Some questions on the new Amparo Act.

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Upon its publication in the Official Gazette, the Decree enacting the new Amparo Act, which reforms the Federal Judicial Authority Organisation Act and other related legal codes came into force on April 3, 2013. The base Project of this body of laws, a key element of Mexican legal order, was initiated as part of the nation's judicial branch since the beginning of the last decade, regaining initiatives among various actors. It finally reached a broad consensus to be enacted, thus substituting a law that though reformed several times, dated back to President Cárdenas times (1936).

The Amparo Act regulates articles 103 and 107 of the Mexican Constitution, which lay down the principles and basic rules for the laws and norms of the State, protecting fundamental rights. It is in this regard that the new law considers and enhances constitutional reforms on human rights and its guarantees, issued since June 2011, which imply a Copernican turn in the relationship between Mexican State and individuals.

Without attempting exhaustive analysis, a few examples of the protective turnaround that these constitutional reforms imply and that are currently provided with legal application are shown below. These examples, of course, entail several questions at its implementation on the judicial ground:

1. An Amparo trial helps not only to check the conventionality and constitutionality of rules and other acts of the authorities but also to compare it with human rights and guarantees recognised in the international treaties that Mexico is party to. It appears that the country is for the first time taking seriously the rights established in the many covenants it has signed. Nowadays, is the Federal Judicial Power completely able to argument and resolve with treaties? Are lawyers familiar with them? What is really the scope of those treaties? Would an amparo be brought in the protection of a right included, for instance, in a trade agreement?
2. There is now the possibility that an indirect amparo trial may be submitted not just by who has a legal interest, in other words, a direct concern in his or her human rights, but also by someone who has a legitimate interest, whether individual or collective. Unfortunately the law proposal is not making progress in defining this new constitutional concept and is only differentiated from the "simple" interest, bringing as a result that its interpretation becomes an exclusive task for the judge. How will this idea fit with judges and magistrates, who are used to legal formalisms? Will the users of a regulated service have a legitimate interest concerning the acts of authority initially targeted to concessionaries and license holders? Will this concept be a box of Pandora for the overburden of the judiciary?
3. The draft legislation provides a "horizontal" protection of fundamental rights for which discussions were held and decided on European Constitutional Courts. An amparo would not only protect individuals against public powers but also against other individuals should they ever decide to act as an authority and had their competencies determined by a general rule. With this, the concept of authority and its "empire" should be redefined. But, how much will the act of an individual be equal to an authority? If the individual must act under general law standards so the amparo may proceed, can it still be considered de facto authority? In any case, isn't civil and criminal law just about enough to compensate or punish fundamental rights violations committed by individuals?
4. The legislation develops a trend introduced in the Constitution with the "Otero formula", which implies the relativity of amparo sentences towards the suing complainants. This means whenever jurisprudence is used on the invalidity of a general rule, an opportunity to amend it will be provided to the issuing authority or else the Mexico's Supreme Court will issue a general declaration of inconstitutionality by a majority of at least 8 votes. One might wonder if excluding tax laws from this scheme is justified, when most amparos deal with contributions. Besides, will there be cases of rebelliousness from Congress and state administrations upon correction opportunities provided from Judicial Power? What role will the large discussion on constitutional theory about balance between representation of the people and "rule by judges" play?

Now, in the opposite direction of this protective trend, the new apparatus establishes a controversial formula, which was the basis of a public debate on the weeks prior to its enactment.

Mexican Constitution stipulates that acts claimed in an amparo trial may be suspended, for which judges must elaborate a weighted analysis on the appearance of the good of the act and the social interest at stake. The suspension allows keeping track of the trial's matter while it is resolved, in a way that a definite affection for the complainant is not produced and the dispute loses its purpose.
With that basis, the currently abrogated Amparo Act already pointed out that suspension of the claimed act may proceed whenever damages to the injured part are difficult to compensate and as long as social interests are not harmed and without violating provisions of public order. It established an illustrative list of cases in which these damages were produced. It is in this list where the Chamber of Deputies incorporated two additions during the legislative process: suspension shall not proceed whenever it implies the operation of gambling centers or whenever it may prevent or hinder the use, development or exploration of public domain assets, which is referred in article 27 of the Mexican Constitution.

While it is expected that judges and courts may exceptionally grant a suspension even when it's about cases referred, if in his or her opinion, the refusal could cause a greater impact on social interests, in reality they will have to deny it if it's authority cases with the purpose of preventing gambling centers from operating, or reverting concessions of public domain assets (such as minerals, airspace, radio spectrum, national waters). Of course, legislators' motivation lies in the need for a better control of certain "de facto powers" which have strained the Mexican State with legal strategies to elude regulations that are seeking to triumph public interests over private ones. There have been paradigmatic cases in which judges have freely granted suspensions, when the public interest was too large to dismiss. Nevertheless, those specific cases are examples of using a sledgehammer to crack nuts.

Were Congressmen aware that there could be investments in industries such as telecommunications, mining or air transportation that could be inhibited by an act of authority that will not be subject to suspension? Ultimately, running businesses –including small and medium companies – could be ruined due to arbitrary actions that would be sustained until a favourable sentence is given. When the State withdraws a concession on the aforementioned subjects, will it always be due to the legitimate process of defending public interests or will political motivations be an influence to attack certain groups as well?
Upon receiving the draft from the co-legislative chamber, members of the Senate were given a chance to reflect whether the action was proportional to the task it had to sort through. Perhaps an alternative, intermediate formula could've been thought that, without arguing trust on the judiciary, could ensure that suspensions conceded with a rigorous and balanced analysis, just as the Mexican Constitution demands. In the coming years, a critical light should be shed if this materializes into a delicate balance between public interests and fundamental rights.