The Latin American Model of Constitutional Jurisdiction: Amparo and Judicial Review

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In the tradition of Latin American states, the amparo procedure works as an extraordinary legal remedy against violations of constitutional rights by officials and government agencies. The procedure has been created according to the pattern of the habeas corpus right in anglo-american law. To date it therefore mainly serves as an instrument to protect the individual concerned. The judgment is restricted to an inter partes effect that is strictly to be distinguished from the erga omnes effects achieved by comprehensive constitutional review. In addition to this functional difference, more and more countries in Latin America supplement their court organization by specialized constitutional courts similar to those established in continental Europe. By simultaneously retaining their amparo procedure, the states of Latin America today achieve a unique combination of traditional and novel instruments within their constitutional jurisdiction.

I. The Amparo Procedure in Latin America

1. Developing the Amparo in Latin America

a) Mexican Origin

Nowadays established in almost all Latin American states, the amparo proceeding originates in Mexico.[1] Its first legal consolidation is to be found in the Constitution of the Mexican state Yucatán of 31 March 1841. Until today the amparo proceeding serves as a protection of constitutional rights against encroachments by the state, in-

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1 See *Norbert Lösing*, Die Verfassungsgerichtsbarkeit in Lateinamerika, Baden-Baden: Nomos 2001, pp. 45 f.; see also *Rainer Hofmann*, Grundzüge des Amparo-Verfahrens in Mexiko, in: Jahrbuch des öffentlichen Rechts (JöR) 53 (1993), pp. 271-292 (at 273 f.).

cluding its legislative authority.[2] Hence, in an amparo proceeding, a statute can be subjected to an incidental judicial review of its compliance with the protected constitutional rights. Therefore the amparo constitutes an important piece of the general diffuse method of constitutional review, which was likewise established in Yucatán's Constitution in 1841, primarily influenced by the US-american model of *judicial review*.[3]

Mexico adopted the amparo procedure as constitutional law with the revision of the Constitution in 1847. The draft for this revision was provided by *Mariano Otero.* One of its guiding principles, named *Otero*-formula, states that judicial decisions in amparo only bind the parties of the case (*inter partes* effect):

> "[...] limitándose dichos tribunales a impartir su protección, al caso particular sobre el que verse el proceso, sin hacer declaración general respecto de la ley o del acto que la motivare."[4]
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> ... the courts restrict their protection to the specific case as defined by the procedure with no general declaration regarding the law or the act that is at issue.

This constraint might have not even been intended by *Mariano Otero.*[5] Nevertheless, the restrictive principle still holds true for contemporary constitutionalism in Mexico. Article 107 Number II Section 1 of the Mexican Constitution reads:

> "Las sentencias que se pronuncien en los juicios de amparo sólo se ocuparán de los quejosos que lo hubieren solicitado, limitándose a ampararlos y

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2 *Héctor Fix-Zamudio/Salvador Valencia Carmona*, Derecho constitucional mexicano y comparado, Mexiko: Porrúa 2007, p. 869.

3 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); for detailed analysis and further references see *Werner Heun*, Die Geburt der Verfassungsgerichtsbarkeit – 200 Jahre Marbury v. Madison, in: Der Staat 42 (2003), pp. 267-283 (267 ff.); regarding the self-empowering character of this case see *Axel Tschentscher*, Supreme Court und Schweizerisches Bundesgericht als Modelle integrierter Verfassungsgerichtsbarkeit, in: Thomas Simon (ed.), Schutz der Verfassung: Normen, Institutionen, Höchst- und Verfassungsgerichte, Abschnitt III.1.b, to be published in 2014.

4 The *Otero*-formula is mentioned at the end of Article 25 of the reform statute of 1847 (quoted according to the publication in: *Arturo Gonzáles Cosío*, El juicio de amparo, Mexiko: Porrúa 1994, p. 31. A modernized text of the fomula has been published by the government at its legal information page <http://www.ordenjuridico.gob.mx/Constitucion/1847.pdf> (last visit: 18.04.2013).

5 Cf. *Franzcisco Fernández Segado,* Du Contrôle Politique au Contrôle Juridictionnel – Evolution et Apports de la Justice Constitutionnelle en Amérique Latine, in: Jahrbuch des öffentlichen Rechts (JöR) 54 (2006), pp. 655-700 (at 696 f.), emphasizing the different effects this legal transplant had outside of the case law system of the United States of America with its *rule of precedent* and *stare decisis*.

protegerlos, si procediere, en el caso especial sobre el que verse la demanda."[6]

The judgments pronounced in amparo proceedings only concern the parties that have been part of the procedure and limit the relief and protection, if any, to the special case for which it has been demanded.

In 1882 some moderation of the principle was achieved by *Ignacio Vallarta*.[7] He initiated the adoption of an exemption to the *Otero*-formula called *"jurisprudencia"*: Whenever the Supreme Court in its constitutional jurisdiction issues *five consecutive judgments* with a *qualified majority of eight justices* (out of eleven), the decision is binding for all the other courts.[8] Up to the present day, this moderating exception is part of the Amparo Law (Ley de amparo, LA-MX). The completely renewed text adopted on April 2nd, 2013, Article 222 LA-MX reads:

"La jurisprudencia por reiteración del pleno de la Suprema Corte de Justicia de la Nación se establece cuando se sustente un mismo criterio en cinco sentencias no interrumpidas por otra en contrario, resueltas en diferentes sesiones, por una mayoría de cuando menos ocho votos."[9]

Binding jurisprudence is established by the Supreme Court of Justice of the Nation in reiterating the same criteria in five consecutive judgments, not interrupted by any contrary judgment, issued in different sessions by a majority of at least eight votes.

The *jurisprudencia*-rule has been upheld even by the most recent reform of Mexican judicial review.[10] *Jurisprudencia* in Mexico is, however, restricted to the courts and

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6 Official publication of the Mexican Constitution on the Parliament's web site at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf> (last visited: 18th April 2013). For the Constitutions and Statutes of Latin America we use the following country codes according to ISO 3166: Argentina (AR), Bolivia (BO), Brazil (BR), Chile (CL), Costa Rica (CR), Dominican Republic (DO), Ecuador (EC), El Salvador (SV), Guatemala (GT), Honduras (HN), Columbia (CO), Cuba (CU), Mexico (MX), Nicaragua (NI), Panama (PA), Paraguay (PY), Peru (PE), Uruguay (UY), Venezuela (VE). All texts of Constitutions and Statutes, if not otherwise specified, are based on the official internet publications by government authorities (government, parliament, official gazette etc.).

7 See *Matthew C. Mirow, Marbury* in Mexico: Judicial Review's Precocious Southern Migration, in: Hastings Constitutional Law Quarterly 35 (2007), pp. 41-117 (at 55 ff., 57, 63 f.) for the legal developments under *Vallarta* and for his draft of the Amparo Law of 1882.

8 *Héctor Fix-Zamudio*, Verfassungskontrolle in Lateinamerika, in: Jahrbuch des öffentlichen Rechts (JöR) 25 (1976), pp. 649-693 (at 664).

9 Publication in the official gazette: <http://www.ordenjuridico.gob.mx/Documentos/Federal/wo6028.pdf> (last visit: 18.04.2013).

10 *Declaratoria general de inconstitucionalidad,* introduced with the constitutional reform of 2011 and implemented by the revised Amparo-Law in 2013, see infra at n. 77.

does not encompass administrative agencies.[11] Therefore, even the demanding requirement of five consecutive judgments by the Supreme Court does not lead to an *erga omnes* effect in any comprehensive sense. This also holds true for other Latin American countries.[12] The *inter partes*-effect is an established feature of the amparo procedure at large.

The Mexican amparo turned out to be a very attractive procedure, leading to a case overload at the Supreme Court. For this reason, in 1951 an institutional reform established five Collegial Circuit Courts (*tribunales colegiados de circuito*) between the Supreme Court and the Federal Circuit Courts.[13] After the number of Collegial Circuit Courts had been increased to 17 in 1967/68, the Supreme Court was able to restrict its activity to issues of the highest importance.[14]

b) The Five Functions of Amparo in Mexico

Compared to other Latin American states, Mexico still holds the widest variety of amparo forms. Some of them exist from the very beginning, some were adopted later on. Ever since the amendment to the constitution in 2011, the review standard for all forms of amparo goes beyond constitutional rights and extends to individual human rights in international treaties.[15]

(1) The first function of the Mexican amparo is the ***protection of individuals against state acts or omissions***.[16] This protection often pertains to personal liberty (*amparo*

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11 *Carlos Báez Silva,* La "fórmula Otero" y la declaración general de inconstitucionalidad en el Proyecto de nueva Ley de Amparo de la Suprema Corte de Justicia, in: Revista del Instituto de la Judicatura Federal 11 (2002), pp. 17-51 (at 37).

12 Cf. *Lydia Brashear Tiede/Aldo Fernando Ponce,* Ruling Against the Executive in *Amparo* Cases: Evidence from the Peruvian Constitutional Tribunal, in: Journal of Politics in Latin America 2 (2011), pp. 107-140 (at 109).

13 Cf. *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), p. 51.

14 See *Hofmann*, Grundzüge des Amparo-Verfahrens (n. 1), p. 276.

15 Art. 103 Nr. I Verf.-Mexiko; see also *Héctor Fix-Zamudio*, Las reformas constitucionales mexicanas de junio de 2011 y sus effectos en el sistema interamericano de derechos humanos, in: Manuel González Oropeza/Eduardo Ferrer Mac-Gregor (eds.), El juicio de amparo. A 160 años de la primera sentencia, vol. 1, Mexico 2011, pp. 423-471 (427).

16 For this and the following analysis see *Alan R. Brewer-Carías*, Constitutional Protection of Human Rights in Latin America. A Comparative Study of Amparo Proceedings, Cambridge u.a.: Cambridge University Press, 2009, pp. 83 f., 231; *Héctor Fix-Zamudio/Eduardo Ferrer Mac-Gregor*, El derecho de amparo en México, in: idem (eds.), El derecho de amparo en el mundo, Mexiko: Porrúa, 2006, pp. 461-521 (472 ff.); *Fix-Zamudio/Valencia Carmona*, Derecho constitucional mexicano y comparado (n. 2), pp. 871 ff.; *Hofmann*, Grundzüge des Amparo-Verfahrens (n. 1), pp. 277 ff.; *Hans-Rudolf Horn*, Grundzüge des mexikanischen Verfassungsrechts, in: Jahrbuch des öffentlichen Rechts (JöR) 29 (1980), pp. 479-526 (500 ff.).

libertad). Therefore, much of the protective function corresponds to the Anglo-Saxon *habeas corpus* with which the amparo was closely associated in history.[17]

(2) The second function compromises the ***challenge of unconstitutional statutes*** (*amparo contra leyes*) either through direct action (*acción de inconstitucionalidad*) or through an appeal (*recurso de inconstitucionalidad*). The *acción de inconstitucionalidad* directly challenges a legal provision due to its unconstitutional consequences in a particular situation. The *recurso de inconstitucionalidad* aims at a court decision, which is based on an unconstitutional legal provision. Thus, in both procedures the constitutionality of a statute is debated.

(3) The third function has evolved after 1869 and is now the most frequently used form of amparo. It's aim is to ***overturn a court decision*** (*amparo de casación*) in which a constitutional legal provision has been applied in an unconstitutional way.[18] In contrast to the *recurso de inconstitucionalidad*, the constitutionality of the legal provision itself is not challenged during an *amparo de casación*. Therefore, this form does not lead to judicial review of legal provisions.

(4) The fourth function entails a ***review of government acts or administrative acts*** regarding their conformity with basic rights (*amparo administrativo*).[19] This procedure often focuses on the question, whether a restriction of rights has a sufficient basis in law. Formally, the *amparo administrativo* enforces constitutional jurisdiction directly on administrative acts without any prior decision of an ordinary court. This form of amparo gained particular importance when fiscal and administrative jurisdiction had not yet been fully developed.[20]

(5) The fifth and last function of the Mexican amparo has emerged since 1962. It comprises the ***protection of farmers*** that are affected by measures related to the land reform (*amparo agrario*).[21]

Due to the formation of fiscal and administrative jurisdiction (since 1936) as well as special agrarian jurisdiction (since 1992) the last two functions (*amparo administrativo* and *amparo agrario*) have become less important.[22] The future will see a consolida-

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17 *Domingo García Belaunde,* Latin-American Constitutionalism and its Influences, in: Jahrbuch des öffentlichen Rechts (JöR) 54 (2006), pp. 701-711 (707 f.).

18 *Fix-Zamudio/Ferrer Mac-Gregor*, El derecho de amparo en México (n. 16), p. 468; *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), pp. 48 f.

19 See *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), p. 663.

20 *Hofmann*, Grundzüge des Amparo-Verfahrens (n. 1), p. 280; cf. also *Héctor Fix-Zamudio*, El juicio de amparo mexicano y el recurso constitucional federal alemán (breves reflexiones comparativas), in: Boletín Mexicano de Derecho Comparado 77 (1993), pp. 461-488 (467 f.); *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), p. 62 at n. 175.

21 For details see *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), pp. 664 f.

22 For this and the following analysis see *Fix-Zamudio/Ferrer Mac-Gregor*, El derecho de amparo en México (n. 16), pp. 475 ff.; *Fix-Zamudio/Valencia Carmona*, Derecho con-

tion of the amparo action mostly in its first three functions (*amparo libertad, amparo contra leyes, amparo de casación*).

c) The Proliferation of Amparo Procedures

The amparo has spread from its Mexican origin to all other Latin American states with the exception of Cuba.[23] Early on the Central American states El Salvador (1886), Honduras, and Nicaragua (1894) as well as Guatemala (1921) adopted the instrument. The last countries to implement amparo procedures were Colombia (1991) and the Dominican Republic (1999).[24] The amparo was adopted primarily in its first function (*amparo libertad*). There is great varation among the Latin American countries in their incorporation of the other amparo functions.[25] The amparo has even been adopted by two countries outside of Latin America. It was established in Spain by constitutional provision in 1931 (originally in Art. 121 lit. b; today in Art. 53 Paragraph 2). Finally, the Philippines introduced the amparo by judgment of the Supreme Court in 2007.[26]

2. Comparison of Amparo to *habeas corpus* and Other Special Instruments

Along the lines of historic development, one can distinguish three phases of instrument adoption. The *habeas corpus*-action was by far the earliest instrument. In Latin America this was followed by developing amparo-proceedings. Specialized constitutional jurisdiction in the form of constitutional complaints was introduced even later on.

Regaring the content of these instruments, the *habeas corpus*-action protects very specifically the physical liberty of an individual whereas amparo-proceedings and constitutional complaints protect all basic rights of a person.

From a functional point of view, the *habeas corpus*-action aims at the review of individual violations of liberty, but not at the abstract review of legal provisions about re-

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stitucional mexicano y comparado (n. 2), pp. 885, 891 ff.; cf. also *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), p. 62 at n. 175.

23 For this and the following analysis see *Brewer-Carías*, Constitutional Protection (n. 16), pp. 84 f.; *Fix-Zamudio*, El juicio de amparo mexicano (breves reflexiones) (n. 20), pp. 469 ff.

24 *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), p. 662, in addition to Guatemala also names Argentina (1921), Panama (1941), Costa Rica (1949), Venezuela (1961) as well as Bolivia, Ecuador and Paraguay (all 1967).

25 *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), p. 663; for more recent developments cf. also *idem/Valencia Carmona*, Derecho constitucional mexicano y comparado (n. 2), pp. 870 ff.

26 Regarding Spain: *Horn*, Grundzüge des mexikanischen Verfassungsrechts (n. 16), p. 507; Regarding the Philippines: Supreme Court of the Philippines, Manila, A.M. No. 07-9-12-SC, The Rule of the Writ of Amparo, Resolution, 25.09.2007, published at: <http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/PH/KAR_PHL_UPR_S1_2008anx_03.pdf> (last visit: 18.04.2013).

strictions on liberty. Owing to the specialty of the *habeas corpus*-action, some Latin American states separated this action from the amparo-proceedings. Argentina, for instance, since its constitutional reform of 1994 distinguishes separated actions for amparo and *habeas corpus*.[27] In the constitutions of El Salvador and Costa Rica the amparo-proceedings are also distinguished from the *habeas corpus*-action.[28] According to this trend, new special elements rather resembling *habeas corpus* than amparo are often regulated separately. This is the case in states with a specialized *habeas data*-action (e.g., Argentina, Panama, Paraguay, Peru). The Paraguayan Constitution contains details on all three instruments in separated provisions.[29] And the catalogues of actions in the Brazilian and Peruvian Constitution are also examples of recognizing the *habeas data*-action as a separate instrument from amparo-proceedings.[30]

Finally, the trend to specialization even turned on the traditional *amparo agrario* in Mexico. The agrarian amparo was developed to fit the particular needs of property protection in context with agrarian reforms.[31] Even though there is more than a single right protected by this *amparo agrario* (i.e., agrarian land, cooperative structure, means to earn a living, miscellaneous social and procedural rights of famers) the scope of this function is clearly smaller than the totality of basic rights captured by the first four functions (individual protection, judicial review of legal provisions, review of court decisions, review of administrative acts). Accordingly, the agrarian amparo has been treated as a special case by Mexico's amparo act and by the legal literature for a long time.[32] According to the most recent revision of the amparo act in 2013, the *amparo agrario* is no longer regulated by the amparo act.

Due to their status as special instruments, *habeas corpus*, *habeas data* and *amparo agrario* are not analyzed in this paper.

3. Distinguishing Amparo and Constitutional Complaint

a) Functional Overlap

At first sight, the amparo-proceeding strongly resembles a constitutional complaint. Therefore, introducing constitutional courts based on the Continental European model in addition to amparo courts could lead to functional overlap and thus redundancy. Both proceedings aim at the protection of basic rights and both are at the disposal of

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27 Article 43 Verf.-AR.

28 Article 247 Verf.-SV, Article 48 Verf.-CR.

29 Article 134 (Amparo), 133 (*habeas corpus*), 135 (*habeas data*) Verf.-PY; cf. *Anja Schoeller-Schletter,* Verfassungstradition und Demokratieverständnis, Paradigmenwechsel und Reform. Die Verfassung der Republik Paraguay vom 20. Juni 1992, VRÜ-Beiheft Nr. 17, Baden-Baden 2001, p. 203 ff.

30 Article 5 n. 68 (Amparo), 67 (*habeas corpus*), 71 (*habeas data*) Verf.-BR; Article 200 Verf.-PE.

31 Cf. text at n. 22 above.

32 *Hofmann*, Grundzüge des Amparo-Verfahrens (n. 1), p. 280.

the subjects of basic rights. Furthermore, both proceedings are being used as a legal remedy in courts. The functional overlap becomes apparent, when the forms of the Mexican amparo are compared to those of an constitutional complaint exemplified in the German model. Each amparo function has its analogy in the extensive model of constitutional complaints in Germany.[33] Even the procedural requirements for constitutional complaints are quite similar to the requirements acknowledged for amparo-proceedings. For example: the plaintiff must be personally and directly affected by the state action, the action has to be of current concern, and the affected persons may not have waived their right to protection.[34]

However, looking at the details we can see major differences between amparo and constitutional complaint, mainly regarding (b) the legal effect, (c) the institutionalization of the procedure, and (d) the integration of legal and constitutional questions.

b) Legal Effect of Judgments

Amparo-proceedings result in a mere *inter partes*-effect as witnessed by the still valid Mexican *Otero* formula.[35] In case of a constitutional complaint, however, full judicial review of legal provisions can take place, leading to a general decision with *erga omnes*-effect. This judgment can subsequently be invoked by everyone, not only by the plaintiff. Therefore, an unconstitutional statute will no longer be applied. In contrast, the amparo system does not preclude the continuing application of unconstitutional statutes. Future violations of basic rights can occur and will lead to additional amparo-proceedings.[36] Even the exceptional binding force of other courts through the rule of *jurisprudencia* does not entail a comprehensive *erga omnes*-effect. Firstly, the *jurisprudencia* is only valid for other courts while administrative agencies are not bound by it.[37] Secondly, the binding force of *jurisprudencia* can be overruled with the same qualified majority.[38] Even the most recent amparo reform has not achieved a more comprehensive binding effect.[39] Therefore, the judicial review within the amparo-proceedings is easier to access, but it is less effective than the judicial review within a constitutional complaint. In Mexico a single amparo does not lead to any precedential effect for later proceedings.[40]

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33 See *Axel Tschentscher/Caroline Lehner*, Das Amparo-Verfahren im Verhältnis zur Individualverfassungsbeschwerde, to be published in: Peter Häberle (ed.), Jahrbuch des öffentlichen Rechts (JöR) 62 (2014).

34 Cf. for these requirements: *Brewer-Carías*, Constitutional Protection (n. 16), pp. 261 ff.

35 For the *Otero* formula see text at n. 4 above.

36 For Mexico: *Brewer-Carías*, Constitutional Protection (n. 16), p. 127.

37 See supra at n. 11. For the continued applicability of the *jurisprudencia* in the new (2011) procedure of the *delcaratoria general de inconstitucionalidad* see below at n. 78.

38 Article 228 Paragraph 1 LA-MX.

39 For the reform see infra at n. 77 ff.

40 *Mirow, Marbury* in Mexico (n. 7), p. 75.

c) Institutionalization of the Procedure

On the one hand, Amparo-proceedings are easier to implement within the judicial system than constitutional complaints. On the other hand, constitutional complaints are more effective as a remedy against violations of basic rights. What makes the amparo an easy procedure? Like the *habeas corpus*-proceeding, the amparo can generally be invoked before any court. Some Latin American states have established special amparo courts. But even in these systems – Nicaragua being the only exception[41] – there is no concentration of the amparo power within one single court, but a number of courts share in the burden.

In contrast, a specialized constitutional jurisdiction usually involves concentrated judicial review. Only with the concentration of judicial review does the *erga omnes*-effect of one court's judgment not conflict with the *erga omnes*-effect of another court's contrary judgment. Therefore, constitutional complaints are often concentrated at a specialized constitutional court. All other courts are entitled and required to *request a preliminary ruling* on the constitutionality of a law before issuing their final judgment on the case (e.g., Germany, European Union). They may not void on their own power a statute. Thus, from an institutional point of view the higher systematic efficiency of constitutional complaints entails a minus of simplicity.

There are very few countries combining integrated constitutional jurisdiction with diffuse judicial review, most notably the United States of America and – following that example – Switzerland. Both countries have an institution with the power of a constitutional court (Supreme Court, Bundesgericht), but still grant judicial review to every other court, too. This diffuse system without concentration traditionally dominated Latin American and Scandinavia. Now it is, however, upheld by fewer and fewer countries.[42]

d) Integration of Legal and Constitutional Questions

Constitutional jurisdiction of any kind needs to be coordinated with ordinary jurisdiction. Within the framework of constitutional complaints it is possible that the constitutional court deals conclusively with all legal questions. There is no need to refer the case back to another court.[43] This is not true for preliminary rulings, but it applies to most constitutional complaints against lower court judgments where the courts have already exhaustively examined all legal questions. The case is then ready to be decided by the constitutional court.

Within the amparo the procedure is entirely different: Here the maxim of the *non-compensatory* character prevails. The amparo court may include in its verdict preven-

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41 *Brewer-Carías*, Constitutional Protection (n. 16), pp. 139 ff.

42 *Tschentscher*, Supreme Court und Schweizerisches Bundesgericht (n. 3), Section IV.

43 See for instance *Klaus Schlaich/Stefan Korioth*, Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidungen, 9th ed., Munich 2012, n. 376.

tive and restorative orders. The question of compensation, however, is left to the ordinary courts and hence to a further proceeding not related to the amparo.[44] In El Salvador, for instance, this maxim is expressed in Article 35 of the Procedural Law for Constitutional Jurisdiction (*ley de procedimientos constitucionales*):

> "En la sentencia que concede el amparo, se ordenará a la autoridad demandada que las cosas vuelvan al estado en que se encontraban antes del acto reclamado. Si éste se hubiere ejecutado en todo o en parte, de un modo irremediable, habrá lugar a la acción civil de indemnización por daños y perjuicios contra el responsable personalmente y en forma subsidiaria contra el Estado."
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> In the amparo decision the defendant is required to restore the original situation as it has existed before the contested act. If the act has already been carried out in part or if it is completely irreversible, a civil claim for compensation can be raised against the responsible person or, if this failes, against the state.

An exception to this is the amparo in Colombia, where the question about compensation is decided by the amparo court *in abstracto*, whereupon the responsible court, after referral, decides about the amount *in concreto*:[45]

> "[...], en el fallo que conceda la tutela el juez, de oficio, tiene la potestad de ordenar ***en abstracto*** la indemnización del daño emergente causado si ello fuere necesario para asegurar el goce efectivo del derecho así como el pago de las costas del proceso. La liquidación del mismo y de los demás perjuicios [...] para lo cual el juez que hubiere conocido de la tutela remitirá inmediatamente copia de toda la actuación."
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> ... in the Tutela proceeding [Amparo] a judge may order ex officio the compensation for the damages caused ***in abstracto***, if this is necessary for the legal protection to be effective ... whereupon the Tutela judge, for concretization, immediately refers the matter to the competent administrative court or the court of lower instance.

Such exceptions are proof to the overall rule, that the decision in an amparo-proceeding is meant to be a mere writ of protection and not a comprehensive legal remedy. However, the limited reach of amparo judgments does not render them unattractive to the citizens. Depending on the state there can be considerable cost benefits

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44 *Brewer-Carías*, Constitutional Protection (n. 16), pp. 384 ff. with further references.

45 Article 25 of the Decree n. 2591 of 19.10.1991 on the *acción de tutela*, published at http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=5304 (last visit: 22.04.2013); emphasis added. For further sparse exceptions (Bolivien, Guatemala, Costa Rica) see *Brewer-Carías*, Constitutional Protection (n. 16), p. 386.

in the amparo-proceedings. In Peru for instance, only copy costs and no court fees accrue.[46]

e) Conclusion

In sum, comparing traditional Latin American amparo-proceedings to the European style constitutional complaints does reveal a certain functional overlap, but also shows major differences in the realization of basic rights protection. The amparo as the older instrument cannot be considered equivalent in in all respects to specialized constitutional jurisdiction. This might explain why more and more Latin American states strengthen their traditional protection of basic rights with proceedings by specialized constitutional courts. The following chapter of this paper will look at this evolving trend.

II. Evolution of Constitutional Jurisdiction – A Two-Thread Analysis

We can distinguish two threads of evolution in the constitutional jurisdiction of Latin American countries. Both are closely related to how the judicial review of legislation is achieved. **Thread 1** established a model of **integrated constitutional jurisdiction** (section 1 below). Depending on the state, this was achieved by amparo-proceedings or by a general competence of judges for *concrete judicial review*, i.e., a case-by-case decision about the constitutionality and applicability of statutes, also known as "incidental" review. Both parts of this first thread led to a system of *diffuse judicial review*, where normally all or at least multiple courts have the competence to review the constitutionality of legal provisions while deciding specific cases. Diffues judicial review is the model of amparo-proceedings in Latin America as well as **19th century** constitutionalism in the United States and Switzerland.

Thread 2 follows the model of **specialized constitutional jurisdiction** as developed in continental Europe during the early **20th century**. In Latin America this tradition was started by complementing the prevailing concrete judicial review with variations of *abstract judicial review*, i.e., the decision about the constitutionality of statutes without regard to specific cases. Latin American abstract review was implemented in a concentrated way, i.e., by empowering a single court or court chamber with this function. As a consequence of this concentration, more and more countries installed specialized constitutional courts similar to the European model (sections 2 and 3 below).

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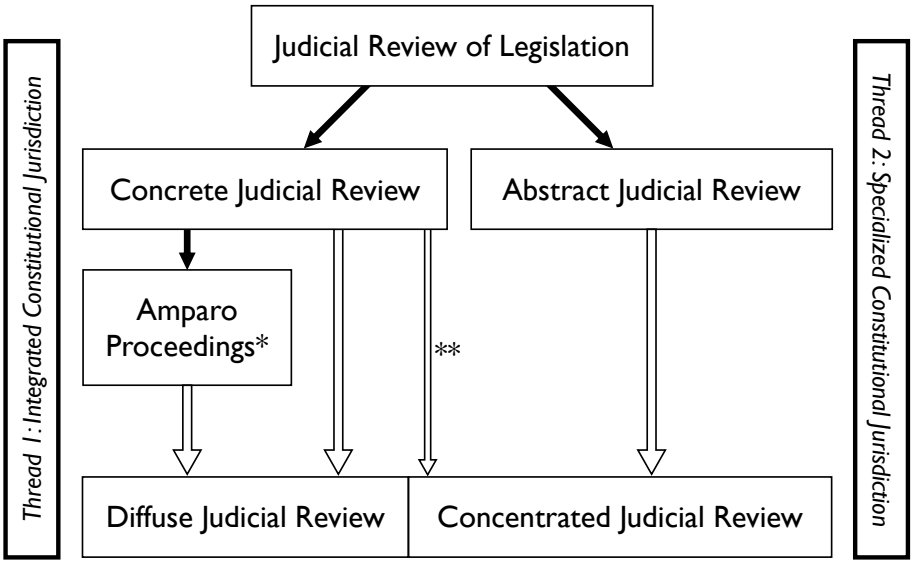
[46] *Brashear Tiede/Fernando Ponce,* Ruling Against the Executive in *Amparo* (n. 12), p. 109.



All Latin American countries chose to organize their abstract judicial review in a concentrated rather than diffuse form. In theory this is not necessary. It is possible for various courts to competitively declare a legal provision void or valid, each of those decisions being generally binding on subsequent court proceedings. Nevertheless, it is more consistent and therefore more pragmatic regarding the certainty of legal expectations if only one court voids or validates the law. Thus, either the supreme court or a newly founded constitutional court gains this exclusive power in the concentrated system of judicial review.

The tendency of concentration was not restricted to abstract judicial review, but also occurs with some forms of concrete judicial review. Some states (marked * and **) combine concrete review with an exclusive power of a single court.[47] As a result of these developments, an independent mix of constitutional jurisdiction becomes apparent in Latin American countries (section 4 below).

1. Integrated Constitutional Jurisdiction With Diffuse Judicial Review

Apart from Mexico, the system of diffuse judicial review has been established in Latin American countries since the mid-19th century. In some states the competence of a judge to disregard an unconstitutional legal provision in a specific case (concrete judicial review) was introduced even before the amparo.[48]

However, within the integrated system of constitutional jurisdiction judges were not allowed to declare the statute itself void with general effect. In the amparo-proceeding

47 The single *-character signifies amparo proceedings concentrated before a single court (Costa Rica, El Salvador, Nicaragua); the double **-character signifies other non-amparo procedures of concrete judicial review concentrated before a single court (Bolivia, Chile, Honduras, Panama, Paraguay, Uruguay).

48 For instance Venezuela, Dominican Republic, Brazil, Colombia, Peru, Argentina. See the first timeline chart at n. 85.

this restriction arises from the *Otero*-Formula. With non-amparo variants of concrete judicial review it is the result of the *inter partes*-effect of the specific court decision. The impossibility of a general declaration of unconstitutionality was perceived as a burden to the legal system. Due to this restriction the diffuse judicial review frequently resulted in legal uncertainty, for instance when a supreme court decided as last instance in an amparo-proceeding, but its decision would not (or only very exceptionally) be binding on other courts.[49] Furthermore, citizens were expected to bring multiple complaints against a statute. This obstacle is not only difficult to surmount on a case-by-case basis, but also especially burdensome for disadvantaged groups, thereby resulting in *de facto* legal discrimination.[50]

2. Specialized Constitutional Jurisdiction With Concentrated Judicial Review

a) Mixing Diffuse and Concentrated Judicial Review

To overcome the disadvantages of diffuse judicial review, many Latin American countries later adopted some form of abstract judicial review concentrated within their supreme court.[51] As presented below, this mix of diffuse and concentrated judicial review still exists in the majority of states (10) among those having an amparo-proceeding (18).[52]

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49 *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), p. 86.

50 For the conflict between the *inter partes*-effect and the principle of equality *Héctor Fix-Zamudio,* La declaración general de inconstitucionalidad en Latinoamérica y el juicio de amparo mexicano, in: Anuario Iberoamericano de Justicia Constitucional 6 (2002), pp. 87-142 (136 f.); *Arturo Zalvídar Lelo de Larrea*, Hacia una nueva Ley de Amparo, Mexiko: Universidad Nacional Autónoma de México, 2002, p. 116; for the social aspect *Horn*, Grundzüge des mexikanischen Verfassungsrechts (n. 16), p. 506.

51 Exceptions to this are Paraguay, Uruguay and Argentina, where an abstract judicial review does not exist. *Brewer-Carías*, Constitutional Protection (n. 16), pp. 116 f., 119; *Schoeller-Schletter,* Verfassungstradition und Demokratieverständnis (n. 29), p. 212.

52 Brazil, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Peru, Venezuela, Nicaragua. Cf. *Brewer-Carías*, Constitutional Protection (n. 16), pp. 90, 102 f., who does not mention El Salvador, even though Article 185 Verf.-SV stipulates a diffuse judicial review before all courts. Insofar correct: *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), p. 110; *S. Enrique Anaya,* La justicia constitucional en El Salvador, in: Armin von Bogdandy et al. (eds.), La justicia constitucional y su internacionalización. ¿Hacia un Ius Constitucionale Commune en América Latina?, Vol. I, Mexiko: Universidad Nacional Autónoma de México, 2010, pp. 297-344 (310 ff.).

		(**Specialized**) Constitutional Jurisdiction With Judicial Review (JR)		
		Concentrated (every JR)	Mixed (Concrete JR diffuse, Abstract JR concentrated)	Diffuse (only concrete JR)
Amparo Proceeding at ...	... a single court	**Costa Rica**	**El Salvador** **Nicaragua**	–
	... more than one court	**Bolivia** **Chile** **Honduras** Panama **Paraguay** Uruguay	Brazil **Dom. Republic** **Ecuador** **Guatemala** **Columbia** **Mexico*** **Peru** **Venezuela**	Argentina

* Spezialized Constitutional Court according to its function; Supreme Court of Justice according to its name.

b) Variations of Abstract Judicial Review

The arrangement of abstract judicial review differs a lot among Latin American countries. Some of them established a popular complaint procedure by granting every citizen the right to request an abstract judicial review even if they are not personally concerned by the legislation.[53] Others reserved the initiative of abstract review to specific office holders (state president, general state attorney, a certain number of parliamentarians) or particular state bodies (government of member states, parliamentary groups etc.).[54] The main objective of these restricted variations of abstract review is to give the minority in parliament means of controlling the constitutionality of statutes adopted by the majority.[55] Establishing abstract review is far from perfect. Sometimes it is impeded by specific requirements. Through the Mexican *acción de inconstitucionalidad* for instance, an annulment of a legal provision is only possible with a quorum of eight out of eleven judges (72%).[56]

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53 El Salvador, Honduras, Colombia, Nicaragua, Panama, Venezuela; see *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), pp. 671, 674 f., 679 f.; *idem*, La declaración general de inconstitucionalidad (n. 50), pp. 96 ff., as well as Article 185 Verf.-HN.

54 Cf. Article 105 n. 2 Verf.-MX; Article 103 Verf.-BR (1988); Article 120 Par. 1 Verf.-BO.

55 *Fix-Zamudio*, La declaración general de inconstitucionalidad (n. 50), pp. 121 ff.; *idem/Valencia Carmona*, Derecho constitucional mexicano y comparado (n. 2), p. 918.

56 Article 105 n. II Verf.-MX; for this and the following analysis see as well *Hans-Rudolf Horn*, 80 Jahre mexikanische Bundesverfassung – was folgt?, in: Jahrbuch des öffentlichen Rechts (JöR) 47 (1999), pp. 399-440 (422).

c) Concentrations in Concrete Judicial Review

Along with this concentration of abstract judicial review, some Latin American states went even further. In Bolivia, Chile, Honduras, Panama, Paraguay, and Uruguay even the concrete judicial review is concentrated within the highest court.[57] However, this still does not lead to an exclusive power to reject statutes. An important exception to this competence resides in amparo proceedings that continue to be handled by a variety of courts. To guarantee a certain uniformity in these proceedings, states have incorporated various mechanisms. In Chile, Paraguay, and Uruguay, for instance, an amparo proceeding will be remitted to the highest court, as a matter of exception, if the unconstitutionality of a statute is at issue.[58] In Bolivia and Honduras all court decisions in amparo proceedings have to be transferred to the constitutional court in order to be reviewed.[59] Furthermore, even ordinary appeal stages ultimately lead to a certain uniformity, as it is witnessed by the example of Peru.[60]

d) Emerging Mixed Model

Considering the overall evolution of constitutional jurisdiction in Latin America, there seems to emerge a permanent coexistence of diffuse and concentrated judicial review. The only example of a completely concentrated system, where every constitutional question including amparo proceedings is exclusively treated by the highest court, is Costa Rica.[61]

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57 For this and the following analysis see *Brewer-Carías*, Constitutional Protection (n. 16), pp. 102, 107. Paraguay and Uruguay do not even have abstract judicial review; see n. 51 above.

58 Article 93 N° 6 Verf.-CL; Article 582 Ley N° 1.337/88 Código Procesal Civil (PY); Article 257 Verf.-UY and Article 509 Par. 1 N° 2 Ley 15.982 Código Genral del Proceso (UY); *Brewer-Carías*, Constitutional Protection (n. 16), pp. 111, 116, 118; *Norbert Lösing*, La justicia constitucional en Paraguay y Uruguay, in: Anuario de Derecho Constitucional Latinoamericano 2002, pp. 109-133 (128 f.); *Jorge Seall-Sasiain*, El Amparo en Paraguay, in: Fix-Zamudio/Ferrer Mac-Gregor (Ed.), El derecho de amparo (n. 16), pp. 581-591 (183 f.); *Schoeller-Schletter,* Verfassungstradition und Demokratieverständnis (n. 29), p. 211.

59 Article 19 n. IV, Article 120 Par. 7 Verf.-BO; Article 32 Par. 1, Article 33 LA-HN; cf. as well *José Antonio Rivera Santivañez*, El amparo constitucional en Bolivia, in: Fix-Zamudio/Ferrer Mac-Gregor (Ed.), El derecho de amparo (n. 16), pp. 81-122 (84 f.); *Brewer-Carías*, Constitutional Protection (n. 16), pp. 108 f.; *Francisco Daniel Gómez Bueso*, El derecho de amparo en Honduras, in: Fix-Zamudio/Ferrer Mac-Gregor (Ed.), El derecho de amparo (n. 16), pp. 409-460 (411, 425).

60 See *Brashear Tiede/Fernando Ponce,* Ruling Against the Executive in *Amparo* (n. 12), pp. 109 f.

61 *Brewer-Carías*, Constitutional Protection (n. 16), p. 103. *Brewer* adds El Salvador as well. However, according to Article 185 Verf.-SV every judge can ignore a unconstitutional provision when deciding a case. Cf. as well *S. Enrique Anaya*, La justicia constitucional en El Salvador, in: Armin von Bogdandy et al. (eds.), La justicia constitucional y

e) Specialized Constitutional Jurisdiction

Since the mid-20th century numerous Latin American states established specialized constitutional courts.[62] Courts with a similar function even date back to 1940.[63] This 20th century thread of the development is an approach towards the continental European model of constitutional jurisdiction.[64] Here again, the different designs are manifold. There are pure constitutional courts (*Tribunales Constitucionales*) *outside* the appeal stages, pure constitutional courts *within* the appeal stages, and simple constitutional panels (*Salas Constitucionales*), integrated into the highest court.[65]

More than half of the countries with a specialized constitutional court (14) chose a mixed model by keeping the 19th century thread of integrated constitutional jurisdiction with diffuse judicial review (9).[66] Thus the respective constitutional court does not retain exclusive competence for all questions of constitutionality. Mexico falls into this category. The Mexican Supreme Court (*Suprema Corte de Justicia*) has been released from its court of cassation duties through constitutional and legal revisions in 1988 and 1995, in order to allow it to focus on constitutional jurisdiction.[67] As a result the *Suprema Corte* of Mexico is now a specialized constitutional court, notwithstanding its traditional name.[68] At the same time, other courts are involved in constitutional questions both by the general diffuse judicial review and by amaparo proceedings. The new amparo act of 2013 did not lead to stronger functional concentration.[69]

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su internacionalización. ¿Hacia un Ius Constitucionale Commune en América Latina?, Mexiko, 2010, pp. 297-344 (310 ff.); *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), p. 110.

62 Ecuador (1948), Guatemala (1965), Chile (1970), Peru (1979), Colombia (1991), Bolivia (1994), Dominican Republic (2010). Furthermore *Salas Constitucionales* in: El Salvador (1983), Costa Rica (1989), Honduras (1989), Paraguay (1992), Nicaragua (1995), Venzuela (1999); see *Fix-Zamudio*, La declaración general de inconstitucionalidad (n. 50), pp. 106 f.; *Domingo García Belaunde*, Verfassungsgerichte in Lateinamerika, in: A. Blankenagel et al. (eds.), Verfassung im Diskurs der Welt: Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag, Tübingen 2004, pp. 595-604 (599 ff.); partly dissenting *García Belaunde,* Latin-American Constitutionalism (n. 17), p. 708 (Ecuador 1945, Chile 1971).

63 *García Belaunde,* Latin-American Constitutionalism (n. 17), p. 708.

64 *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), p. 687.

65 *Giancarlo Rolla*, La evolución del constitucinoalismo en América Latina y la originalidad de las experiencias de Justicia Constitucional, Anuario Iberoamericano de Justicia Constitucional 16 (2012), pp. 329-351 (339); *García Belaunde,* Latin-American Constitutionalism (n. 17), p. 708 (Costa Rica 1989); *Brashear Tiede/Fernando Ponce,* Ruling Against the Executive in *Amparo* (n. 12), pp. 115 f.

66 See the crosstab form at n. 52.

67 For this and the following analysis see *Fix-Zamudio*, El juicio de amparo mexicano (breves reflexiones) (n. 20), p. 483; *idem/Ferrer Mac-Gregor*, El derecho de amparo en México (n. 16), pp. 470 f.; *Horn*, 80 Jahre mexikanische Bundesverfassung (n. 56), p. 421; *Mirow, Marbury* in Mexico (n. 7), pp. 95 f.

68 *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), p. 52.

69 For the competence of various courts in amparo proceedings cf. Article 33 LA-MX.

3. Current State and Prospective Development – The Example of Mexico

a) No Clear Leading Role For Mexico

Considering the most recent development, Mexico does no longer play the leading role in Latin Amercia.[70] Extending the amparo proceedings to human rights in *international treaties* – some of which explicitly claim such proceedings[71] – has been implemented later than in other Latin American countries.[72] The pioneer state in this respect was Costa Rica (1989), followed by Argentina, Ecuador, and others.[73] Some states are also ahead of Mexico by allowing a popular complaint procedure in order to more effectively protect citizens' rights.[74] Nevertheless, Mexico is still a good example for a mixed model of constitutional jurisdiction where the integrated and specialized part must be combined. The state has also adopted a new amparo act in April 2013, thereby showing the current edge of development.

b) Revision of 1994 – Introduction of Abstract Judicial Review

As a first step, Mexico adjusted the disadvantage of the *inter partes*-effect by introducing the abstract judicial review competence of the Supreme Court in 1994. Despite the initial skepticism against this change,[75] the new option of abstract review has frequently been used in recent years. During the seven years following the introduction of abstract review, i.e., from 1995 to 2002, the Supreme Court declared a legal provision unconstitutional and void in 25 challenges of unconstitutionality (*acciones de inconstitucionaldiad*).[76] This number is particularly impressive because abstract judicial review in Mexico is only granted at the request of the general state attorney, of a third of

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70 For critics, especially of holding on to the *Otero* formula, see *Fix-Zamudio*, La declaración general de inconstitucionalidad (n. 50), p. 136.

71 For the American Convention of Human Rights cf. *Humberto Nogueira Alcalá*, El derecho y acción constitucional de protección (amparo) de los derechos fundamentales en Chile a inicios del siglo XXI, in: Fix-Zamudio/Ferrer Mac-Gregor (Ed.), El derecho de amparo (n. 16), pp. 159-211 (180); *Carlos M. Ayala Corao/Rafael J. Chavero Gazdik*, El amparo constitucional en Venezuela, in: *idem*, pp. 649-692 (655 ff.). The member states are bound by the Convention to introduce an unbureaucratic and prompt procedure of individual legal protection before a judge (Articles 2 and 25).

72 Established in Mexico by constitutional revision in 2011; cf. text and citations at n. 15 above.

73 Argentina (1994), see *Néstor Pedro Sagüés*, El derecho de amparo en Argentina, in: Fix-Zamudio/Ferrer Mac-Gregor (eds.), El derecho de amparo (n. 16), pp. 41-80 (50); Ecuador (1998), see *Hernán Salgado Pesantes*, La garantía de amparo en el Ecuador, in: ibid., pp. 305-331 (319 f.); Venezuela (1999), see *Carlos M. Ayala Corao/Rafael J. Chavero Gazdik*, El amparo constitucional en Venezuela, in: ibid., pp. 649-692 (667 f.), Art. 27 Verf.-VE; Bolivien (2003), see *José Antonio Rivera Santivañez*, El amparo constitucional en Bolivia, in: ibid., pp. 81-122 (92).

74 See n. 53 supra.

75 *Horn,* 80 Jahre mexikanische Bundesverfassung (n. 56), p. 424.

76 *Fix-Zamudio*, La declaración general de inconstitucionalidad (n. 50), p. 138.

the delegates of congressmen or senators, or of a few other groupings (Art. 105 Nr. 2 Verf.-MX). There is no popular complaint procedure yet.

c) Revisions of 2011 and 2013 – Reform of Amparo Proceedings

Further reform concepts have influenced to constitutional revision of 2011, which have also been implemented in the recent amparo act of 2013.[77] Henceforth the Supreme Court can declare a statute unconstitutional and void with *erga omnes*-effect (*declaratoria general de inconstitucionalidad*) even outside the abstract review procedure – namely, during some forms of amparo.[78] However, using this new competence still requires *jurisprudencia*, i.e., a qualified majority of Supreme Court judges agreeing on the unconstitutionality of the legal provision in five consecutive decisions.[79] Before the recent amparo act was adopted in April 2013, high hopes were raised to somehow moderate the stringent requirements of *jurisprudencia.* That would have been well possible without any further constitutional revision because the constitution does not regulate the criteria. One option would have been to go from five to three consecutive decisions for the acknowledgement of *jurisprudencia*.[80] That rule was even designed into the draft of the amparo act. It would have relieved some of the procedural burden currently imposed on the *declaratoria general de inconstitucionalidad*.[81] However, this part of the draft did not make it to the final version of the procedural law. The stringent requirements of the past are still upheld in the amparo act of 2013 (Art. 222 LA-MX).

The main advantage of the 2013 amparo law over the previous version is that it does enable a declaration with *erga omnes*-effect once the *jurisprudencia*-obstacle is overcome. Administrative bodies are no longer empowered and compelled to apply legal provisions that have been declared unconstitutional during amparo proceedings.[82] Furthermore, the Supreme Court itself can no longer change its decision once the law has been declared void. The *erga omnes*-effect is valid once and for all. Before, the Court was not prevented to change its jurisprudence whenever a qualified majority was achieved to uphold the constitutionality of the law.[83]

Finally, the reforms of 2011 and 2013 also made it easier to get access to the constitutional justice in amparo proceedings. During pre-reform times a specific *legal* interest

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77 For the early stages of this reform see *Fix-Zamudio/Ferrer Mac-Gregor*, El derecho de amparo en México (n. 16), pp. 508 ff.

78 Article 107 No. II Paragraph 3 Verf.-MX; Article 231-235 LA-MX; the so-called indirect amparo procedures, reaching amparo courts only on appeal.

79 For the *jurisprudencia*-rule see text at n. 7 ff. above.

80 *Fix-Zamudio*, La declaración general de inconstitucionalidad (n. 50), p. 140.

81 Article 222 and Art. 232 Par. 2 LA-MX (Entwurf), cf. <http://www.cjf.gob.mx/reformas/boletin/0812/5.2NuevaLeyAmparo.pdf> (last visit: 22.04.2013).

82 Regarding this deficit see *Báez Silva,* La "fórmula Otero" y la déclaratión general (n. 11), p. 37.

83 For this possibility see text at n. 38 above.

(*interés jurídico*) was required to initiate an amparo. The plaintiff therefore needed to be personally and directly concerned by the law. Now the action is more easily accessible by only requiring some kind of *legitimate* interest (*interés legitimo,* Art. 107 Nr. I Verf.-MX).[84]

d) Conclusion

The current state of constitutional jurisdiction in Mexico is a good example for the prevalent Latin American trend: Amparo proceedings are being refined and at the same time specialized constitutional courts are being introduced and empowered. Mexico has come a long way with these reforms. Still, there remains much to do in prospective development. The power of the constitution would profit much from a popular complaint procedure granting abstract judicial review to the general public. At the same time, restrictions of the *erga omnes*-effect by the stringent criteria of *jurisprudencia* hinders the constitutional control by amparo proceedings. Both threads of development therefore retain some scope for further reforms.

More generally, Mexico exemplifies that the traditional model of integrated constitutional jurisdiction with diffuse judicial review is not at all challenged by the introduction of specialized constitutional courts. There is no switch from an "old" Latin American model darfted around the example of amparo to a "new" model drafted on the example of European style constitutional courts. Rather, Mexico like other Latin American countries settles for a long term coexistence of both threads of constitutional jurisdiction. Therefore, the prospective development will focus on building a balance beetween these threads, not overcoming one by the other.

4. Analytical Overview For Latin America

How prevalent is the model of combined threads of constitutional jurisdiction in Latin America? To answer this question, two schematic overviews are used to bring some order into the chaos of diverse historical developments. There is no single tradition or even institutional sequence followed by an overwhelming majority of countries. But there are some trends to be read from the schematic overviews.

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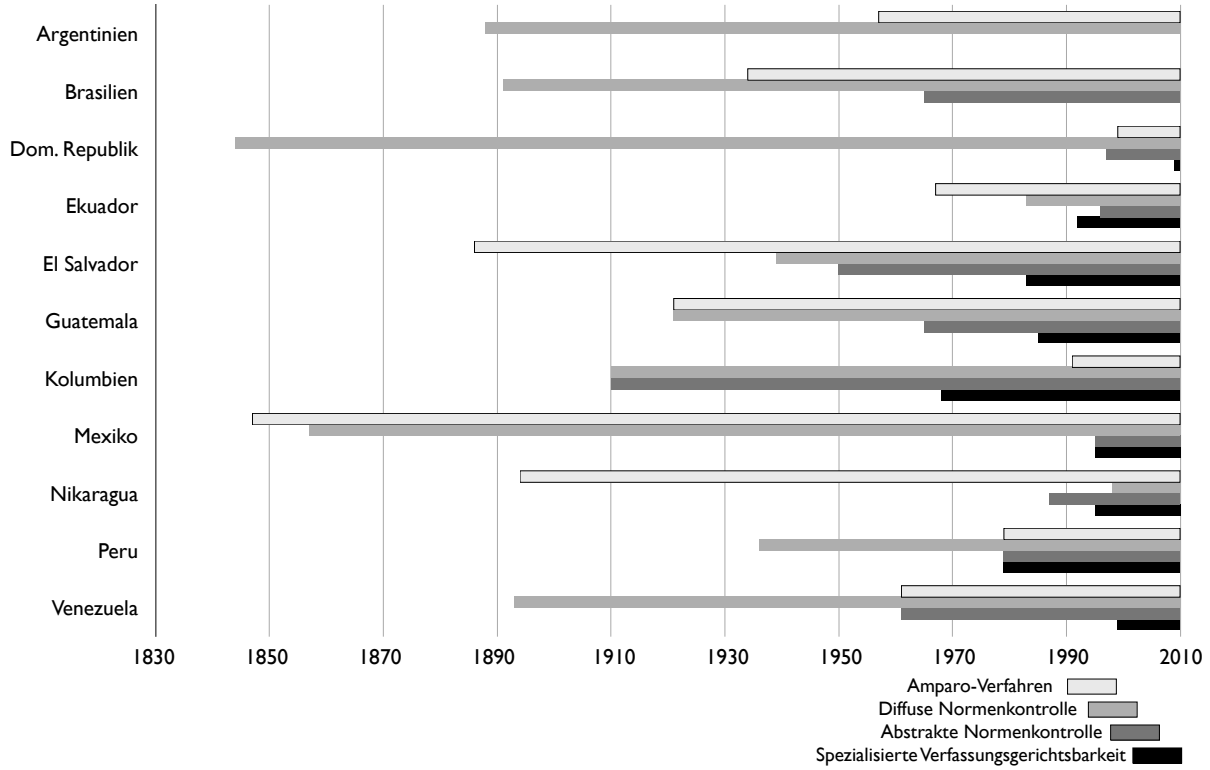
84 *Marcos del Rosario Rodríguez/Raymundo Gil Rendón*, El juicio de amparo a la luz de la reforma constitucional de 2011, in: Universidad Nacional Autónomo de México (ed.), Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas <http://www.juridicas.unam.mx/publica/librev/rev/qdiuris/cont/15/cnt/cnt4.pdf> (last visit: 22.04.2013), pp. 57-73 (69).

a) Diffuse Review Countries (Scheme 1)

The following scheme illustrates the historic stages of development (timeline) for those Latin American countries that unto this day keep a diffuse judicial review of legislation while having introduced elements of concentrated judicial review.[85]



[85] The data for this four factor timeline, somewhat adjusted to more recent versions of constitutions and statutes, has been assembled from the following sources: *Brewer-Carías*, Constitutional Protection (n. 16), p. 85; *Sergio J. Cuarezma Terán*, Introducción al control constitucional en Nicaragua, in: Víctor Bazán (ed.), Derecho Procesal Constitucional Americano y Europeo, vol. 1, Buenos Aires: Abeledo Perrot, 2010, pp. 605-626 (608); *Iván Escobar Fornos*, El amparo en Nicaragua, in: *Fix-Zamudio/Ferrer Mac-Gregor* (eds.), El derecho de amparo en el mundo (n. 16), pp. 523-563 (523); *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), pp. 671 ff. (data differs in some details); *Peter Häberle,* Argentinien als Verfassungsstaat, in: Jahrbuch des öffentlichen Rechts (JöR) 60 (2012), pp. 571-584 (577 f.); *Lösing,* Verfassungsgerichtsbarkeit in Lateinamerika (n. 1), pp. 46 ff. and passim; *idem*, La justicia constitucional en Paraguay y Uruguay, in: Anuario de Derecho Constitucional Latinoamericano 2002, pp. 109-133 (122). The exact years used for this timeline are (in chronological sequence of the bars): Argentina (1888, 1957), Brasil (1891, 1934, 1965), Dom. Republic (1844, 1997, 1999, 2010), Ecuador (1967, 1983, 1992, 1996), El Salvador (1883, 1939, 1950, 1983), Guatemala (1921, 1965, 1985), Columbia (1910, 1968, 1991), Mexico (1847, 1857, 1995), Nicaragua (1894, 1987, 1995, 1998), Peru (1936, 1979), Venezuela (1893, 1961, 1999).

An exception is Argentina that formally kept a purely diffuse model of judicial review. As a matter of fact, however, lower instances assume an *erga omnes*-effect for decisions of higher instances, as it usually results from abstract judicial review.[86] Regarding the end result of constitutional jurisdiction, Argentina therefore functionally belongs in the category of mixed systems.

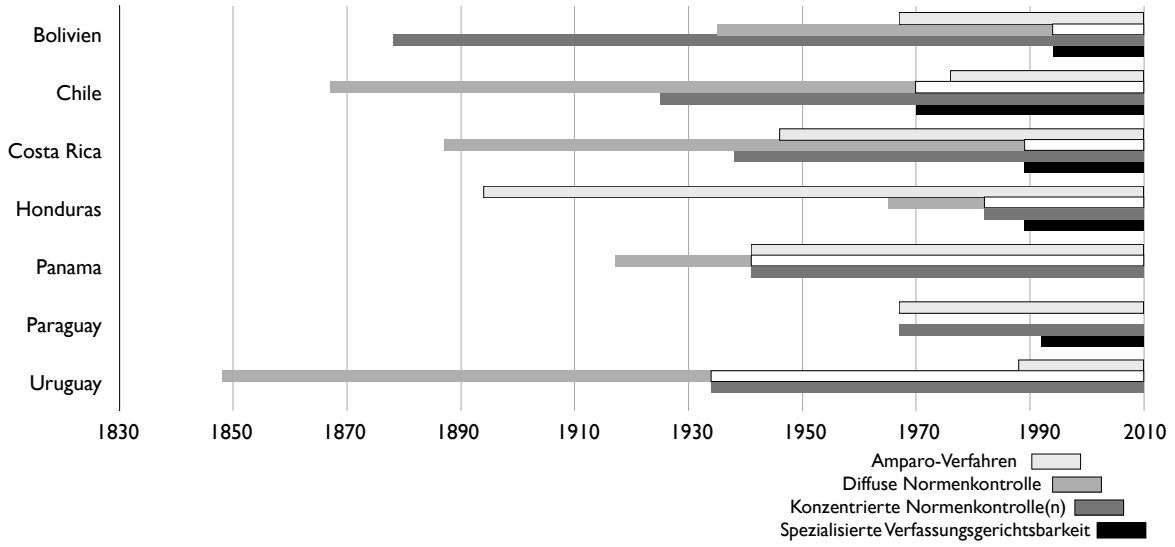
The bars of the scheme 1 timeline designate: (1) the **amparo proceeding** that has not been abolished, but has been retained while adopting elements of concentrated judicial review; (2) the **diffuse judicial review** persisting alongside to the amparo; (3) the **abstract judicial review** that is always **concentrated** within one single court (e.g., the country's Supreme Court); and (4) the introduction of a **specialized constitutional court**.

As a universal feature, all countries in this category now feature amparo proceedings and (near universal), a total of 9 out of 11 have institutionalized a specialized constitutional court. However, the timeline shows that these results do not follow a clear pattern. Amparo proceedings have a long tradition in some countries (Mexico, El Salvador, Nicaragua) while otheres added this feature only recently. More generally, the countries started out with the first thread of constitutional jurisdiction, either with amparo or with some other form of diffuse judicial review, while the second thread of constitutional jurisdiction by abstract review started 50 to 100 years later. It consolidates into specialized constitutional courts (last bar) only very recently. Within this group of countries, the consolidation does not end the tradition of diffuse review, but keeps all the instruments together in one mixed Latin American model.

86 *Fix-Zamudio*, Verfassungskontrolle in Lateinamerika (n. 8), pp. 671 f.

b) Concentrated Review Countries (Scheme 2)

The following scheme illustrates the historic stages of development (timeline) for those Latin American countries that today concentrate all judicial review in one court.[87] The bars of the scheme 2 timeline designate: (1) the **amparo proceeding** that has not been abolished, but was retained while eventually concentrating all other forms of judicial review in one court; (2) the **diffuse judicial review** converted subsequently into a concentrated judicial review; (3) the completely **concentrated judicial review** (concrete and usually also abstract); and (4) the introduction of a **specialized constitutional court**.



Again, as a universal Latin American feature, the countries in this second category today also feature amparo proceedings and by a vast majority of 5 out of 7 have institutionalized a specialized constitutional court.

c) Conclusion

Altogether these schemes illustrate that there is no consistent order of the different states of development in Latin American countries. However, an obvious tendency to-

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87 The data for this four factor timeline, somewhat adjusted to more recent versions of constitutions and statutes, has been assembled from the sources listed in n. 85 above. The exact years are (in chronological sequence of the bars): Bolivia (1878, 1935, 1967, 1994), Chile (1867, 1925, 1970, 1976), Costa Rica (1887, 1938, 1946, 1989), Honduras (1894, 1965, 1982), Panama (1917, 1941), Paraguay (1967, 1992), Uruguay (1848, 1934, 1988). Paraguay does not seem to have adopted diffuse judicial review at any time; cf. *Schoeller-Schletter,* Verfassungstradition und Demokratieverständnis (n. 29), pp. 205, 211 f.

wards a combined system is discernable – a system where Latin American amparo and specialized constitutional courts coexist.

III. Challenges For the Amparo – A Comparative View on *inter partes*- and *erga omnes*-Effects

How viable is a mixed system as analysed in the preceding section? This depends on the functional difference between amparo and specialized constitutional jurisdiction. Is it significant enough to justify a long-term coexistence of both threads?

We can rephrase this question as to how *inter partes*-effect and *erga omnes*-effect complement each other. It has already been mentioned in the second section of this paper (p. 11 above) that the model of integrated constitutional jurisdiction dates back to the 19th century. A comparative view of older constitutional orders with concrete judicial review such as the United States and Switzerland could therefore provide answers to how old an new threads can be combined into a viable system.

1. Limited *erga omnes*-Effect by Diffuse Judicial Review

It is common knowledge in comparative constitutional law, that Latin America belongs to those regions of the world traditionally preferring a diffuse rather than concentrated judicial review. The power to declare laws unconstitutional and refuse their application is distributed among various judicial authorities. Constitutional jurisdiction is then not the power of one single court, but various courts are competent to decide about issues of constitutionality.

The main disadvantage of a diffuse judicial review system is its functional limitation in declaring laws void with *erga omnes*-effect. This limit can be examplified in view of the constitutional jurisdiction in the United States of America and in Switzerland. Both countries are among the oldest legal systems with an integrated constitutional jurisdiction relying on diffuse judicial review.

a) Judicial Review in the United States of America

In the United States the model of diffuse judicial review is accompanied by the Anglo-American function of the *rule of precedent* (*stare decisis*). In this context a limited *erga omnes*-effect can result from a diffuse judicial review.[88] If a court refuses the application of a statute due to its unconstitutionality and if the reasons given belong to the *holding* of the decision rather than just being *obiter dictum*, other courts are bound by the precedential force of the case. However, this binding force of the precedent is re-

[88] Cf. *Fernández Segado,* Du Contrôle Politique au Contrôle Juridictionnel (n. 5), p. 697: "une véritable efficacité *erga omnes,* analogue à celle de l'abrogation de la Loi".

stricted in numerous ways. Regarding its content, restriction results from the power of other courts to distinguish between the precendent and the new case at hand. Formally, the binding force is restricted by the fact that the rule of precedent only works downwards within the court hierarchy. For courts on the same level (e.g., among various *Federal Circuit Courts*) and even more clearly for higher courts (e.g., the *United States Supreme Court* after a ruling of a *Federal Circuit Court*) the precedent has no binding force, but is only persuasive authority. Altogether the practical outcome is a very limited *erga omnes*-effect.

b) Judicial Review in Switzerland

Switzerland, unlike the mainstream of other European countries, follows the example of the United States of America in its constitutional jurisdiction. The country established an integrated system with diffuse judicial review. In its design details, however, Switzerland differs quite a bit from the American example and imposes its own characteristic on the model.

As in other countries of Continental Europe, the first difference to Anglo-American courts is the lack of any formal rule of binding precedent. Decisions of higher courts are persuasive authorities, but lower courts are not formally required to share their legal opinions. Also, different from most countries in the world, Switzerland strongly restricts judicial review by excluding all parlamentiary laws on the federal level. Federal laws are binding to all courts and other authorities according to a clear provision in the Federal Constitution (Art. 190 BV). Even the highest judicial authority, the Federal Court (*Bundesgericht*), may only proclaim the unconstitutionality of a federal statute, but cannot act on that analysis. No authority may refuse the application of laws adopted by the Federal Parliament. Whenever the Federal Court proclaims the unconstitutionality of a provision in a federal statute, this is understood as an appeal to the federal parliament to change the law, but the proclamation does not in itself have any kind of direct legal effect – neither *inter partes* nor *erga omnes*.

Apart from this federal law restriction, diffuse judicial review of all other legal rules (federal regulation, cantonal statutes and regulation, communal legal provisions) is guaranteed. Every court has the power to refuse the application of such rules on the basis of unconstitutionality. Within this diffuse judicial review all courts are simultaneously working as constitutional courts. They can on their own power decide about the unconstitutionality of a legal provision and refuse its application. The power of this decision, however, is restricted to the concrete case at hand – thus with *inter partes*-effect. The simple non-application of a legal provision does not entail a general declaration of the rule as being void.[89] And since there is no rule of binding precedent in Continental Europe, all courts can adjudicate without regard to prior decisions about

[89] *Bernhard Rütsche,* Rechtsfolgen von Grundrechtsverletzungen. Mit Studien zur Normstruktur von Grundrechten, zu den funktionellen Grenzen der Verfassungsgerichtsbarkeit und zum Verhlätnis von materiellem Recht und Verfahrensrecht, Basel u.a. 2002, p. 111.

the unconstitutionality of a legal provision. As a matter of jurisdictional power, the *erga omnes*-effect is excluded in this system.

While the binding force *de lege* is nil, however, the *de facto* binding force of higher court decisions is quite real. Even without a formal rule of precedent there are some legal pathways creating stability within the multiplicity of court decisions. First, binding force arises through the legal self-binding of a court to its own precedent. In Switzerland a sudden change of established practice can be inadmissible under certain circumstances.[90] In changing a long standing practice of decisions, courts try to first announce the impending change before actually acting on this announcement in the next case. This way the parties of an ongoing court procedure are not troubled by unpredictable decisions. Second, some of the binding force of precedent is generated through the hierarchy of the courts. Inferior courts integrate the legal opinion of superior courts into their decisions.[91] Failing to do so, their decisions are bound to be overruled during appeal. Through this informal connection between instances, a decision by the Federal Court (*Bundesgericht*) has a very strong impact on all branches of the court hierarchy. As a third and final aspect, an exceptional *erga omnes*-effect is assigned to some decisions of the *Bundesgericht.* When the court declares a legal provision void during the proceeding of abstract judicial review, the law cannot be applied by any other authority in the future.[92] There is near-popular access to abstract review in Swiss procedural law. Anyone can initiate this action with a claim of "virtual concern", i.e., possibly being affected by the law in future. Nevertheless, cases of abstract judicial review are still much rarer than cases including concrete judicial review.

In sum, there are some constellations under Swiss law where an *erga omnes*-effect can occur during judicial review. Considering the prevalence of concrete judicial review where a formal rule of precedent is missing, however, the *inter partes*-effect remains dominant in Switzerland. In this respect, Switzerland differs significantly from neighboring Germany where an *erga omnes*-effect is prescribed by law (§ 31 Paragraph 1 BVerfGG).[93]

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90 Regarding the change of practice, see *Susan Emmenegger/Axel Tschentscher*, Kommentierung zu Art. 1 ZGB, in: Heinz Hausheer/Hans Peter Walter (eds.), Berner Kommentar, Band I.1: Schweizerisches Zivilgesetzbuch. Einleitungsartikel, Bern 2012, Rn. 490 ff. (497 f.) with further references.

91 *Rütsche,* Rechtsfolgen von Grundrechtsverletzungen (n. 89), p. 433 with further references to older literature.

92 Law abolishing power, e.g., the annulment of the prohibition of intratubular gem cell transfer in Section 4 Par. 2 Lit. c of the Law of the Canton Basel-City regarding the reproductive medicine for humans (GRM) in BGE 119 Ia 460 E. 8 pp. 489 ff. – Reproductive Medicine Basel.

93 Regarding the extensive interpretation of the rule of precedent see the most recent and extensive analysis of *Antje von Ungern-Sternberg,* Normative Wirkungen von Präjudizien nach der Rechtsprechung des Bundesverfassungsgerichts, in: AöR 138 (2013), pp. 1-59 (16 ff.) with further references.

c) Comparison to the Amparo Proceedings

The analysis of the effect of judicial review in the United States and Switzerland illustrates that in a legal system with diffuse judicial review, declaring a law unconstitutional and refusing its application normally only has an *inter partes*-effect. This baseline is only partially complemented with an *erga omnes*-effect under specific circumstances.

Amparo proceedings fit very well into this basic model of integrated constitutional jurisdiction with diffuse judicial review. The amparo as other forms of diffuse review generally restricts constitutional control to the case at hand and the parties involved. It has a constitutive effect to the legal order at large only in very extraordinary cases, e.g., the Mexican *jurisprudencia*-ruling. Simply put, amparo proceedings belong into the domain of integrated constitutional jurisdiction. They are systematically opposed to the model of specialized constitutional jurisdiction with concentrated judicial review. Accordingly, any form of specialization and concentration at first sight appears foreign to the amparo tradition.

2. New Burden Sharing Between Ordinary Courts and Specialized Constitutional Courts

While the amparo tradition seems opposed to installing specialized constitutional courts, the analysis at the end of the second section (p. 19 above) reveals that today Latin America shows a near-universal trend to establishing such courts. Specialization usually involves concentration, at least for abstract judicial review. This is due to the interest in efficiency and legal security. Both require that an *erga omnes*-effect be established in order to avoid contradicting decisions of different courts. Application and non-application of a law cannot simultaneously be upheld within a legal system.

When a specialized constitutional court is entrusted with concentrated judicial review, ordinary courts in amparo proceedings must lose this power in order to avoid duplication. This creates a new burden sharing. In the traditional pure amparo system the entire constitutional jurisdiction was carried out in an integrated and diffuse way. In future, the only amparo controls retained by ordinary courts are those directed at an *inter partes*-effect. The control with *erga omnes*-effect, especially the abstract judicial review, will exclusively be allocated to the new constitutional courts. A typical version of this trend of reform can be found in Bolivia where the amparo system with its *inter partes*-effect has been complemented by a specialized constitutional jurisdiction through a constitutional revision in 1994. Now there is an exclusive competence of the constitutional court to declare laws void with *erga omnes*-effect.[94] In our main exam-

[94] Article 58 Verf.-BO, including a procedure for preliminary rulings with concrete judcial review in Article 59 Ley del Tribunal Constitucional No. 1836 from 10.04.1998 <http://www.tribunalconstitucional.gob.bo/descargas/ltc1836.pdf> (last visit: 25.04.2013).

ple, Mexico, the distribution of tasks is more complicated.[95] But even here the stated trend is confirmed, since the Supreme Court, from a material point of view redesigned to a constitutional court, is the only instance that can issue rulings with *erga omnes*-effect.

3. The "Latin American Model" of Constitutional Justice

Do the recent reforms in Latin American constitutional jurisdiction lead to a consolidated model? Does that mixed model take its unique position next to the classical forms of integrated constitutional jurisdiction (USA, Switzerland, Scandinavia) and of specialized constitutional jurisdiction (Continental Europe)? We would have to answer these questions with a resounding "No" when it comes to the details of the early stages of development and the delimitation of the instruments. There is simply too much diversity in Latin America. Even the early development and adoption of the amparo occurred at quite different times depending on the country. At the least, there are two groups of countries with different approaches instead of a uniform solution (diffuse and concentrated review groups, p. 20 above). Earlier attempts to establish models for Latin America were typically concentrated on a few exemplary states.[96] Constitutional justice in Latin America, due to its diversity of development, has even been characterized as "absolutely heterogeneous".[97]

Considering the close cultural bond between the Latin American people it would be quite surprising if there was not a certain extent of harmonization to be detected in the socially important domain of constitutional justice.[98] The question about a "Latin American model" of constitutional justice can today be answered with "Yes" regarding to the following aspects: First, in all the states an amparo proceeding has been preserved or introduced. This usually involves only an *inter partes*-effect and does not offer a satisfying answer to all legal questions, for instance with regard to compensation. Second, almost all states have introduced an abstract judicial review that is concentrated within one court and that provides a complementary *erga omnes*-effect. Third, there is a clear trend to the introduction of specialized constitutional courts and these courts usually hold the power for abstract judicial review. Fourth, in addition to the abstract judicial review, even part of the concrete judicial review has been concentrated in a

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95 See text at n. 8 and 70 ff. above.

96 See for instance *Belaunde*, Verfassungsgerichte in Lateinamerika (n. 62), pp. 597 ff.

97 *Fernández Segado,* Du Contrôle Politique au Contrôle Juridictionnel (n. 5), p. 655 ("un devenir évolutif absolument hétérogène") and p. 689 ("un véritable laboratoire constitutionnel").

98 Cf. *Peter Häberle,* Verfassungslehre als Kulturwissenschaft, 2nd ed., Berlin 1998, pp. 83 ff. (cultural foundations of constitutional law), pp. 1111 ff. (convergence of instruments for the protection of cultural assets in Latin America); *idem,* Die Verfassungsbeschwerde im System der bundesdeutschen Verfassungsgerichtsbarkeit, in: Jahrbuch des öffentlichen Rechts (JöR) 45 (1997), pp. 89-135 (98 ff.: constitutional courts as "societal" courts).

relatively large number of states. The resulting picture is that of a monopoly of the constitutional court in the power to reject laws for their unconstitutionality.

IV. Summary and Conclusion

Notwithstanding great variety in development and reform, a specific model of constitutional justice has emerged among the Latin American countries. The model establishes a mix of integrated and specialized constitutional jurisdiction. On the one hand constitutional controls limited to an individual case are allocated to the amparo proceedings. They are institutionally integrated, functionally diffuse and entail a *inter partes*-effect. On the other hand the constitutional controls intended to have an overall effect throughout the legal system tend to be assigned to a special constitutional court. These controls are institutionally specialized, functionally increasingly concentrated and they involve an *erga omnes*-effect. Within this burden sharing model the Latin American tradition of an integrated constitutional jurisdiction is preserved. At the same time the advantages of specialized constitutional jurisdiction are acknowledged. This Continental European model, implemented throughout Europe after the example of Austria, now has gained a strong impact in Latin America.

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