

**THE LAW OF AMPARO: A CRITICAL ANALYSIS OF THE FUNCTION AND USES OF
THE AMPARO PROCESS IN INTERNATIONAL TRADE LAW MATTERS**

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INTRODUCTION

The Amparo process in Mexico has been defined and treated by many authors. The discussion centers in the nature of this “extraordinary challenge mechanism”. Some, catalogue the Amparo process as another instance of the judicial review, whereas most authors consider it as a unique appellate institution. At the end, every author agrees that the Amparo process is the way and mean of Constitutional control.

Notwithstanding the above, the true importance of this discussion it to know whether the Amparo process is the last recourse available for the parties or if its limited for certain acts and under certain conditions. Certainly, the Law of Amparo limits the scope of the Amparo process so that it is not used as a legal recourse in every dispute, but instead is used as a true and authentic extraordinary process for Constitutional control. However, in practice, a great number of cases are brought to the Amparo process, making use of flaws and omissions in the legislative process or during the original dispute of the parties. It is common to find or even to presume the existence of a Constitutional violation, asking the

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Amparo Judge to analyze if such a violation really occurred. If the case is strong and legally supported, the Judge could grant Amparo (Constitutional protection) to the plaintiff.

This paper does not pretend to be an Amparo treaty. Rather, this paper will try to address in a few pages the main characteristics of the Amparo process, its principles and types of resolutions, making a critical approach to the uses and functions of the Amparo process in international trade law as opposed to other optional dispute mechanisms, that limit the use of the Amparo process.

1.- The Amparo Nature and Concept

It is difficult to define when and to whom we owe the Amparo process in Mexico. However, this legal institution finds its origins in Mexico during the late first half of the nineteenth century. Then, in the Federal Constitution of 1857, the Amparo process was encompassed in Constitutional articles 101 and 102. Today, the Law of Amparo (“Ley de Amparo”)¹ is a regulatory law of Constitutional articles 103 and 107.

A general accepted definition of the Amparo trial is:

A way and mean of constitutional control, exercised by jurisdictional organs, under action, whose object is the constitutional protection of the plaintiff or affected party, in the cases set forth in Constitutional article 103 (see below). Thus, the Constitutional protection tends to restore the damage that the party suffered in the exercise of the particular individual right demonstrated to be violated by the authorities.

The Amparo process constitutes the last opportunity to overcome a final resolution in a dispute. The Amparo trial is a process of constitutional nature, not understood to be a recourse because the parties which intervene have a different character to which they

¹ *Ley de Amparo Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*, of 1935.

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participated in the act or process of origin. For instance, during an ordinary judicial or administrative dispute, parties may be private particulars wanting to obtain from a Judge or the administrative authority a resolution in their favor. If the determination is negative, and provided there is legal foundation to file an Amparo suit, the Judge or the administrative authority will occupy the role of the defendant (as responsible authority of the act)², and the original opposing party will be a “third interested party”. This is where the original roles change, meaning also that an original respondent could be the plaintiff in the Amparo process, or viceversa.

In the Amparo process, only violations to individual rights are ventilated, which if happened, may bring the revocation of the act causing a legal damage. This is important, since a competent Judge or Tribunal will only study if violations to individual rights³ occurred from an erroneous conduct of the authority or from a lack of observation and erroneous interpretation of Constitutional provisions.

The Amparo process’ objective is to solve the existent controversies from: (i) laws or acts of authorities violating individual rights; (ii) laws or acts of federal authorities which restraint the States sovereignty, and (iii) laws or acts of the States which invade Federal authority.⁴

It is worthwhile mentioning that the Amparo trial may only be pursued by the party to which the law, international treaty, regulations or act affects or damages. This is called the claimed act. The legal damage for Amparo purposes is different from other damages or

² Responsible authority is the one that issues, promulgates, publishes, orders, executes or tries to execute the law or the act being challenged (claimed act). Art. 11 of the Amparo Law.

³ Individual rights are contained in Articles 1 to 29 of the Federal Constitution.

⁴ Constitutional article 103 and article 1 of the Amparo Law.

losses. In this sense, legal damage must be understood as the one which affects the legal interest of an individual rather than a sole economic or commercial interest.

2. Principles of the Amparo Process

Many authors have studied the principles in which the Amparo process relies. Some consider such principles as being more than nine. However, almost every author has agreed that six are among the main principles of the Amparo process. These principles are briefly mentioned and explained below:

- Principle of affected *ex-parte* action.- The Amparo protection may not be started *ex-officio* and may only be followed by an affected interested party;
- Principle of judicial prosecution.- The process contains ways and formalities in which the Amparo must be followed;
- Principle of relativity of the Amparo sentence.- Amparo sentences must not have *erga-omnes* or general effects; rather, the Constitutional protection of the plaintiff shall be its own limit;
- Principle of definitivity.- Ordinary judicial remedies must be exhausted, except for those cases in which the law orders otherwise;
- Principle of strict legal right.- The judicial authority must only decide on those violations concepts argued by the plaintiff and must not substitute them in its favor. There are some exceptions to this principle for certain matters, and
- Principle of proceeding.- In hierarchy form, the competent organs to solve Amparo processes are: Supreme Court, Colleged Circuit Tribunals and District Judges.

3. Types of Amparos

Although the following description of the different types of Amparo processes is very vague, we will try to describe the main characteristics and its procedural elements. Each of the different types of Amparo must be seriously comprehended so that individuals or companies are able to decide the pertinence or need of following one or another.

There are two type of constitutional processes (Amparos), in attention to the act that originates it:

A.- Indirect

The Amparo trial in the indirect way,⁵ among others, applies against any provision of general character issued by the competent authorities considered by individuals as unconstitutional. This type of Amparo trial is competence of the District Judges, and ordinary judicial remedies must not be previously exhausted.

Hence, the Amparo in indirect way may be requested against:

- Federal or local laws, international treaties, executive regulations (federal or local), or other regulations, decrees or agreements of general observation, which by its sole entering into force or by virtue of its first application act, affect and cause damage to the individual;
- Against acts not coming from judicial, administrative or labor tribunals;
- Against acts of judicial, administrative or labor tribunals executed outside trial or after having been concluded;

⁵ Most commonly known as the Amparo against laws.

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- Against acts in trial which have over the persons or properties an execution order of impossible reparation;
- Against acts executed in or outside trial that affect third persons, provided the law does not grant such individuals any ordinary legal remedy, and
- Against acts or laws of the federal or local authorities in cases of sovereignty restraint or competence invasion.

By general rule, the Amparo writ must be filed within 15 days following the notification of the first act that affects the individual. In the case, for example, of the laws by which its sole expedition causes a damage, the individuals may request Amparo within 30 days of the entering into force of said law.

The Amparo in indirect way could be subject of an ulterior review. Thus, although its nature is to be extraordinary, it may be composed of two instances. This is so because the indirect Amparo is the exception to the general rule of exhausting the ordinary remedies. Due to this, if an individual is going to challenge the unconstitutionality of certain legal provision, it is competence of the Supreme Court to review the sentence or resolution issued by the District Judge. Moreover, if the District Judge also enters into the study of legality defects at request of the plaintiff, another appellate organ has competence to review the District Judge's determination if an Amparo review recourse is filed.

B.- Direct

On the other hand, the Amparo trial in the direct way, acts against the final sentences or resolutions that have put an end to the process and to which there are no ordinary legal remedies to overcome or modify them. In this order of ideas, once the ordinary legal remedies are exhausted with negative results, the only way and mean of

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judicial protection is the Amparo process. As a general rule, contrary to the Amparo in indirect way, the Amparo in direct way is composed of only one instance⁶ and is of the exclusive competence of the Colleged Circuit Tribunals.

As a general rule, under Amparos in direct way, parties may not allege unconstitutionality of the laws or regulations in which the act is founded. More precisely, direct Amparos proceed against final sentences and resolutions which put an end to the trial, issued by judicial, administrative or labor tribunals, which may not be modified or overturned by any other ordinary legal remedy. That is, the judicial review remedies must have been previously exhausted. The Constitutional violation is understood to have been made during the judicial review remedies or committed during the original procedure, affecting the defense of the individual and transcending to the final outcome, as well as those violations to individual rights made in the sentence or resolution itself. Thus, violations could be of two kinds: procedural errors and erroneous legal interpretation. Any of these could give the individual the right to pursue the Amparo protection, and obtain the restoration of the violated individual right.

4.- Inadmissibility and Dismissal of the Amparo Process

Going through the Amparo process is complicated. Specially, one should analyze with all legal certainty whether its action deserves to be studied by the Judicial organs. A number of cases filed before Amparo Judges are inadmissible and most are later rejected on procedural grounds after being studied by the Judges; that is, they are dismissed in the course of the process. Thus, not every case is subject to the Amparo process. Below, we

⁶ These Constitutional procedures are called one-instance Amparos because review recourse is not permitted.

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will briefly enunciate the reasons for which an Amparo process shall be considered inadmissible or subject to dismissal. Notwithstanding, it is worthwhile mentioning that the inadmissibility operates at the presentation of the Amparo writ and the dismissal during the course of the process and made effective in the Judge's sentence or resolution.

A.- Inadmissibility

The Federal Constitution declares that Amparo trials will not operate when they are Constitutionally, Legally and Jurisprudentially inadmissible. Legal reasons for its inadmissibility may only be declared in the Amparo Law and not in other legal framework, such as international treaties or regulations.⁷ The Amparo Law declares the following events as causes of inadmissibility:

- It is addressed against acts of the Supreme Court of Justice;
- Against resolutions issued in the Amparo trials or in execution of them;
- Against laws or acts that are being subject to resolution in another Amparo process, brought by the same plaintiff against the same authorities for the same claimed act;
- Against laws or acts that have been subject to execution in another Amparo trial, in the same terms above mentioned;
- Against acts that do not affect the legal interests of the plaintiff;
- Against laws, treaties and regulations that for its sole entering into effect, does not causes a damage to the plaintiff but needs an ulterior act of application;
- Against resolutions of Electoral authorities;
- Against consumed acts impossible to repair;

⁷ Thus, for example, NAFTA's Chapter XIX may be declared unconstitutional taking into consideration that it precludes Parties to have domestic judicial remedies who may overturn Panel orders.

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- Against consented acts, expressly or tacitly;
- Against judicial organs or administrative or labor tribunal resolutions, not timely challenged in an ordinary legal remedy that could eventually modify or revoke such determinations;
- When an ordinary legal remedy is in process, that could eventually modify, revoke or nullify the claimed act;
- Against acts of authorities different from judicial, administrative or labor tribunals subject to be challenged in ordinary legal remedies that could eventually modify, revoke or nullify such determinations;
- In the case the effects of the claimed act have ceased, and
- In the case the claimed act have not ceased, but its legal effects may not operate because the object or matter does not longer exists.

The Amparo Judge, at the presentation of the Amparo writ, must evaluate whether the Amparo process is admissible based in the previous events. If the Judge or Tribunal considers the Amparo as inadmissible it must so declare and reject it according to the proper foundation. If the Judicial organ considers that there is no evident cause of inadmissibility, it must order the continuance of the procedure.

B.- Dismissal

As mentioned, dismissal occurs during the course process. In such event, the Judge or Tribunal does not make a declaration towards the constitutional issues under discussion because of dismissal reasons.

Dismissal operates in the following events:

- When the plaintiff desists expressly of his action;

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- When the plaintiff dies during the course of the process;
- When during the process, causes of inadmissibility occurs;
- When the record does not evidence the existence of the claimed act;
- Procedural inactivity for a period longer than 300 days.

In a great number of cases, dismissal occurs. This is due to various reasons, from not having exhausted the ordinary legal remedies⁸ to lack of legal interest. Jurisprudence here plays a big role, because Constitutional and legal interpretation may give the Judicial organ foundations to dismiss cases in events that were not necessarily foreseen by the plaintiff. At the end of the day, the final sentence or resolution declaring the case to be or not dismissed is subject to a legal recourse.

5.- The Sentence

As it was previously stated, the sentence in an Amparo trial must only deal with respect to the petitioner of the Amparo, limiting to protect the plaintiff for the special reasons of the claimed act, without making any general declaration in respect to the law or act that originated the Amparo protection.

A sentence must include (i) a clear and precise fixation of the claimed acts and the appreciation of the evidence for having them or not as demonstrated; (ii) the legal foundation in which the Judicial organ supports its decision to dismiss the trial or declare the constitutionality or unconstitutionality of the claimed act, and (iii) the Resolution points by which the sentence must conclude, expressing clearly and precisely the acts by which the Amparo is being dismissed, conceded or denied the Constitutional protection.

⁸ In the case of Amparos in direct way.

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The sentence which concedes the Amparo must restore the plaintiff in the benefit of the violated individual right, re-establishing things in the state in which they were previously to the violation, and/or to obligate the responsible authority to act in one way and to respect the individual right. It is worthwhile mentioning that, under certain conditions, during the course of the Amparo process the Judicial organ may temporarily suspend the effects of the claimed act, until a final sentence or resolution. This has as purpose to avoid irreparable damages to the plaintiff during the course of the Amparo process.⁹

Positive Amparo sentences may be of two kinds: (i) of full and final effects and (ii) for remand to the responsible authority ordering to comply certain issues that were not contemplated in the claimed act.

After the sentence is issued and once it is final —meaning that it cannot be modified or nullified by a legal recourse—, the responsible authority must comply with the Constitutional order. Execution of the Amparo sentence is also a complicated issue, and will not be treated thoroughly on this paper.

Testimony of an executive sentence must be sent to the responsible authority for its immediate compliance. The responsible authority is, of course, subject to fine and sanctions if it does not complies in full terms and in satisfaction of the Judicial organ grantor of the Amparo. There is a special provision in the Amparo Law that orders that an Amparo trial may not be closed and filed until the responsible authority complies with the sentence that has granted the plaintiff the Constitutional protection.

⁹ A provisional suspense resolution must not be identified with an Amparo protection order.

6.- Legal Recourses

Three are the legal recourses that the Amparo Law permits in Amparo processes: (i) Review recourse; (ii) complaint recourse, and (iii) reclamation recourse.

A.- Review Recourse

Sentences issued by the District Judges (Amparo in indirect way) admit the review recourse, and the sentences issued by the Colleged Circuit Tribunals (Amparo in direct way) or the Supreme Court of Justice cannot be reviewed by judicial mechanisms.¹⁰ This is why sentences of the Supreme Court bear the name of “executables”.

In general terms, the review recourse is permitted in indirect Amparos solved by the District Judges that:

- Reject or have an Amparo writ as not filed;
- Grants or denies the provisional suspension of the claimed act;
- Dismisses the Amparo process, and
- Issues a sentence after the Constitutional hearing.

For very special reasons, sentences issued by the Colleged Circuit Tribunals during direct Amparos may be subject to review, provided if these sentences contain a pronouncement in respect to the constitutionality or unconstitutionality of federal or local laws, international treaties and federal or local regulations, or when these sentences establish a direct interpretation to the Constitution. In this case, the review will operate and limit to the constitutionality issue and not to the legality defects of the authorities' act.

¹⁰ Generally speaking, this means that sentences from Colleged Circuit Tribunals and the Supreme Court of Justice are final and executable, whereas sentences from District Judges are not final due to the fact that these may be reviewed by Superior judicial organs.

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In every case in which the sentence (either, from a District Judge or Circuit Tribunal) pronounces in respect to the Constitutionality of a legal provision, the review recourse filed by the affected party shall be solved by the Supreme Court of Justice. In this case, the affected party could be the plaintiff of the Amparo process, the third interested party or, even, the responsible authority. Notwithstanding, the Supreme Court of Justice will not solve in respect to legality defect issues of the act. The aforementioned could bring the possibility for the Colleged Circuit Tribunal to solve a review recourse —only in respect to legality defects— after the Supreme Court of Justice’s determination in respect to the Constitutionality of the law or legal provisions.

Thus, for review purposes, violation concepts must be clearly identified according to its possible defect: (i) Constitutionality of general legal provisions and (ii) illegality defects.

Options are several during Amparo review procedures due to the fact that competence of the Judicial organ will be set after the affected party addresses the issues of his legal disapproval of the sentence. In some cases, the Supreme Court will be the only competent appellate organ; in others, the Colleged Circuit Tribunal will be the competent organ, and in some others, both Judicial bodies will have the authority to review a District Judge’s determination. On the contrary, as it was said, in direct Amparos the only competent appellate organ (under certain cases) is the Supreme Court of Justice.

As mentioned earlier in this paper, the general rule is that the Amparo in indirect way is composed of two instances, whereas the Amparo in direct way is meant to be only of one instance.

B. Complaint Recourse

The complaint recourse is not addressed to the main factual basis of the Amparo sentence, but to the Amparo process itself and ulterior acts in relation to the Amparo protection. For example, the complaint recourse operates (i) against resolutions accepting to process a notoriously inadmissible Amparo writ; (ii) determinations in respect to the suspension of the claimed act, and (iii) against authorities for defects or excess in the compliance of the Amparo sentence, among others.

C. Reclamation Recourse

This recourse is only applicable against procedural orders issued by the President of the Supreme Court of Justice or the Presidents of any of its branches, and those issued by the Colleged Circuit Tribunals.

7.- The Uses of Amparo in International Trade Related Matters

International trade related matters in Mexico are a new area of law. In fact, until Mexico entered GATT in 1986, foreign trade was nearly unknown for Mexican lawyers and Judges. Customs lawyers, however, had long standing practice in the taxation law area but were unaware of the changes that GATT —and later NAFTA— would bring to the Mexican law practice. In practice, Customs disputes were solved by the Customs authorities and by the Federal Fiscal Court. There is extent jurisprudence in customs matters within the Federal Fiscal Court and, in certain degree, in Colleged Circuit Tribunals.

However, international trade law and practice is not only related to customs matters and is very different from fiscal or tax law. International trade law began as a vast new legal universe where jurists had to study and practice. This, however, has taken a number of years and is under a maturing process.

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The problem was, where do we catalogue international trade law in Amparo processes? The answer was simple but difficult to apply: under Administrative Law Matters.

Administrative Judges, in consequence, have dealt with international trade matters in an increasing number of cases. Notwithstanding, it has not been easy for District Judges or Colleged Circuit Tribunals in Administrative Matters, nor it has been for private practitioners the use of the Amparo process in international trade disputes.

This difficulty comes from the learning process in both sides. The private practitioner must be clever enough to explain the dispute in a simple but technical form, tying the controversy to a particular constitutional violation, and the Judge or Tribunal must study thoroughly the case, as well as the applicable laws and international treaties. However, honestly, no matter how much a Judge studies the legal framework, Judicial bodies will never get to know international trade laws as a specialized administrative authority does. Therefore, in certain degree, it is normal for Judicial bodies to give deference to the administrative authorities.¹¹

Notwithstanding the above, the Judicial organ is a good filter for reviewing administrative determinations because authorities are not used to being challenged. Therefore, addressing an Amparo writ to the competent judicial bodies must be straightforward to those points where a clear unconstitutionality rests, leaving the discretionary issues at last or omitting them at all.

¹¹ Deference is not a legal principle in the Mexican legal system.

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In particular, ordinary violation concepts should be used during international trade law Amparos, for example: unconstitutionality of the law or international treaty, lack of legal foundation and motivation and lack of competence of the administrative authority.

It is of utmost importance to decide the type of Amparo which will be used. Going through an Amparo in direct way must include the exhaustion of the ordinary legal remedies, having a chance to obtain positive results during the ordinary legal remedy. However, once the remedies are exhausted, it is important to remember that the Amparo process has only one instance and is not subject to review.

On the contrary, going through the Amparo in indirect way must obligate the petitioner to find a clear unconstitutionality of the law, regulations or international treaties to serve as a trampoline to avoid the ordinary legal remedies. This Amparo, as it was explained, may be subject to review by the Supreme Court of Justice or the Colleged Circuit Tribunals in Administrative Matters. The risk, however, is big. The District Judge could consider the Amparo as inadmissible or dismissed, giving the plaintiff few possibilities of success.

8. Antidumping and Countervailing Law

Until now, Amparo Law has been used very little in international trade related matters. However, antidumping and countervailing duty cases has given the Judicial Power the opportunity on various occasions to live this exiting area of law. During the first years of the Mexican antidumping system,¹² few were the companies —mostly national producers— that underwent Amparo challenges, due to the fact that the Trade Law did not give national

¹² From 1987 to 1993, before the issuance of the new Foreign Trade Law.

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producers an ordinary legal remedy. According to Jurisprudence of that time, the Supreme Court of Justice had interpreted that national producers did not act as parties but as assistants of the investigating authority. Thus, they did not have legal interest until the new Foreign Trade Law of 1993.

This same problem was faced by foreign exporters when these started challenging the determinations of the investigating authorities. According to the decisions of several District Judges and one from a Colleged Circuit Tribunal in Amparo review, the position of the Judicial power was that foreign exporters lacked legal interest because they did not paid the duties. On the contrary, only importers had the legal interest to challenge negative determinations before the Judicial organs. Fortunately, this problem was solved by a recent Jurisprudence issued by the Supreme Court of Justice, where it took the position that foreign exporters and importers had the right to pursue Amparo trials in antidumping and countervailing duty cases.

Since 1993, with the issuance of the New Foreign Trade Law, Amparos in unfair international trade disputes are more common. However, not every case has prospered as plaintiffs would wish. It is to soon yet for the Judicial organs to interpret correctly unfair trade provisions and intricacies of the economic phenomena involving this type of matters. Other cases have brought good results for importers and foreign respondents, which may be of temporary effects because of a possible remand in the Judicial sentence to the investigating authority to correct a flaw or omission committed during the investigation. If this is the case, the authority would make such corrections and, at the long run, would confirm the original duty. This is why the importance of presenting an Amparo case before the Judicial organ trying to avoid a remand. Plaintiffs should try to obtain full Constitutional protection by presenting allegations where only that possibility is foreseen.

9. Amparo Processes vs. Binational Panel Reviews

Binational panel reviews are only for parties whose merchandise is from the country with which Mexico has signed free trade agreements. Foreign respondents from other countries do not have the opportunity to challenge negative determinations in a binational panel review. Their only possibility is to access to an Amparo in indirect way or to ordinary legal remedies (including the Amparo in direct way), or to WTO mechanisms.

The problem for respondents from free trade agreement Parties is difficult. They have various alternatives: (i) Binational panel reviews; (ii) WTO Panel; (iii) ordinary legal remedy, and (iv) Amparo in indirect way.

A party obtaining a negative determination should analyze its action carefully to decide the proper mechanism and how to challenge. For example, several questions should be answered before taking a decision: Did the investigating authority consider misleading facts and made a false interpretation of the case based in the standard of review? Did the investigating authority erroneously interpret a GATT provision? Will the reviewing Court understand the procedural defects? and, Is there unconstitutionality of the law in which the investigating authority supported its decision?

Once the plaintiff makes a serious decision to what legal route it takes, the challenge will be addressed differently. Amparos deserve to be elaborated carefully. It encompasses, international trade law knowledge, administrative law, and most important, Constitutional Law. These should be prepared by experts in these three fields of law or by a team of professionals encompassing necessarily these expertise. Otherwise, preparing an Amparo in international trade matters will most probable have disastrous results.

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However, there are other questions that deserve being answered before challenging an adverse determination through an Amparo trial: Are Amparo processes expeditious? Are other legal remedy mechanisms faster than an Amparo process? Will the Judicial Court understand my legal arguments correctly? Is the Foreign Trade Law really unconstitutional? Only practice gives us the answer.

CONCLUSIONS

The study of the Amparo Law process deserves to be treated in several volumes. The Amparo process in Mexico has over a Century of practice and study, and it has served as example in several countries. With no doubt, Amparo process is an excellent way to control authorities from violating the Federal Constitution, however it has also brought a number of irrelevant cases to the knowledge of the Judicial Power.

We personally believe that the Amparo process in Mexico deserves a change in benefit of the Judicial system and the individuals. However, it must continue to enforce the main principles in which it was created. Judges, Magisters and Ministers must continue to see into a new era of law, where globalization of economy has brought globalization of legal systems. We must not remain passive to this inevitable change.

Mexican jurists must also play an important role in this change and demand the Judicial bodies to become part of it by presenting new cases in new areas of law. Only through this conduct, will we be able to expand our vast and rich legal system. Notwithstanding, the Judicial organs must also have an important weight by trying to avoid inappropriate inadmissibilities and dismissals when they do not feel comfortable in the field of law subject to Amparo. They must solve in an expeditious manner as the Constitution orders.

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Moreover, Democracy and the Judicial Power independence from the Executive Branch will also play a big role in this transformation. Perhaps, unconstitutionality declarations of transcendental legal provisions to national economy will be more often, giving individuals greater legal certainty and confidence in the Judicial system. Therefore, the Legislative and the Executive Powers will have to adjust better to the Federal Constitution.