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# ADMINISTRATION OF JUSTICE IN MEXICO: WHAT DOES THE FUTURE HOLD?

RAFAEL ESTRADA SÁMANO\*

## I. INTRODUCTION

### A. *Article 17 of the Political Constitution of the United Mexican States*

Among the fundamental rights listed in Chapter I (Individual Guarantees) of the Mexican Federal Constitution,<sup>1</sup> there is a right established in Article 17 which states:

No person may administer justice by himself . . . . Any person has the right to secure administration of justice from tribunals which shall be ready to administer it within the terms established in the laws by issuing their resolutions in a prompt, thorough and impartial manner. Their service shall be gratuitous, therefore, judicial costs are prohibited. Federal and state laws shall establish the necessary means to assure the independence of the tribunals and the full execution of their resolutions . . . .<sup>2</sup>

This important constitutional provision was approved without any discussion or debate and by unanimous decision of the Constituent Assembly in Querétaro, during its Nineteenth Ordinary Session, held on December 21, 1916.<sup>3</sup> It should be noted that it is a fundamental political decision which is firmly rooted in the right that all men have to enjoy a just order through the jurisdiction.

When a controversy arises between two or more individual parties with respect to the meaning of the law, or in connection with what is just for each of them, only two procedures may be followed to solve such controversy: either justice is administered through one party's arbitrary use of force or the parties submit themselves to a public entity, i.e., a court of law which will adjudicate impartially. There is, of course, an intermediate institution: the arbitration, which likewise may be used to solve controversies and requires the will and consent of the parties to reach a solution outside the public courts of law.

Once the ancient and uncivilized practice of the *vindicta privata* (private revenge) has been supplanted by the rule of law, it should be accepted

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1. Chapter I of the Mexican Federal Constitution is, in fact, the Mexican bill of rights.

2. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.—POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES], art. 17, at 45 (Cajica Edition 1992) (Mex.) (author's translation).

3. See CÁMARA DE DIPUTADOS, XLVI LEGISLATURA DEL CONGRESO DEL UNIÓN, 4 DERECHOS DEL PUEBLO MEXICANO, MÉXICO A TRAVÉS DE SUS CONSTITUCIONES 74 (1967) (Mex.).

that submission to the jurisdiction of the courts is an unavoidable principle for the existence of the constitutional order, as well as for the definition and adjudication of individual rights. Furthermore, it is a requirement for the effectiveness of the rule of law.

But likewise—and this should be stressed very strongly—if there is a right to seek and attain justice, it follows that there is also a right of access to the judicial system which declares it, because those entities charged with the function of the administration of justice should not act by grace, but by duty.<sup>4</sup>

### *B. Actual Situation of the Administration of Justice*

Notwithstanding the high principles and the noble purposes underlying Article 17 of the Mexican Constitution, it is widely acknowledged that in reality the administration and procuration of justice in Mexico, as well as the respect for the rule of law and the observance of human rights, is quite distant from fulfilling these high standards.

Some of the main areas of concern in this respect are dealt with in the next section. For now, it should be noted that during the recent electoral campaign not only the opposition parties, but also the ruling official party (Partido Revolucionario Institucional - P.R.I.) recognized the deficiencies in the administration of justice as one of the most important issues and offered wide sets of proposals to cope with the problem.<sup>5</sup> The two proposals most representative of the views of the electorate were included in the P.A.N.'s political platform:

DIAGNOSIS: . . . ATROPHIC JUDICIAL POWER . . . (26) The Judicial Power of the Federation is not the third power described by the Constitution. In a moment of Mexico when the reform of the State is a central issue . . . the Judicial Power shows a stubborn resistance to assume any transformation which might be different to its mere technification. There are confusions between autonomy and isolation, between immobility and immobilism, and the gravest: a gradual deterioration of its moral authority is perceived . . . . (27) . . . It is necessary to guarantee the autonomy of the Federal Judicial Power and at the same time to establish provisions in order to force the judges to fulfill their constitutional duties . . . . (41) In Mexico there is an increase in criminal activity, each time more violent and organized . . . . Public insecurity is also growing . . . . (42) Insecurity

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4. For a complete and accurate discussion of the right to enjoy a just order through the jurisdiction under the Mexican Constitution, see JUVENTINO V. CASTRO, *GARANTÍAS Y AMPARO* 180-88 (4th ed. Porrúa Edition 1983) (Mex.).

5. Nine political parties contended in the 1994 federal election to renew both houses of Congress, to replace the individual holding the Federal Executive Power and to renovate the Assembly of Representatives of the Federal District: Partido Acción Nacional (P.A.N.), Partido Revolucionario Institucional (P.R.I.), Partido de la Revolución Democrática (P.R.D.), Partido del Trabajo (P.T.), Partido Popular Socialista (P.P.S.), Partido Auténtico de la Revolución Mexicana (P.A.R.M.), Partido del Frente Cardenista de Reconstrucción Nacional (P.F.C.R.N.), Partido Verde Ecologista Mexicano (P.V.E.M.), and Partido Demócrata Mexicano (P.D.M.). According to the official results of the August 21, 1994 election, only the P.A.N., the P.R.I. and the P.R.D. received substantial percentages of the popular vote, i.e., 27%, 50% and 16%, respectively.

is aggravated by corruption in the police bodies. The way in which some members of these bodies grant protection to criminal organizations is shocking . . . . (43) The procuration of justice is often subject to political pressures which deprive it of the function of assuring protection, under the law and without any discrimination, to the goods and values which are most important for Mexicans.

This gives room for impunity, especially in the cases of some public officers . . . . (48) Due to the absence of the rule of law, the Mexican public administration is invaded by corruption . . . . 2. POSITION . . . (64) It is essential for the effectiveness of the rule of law that the Judicial Power be completely independent of the Legislative and Executive branches, but responsible to the Nation. An independent judiciary is the last safeguard for the rights of individuals . . . (75) The rule of law requires that the public powers guarantee to individuals the administration of justice, the protection of their lives, health and goods, as well as the safeguard of the public order . . . . (76) The State must give special attention and assign enough resources to combat criminal activity and organized crime . . . . 3. PROPOSALS. (106)

The autonomy of the Judicial Power shall be respected. Furthermore, a General Judicial Council shall be created . . . (107) New and more stringent requirements to become a Supreme Court justice shall be established . . . (109) An operative, administrative and organizational modernization of the Judicial Branch of the Federation shall be promoted . . . .<sup>6</sup>

On the other hand, Ernesto Zedillo, presidential candidate of the official party, P.R.I., stated: "We face urgent and grave tasks with respect to justice and security," and he submitted his proposal "which seeks to incorporate new instruments to rely on a more modern and efficient system of justice," in ten points:

1. To achieve the professionalization, dignification and moralization of the members of public security bodies . . . ;
2. To enhance the administration of public security . . . ;
3. To make police coordination a reality . . . ;
4. To conduct a great campaign for crime prevention . . . ;
5. To fight against drug trafficking as well as to prevent and react before abductions and other high-impact crimes . . . ;
6. To modernize the function of the Attorney General's office . . . ;
7. To modernize the system of justice . . . ;
8. To ensure the independence of judges and quality in the administration of justice . . . ;
9. To guarantee access to justice for all . . . ; and
10. To establish effective mechanisms for the judicial review and control of acts of the authorities.

Zedillo finished by saying: "Today, I ratify before the nation my will to change. I adhere myself once again to the popular clamor for security, and justice for the citizenship."<sup>7</sup>

6. PARTIDO ACCIÓN NACIONAL, SECRETARÍA NACIONAL DE ESTUDIOS, PLATAFORMA POLÍTICA 1994-2000 at 3-12 (1994) (author's translation).

7. Ernesto Zedillo, Seguridad y Justicia Para la Ciudadanía *in* EXAMEN, UNA PUBLICACIÓN DARÁ LA DEMOCRACÍA 18-19 (Comité Ejecutivo Nacional del P.R.I. [P.R.I. National Executive Committee] Aug. 1994) (author's translation).

The political parties and their candidates are not the only voices that have expressed concern for the pitiful state of the administration of justice in Mexico. Intellectuals, scholars and practitioners have also joined the popular outcry. In September 1994, two prominent lawyers and professors of law at the National Autonomous University made important remarks on the issue to an influential Mexico City newspaper. In one interview, Dr. Raúl Carrancá y Rivas maintained that:

[t]he fierce presidentialism has inhibited the Judicial Power to fulfill its functions. The administration of justice has been impaired by the Federal Executive's interference. Furthermore, with the amendments and reforms to the Constitution and the laws promoted by that same Executive, the powers of the Nation's Supreme Court of Justice have been atomized . . . . Therefore, it is urgent to restore the Judicial Power in all its force, in order for it to really be the highest organism in the administration of justice . . . . Ernesto Zedillo, virtual President-Elect, is under the obligation to honor, like a man and a citizen, the compromise he acquired with the people: to respect and to fortify the Judicial Power, through the obedience of the constitutional provisions and the avoidance of the trend to take powers which do not pertain to him.<sup>8</sup>

Carrancá expressed the wish that Zedillo's statements on the issue "are not a campaign promise only."<sup>9</sup> In turn, Dr. José Luis Soberanes declared that "the administration of justice leaves much to be desired, and the population has no confidence in it."<sup>10</sup> He demanded a profound and integral reform of the Judicial Power, because in Mexico crime is not punished, but poverty is.<sup>11</sup>

The lack of confidence in the administration of justice is due to the fact that the Mexican State does not fulfill its obligation to administer justice in a prompt and expeditious manner because, among other things, the Supreme Court is influenced by politics. Thus, it is urgent to stop the interference the Federal Executive exercises over the Judicial Branch . . . the people will believe in justice again when it is clear that changes in the Judicial Branch force those who administer justice to act impartially. The public confidence will be restored, neither with addresses nor with good intentions, but with tangible facts.<sup>12</sup>

## II. MAJOR PROBLEMS AND MAIN CONCERNS

### A. *Mexican Presidentialism and the Independence of the Judicial Branch*

Ever since that nation began its constitutional life as a free and independent state, the fundamental laws of Mexico adopted the principle

8. Interview with Dr. Raúl Carrancá y Rivas, Professor Emeritus at the National Autonomous University of Mexico, in *EL UNIVERSAL* (Mexico City), Sept. 4, 1994, at 1, 24 (author's translation).

9. *Id.* (author's translation).

10. Interview with Dr. José Luis Soberanes, Director of the Instituto de Investigaciones Jurídicas of the National Autonomous University of Mexico, in *EL UNIVERSAL* (Mexico City), Sept. 5, 1994, at 1, 26-27 (author's translation).

11. *Id.*

12. *Id.* (author's translation).

of "division of powers," as has been classically phrased by Locke and Montesquieu. The Constitution presently in force, seventy-seven years after its issuance, still recognizes division of powers as the cornerstone of Mexico's political organization; however, it does not grant that principle the rigid and absolute character of its original interpretation. Today it is generally accepted that the necessary distribution of state functions among the several branches of government implies, by itself, a reciprocal control among the branches: a system of checks and balances which additionally produces a coordination of the branches to act jointly and in collaboration. There is no question, however, that each of the three traditional branches of government, legislative, executive and judicial, must be exempt of any subordination or dependency with respect to the other branches.

It should be noted that within this Mexican constitutional framework, the federal Judicial Power occupies a relevant place because the exercise of the jurisdictional power primarily vested in it not only refers to the resolution of conflicts, controversies and legal issues that arise in the ordinary lives of the state and its citizens, but also to the interpretation and defense of the Constitution at the highest level of authority.

Therefore, the federal judiciary becomes the interpreter and the guard of the whole legal order. Its mission as supreme interpreter of the Fundamental Law leads to the conclusion that the judicial branch is the branch of government most tightly related to the observance and defense of fundamental human rights, as well as to the protection and survival of the constitutional system. To properly discharge these vital duties, the judicial branch has to rely on its independence and autonomy from the other government branches of the Mexican state.<sup>13</sup>

The preceding theory, however, is no more than that, a theory. The Mexican political system is a system of government that was originally intended to be merely *presidential*, as opposed to parliamentary. However, the system has developed into a *presidentialist* one: the chief executive often acts outside of constitutional bounds in the exercise of certain powers which supposedly have been conferred upon him by the political system itself, rather than by the Fundamental Law.

In a very extensive and serious analysis of the Mexican presidentialism phenomenon, Dr. Jorge Carpizo refers to such powers as "metaconstitutional powers," i.e., powers which go beyond the limits of the powers effectively granted by the Constitution. Such powers are, according to Dr. Carpizo, (a) the ones which derive from being the real leader of the official party, P.R.I., which include the appointment of that party's candidates for the Federal Congress, the state governors and the mayors

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13. For a brief but accurate discussion of the integration, powers and role of the federal Judicial Power in Mexico, see Claudia Leticia Ortega Medina, *Integración, prerrogativas y competencia del Órgano Judicial Federal*, in 75 ANIVERSARIO DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS 367-91 (Porrúa Edition 1992) (Mex.) [hereinafter Ortega Medina]. For a more detailed discussion, see Felipe Tena Ramírez, *DERECHO CONSTITUCIONAL MEXICANO* 477-533 (20th ed. Porrúa Edition 1984) (Mex.).

of the principal municipalities; (b) the appointment of his successor in the presidency; and (c) the appointment and removal of state governors.<sup>14</sup> Although Carpizo's analysis and discussion are valid and accurate, these supposed powers should not be labeled as being "metaconstitutional," but instead as clearly "unconstitutional."

This hypertrophic enlargement of the powers of the Mexican presidency led Daniel Cosío Villegas to maintain that Mexico is the only republic in the world which is governed by an absolute monarch for six years, "and the requirement that a person be a member of the revolutionary family to become president leads the scurrilous commentator to refine the foregoing definition by saying that it is a six-year absolute and hereditary monarchy."<sup>15</sup>

It would certainly be interesting to discuss at length the historical development of the judicial branch in Mexico and of its main organism, the Supreme Court of Justice. However, this subject is too extensive to be included in this presentation.<sup>16</sup> For now, it should only be noted that "the independence of the judiciary has been a constant issue in Mexico's history. With more or less good judgment, the diverse Constitutions have established systems to guarantee such independence. There is the belief that impartial justice is an indispensable value."<sup>17</sup>

Again, it would appear that the problem is not one of absence of provisions in the Constitution and the laws, but one of observance and fulfillment of their mandates. Carrancá y Rivas charges that Mexican presidentialism has impaired the independence of the judiciary.<sup>18</sup>

It appears that a prestigious justice of the Supreme Court of Justice, Mariano Azuela Güitrón, concurs with Carrancá's opinion. Recently, Azuela declared that "the administration of justice in Mexico has been disarranged by the interference of the Federal Executive, and because the Supreme Court of Justice has been utilized as a 'political springboard' by politicians who have been appointed to the Court as a transitory position while seeking to satisfy their political ambitions in other positions."<sup>19</sup>

It is necessary to insist and stress that independence of the judiciary depends basically on the will of those who are its members.<sup>20</sup> Nevertheless,

14. JORGE CARPIZO, *EL PRESIDENCIALISMO MEXICANO* 121, 190-99 (Siglo XXI Edition 1978) (Mex.).

15. DANIEL COSÍO VILLEGAS, *EL SISTEMA POLÍTICO MEXICANO* 30-31 (Joaquín Mortiz Edition 1972) (Mex.) (author's translation).

16. Complete discussions about this subject, which focus on the independence of the judiciary, may be found in Elisur Arteaga N., *La Independencia de la Rama Judicial*, in *DERECHO COMPARADO MÉXICO ESTADOS UNIDOS* 399 (James F. Smith ed., 1990) (Mex.) [hereinafter Arteaga], and in Héctor Fix Zamudio, *La Independencia Judicial en el Ordenamiento Mexicano*, in *DERECHO COMPARADO MÉXICO ESTADOS UNIDOS* 379-92 (James F. Smith ed., 1990) (Mex.). See also Rafael Estrada Sámano, *La Independencia de la Suprema Corte de Justicia de la Nación*, 5 *ANADE* 23-34 (1992) (Mex.) [hereinafter Estrada Sámano].

17. Arteaga, *supra* note 16.

18. See *supra* note 8.

19. Interview with Justice Mariano Azuela Güitrón, Justice of the Supreme Court of Justice, in *EL UNIVERSAL* (Mexico City), Sept. 12, 1994, at 1, 24-25 (author's translation).

20. See Estrada Sámano, *supra* note 16.

many scholars and practitioners have proposed a series of measures and constitutional amendments to avoid future lamentable experiences when the federal judiciary shows lack of independence and even abdicates its functions. An example of such an experience took place when President José López Portillo nationalized the banking system in 1982. To say the least, the behavior of the federal courts in this important matter was dismal.<sup>21</sup>

Among the mechanisms and amendments that have been proposed to assure the independence of the federal judiciary and the Supreme Court, and to restore their prestige and make them fully assume their functions, are the following: (a) to establish the judicial career; (b) to make a qualified selection of federal judges, magistrates and justices; (c) to provide them with adequate compensation, rewards and recognition, as well as a decent retirement; (d) to make judicial officers non-removable from office; and (e) to amend the procedure to appoint the justices of the Supreme Court of Justice. Today, the procedure for appointing Supreme Court justices is very similar to the one followed in the United States. However, the advice and consent of the Mexican Senate is widely regarded as a mere "rubber stamp" for those appointed by the Chief Executive. Consequently, candidates for a justiceship are often politicians who once attended law school, but who have either not practiced the legal profession nor served as judges on the bench.

Azuela Güitrón has even proposed that individuals who accept and serve a justiceship in the Supreme Court should be barred from accepting any appointive or elected public office in the future. This would eliminate the practice of using the Supreme Court as a political springboard or, even worse, as a shelter for politicians who are temporarily in misfortune, due to the continuously changing circumstances of politics.<sup>22</sup>

### *B. The Lack of a Department of Justice*

The revolutionary Constituent Assembly of Querétaro, during its last session January 29-31, 1917, approved the text of Transitory Article 14 of the new Federal Constitution without any precedent, without paying much attention to the issues involved during the debate, and with a great degree of haste. Transitory Article 14 prohibited, proscribed and extinguished the Department of Justice, a ministry that had existed in Mexico since its independence from Spain. It must be acknowledged that there is a great variety of services which the administration of justice implies and requires, and which must be rendered by the executive branch rather than by the judiciary. This is because the judicial branch must primarily,

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21. See RAMÓN SÁNCHEZ MEDAL, *EL FRAUDE A LA CONSTITUCIÓN* (Porrúa Edition 1988) (Mex.).

22. See Estrada Sámano, *supra* note 16; RAMÓN SÁNCHEZ MEDAL, *TEMAS JURÍDICOS DE ACTUALIDAD* (1993) (Mex.); Efraín González Morfín, *Reformas y Adiciones a la Constitución Jurídica*, 10 ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 153 (1978) (Mex.); MARIANO AZUELA GÜITRÓN, *EL DERECHO A LA JURISDICCIÓN Y LA MODERNIDAD EN LA ADMINISTRACIÓN DE JUSTICIA*, ESTUDIOS JURÍDICOS EN HOMENAJE A MANUEL HERRERA Y LASSO (1890-1990) 65-66 (1990) (Mex.).



and almost exclusively, preoccupy itself with exercising the jurisdictional power of the State.

After a very thorough investigation,<sup>23</sup> this author has concluded that the Constituent Assembly's rationale for proscribing a ministry as important as the Department of Justice is not clear. A respected professor of Mexican constitutional law, F. Jorge Gaxiola, guesses that such an extreme measure was taken because during the long dictatorship of Porfirio Díaz, the Department of Justice was used by the Executive Branch as a channel to unduly influence judicial resolutions, thereby depriving judges, magistrates and justices of their independence and autonomy. However, Gaxiola's conclusion is not based either on historical fact nor on the arguments discussed during the above-mentioned session of the Querétaro Assembly.

In any case, it is clear that since 1917 the Mexican public administration has lacked a Department of Justice. It is also true that the functions and services traditionally attributed to a Department of Justice were either improperly allocated to the Department of the Interior and the Office of the Attorney General or, worse yet, they were not assigned to any governmental agency at all. The administration of justice has undoubtedly suffered negative effects as a result.

In 1957, the influential journal *Novedades* conducted a survey on the state of the administration of justice in Mexico. Distinguished jurists expressed their opinions about the deficiencies in the federal and state tribunals. One such jurist, Dr. Antonio Martínez Báez, a conspicuous Mexican scholar, opined that the grave backwardness so apparent in Mexican justice was due to the circumstance "that in our political organization there does not exist an organism or institution charged with the task of watching the administration of justice, not only pursuant to legal provisions, but in accordance with ethical and moral imperatives."<sup>24</sup> Martínez Báez concluded that the adequate remedy for such a situation was "the immediate creation of an organism that should be responsible for paying attention to the material, moral and technical problems which affect Mexican justice today. Such an organism should act with due respect for the absolute independence of the Judicial Power."<sup>25</sup>

This idea was later discussed in depth and adopted by the Barra Mexicana, Còlegio de Abogados, a professional association.<sup>26</sup> During 1961 and 1963, the Barra organized a series of lectures, among them an extensive essay by Martínez Báez. Such lectures and studies were published by the Barra de Abogados under the title "For a Department of Justice."<sup>27</sup>

23. Rafael Estrada Sámano, *Necesidad de Reinstaurar, dentro de la estructura del Poder Ejecutivo Federal, la Secretaría de Justicia*, 3 REVISTA DE INVESTIGACIONES JURÍDICAS 367-69 (1979) (Mex.).

24. Antonio Martínez Báez, *La Institución del Ministerio Público y su carácter de Representante Social: Una revaloración*, in LA PROCURACIÓN DE JUSTICIA, PROBLEMAS, RETOS Y PERSPECTIVAS 334 (Procuraduría General de la República 1993) (Mex.) (author's translation).

25. *Id.* (author's translation).

26. Dr. Martínez Báez was, and still is, a respected member of this organization.

27. Barra Mexicana & Colegio de Abogados, *Por una Secretaría de Justicia*, in EL FORO (Mexico City) (1963).

By its own nature, Transitory Article 14 of the Constitution was intended to pertain to temporary situations; it has resulted, however, in a very permanent and persistent provision which subsists as a prohibition to create a Department of Justice. Meanwhile, the very important functions traditionally attributed to that department have not been discharged by the Office of the Attorney General, even though the latter was styled "Legal Counsel of the Federation" in a different constitutional provision—Article 102. There is no question about the harm that this careless oversight has caused. A convenient and desirable development of many aspects related to the administration of justice in Mexico simply has not been possible.

### C. *The Amparo Lawsuit and the "Otero Formula"*

The system to control the constitutionality of acts performed by both local and federal entities, which has been adopted by the Mexican Constitution, is solely a judicial function. This is due not only to the nature of the organ which is charged with such function, the federal judiciary, but also because its exercise implies a sequence of acts of a judicial character. As a result, a true jurisdictional proceeding takes place and may result with the declaration of a law as being unconstitutional, or of an act by any authority as being in violation of the fundamental individual rights. Such a system has been shaped through "the most important and fruitful legal institution in the nation's legal order and, without any doubt, the only original and creative work made by Mexican jurists: the *amparo* lawsuit."<sup>28</sup>

Indeed, the *amparo* suit is a Mexican legal institution similar in its effects to such Anglo-American procedures as habeas corpus, error and other forms of injunctive relief. It has undergone a long evolution since it was first incorporated in the State Constitution of Yucatán in 1841 and then in the Federal Constitution of 1857. Today, its principal purpose is to protect private individuals in the enjoyment of rights granted to them by the first twenty-nine articles of the Constitution, commonly known as "Individual Guarantees."<sup>29</sup>

It should be noted that the *amparo* lawsuit has evolved into a highly complex institution performing three functions: the defense and protection of the "Individual Guarantees," the determination of the constitutionality of federal and state legislation, and cessation.

The second of these functions deserves special treatment for purposes of this article. With respect to its effects, the *amparo* resolution affects only the parties who have intervened in the procedure and pertains solely to the specific case that has been brought before the federal judiciary. This is the constitutional principle known as "relativity of the *amparo*

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28. Alfonso Noriega Cantú, *El Juicio de Amparo*, in *Obra Jurídica Mexicana*, 2 PROCURADURÍA GENERAL DE LA REPÚBLICA 1562 (1985) (Mex.).

29. For a thorough and well documented study of the *amparo* in English, see RICHARD D. BAKER, *JUDICIAL REVIEW IN MÉXICO, A STUDY OF THE "AMPARO" SUIT* (1971).

resolutions.” This principle derives from the “Otero formula,” so designated because it was conceived in 1847 by Mariano Otero, one of the creators of the *amparo* lawsuit, when he proposed the adoption of this constitutional procedure.

The Otero formula and the principle of relativity of the *amparo* resolutions acquire great importance with respect to the *amparo* complaints which are brought to challenge the constitutionality of a given law. A declaration of unconstitutionality issued by the federal judiciary does not have the effect of repealing the law *erga omnes*. It does not generate the obligation of the legislative body to repeal the unconstitutional law. Its effects are limited to establishing that the law declared unconstitutional shall not apply to the specific case and with respect to the parties involved in the *amparo* action. Therefore, as Dr. Juventino V. Castro has pointed out, “there is no such thing as *amparo* against unconstitutional laws; there is only *amparo* against the application of such laws to a specific case which has been raised by an individual who has been diligent enough to request it from the Federal Judiciary.”<sup>30</sup> Dr. Castro has conducted perhaps the most complete research work on the Otero formula. He concludes that it was only partially adopted and that, therefore, it is historically inaccurate and unfair to blame Mariano Otero for the application of the principle of relativity of the *amparo* sentence to cases where a Congressional law is declared unconstitutional.<sup>31</sup> Based on strong reason and on impeccable logic, Castro concludes—and this has been his position since long ago—that the effects of the *amparo* resolution should be the annulment and repeal of such law *erga omnes*.<sup>32</sup> He supports his assertion in the following quote by the famous Italian Professor Calamandrei: “A system may not be deemed a civilized order when the free application of discredited laws is accepted.”<sup>33</sup>

Other authors also maintain that the principle which derives from the Otero formula requires a revision. Antonio Carrillo Flores stated that the Otero formula has already met its objectives. Therefore, he proposed that:

the *amparo* resolutions condemning a law as unconstitutional have effects not only for the specific case, but for any other case. Perhaps, as I have dared to propose, a realistic and intermediate formula would be that such resolutions notify the respective Congress, either Federal or State, so that the latter would proceed to repeal the law or to modify it and adjust it to the terms of the Supreme Court of Justice’s resolution.<sup>34</sup>

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30. JUVENTINO V. CASTRO, HACÍA EL AMPARO EVOLUCIONADO 42 (Porrúa Edition 1971) (Mex.) (author’s translation).

31. *Id.*

32. *Id.*

33. *Id.* at 44 (author’s translation).

34. ANTONIO CARRILLO FLORES, LA CONSTITUCIÓN, LA SUPREMA CORTE Y LOS DERECHOS HUMANOS 32-33 (Porrúa Edition 1981) (Mex.) (author’s translation).

Héctor Fix Zamudio also shares the idea of extending the traditional Otero formula in order to

adopt the contrary principle, i.e., to establish the “*erga omnes*” effects of the Supreme Court’s findings of unconstitutionality of legislative provisions, as it has been accepted, gradually but inexorably, not only through the European constitutional tribunals of the Austrian type, but also throughout Latin America . . . .<sup>35</sup>

In accordance with the Constitutional principle of collaboration among the branches of government, to attribute general or *erga omnes* effects to a judicial decision declaring a legal provision unconstitutional would not necessarily constitute an intromission by the judicial branch into the legislative function: the judiciary would still be powerless to initiate bills or laws. More precisely, it would enhance collaboration among the two branches in seeking the improvement of the legal order, and its development within the constitutional framework.

On the other hand, the *amparo* lawsuit’s objectives are to defend and protect the enjoyment of the “Individual Guarantees” and, in general, to control the constitutionality of acts of the authorities. These two objectives are poorly served if the effects of the *amparo* resolution continue to be confined to the specific case and to the individual who sought the constitutional protection, especially if the subject matter involved is a law, by definition an order or mandate with general and abstract effects.<sup>36</sup>

Finally, in a very recent editorial entitled *Light and Shadow in Justice*, Dr. Sergio García Ramírez lists twenty-two concerns regarding the administration of justice in Mexico.<sup>37</sup> Listed under No. 12 is a reference to the Otero formula. With a high degree of resemblance to Carrillo Flores’ opinion, García Ramírez states that:

the Otero formula avoided collisions among the Powers: conflicts between the Legislative Power which enacts a law, or the Executive Power which issues a set of regulations, and the Judicial Power that deems such provisions unconstitutional. This has allowed the development of the Mexican Amparo. However, the hour has come—perhaps it came long ago—to revise that formula or to find progressive solutions for the sake of justice. One of these solutions may be the official communication by the Attorney General’s Office<sup>38</sup> to Congress of the ruling declaring the unconstitutionality of the law and with a legal opinion by the Attorney General, so that the legislature revises its own act, if that be the case. Thus, each government branch would fulfill its natural attributes and the danger of a conflict would be reduced.<sup>39</sup>

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35. Héctor Fix Zamudio, *Los Tribunales Federales como Controladores de la Constitución*, in TEMAS Y PROBLEMAS DE LA ADMINISTRACIÓN DE JUSTICIA EN MÉXICO 163 (Porrúa Edition 1985) (Mex.) (author’s translation).

36. See also Ortega Medina, *supra* note 13, at 386.

37. Editorial by Sergio García Ramírez in *EXCÉLSIOR* (Mexico City), Aug. 4, 1994, at 1, 10, 15 [hereinafter García Ramírez].

38. Or through the Department of Justice, should it be reinstated.

39. García Ramírez, *supra* note 37, at 10.

As stated before, the Mexican *amparo* lawsuit has undergone a long evolution that has required a considerable effort from jurists, practitioners and members of the judiciary. It would be a pity to stop this evolution; moreover, it would be a serious mistake and a disservice to justice.

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This study has been an attempt to deal in depth with three of the major areas of concern with respect to the administration of justice in Mexico. However, it should be noted that there is a long list of other problems and concerns. It would be impossible to deal with all of them in the same depth; therefore, it appears that short mention of other issues is in order.

#### *D. Slowness and Tardiness*

It is often stated that delay in the administration of justice is equivalent to a denial of justice. If this is so, then Mexico is plagued with denials of justice. An excessive formalism in the proceedings, indolence on the part of judges and judicial officers, and the activities of certain litigious lawyers who are used to taking advantage of the sluggishness in the administration of justice are the main causes for this situation.

More than a matter of amendments to the procedural laws to reduce or eliminate terms, what is truly necessary is to create a new "type of proceedings,"<sup>40</sup> which offer celerity and at the same time observe the essence of due process of law. It is true that this has been attempted several times without success. In fact, the amendments and reforms have at times represented more of a backwards motion than a progressive one. From a practical standpoint, there is a great deal to do on this issue in all areas of the law.

#### *E. Proliferation of Specialized Agencies and Tribunals*

Perhaps with the intention of coping with some of the deficiencies of the ordinary jurisdiction, there has been a trend in Mexico to create parajudicial agencies within the Executive Power or specialized tribunals. In these entities conciliation between the parties is normally mandatory, prior to the moment when the litigation phase properly takes place. In many instances, like in the case of the Federal Consumer Protection Agency (*Procuraduría Federal del Consumidor*), this measure has produced good results, both from the viewpoint of prompt solution of controversies and because it has diminished the workload in the ordinary tribunals.

Among these newly created bodies, one governmental organization deserves special mention. The National Human Rights Commission (*Comisión Nacional de Derechos Humanos*) was created in 1989 by decree of President Carlos Salinas de Gortari to receive the complaints of Mexican citizens or inhabitants who believe their human rights have been violated by a governmental authority or public servant. Although these types of

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40. *Id.* at 15.

violations could be relieved by resorting to an *amparo* lawsuit, the excessive formalities, the complexity and the difficulty in obtaining a quick resolution in an *amparo* have caused popular recourse to the Human Rights Commission. When a complaint is filed, the Commission secures information and evidence, and ultimately issues a recommendation to the authority or public servant involved in the complaint. Such recommendations are public, autonomous and non-mandatory; however, if a criminal offense is involved, the Commission may proceed to file the corresponding accusation before the Office of the Attorney General.

It should be noted that after its creation, it was soon realized that the Commission lacked a constitutional entity. Therefore, the Federal Constitution was amended by Paragraph B in Article 102 which regulates the existence of the Commission and the similar commissions organized in each state by the local governments.

Other parajudicial agencies or specialized tribunals which have recently been created by the federal government are (1) the Economic Competence Commission (*Comisión de Competencia Económica*), which deals with antitrust matters (curiously enough a very recent area of the law in Mexico resulting mainly from Mexico's entrance into the global market, specifically through the North American Free Trade Agreement (NAFTA));<sup>41</sup> (2) the Superior Agrarian Tribunal (*Tribunal Superior Agrario*), which was created as a result of the amendments introduced in Article 27 of the Constitution to cope with problems related to property and exploitation of agrarian lands; and (3) the Federal Electoral Tribunal (*Tribunal Federal Electoral*), organized to resolve controversies between the political parties and their candidates, on the one hand, and the electoral authorities, on the other, that arise from contested elections.

To these recently created entities, others that were organized years ago should be added: the National Banking Commission (*Comisión Nacional Bancaria*); the Labor Tribunals (*Juntas de Conciliación y Arbitraje*); and the Federal Tax Tribunal (*Tribunal Fiscal de la Federación*). All of these agencies follow the tendency to create specialized bodies or entities for the solution of controversies. It should be noted that each entity is subject to judicial review and constitutional control through the *amparo* lawsuit, with the sole exception of the Federal Electoral Tribunal, which has the power to issue final and definitive resolutions.

#### F. *The Role of Arbitration*

The use of arbitration as an alternative instrument to solve controversies and thereby administer justice in private matters has been acknowledged by Mexican law for many years, but has rarely been used.

In the commercial arbitration context, a separate provision on arbitration was included in the Commercial Code up until 1989. It is patterned after international commercial arbitration rules and is expected to foster

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41. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., H.R. Doc. No. 103-159 (effective Jan. 1, 1994).

recourse to arbitration among merchants and commercial companies. The international trade agreements or treaties to which Mexico has entered as a party, such as NAFTA, will also enhance the use of international commercial arbitration, as will the creation of multinational entities to solve controversies that may arise between the NAFTA nations, or between citizens of these countries and the government of a different member nation.

*G. The Attorney General's Office (Ministerio Público) and the Prosecution of Criminal Offenses*

This is an area where a complete treatise would likely not be enough to deal with all the intricate problems posed by a very deficient and corrupt system for the prosecution of criminal offenses. Practitioners and scholars, as well as political parties and, in some instances, even government authorities, accept that in Mexico criminality and organized crime are increasing, each time with more violence and belligerency. Public insecurity is growing, aggravated by corruption in the police bodies. The protection that some members of the police bodies give to criminal organizations is especially scandalous.<sup>42</sup>

Professionalization of the police organizations and of the offices of the attorneys general (*Ministerios Públicos*) has not been achieved. For one, there is a lack of scientific bodies for the investigation and prosecution of criminal offenses. Second, there is no civil service career in the public security agencies. Finally, in order to achieve professionalization, it is urgent to foster an ethical education in the different police academies.

Notwithstanding express limitations and prohibitions in the Constitution, several police organizations have proliferated on the federal level. These bodies duplicate each other's functions and propitiate out-of-control police actions. As a result, insecurity for the common citizen has flourished. The prosecution of crime is often subject to pressures of a political character which deprive it of the high function of protecting, in accordance with the law and without any discrimination, the most important goods and values of the Mexican community. The current situation allows for the exercise of authority with impunity, especially in the case of some high public officers.

In sum, very profound and effective reform is urgently needed in this area, in accordance with the writings, proposals and requirements of scholars, law professors, political leaders, intellectuals and journalists. It can be said without hesitation that less talk, less ink, and much more effective facts and deeds on this very sensitive issue are badly needed in Mexico, a country otherwise so beautiful, so colorful, so hospitable, and so friendly.

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42. García Ramírez, *supra* note 37.