–2009)*, [in:] M. González, E. Ferrer, *El juicio de amparo. A 160 años de la primera sentencia: Tomo I*, Ciudad de México 2011, p. 111.

23 This is the possibility that, under specific hypotheses, the Court may complement the arguments provided by the applicant. The concept is particularly used in cases of vulnerable groups (persons deprived of liberty, children, workers, etc.). The Law presupposes that such groups may be deprived of their rights if forced to litigate with the same level of technicality as "normal" parties. Therefore it grants judges the faculty to correct their arguments or even to grant Amparo in the absence of a concrete argument if *ex officio* they perceive a violation of their rights.

 DOI: 10.7206/kp.2080-1084.389

development. It is also noteworthy that a very particular interpretation of article 14[24] of the Mexican Constitution by the Federal Courts created[25] the right to "legality." That is, Federal Courts consider that an improper application of the statute violates a fundamental right. Through this interpretation, Federal Courts through Amparo do not only control the constitutionality but may also control the legality of any law/act/resolution in Mexico (the misinterpretation of a law, unlawful weighing of evidence, *et cetera*).

Under the 1917 Constitution, Amparo positioned itself as the central Mexican constitutional control mechanism (for example, in 2019, according to the Federal Judiciary, around 1,000,000 Amparos were resolved by Mexican judges). However, in 1994 a constitutional amendment introduced several changes to the Constitution. Such amendments intended to transform the Supreme Court into a material Constitutional Court. Among those changes, the Supreme Court was granted the competence to resolve actions of unconstitutionality (abstract normative control) and constitutional controversies.[26] Both procedures allow the Supreme Court to annul statutes with *erga omn*es effects under a qualified majority (8 votes of the 11 justices). Thus, currently, there is no Constitutional Court in Mexico, although this function is performed materially by the Mexican Supreme Court.

The 2011 amendment and the 2013 Amparo Law

The Mexican legal system embraced a profound constitutional amendment to Amparo in 2011. Criticism pertaining to the functioning of Amparo emerged during the 72 years of the application of the 1939 law. *Inter alia*, the critique denounced the excessive technical nature of the procedure, the rigid "legal interest" required by law towards the plaintiff, the Otero formula as an excessive limitation of judicial power, and the need to modernize the procedure. The 2011 amendment preceded another

---

24 Article 14 states: "No law will have retroactive effect to the detriment of any person. No one can be deprived of his freedom, properties, or rights without a trial before previously-established courts, complying with the essential formalities of the proceedings and according to those laws issued beforehand. With regard to criminal trials, it is forbidden to impose any penalty which has not been expressly decreed by a law applicable to the crime in question, by arguing mere analogy or majority of reason. In civil trials, the final sentence must be according to the text of the statute or the legal interpretation thereof. In the case of the lack of an appropriate law, the sentence must be based on the general principles of law."

25 Ortega provides a brief narration of this interesting process and the classic arguments from Rabasa and Vallarta. R. Ortega, *El derecho mexicano entre legalismo y constitucionalismo*, "Estudios de Historia Moderna y Contemporánea de México" 2017, 54, pp. 14–15.

26 Their constitutional configuration has been commented on by M.A. Rivera, *Artículo 105*, [in:] J. Cossío (ed.), *Constitución Política de los Estados Unidos Mexicanos Come*ntada, Ciudad de México 2017, pp. 1652–1669.

constitutional amendment concerning human rights. Therefore, academia has seen these amendments as complementary reforms of a single human rights system (the amendment of the human rights core and its mechanism of protection).

The 2011 Constitutional amendment introduced as new concepts to Amparo legitimate interest: adhesive/precautory Amparo, the possibility to produce *erga omnes* effects through a new procedure termed the "general declaration of unconstitutionality," a parameter control extension to international law, the concentration of procedural violations in Amparo against final judicial decisions, among others.

The 2011 constitutional amendment transitory regime forced Congress to issue the corresponding legal modifications within 120 days. However, it took Congress almost two years (more than 600 days) to issue a new legislation. In the meantime, the Supreme Court, in several decisions, directly applied the relevant constitutional provisions pertaining to the amended Amparo institutions.

Amparo functions and procedure

Conceptual and procedural aspects

Amparo is a constitutional control procedure through which a person (either natural or legal) may protect one's constitutional or human rights[27] against attacks concerning such rights by public authorities.[28]

The Mexican Supreme Court has maintained in several recent decisions that Amparo is a mechanism of concentrated/European/Kelsenian constitutional control.[29] This erroneous conceptual assessment confuses a "direct" control with

---

27 The Mexican Supreme Court stated in two relevant decisions (CT 56/2011 and CT 360/2013) that legal persons are entitled to human rights compatible with their nature. The statement is probably erroneous. A similar opinion is held by the Inter-American Court of Human Rights. The Inter-American Court stated in the consultative opinion OC-22/16 that legal persons generally are not entitled to the rights of the Inter-American Convention on Human Rights as only "human persons" may be holders of such rights. The Mexican Supreme Court seems to have taken such a decision while facing an apparent dilemma: either to grant human rights to legal persons compatible with their nature (especially jurisdictional rights) or not to grant them any rights at all. The dilemma is a non-existing one. Even though the Mexican Constitution grants protection of "human rights" (article 1), it is possible to conceive that other rights (constitutional rights which do not necessarily need to be human rights) may be granted to legal persons without the need to recognize them as entitled to human rights *per se*. However, a recent decision by the First Chamber of the Supreme Court seems to have started to note this conceptual issue (ADR 345/2018).

28 Bonilla provides a useful definition. See: M. Bonilla, *El amparo contra actos en juicio de ejecución irreparable*, Ciudad de México 2019, pp. 16–18.

29 For example, in the following rulings: Varios 912/2010, ADR 4062/2013, ADR 4927/2014, *inter alia*.

 DOI: 10.7206/kp.2080-1084.389

a "concentrated" control. The European constitutional control model, as theorized by Kelsen, presupposes that a single body (i.e., the Constitutional Court) has a monopoly on constitutional adjudication.[30] Therefore, the abstract normative control as envisaged by Kelsen was in the hands of a single body. Mexican Amparo, on the other hand, may be resolved by hundreds of judges in their respective competences. Namely, District Courts, Unitary Courts, Circuit Courts and the Supreme Court are deemed competent to hear Amparo trials. Therefore, regardless of the theory of the Mexican Supreme Court, Amparo is not a concentrated but rather a decentralized control. In turn, Amparo is indeed a direct control mechanism as the constitutionality of a law may itself form part of the main litis and is not analyzed incidentally as in diffuse control.[31] Certainly, Mexico possesses constitutional control mechanisms that are typical of a Kelsenian/European model, yet Amparo (as regulated in Mexico) is not one of them.[32]

Amparo, given its broadness, serves multiple functions. Mexican national doctrine has identified the following functions performed through Amparo: 1) habeas corpus; 2) a cassation appeal function (similar to the French "cassation" or to the Polish "kasacja"); 3) normative control ("Amparo contra leyes"); 4) competence control through "sovereignty Amparo" or "Amparo soberanía"; 5) control of the acts of public administration; 6) the mechanism for civil society scrutiny[33] and 7) a mech-

---

30 This was the original design of H. Kelsen, *La garantía jurisdiccional de la Constitución*, Ciudad de México 2001, p. 68. Also see G. Haase, K. Struger, *Verfassungsgerichtbarkeit in Europa*, Wien 2009, pp. 37 ff. Also T. Fleiner, C. Saunders, *Constitutions embedded in different legal systems*, [in:] M. Tuschnet et al. (eds.), *Routledge Handbook of Constitutional Law*, Abingdon 2013, p. 27. The same opinion is presented by M. Schulz, *Verfassungsgerichtbarkeit im globalen Kontext*, "Giga Focus Global" 2010, 5, p. 3 and by N. Lösing, *Die Verfassungsgerichtbarkeit in Lateinamerika*, Baden-Baden 2001, pp. 53–55. The same definition has been adopted by the Polish constitutional doctrine. For example, B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej*, Warszawa 2009, p. 822. See also J. Sobczak, *Trybunał Konstytucyjny*, [in:] W. Skrzydło (ed.), *Polskie Prawo Konstytucyjne*, Lublin 2010, p. 402.

31 Bygone Mexican constitutional doctrine was familiar with the distinction. For example, Peniche explained in 1929 the difference between what he called "action" and "exception" constitutional control systems. The distinction lies in whether or not the statute's constitutionality is part of the litis or is incidental to it. The Mexican Supreme Court seems to confuse this well-known distinction with the European/American models of control. *Vide* V. Peniche, op. cit., p. 73.

32 Here is one of the main differences in relation to Amparo in other jurisdictions. For example, Germany, Spain, or Poland (in the *Verfassungsbeschwerde*, *Recurso de Amparo*, and *skarga konstytucyjna*) attribute solely to the Constitutional Court the competence to solve Amparo. In such countries, Amparo may function as a concentrated mechanism as its competence is limited to a single Tribunal. In the Mexican model, multiple judges from several jurisdictions (not only the Supreme Court) may resolve Amparo. It must also be noted that Germany, Spain or Poland's version of Amparo are a reduced version of the mechanism (rather similar to amparo directo en revision than to a full scale version of Amparo).

33 For example, AR 323/2014. In such a ruling, the First Chamber of the Supreme Court stipulated that civil associations could appeal acts of public bodies without direct harm as long as they are

anism to control legislative omissions.[34] Amparo performs all the above mentioned functions.[35]

There are, in general, four autonomous parties in an Amparo trial. In the first place, the plaintiff is named "Quejoso" (from the old Spanish "he, who complains"). A plaintiff may be a natural person (individual or collective) or a legal person, including public authorities. That is, even a public authority (such as the Ministry of Foreign affairs) may petition Amparo under certain conditions.[36] The "sued" authority is called "autoridad responsible." An "autoridad responsable" is the public body that allegedly violated the rights claimed by the applicant. Here it is essential to note that, as a new feature of the 2013 Amparo law, even particular individuals may be held accountable as "responsible authorities" if they perform a public function in a hierarchical position equivalent to that of an authority[37] in virtue of a statute (article 5.II of the Amparo Law). In Amparo, the applicant attributes an "act of authority" or challenged act to the authority. Authorities must defend, in the trial, the constitutionality of the act and provide arguments to prove its legality.

Amparo Law designates in general terms as an "interested third party" any subject who has a legal interest contrary to the plaintiff. That is, a party whose interest resides in defending the constitutionality of the act (for example, in a civil procedure in which A sued B, if A claims Amparo against a judicial decision because it was adverse to their interest, B would be an interested third party[38]). Finally, a Public

---

related to its corporate statutes. In such a way, a society devoted to education, as in Mexico, was allowed to appeal a deficient audit by the Federal Audit Office regarding education budget expenditures.

34 See for example, the rulings AR 1359/2015 and AR 805/2018. In both cases, the First Chamber of the Supreme Court forced Congress to issue legislation upon finding an omission in particular aspects.

35 For example, Clagett stated that Amparo might be equivalent to the various remedies of habeas corpus, injunction, writ of error, and certiorari developed in the Anglo-American legal system. H. Clagett, *The Mexican Suit of "Amparo"*, "Georgetown Law Journal" 1945, 33(4), p. 418.

36 In the case of Amparo initiated by authorities, article 7 in the Amparo Law defines a close set of conditions. An authority may only claim Amparo through their rightful representatives predetermined by law. In the second place, an authority must claim direct patrimonial loss. Finally, the relationship from which the act derives must be of coordination and not of subordination (implying that in such a relationship, the authority must have performed a relationship analogous to a regular citizen). For example, a public authority may claim Amparo after being condemned to pay damages derived from a contractual obligation with a citizen (appealing the final judicial resolution which had upheld a first instance civil conviction).

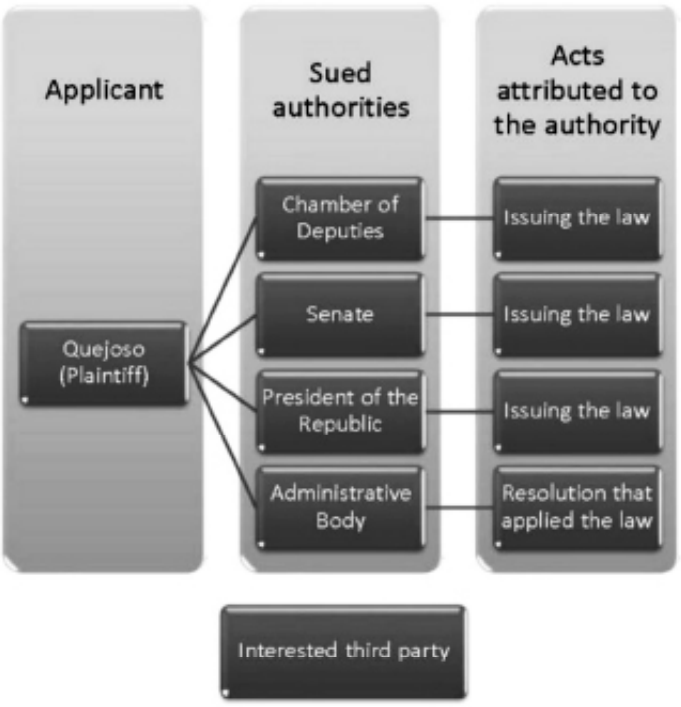
37 Deeper analysis of this hypothesis is offered by J. Mijangos y González, *El juicio de amparo contra particulares*, [in:] E. Ferrer, A. Herrera (eds.), *El juicio de amparo en el centenario de la Constitución Mexicana de 1917: Pasado, Presente y Futuro*, Ciudad de México 2017, pp. 271 ff.

38 Different hypotheses regarding the interested third party apply if Amparo analyses a decision regarding a criminal procedure. If a person accused of a crime is the plaintiff (Quejoso), the alleged

 DOI: 10.7206/kp.2080-1084.389

Prosecutor, usually "assigned" (adscrito) to the corresponding Amparo Court, always is party to every Amparo procedure; to defend the public interest.

The following diagram represents the litis ensuing from a situation in which a citizen challenges the constitutionality of a law applied in an administrative resolution by a public body "X":



Source: elaborated by the author.

Even though Amparo is referred to as a single procedure, it comprehends two different "vías" or procedural forms. Namely, "Direct Amparo" (Amparo directo) and "Indirect Amparo" (Amparo indirecto[39]). Amparo directo refers to an Amparo against a final non-appealable judicial resolution that resolves a case in meritum

victim will be an interested third party. If a victim appeals through Amparo, the final resolution regarding the non-conviction of the accused, the victim will be an interested third party. Finally, in all cases, the Public Prosecutor who took part in the procedure will be an interested third party (article 5.III of the Amparo Law).

39 The terminology originated in the times in which Amparo against a final judicial ruling was "directly" filed to the Supreme Court, and Amparo against other acts was presented to a District Court and only in the second instance (indirectly) would be resolved by the Supreme Court. Bar this the terminology holds no real conceptual meaning.

or ends a procedure definitively. For example, no legal remedy may be raised against the resolution of a criminal appeal either at the local or federal level. In such cases, an "amparo directo" may be filed. Amparo indirecto may be filed against any other act that is not a final, non-appealable, judicial resolution resolving a dispute or ending a procedure. For example, an Amparo indirecto may be filed against a law that is deemed unconstitutional, a detention warrant, a precautionary measure issued by a Court, or against the omission of an authority to answer a petition from a citizen. Competences vary in both types of Amparo. Amparo indirecto is usually resolved by a District Court in the first instance and by a Circuit Court or the Supreme Court in the second instance, depending on the case. In Amparo directo, the first instance is resolved by a Circuit Court and the second instance by the Supreme Court (however the admissibility of the second instance is limited to the existence of extraordinary circumstances concerning a constitutional interpretation of importance to the legal order).

Amparo, either direct or indirect, constitutes a trial, not an intraprocedural complaint/appeal. Being a trial *per se* has an autonomous procedural nature. That is, even if a person claims Amparo against an administrative or judicial resolution, Amparo has autonomous parties, litis, appeals, and, in general, is an independent constitutional control.[40]

The procedure varies depending on whether Amparo is pursued in a "direct" or "indirect" way. The "direct" way, as explained before, functions mainly as a cassation. In turn, the remaining significant Amparo functions are performed in the "indirect Amparo" – wherein the procedure is more complicated.

After an indirect Amparo has been filed, a District Court Judge[41] has 24 hours to decide its admission or dismissal on formal grounds.[42] Within this 24-hour period, the District Court Judge must also reach the decision as to whether to grant a suspension of the act. If a suspension is granted, it will have only a provisional effect. A suspension lasting the entire Amparo procedure (definitive suspension) will be decided in the so-called "incidental hearing" a few days later, after the authorities

---

40 The debate is old in the Mexican doctrine. Even preceding 1930, the doctrine had agreed on the autonomous nature of Amparo. However, Mexican doctrine admits that "direct Amparo" has a cassation nature resembling an ordinary appeal. For example, V. Peniche, *Garantías y Amparo*, Ciudad de México 2007 (originally written in 1929). Another classic example is J. Castro, *El Sistema del derecho de Amparo*, Ciudad de México 1979, p. 127.

41 The only case where a District Court Judge is not deemed competent to resolve an indirect Amparo is when the allegedly unconstitutional act is a judicial resolution of a Unitary Circuit Court. In such a case, a different Unitary Circuit Court will be deemed competent to resolve the Amparo (given the known principle that a lower hierarchical Court may not scrutinize the legality of a decision issued by a hierarchically higher Court).

42 Article 61 of the Amparo Law provides a list of 23 reasons for dismissing a case on formal grounds.

 DOI: 10.7206/kp.2080-1084.389

have provided the Court a summary briefing concerning the act. Decisions concerning the suspension are appealable. The Amparo will be resolved in approximately 30 working days in the "Constitutional hearing," where evidence is produced and the sentence delivered. The decision may still be appealed through a "recurso de revision." The appeal is usually resolved by a Circuit Court or, in exceptional cases, the Supreme Court itself.

Binding case law and the General Declaration of Unconstitutionality

One of the main features of the Mexican legal system is that, through Amparo decisions, specific bodies of the federal judiciary (namely Circuit Courts and the Supreme Court) may issue "jurisprudencia" or binding legal criteria regarding how to interpret the Constitution or ordinary statutes. Jurisprudencia is a concept that has had its roots in Mexican Law from 1882, however it was formally introduced to the Constitution by the 1951 constitutional amendment.[43] Article 94 of the Constitution delegates to law the possibility to determine the cases in which "jurisprudencia" are binding, and the requirements to create it or interrupt its binding nature. In turn, Article 217 of the Amparo Law regulates Jurisprudencia. It states that jurisprudencia issued by the Supreme Court shall bind all Mexican courts (either federal or local) while Jurisprudencia issued by "Plenos de Circuito"[44] and Circuit Courts are binding to all judicial bodies under their jurisdiction.[45] Furthermore, it is also possible to issue "tesis aislada," namely, guiding criteria for the Courts, albeit not legally binding. It must be noted that jurisprudencia is, therefore, binding to courts and tribunals but not to administrative or legislative authorities. That is, even if the interpretation or the unconstitutionality of a statute has been declared in accordance with binding case law, such jurisprudencia only binds courts and not the Federal Public Administration, nor Congress.

---

43 Serna reconstructs the historical path in J. Serna, *The concept of Jurisprudencia in Mexican Law*, "Mexican Law Review" 2009, 1(2), pp. 133–135.

44 That is, a specific *ad hoc* body created by all the Judges (Magistrados) of a particular judicial circuit to resolve contradicting criteria from Circuit Courts within the same judicial circuit. Therefore, Plenos de Circuito are not judicial bodies *per se*, but non-permanent bodies that determine which interpretation (of a statute or of the Mexican Constitution) should prevail in a judicial circuit if several Circuit Courts adopt contradicting interpretations.

45 That is, Jurisprudencia of a concrete Pleno de Circuito is binding for all Courts from such circuits (including Circuit Courts) but not for Circuit Courts from different judicial circuits to the Pleno which issued the jurisprudencia. The same interpretation applies to Circuit Courts, which may bind all judicial bodies in such a circuit, except other Circuit Courts (in this case not even from their own circuit). For an explanation of the complex Mexican court system, see J. Caballero, *The Supreme Court of Mexico: Reconfiguring federalism through Constitutional Adjudication and Amendment after Single-Party rule*, [in:] N. Aroney, J. Kincaid, *Courts in Federal Countries*, Toronto 2017, pp. 261–272.

Jurisprudencia tends to abstraction. It is based on the creation of abstract rules that interpret the law without any concrete reference to a case. Article 218 of the Amparo Law states that a jurisprudencia must have a title and a subtitle explaining further the criteria adopted (which must be in capital letters for historical reasons), the argumentation pertaining to the proposed interpretation, and the identification data of the case law.[46]

There are three ways to generate jurisprudencia. The first way, which classically was the most frequently employed, is "reiteration." That is, after a body which is entitled to create jurisprudencia issues five consecutive rulings with the same decision (without issuing a contradicting decision in the same period), a jurisprudencia may be created. The second way is criteria contradiction. When Circuit Courts issue contradicting resolutions (in the interpretation of the Constitution or a Statute, for example), the interested parties or Judges may denounce such circumstances. If the Circuit Courts belong to the same circuit, the corresponding "Pleno de Circuito" will decide the prevailing interpretation. If the Circuit Courts do not belong to the same Circuit, then the deciding body will be the Supreme Court. The contradiction of criteria is resolved in an autonomous resolution which does not modify or change the decision taken primarily in the criteria under contradiction. Finally, "substitution" is a method which allows certain subjects to request the abandonment of jurisprudencia in favor of different criteria. It is also important to note that jurisprudencia loses its binding nature if the issuing body resolves a single case contrary to the rule set by it.

The "General Declaration of Unconstitutionality" (GDU) is a procedure that enables the creation of an *erga omnes* annulment of a statute. The GDU was introduced

---

46 I offer the example of jurisprudencia P./J. 17/2019 issued by the First Chamber of the Supreme Court (translated by the author):

Jurisprudencia P./J. 17/2019. "Legitimate Interest. It cannot be employed to identify an interested third party in Amparo. According to article 5, section III, subsection a) of the Amparo Law, legitimate interest cannot serve as criteria to identify an interested third party in Amparo. That is, 1) The legislator was explicit and emphatic that the interested third party who aims to defend the constitutionality of the appealed act must have "legal interest" and 2) the amendment to article 107, section I of the Federal Constitution which modified the Mexican legal order by introducing "legitimate interest" only in regard to the plaintiff. This is because their motivation was to open the legal standing to file an Amparo – and not, in turn, to be an interested third party. A contrary interpretation, which states that legitimate interest may be employed to identify the interested third party, would render the plaintiff with severe procedural obligations. That is, it would imply forcing the plaintiff to mention all potential third parties which may have a legitimate interest in the subsistence of the appealed act. It would also force the judge to take all legal measures regarding the investigation of the legal address of such a category of people, implicating a substantial justice delay, which would violate article 17 of the Constitution.

Contradicción de tesis 306/2018 (the ruling from which the jurisprudencia originated)."

 DOI: 10.7206/kp.2080-1084.389

in the 2011 constitutional amendment (Article 107) as a way to qualify the effects of the so-called "Otero's Formula."

The procedure, however, lacks a concrete legal standing. The Mexican Constitution states that once Jurisprudencia has been established, the Supreme Court will notify the issuing body (Federal or State Congress) and, in 90 days, will issue a general declaration of unconstitutionality if so approved by a majority of 8 votes. The period of 90 days is thought as a way to lessen the counter-majoritarian effects of an *erga omnes* annulment providing Congress the opportunity to address *motu proprio* a potential amendment or repeal of the statute.

The Constitution also forces the Supreme Court to notify the Federal/State Congress after ruling twice consecutively the unconstitutionality of a statute in an "Amparo en revisión" (that is, the second instance of an Amparo indirecto). The system presupposes that, given the nature of the Supreme Court (which performs the functions of a Constitutional Court), the legislator will likely take into account such an unconstitutionality assessment. Even though the GDU is conceptually appealing, it lacks functionality. In the eight years since its establishment, it has only served to repeal one single statute (DGI 6/2016).

Conclusions

Mexican Amparo is an extraordinarily complicated procedure. As such, it has been developed through more than 160 years of effective functioning and has exerted influence over a wide variety of human rights protection mechanisms in Latin-American, Europe, and Africa. However, its complexity, often seen as a source of pride by Mexican Constitutional doctrine, is also its main weakness. The "technique of Amparo" has grown in importance to such a degree that it often prevails over the actual defense of fundamental rights. This technical complexity is the issue which motivated the 2011 Constitutional Amparo amendment: the amendment addressed the issue, but it did not solve it.

Amparo must undertake a discussion to overcome historical legal nationalism and allow itself to change. A future discussion (in which comparative law could prove essential) may include partial real abandonment of Otero's Formula, structural effects, and a more simplified procedure. These aspects would not be the end, but merely the beginning of a much-needed discussion if Amparo is to prevail as the mechanism envisioned by Cresecencio Rejón and Otero.