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Loperena Ruiz: Civil Justice Reform in the Americas: Lessons from Mexico
**CIVIL JUSTICE REFORM IN THE AMERICAS: LESSONS
FROM MEXICO**

*Carlos Manuel Loperena Ruiz**

After listening to what Daniela Vargas said about Brazil, I would say, to be very brief, that it is the same in Mexico. But I prefer to say more by telling you what our history is in civil procedure, the dispute resolution system, and the judicial system in Mexico.

First of all, our commerce code was enacted in 1889, so not just in the last century, but the nineteenth century. It followed the Spanish model. In 1996, more than seven years ago, there was a movement for deregulation in all administrative issues; supporters of the movement felt that the judicial rules were over-regulated. They tried to deregulate, to simplify the commercial procedure and the civil procedure because they said it was a kind of obstacle to the economy. Mexico is not ruled by lawyers as it was in the past; first it was ruled by generals, then by lawyers, now by economists. The economists think about judicial reform and judicial changes because they are something that affects the economy. All types of commercial transactions are, at some point, going to court to resolve disputes. When the business people noticed that disputes were not quickly and fairly solved, they said, "We don't want to do business in Mexico. We don't want to invest in Mexico. We don't want to have anything to do with Mexico." That is the idea held by foreign investors, and also by local investors, who prefer to send their money to some other jurisdiction where they have a better judicial system. I do not know where, but they say that there are better judicial systems.

What are the contents of the amendments of 1996? Mainly, what Daniela Vargas said about Brazil; defenses that stayed procedures were eliminated. Also, all the objections to jurisdiction, all the motions to change jurisdiction, were motions that stayed procedures as well because the law said, "First, we have to determine what the proper jurisdiction is, and then we may continue the case." But the litigators said, "No, no, lack of jurisdiction" simply because it stayed the case.

Inflation was a problem that we faced in the 1980s, when we had inflation rates over a hundred percent per year. Interest rates paid by the banks were 120% per year while the interest rate in court was 6%, so it made the best business sense to be sued with legal interest rates and have

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your money in a bank. After the case was resolved three years later, you would have, just with interest, enough money to pay the creditor, to pay the attorney, and to have twice the money you owed.

In Mexico we also have a lot of objections about the power of attorney. I see the lawsuits in the United States where the attorney signs on behalf of the plaintiff without a power of attorney. How do we know the lawyer is representing the plaintiff just because he says so? In Mexico you need a sweeping power of attorney, including all of the background of the company, the date of incorporation, the proof of incorporation, the name of the shareholders, the name of the board, the changes of the board, the powers of the board, and finally the granting of the power of attorney before a notary public. If it is a foreign power of attorney, you have to look at the Washington protocol and other agreements, and this often leads to fighting because of the representation in court.

In the 1996 amendments this was changed. If lack of power of attorney can be cured, the plaintiff has ten days to cure the problem. Then the litigation is about how to cure it. I have had a lot of problems with it, but in the end the problem does not supercede the case. You have the chance to remedy it. Also, the appeals that stopped the procedure were deleted. The only appeal that suspends the procedure is the appeal against the final judgment. In the past, several appeals could stay the case, but today only the final judgment appeal is the one that leads to stays.

Regarding the evidence period, the rule of article 14 of the Brazilian Code is beautiful; Daniela Vargas says that it is not enforced. In Mexico we do not even have that rule, but it is always understood that you do not have to file unnecessary evidence and so forth. But in our system, the more evidence you provide, the more time you consume and the longer the case lasts. Litigators say, "Well, if you are not going to win, if you are going to lose the case, lose it in five years, and it will be better." I remember a story that a former chief justice of Mexico used to tell when he became district judge thirty years ago. He said that his second week in the district court, he saw a birthday cake. He said, "What are you doing with this birthday cake? Who is the person with the birthday?" His staff replied, "No, no, no, this is for a case. It is the tenth birthday of this case." They had a cake to celebrate ten years of an amparo case.

We also have a problem of local justice against federal justice. In Mexico all cases, without exception, can be resolved by the federal judiciary. Our system is a federal republic. Following the American constitution, we have a federal constitution with different states, and a local judiciary as well as a federal judiciary. But our constitution provides for something that is known as amparo and Americans often think, "What is amparo? What is it like?" It is said that amparo was a Mexican invention that was followed by some other Latin American countries. I do not know

if it was really a Mexican invention or whether Mexicans were just the first to use the word *amparo*. *Amparo* means “protect.” We say that *amparo* is like the eye of God. It appears everywhere and sometimes we want it and sometimes we do not want it. What is it? *Amparo* is a procedure that is established in the Mexican constitution to protect the bill of rights. Illegal imprisonment, illegal arrest, illegal foreclosure, everything that could be illegal from any authority is subject to *amparo*.

Within the bill of rights, one of the most important clauses is the exact application of the law. No one can be deprived by an authority of his or her assets, goods, or freedom without the exact application of the law through due process of law. So we have the exact application of due process. All judicial rulings can be challenged, arguing that any procedural breach resulted in a lack of due process or that there is no exact application of the law. What is the exact application of the law? That depends on every litigator. That leads to a dispute. As it is a provision of the very bill of rights, and the *amparo* exists to protect the bill of rights, any judgment that deprives you of any property right, possession or the like can be challenged through the *amparo*.

In the beginning, the constitution dictated that the *amparo* was something to be heard by the district court and then by the Supreme Court itself. You can imagine the trouble that could arise when, with millions of people in Mexico, one could have litigation for small amounts and even those cases went to the Supreme Court. The Supreme Court resolved every case that litigators wanted to have resolved by them. In the 1940s or 1950s there was an amendment to the constitution establishing that the circuit courts could hear some cases instead of the Supreme Court. And finally in the 1970s cases were divided on the basis of the amount in dispute. Depending on the amount, the case could be heard by the Supreme Court or by the circuit courts. In 1994 we had the last and most important amendment to the judicial system in Mexico, after which the Supreme Court only hears cases in matters of constitutionality, or cases that arise under the attraction powers. Under the latter, the Supreme Court can “attract” a given case that is important for its relevance, either socially speaking or legally speaking. So today the Supreme Court has been replaced by the circuit courts. We have hundreds of circuit courts and they have final resolution of most cases. The problem is that the circuit courts contradict one another because what is good for one circuit court is not always good for all. The Supreme Court resolves these contradictions.

So, every case can be resolved by the federal judiciary, even if it is a local case for application of a local law. It is the same in criminal cases, in commercial cases, in tax cases, and in labor cases. There was a discussion four or five years ago that the chief justices of all these states wanted to stop the *amparo* for judicial cases. They said, “We want our autonomy. We

as local judiciary want our judgments to be the final and last ones without any challenges being taken to the federal judiciary.” Some lawyers supported that idea. Are the states minors? Are they children? Can we leave them to resolve their disputes without the federal judiciary handing down the last judgment through the amparo? Some people were in favor of that amendment, but of course if you are a litigator and you go to a state, you cannot imagine how strong the localism is. I usually tell my students, “Would you feel comfortable litigating against Ford Motor Company in Detroit? Or against Boeing in Seattle? Or against Cerveceria Cuauhtemoc in Monterrey?” If it is the main industry in a city or in a state, how can we feel comfortable conducting litigation against that big company in that small place? That is why we think that utilizing the federal judiciary is correct.

There was a recent, scandalous case that reveals these troubles. An insurance company in Mexico City had a problem in Baja California where a hurricane damaged an insured plant and the insurance company had not paid to the insured company.¹ The local governor said, “The company is not working, is not paying salaries. It is not a source of income taxes and so forth. So let’s press the insurance company.” Of course the local prosecutor filed charges against the insurance company. The local judge issued arrest orders against the seven directors of the company.² The company has Dutch investment. It was acquired by a Dutch company recently and seven officers were criminally prosecuted in this small state. What did they do? Some of them went to the amparo to obtain a kind of *habeas corpus* and others came to the United States to have a unplanned vacation while the case was solved by the federal judiciary.³ The federal judiciary has been solving the cases in favor of these officers. They still have problems today. But the local judiciary is very partial to the local people. I do not trust local judiciaries and I prefer to have the federal one.

There is a new program that bankers are starting in the judicial system. They want the commercial cases, mainly involving fines and securities and so forth, to be heard by federal courts. They say that they want specialized federal courts in commercial matters. It is something that in the United States they do not understand easily, but commercial cases in Mexico are federal and local. Our constitution says that the federal courts are to try cases involving the application of international treaties or federal law. As

1. See *ING Wants Charges Resolved in Fertinal Case*, BUS. NEWS AM., Oct. 6, 2003.

2. The first case in this ongoing battle has led to two more; in all, 13 ING employees have been charged. See *id.*

3. ING has since filed charges against the judges in the case, alleging an illegal asset embargo. See *ING Files Criminal Charges Against Judges in Fertinal Case*, BUS. NEWS AM., Nov. 6, 2003.

the commerce code is a federal statute, federal courts are open to hear commercial cases. But the constitution says that when only private interests are involved, the local courts may try these cases as well. So most of the people go to the local courts and not to the federal courts. So today, bankers want to have specialized courts in the federal judiciary for commercial cases.

In the international field, we have a lot of problems with the conventions. We have conventions about jurisdiction. We have conventions about enforcement of judgments. We have conventions about taking of evidence abroad. Our main commercial partner is the United States, and we are looking to conventions in many cases with international aspects. We see the inter-American conventions on jurisdiction, the inter-American conventions on enforcement, on taking of evidence abroad, and so forth. Yet every time an American lawyer calls a Mexican lawyer about these conventions, they say, "Let's go to the Hague convention for the taking of evidence abroad." How about the enforcement convention? Well, the United States promoted this inter-American convention very actively and never, never ratified it. Well, how about the inter-American convention on the taking of evidence abroad? It is the same. How about the convention on jurisdiction? The same. In many cases the Americans complained about corruption in Latin America, but we Latin Americans complain about the failure of the United States to sign many of the international litigation conventions.

I remember some years ago at New York University, there was a seminar about the proposed Hague Convention on jurisdiction and enforcement of judgments. One American lawyer said that in Bolivia and Ecuador, in one case, 70% and in the other 100% of the judgments were obtained through corruption. I was really surprised. I said, "How can you know? Is there an official statistic about it? I don't think the bribes are paid before a notary or they give a receipt or they have witnesses. I really don't know. How can they say 100% of judgments involved corruption?"

In my country many times we say, "There was corruption here." Why? We as lawyers say, "What doesn't sound logical, sounds metallic." So, if there is not a logical judgment, you think, there is something funny here. It is not necessarily economic corruption; there is also corruption through friendship and other such things. But I cannot believe that applies to all cases. If it were so, then the law schools would be empty. Why do you need lawyers if you obtain judgments through corruption? When a bad or negligent lawyer loses a case, we have to tell the client we lost. Why not say we lost because the judge is corrupt? It is a very good solution. I am a very good lawyer but the judge received a bribe. It is, however, not true. On the other hand, the Americans and the English in that seminar, were saying, "How can we accept the enforcement of a foreign judgment if the

judgment was obtained through corruption? Well, let us give the American judges the authority to analyze if the judgment was obtained through corruption.” Doing so is almost impossible. So it is a matter of trust. We have to trust foreign systems; if we do not, we cannot continue in the international community, because we have foreign judgments to be enforced in Mexico and Mexican judgments to be enforced abroad. The main problem is that in Mexico we can say, “How can I enforce a foreign judgment against a Mexican in Mexico if it was rendered in English in an American court with depositions, with cross-examination, with a lot of institutions, with discovery, and with all these legal processes that are unfamiliar in Mexico?” We can say, “How can we trust a judgment rendered by somebody wearing a black robe?” for in Mexico we do not have robes for judges except in ceremonies.

Finally, my conclusion is the same conclusion that is shared by some other colleagues from Central and South America who say that we do not need to change the law, we need to change the people. The problem with law students — it is the same in Brazil as in Mexico — is that, once they obtain their degree, they have to choose where to work. What these students want immediately is to earn money. They want to serve justice, of course, but if justice is served here or there, which field is one going to choose? The one that provides better compensation. They do not want to join the judiciary. In the local judiciary in Mexico City only one judge comes from my school, only one judge. If you go, for instance, to the board of the Mexican Bar Association with twenty members, eight of them come from my school. The proportion is strange. The good students go, first of all to the United States to get another degree and to be fully bilingual, then to be hired by important law firms where they earn more money than judges. To be a judge, you need at least five years of practice, must pass an exam, have a record, and so on. If we think that lawyers who are under thirty and have less than five years of experience cannot be judges, then how do you explain our poor judiciary? The answer is very simple. The young attorneys go to law firms, to big companies; they do not go to the judiciary. They are bilingual and the judges are not bilingual. They are well prepared and the judges are not.

In 1994 the Supreme Court had an amendment and they created the so-called Judicial Council. The Judicial Council is devoted to improving the federal judiciary, the skill level of judges. They have an institute to train judges and all other judicial officers, and they are improving. I think the federal judiciary is improving, with better salaries, with better compensation for judges; with more training and more preparation, they are becoming more international today. That is something that surprised me in the recent past. The federal Judicial Council is being copied by the local judiciaries. I think that is a cause for hope.

I want to see the other side of the coin improve too. Not just to improve the judiciary, but also the lawyers — the legal profession is not just the bench, it is also the bar. Are the lawyers very good litigators? Well, we try to be. But we try to be practical. We try to win cases. And there is no disciplinary system in Mexico. Attorneys go unpunished. You can abuse process every time if you want. You can create evidence. You can file unnecessary evidence. If the judge does not take care of it and admits the evidence, the case takes longer. What about abuse of process? What about bar punishment or bar discipline against abusive lawyers? We have nothing. In Mexico, we do not have a mandatory association. We have just a license to practice law that is good forever. We do not have continuing legal education. We do not have ethical supervision. We have nothing. Now the Mexican bar association is trying to do something about it, and we are expecting that, in the future, affiliation with the bar association will become mandatory, and that then we will have disciplinary systems within these associations. I think the solution is not near but we are moving toward it. I think the process will take a long time, but if we have already started it, we are on the right path.

